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Hot Coffee and Freeze-Dried First Amendment Analysis: The Dubious Constitutionality of Using Private Ratings for Public Regulation of Video Games

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INTRODUCTION

Over the last year, the issue of video game regulation began to percolate into the public discussion. After a period of more than a decade during which only three states made any attempt to place legal controls on video games beyond the model of self-regulation used by the industry, legislative discourse is suddenly bubbling over with activity. Numerous states have proposed bills regulating games, several of which have already been signed into law. Even the federal government has reopened the discussion of legal controls on the multi-billion dollar industry that has pioneered the most comprehensive system of self-regulation in the media today.

A number of factors have combined to bring the issue of video game regulation to a boil. Video games have become big business, accounting for more than $7.3 billion of sales every year.

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and have become a popular pastime for players of all ages.\textsuperscript{5} This increasing prevalence has led many opportunistic politicians, particularly Democrats still stung by recent electoral defeats, to use controversial games as a way to court the "family values" constituency.\textsuperscript{6}

One significant reason that the industry has come under increasing legal scrutiny is that the games themselves have been heating up. As graphics have become more realistic and a greater percentage of video games are being marketed directly to adults, several high profile games have been released that have tested the boundaries of acceptable content.\textsuperscript{7} At the vanguard of this push towards more challenging and mature content is Rockstar Games. Rockstar is a studio that has made a name for itself with games that are targeted directly towards mature audiences in terms of both sophisticated, groundbreaking game play and ultra-violent, controversial content.\textsuperscript{8} Games such as "Max Payne" and "Manhunt" have drawn equal amounts of high praise from critics and outrage from media watchdog groups,\textsuperscript{9} and Rockstar's recent

\textsuperscript{5} 62\% of gamers are over eighteen and just under 20\% of gamers are over fifty. See Entertainment Software Association Facts & Research, Game Player Data, http://www.theesa.com/facts/gamer_data.php (last visited Apr. 5, 2006).

\textsuperscript{6} See MacCauley, \textit{supra} note 1 ("Indeed, Democrats – and the successful video game bills of 2005 have all been driven by Democrats – have found that playing to this type of visceral parental reaction is a viable strategy for reconnecting with married parents, an important demographic which they ceded to the Republicans in the last two presidential elections."); see also Herrndobler, \textit{supra} note 3 ("The measure represents a push by Democrats to gain the high ground on moral values, an issue Republicans have used effectively in recent elections.").


\textsuperscript{9} "Max Payne" is a film noir-style drama that won numerous industry and fan awards for its pioneering use of "bullet time" that permits the player to slow down the pace of the game world for a short time. See 3D Realms Site: Max Payne Game Awards, http://www.3dreams.com/max/awards.html (last visited Apr. 5, 2006). "Manhunt" is much darker, following an escaped
blockbuster hit "Grand Theft Auto: San Andreas" ("GTA: San Andreas") is no exception.

"GTA: San Andreas" is the third in a series of hugely popular games, and similar to the two earlier editions, its content is the stuff of Anthony Comstock's nightmares. The player controls a young African-American man named Carl "CJ" Johnson in the mythical town of "San Andreas" (a thinly-veiled version of California in the post-Rodney King 1990s). At the beginning of the game, CJ is confronted by corrupt, racist cops, and spends most of the game reestablishing his gang by taking over organized crime through murder, prostitution, and of course theft.

"GTA: San Andreas" was one of the most anticipated games of 2005 and was highly praised for its revolutionary gameplay as well as its satirically sophisticated story line. Players can criminal captured by a sadistic millionaire who promises him his freedom if he can survive a night of being hunted by vicious bounty hunters. It won several awards for its use of story and pacing to create genuine fear and discomfort. See Manhunt, http://www.rockstargames.com/manhunt/main.html (last visited Apr. 5, 2006).

10. Comstock is a well-known figure in the history of media regulation. Founder of the New York Society for the Suppression of Vice, he became famous (or infamous) for his battles to ban the dissemination of information about birth control, championed by Margaret Sanger. Comstock's name has since become synonymous with censorship. First Amendment historian Margaret Blanchard has identified him as "the first great crusader for cleaning up American literature and artwork." See MARGARET BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 15 (1992).

11. This type of realistic recent historical setting has been common in all three "Grand Theft Auto" games. In the first game, players controlled a young Italian man, voiced by Ray Liotta who is best known for his work in mobster films such as "Goodfellas," in the fictional "Liberty City" (New York) as he fought to become a mob boss. In the sequel, players explored "Vice City" (a "Miami Vice"-esque city set in the 1980s).

12. The "Grand Theft Auto" series is known for introducing one of the most complex, non-linear styles of play in video games. Unlike earlier games, where characters followed a pre-determined path or went on specific "missions" or "quests" delineated by the game, "Grand Theft Auto" essentially creates a fully functioning city and lets players explore as they like. Most critics agree that "San Andreas" achieved this free-flowing, immersive style to a degree that no game had done before. For a compilation of just
follow CJ as he explores three fully-developed cities: Los Santos, San Fierro, and Las Venturas. As he explores, CJ has the ability to talk with every person he sees, buy and operate every business he passes, and, as the title of the game suggests, steal any car he pleases. If CJ eats well and works out, he gets stronger and more attractive. If he subsists on junk food, he grows fat and gets winded more easily. At every level, “GTA: San Andreas” promotes an

under 100 reviews, averaging a score of 9.5 (out of 10), see GameRankings.com, Grand Theft Auto: San Andreas Reviews, http://www.gamerankings.com/htmlpages2/914983.asp?q=san%20adreas (last visited Apr. 5, 2006). Indeed, this “sandbox” style game play arguably makes the “Grand Theft Auto” games less necessarily violent than many others. For example, if a player chooses to do so, he or she can forgo all violent aspects of the game and instead take a fire truck or ambulance around the city saving lives.

13. The other hallmark of the “GTA” series has been its use of social and political satire buttressed by Hollywood-level production values. Well-known actors including Samuel L. Jackson, Dennis Hopper, James Woods, Burt Reynolds, and Peter Fonda voice the characters, and the story alternates between humorous and dramatic treatment of urban life in the early 1990s. “GTA: Vice City” even included an up-and-coming politician named “Congressman Shrub” with a wife named Laura and aspirations for the presidency.

14. “Los Santos” is based on Los Angeles and included numerous well-known landmarks such as Watts Tower, the Grauman Chinese Theater, and “Vinewood,” a Hollywood caricature complete with giant VINEWOOD sign in the hills.

15. “San Fierro” is based on San Francisco and features Chinatown, a gay Castro district, and a Haight-Ashbury district called “Hashbury.”

16. “Las Venturas” is based on Las Vegas and includes numerous casinos where players can try their hand at real-time versions of the games including roulette, poker, and slot machines. The Las Vegas Strip is also reproduced with bawdy names replacing the well-known fronts for The Excalibur Hotel and Casino (“Come-A-Lot”), the Sphinx and Pyramid of the Luxor Hotel (“The Camel Toe”), and the Pioneer Club with Vegas Vic replaced by San Andreas character Candy Suxxx.

17. Assuming the player has the money. CJ starts out as a poor inner-city street thug, but can take a minimum wage job, rob stores, or even manage rap acts (voiced by rap superstar Ice T) to make money.

18. Each car comes equipped with a working radio that can tune between eleven distinct stations that play a real-time mix of period-appropriate songs and original parodies of radio personalities, famous commercials, and political ads.
unfiltered, though often satiric, expression of reality and total interactivity with the environment.

When some fans released a modified version that brought the game’s realism and interactivity into the bedroom, a national furor erupted. When some fans released a modified version that brought the game’s realism and interactivity into the bedroom, a national furor erupted. Throughout the game, CJ can become involved in several romantic relationships. In the official version of “GTA: San Andreas,” CJ’s girlfriend invites him in “for some coffee” when he visits her. The camera remains outside the house, but the player hears a few moans from inside, and then CJ returns to the game. This allusion to off-screen sex was moved on-screen by a fan-created modification, dubbed the “Hot Coffee” mod. When a player using the PC version of the game installed a special program, unused code was enabled that followed CJ inside the house and showed the two figures simulating intercourse.  

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21. The modification (or “mod”) was made available for personal computers because the technology of PC games is much easier to modify. Console systems are very difficult to alter because they are played on a system that can only read games. Because PCs can be used to run many types of programs, creating and adding new content is much easier.
22. Originally, there was some debate as to whether the modification actually added the content or simply unlocked it. It is now clear that the content was in the original game, but was never intended to be accessible by players. This is fairly common in video games; content will be programmed for a test version, cut based on editorial judgment, but never deleted from the source code. The mod itself features no nudity, but simply shows the clothed characters making suggestive motions and sounds. Since then, other mods have been released that remove the clothing as well.

This is not the first mod to add sexual content to an existing PC game. For example, the popular “Tomb Raider” game featuring buxom explorer Lara Croft (essentially a female Indiana Jones) was altered by the “Nude Raider” patch so that Croft’s clothes disappeared. Eidos, the company that released “Tomb Raider,” quickly sent cease and desist letters to those who offered the patch and the controversy subsided. For a full discussion of “Tomb Raider” and the modification, see Wikipedia, Tomb Raider, http://en.wikipedia.org/wiki/Tomb_Raider#Nude_Raider (last visited Apr. 5, 2006). For a general discussion of video game modifications and the “mod” community, see Gloria Goodale, What Lurks Inside Video Games, CHRISTIAN SCIENCE MONITOR FEATURES, Currents 11, July 18, 2005.
Despite the fact that "GTA: San Andreas" was rated "M" (for Mature audiences only), and quickly assigned an "AO" (for Adults Only)\(^{23}\) rating when the content was discovered, the hidden sexual activity in the "Hot Coffee" mod set off a firestorm. Social conservatives and parents' groups were predictably outraged and many politicians responded by proposing legislation that would regulate or even ban the sale of violent or sexually explicit video games to minors.\(^{24}\) A number of bills were introduced, and several quickly passed.\(^{25}\) Although each proposed law had minor differences, all of them used the existing industry ratings as a platform to curtail the sale of games that were either unrated or rated as primarily appropriate for mature audiences.\(^{26}\)

Legislators, impatient with the cumbersome and constitutionally delicate issue of sorting the hundreds of games released every year, have seized on the idea of delegating this task to the industry. A ratings system is already in place that provides customers with a general suggestion as to what age groups might find a given game appropriate, as well as specific information about what aspects of the game might be objectionable. The bills passed in response to the "Hot Coffee" controversy seek to use these ratings as an "instant" analysis of their suitability by giving legal weight to these private evaluations.

The purpose of this Note is to examine the constitutionality of legislation that regulates video games based on industry labeling. Part I begins by describing background information about the existing ratings system for video games and the body that assigns ratings, the Electronic Software Ratings Board (ESRB).

23. The "AO" rating is exceedingly rare, with less than 1% of games earning such a rating. See Entertainment Software Rating Board, About ESRB – Fast Facts, http://www.esrb.org/about_facts.asp (last visited Apr. 5, 2006). Those that do earn the rating are generally computer games sold in adult book and video stores alongside pornographic movies rather than in game stores with other video games. Indeed, until "GTA: San Andreas," no console game had ever been assigned an "AO" rating.


25. See infra Part I.B.

26. Id.
Additionally, Part I provides an overview of the current legislation, discussing each of the bills that have been passed into law and then synthesizing their common elements. Part II turns to the legal status of video games, discussing their increasingly solid standing as a medium protected by the free expression provisions of the First Amendment. Next, Part II examines the law of ratings systems in an analogous area, that of the Motion Picture Association of America’s (MPAA) ratings for films and compare that system with the ESRB. Part III completes the analysis with a discussion of the constitutionality and policy wisdom of the proposed legislation. Finally, this Note concludes with a brief discussion of larger problems with government regulation of video games, a medium that is still in its infancy, particularly given that so many lawmakers seem to misunderstand the nature of that medium.

Hopefully, this Note will provide an overview of the law as it exists today that is informative and interesting for those considering the value and viability of such legislation. It will argue that simply grabbing pre-packaged analysis off the ESRB’s shelf and running it through legislative machinery is not a recipe for good, or even constitutionally acceptable, law. This legislation, which curtails expression protected by the First Amendment, cannot rest on such stale standards.

Additionally, this Note aims to suggest the importance of a serious and respectful application of First Amendment jurisprudence for video games. Although a recent phenomenon, video games comprise a medium that is increasingly popular and has already begun to demonstrate the ability for expression as sophisticated and powerful as any other speaker in the modern marketplace of ideas. Any legislation governing the medium should be grounded in fresh First Amendment analysis. But the legal percolation of the “Hot Coffee” controversy should also serve as a wake up call for the expressive possibilities of the medium as a whole.

27. See Motion Picture Association of America, Film Ratings, http://www.mpaa.org/FilmRatings.asp (last visited Apr. 5, 2006). For a full discussion of the law of MPAA ratings, see infra Part II.B.
I. THE CURRENT RATINGS SYSTEM AND LEGISLATION

A. The Entertainment Software Ratings Board

Controversy surrounding video games is as old as the medium itself.28 The first arcade game was released in 1971,29 and within a few years, parental groups had begun expressing concern about dimly-lit, cacophonous arcades with a seemingly insatiable appetite for their children’s quarters and daylight hours.30 These

29. See generally id. Historians generally point to Steve Russell’s “Spacewar,” programmed in 1961, as the first interactive video game (although several “proto-games” played on rudimentary computers pre-date it). The MIT mainframe project was a hit with fellow students and eventually attained a cult following. On the whole, video games did not find mainstream attention until that same game was re-named “Computer Space” and released as an arcade machine by the founders of Atari to moderate success. Atari’s 1972 follow-up game, “Pong,” found a somewhat wider audience. See id. at 37-48 (describing “Pong’s” rise to become one of the most successful games in history and recounting the now-legendary telephone call from Andy Capp’s Tavern, the first establishment to carry a “Pong” machine. The owner called Atari to complain that the machine had broken just a few days after delivery. Programmer Al Alcorn came and opened up the machine to locate the “malfunction” and was surprised to find that the problem was caused by the overflow of quarters cascading out of the machine.). Kent also discusses the coin shortage in Japan caused by “Space Invaders” which forced the Japanese mint to triple production of 100-yen pieces. Id. at 116.
30. See Sandra Evans Teeley, City Council Seeking Ways to Curb Pupils’ Overuse of Video Arcades, WASH. POST, April 14, 1983, at B13; Wikipedia, Video Arcade, http://en.wikipedia.org/wiki/Video_arcade (last visited Apr. 5, 2006) (discussing parents’ concerns about “the perceived seedy atmosphere of the arcades and of their children’s use of money on the ‘frivolous’ activity of video game playing” and “[s]ome efforts . . . to prohibit children’s patronage of such establishments with varying degrees of success”). But see Video Games Win in Arcades, N.Y. TIMES, Aug. 23, 1980, § 2, at 29 (“Video games have not only successfully infiltrated the arcade business, according to several analysts. They have also endowed the once ‘sleazy reputation’ of the pinball and slot-machine halls with a more respectable image. ‘Because of
Concerns tended to center around specific high profile games or a more general concern about juvenile delinquency, and they mostly subsided after a brief outcry.

As video games entered the home in the mid-1980s on computers and console systems such as the Atari 2600 and the Nintendo Entertainment System, the content of games began to come under increasing scrutiny. By the early 1990s, advances in graphics technology were permitting game designers to create on-screen characters and action that approximated reality in a way that appealed with adults, their size and appearance, video games began appearing in bars, airplane lounges, even country clubs, and this became the rebirth of the coin-operated games business,' [Lee S.] Isgur [analyst at Paine Webber Mitchell Hutchins] said.

31. The first and probably most notorious example of this was the 1976 game “Death Race 2000.” Based on a B movie of the same name, “Death Race” put players behind the wheel of a car and awarded points when they ran over pedestrians. The game was removed from several arcades after protests. Like most games of the era, however, the shelf life of the game was short enough that most arcades quickly cycled past “Death Race” in favor of newer and more popular fare. See Classic Gaming: Features, http://www.classicgaming.com/features/articles/violence/index.shtml (last visited April 5, 2006).

32. See, e.g., Peter Kerr, Should Video Games Be Restricted by Law?, N.Y. TIMES, June 3, 1982, at C1 (discussing parents’ concern over truancy and wastefulness by children in arcades, their general atmosphere marked by drug deals and other illicit activity, as well as video games’ perceived propensity to provoke violence and decrease children’s ability to communicate and socialize with others); see also, e.g., Glenn Collins, Children’s Video Games: Who Wins (Or Loses)?, N.Y. TIMES, Aug. 31, 1981, at B4 (discussing parental concerns about children’s addiction to video games). But see Glenn Collins, Relationships; Children and Video Games, N.Y. TIMES, Sept. 30, 1985, at B11 (discussing a new study concluding that “[v]ideo-game playing did not have pathological effects, even for heavy players”).

33. See Carrie Dolan, Parents Fear Games Turn Their Children into Zombies, WALL ST. J., Mar. 8, 1988, § 1, at 37; Jeanne Malmgren, Nintendo Battles: Parents Have to Say No to Kids’ Game Addiction, ST. PETERSBURG TIMES (Fla.), Jan. 8, 1989, at H1. Happily, the majority of parents did not react negatively to video games and many even embraced the new medium as a form of entertainment that they could enjoy as well. See Marco R. della Cava, Adults Are Mad for Mario, Too, USA TODAY, Aug. 24, 1989, at 6D.
qualitatively different way than before. These advances allowed game-makers new freedom to build compelling worlds and rich, complex characters, but they also made depictions of graphic violence and gore viscerally effective in a way that alarmed many parents.

By 1994, these new graphical advances had propelled high-profile games such as “Doom” and “Mortal Kombat” – two of the most violent and gory games ever released – to record sales and to the forefront of popular debate. Smelling a powerful hot button

34. For a thorough discussion of advances in video game graphics as well as an excellent visual record of those advances, see Rusel DeMaria & Johnny L. Wilson, High Score!: The Illustrated History of Electronic Games (2d ed. 2005).

35. Significantly, this technological sophistication was seen as a vital tool for attracting older teens and adult customers. See Video Game Makers: We’ll Rate Ourselves, Houston Chron., Mar. 5, 1994, at A9 (“Originally, the predominant market for [video games] was children, ... [b]ut as more sophisticated technology evolves, our market is rapidly attracting a more diverse and older audience.”). Every indication is that these expectations have been met. Recent surveys suggest that 55% of frequent console game players are over eighteen and that 20% are over thirty-five. See Entertainment Software Association Facts & Research, Game Player Data, http://www.theesa.com/facts/gamer_data.php (last visited Apr. 5, 2006).

36. “Doom” was the computer game that brought the “First Person Shooter” (FPS) genre to mainstream attention. Rather than displaying the main character on screen in a third person view, FPS games presented the action as if the camera was mounted on the player’s shoulder. The screen was presented as an actual first person view, as if seen from the eyes of the main character with only his hand and gun jutting out as if extending from the player’s own body. This visceral connection with the action of the game transformed a fairly simplistic storyline into a hugely popular phenomenon, but troubled many critics based on the same sense of uniting player and character in supremely violent action.

“Mortal Kombat” was a fighting game that pitted one character against another in single combat. It stood out based on the photo-realistic graphics (instead of rendering cartoonish characters, the programmers used photographs of real actors that were digitized and inserted into the game) as well as the grisly “Fatalities” that allowed the winner to finish off their vanquished foe. Popular “Fatalities” included the ability to rip off opponents’ heads, tear out their hearts, and electrocute them, in each case with bucketfuls of blood and lifelike screaming. For a description of both games and a discussion of the controversy surrounding them, see Kent, supra note 28, at 457-80.
campaign issue, Senators Joseph Lieberman and Herbert Kohl began a much-publicized crusade against violent video games and introduced legislation that would permit the government to regulate all games.

Alarmed by the threat of congressional action and concerned about the ability of consumers to make informed choices, the major producers of video games united to form the Entertainment Software Association ("ESA"). These producers also created the ESRB to "independently appl[y] and enforc[e] ratings, advertising guidelines, and online privacy principles adopted by the computer and video game industry."

Since its inception, the ESRB has been tremendously successful. Using a system based on the MPAA's ratings for

37. See Senator Wages War Against Video Game, PLAIN DEALER (Cleveland, Ohio), Jan. 13, 1994, at 16A (describing Senator Joseph Lieberman's campaign to have the violent parts of "Mortal Kombat" excised by utilizing heavy media coverage including tapes of actual game play).


movies, the ESRB assigns a letter rating to a game based on its appropriateness for a given age group. The ESRB goes a step further than the MPAA, providing more than thirty specific content descriptors that indicate which aspects of the game might raise concerns. These descriptors not only provide warning if a game includes violence, strong language, or use of controlled substances, they further differentiate the degree and quality of the content. As an example, the “violence” warning may be further described as being “Mild Violence,” “Intense Violence,” “Cartoon Violence,” “Fantasy Violence,” or “Comic Mischief.” Every applicable category is listed under the rating and each has further descriptions available at the ESRB’s web page. The vast majority of games released easily fit into the safest “E” (“Everyone”) or “T” (“Teen”) ratings, but the ESRB’s ratings and descriptors are broad enough to describe almost any content.

42. An “E” (“Everyone”) is roughly the equivalent of a “G” rating. “E10+” (“Everyone older than ten”) is analogous to “PG.” “T” (“Teen”) corresponds to a “PG13,” and “M” (“Mature”) equates to an “R” rating. For extreme cases, the ESRB has an “EC” rating for games appropriate for “Early Childhood” and “AO” for games suitable for “Adults Only.” Entertainment Software Rating Board, About ESRB, http://www.esrb.org/about.asp (last visited Apr. 5, 2006).

These rating are assigned by a panel of trained raters who are unaffiliated with the industry. Publishers fill out a detailed questionnaire explaining what is in the game and submit a video tape of both the general content and the most extreme content of a given game. The raters review both of those and then assign a rating. Id.

43. For the full list, see ESRB Game Ratings, http://www.esrb.org/esrbratings_guide.asp#symbols (last visited Apr. 5, 2006).

44. Id.

45. Id.

46. In 2004, 87% of games received either an “E” or “T” rating, while “M” rated games made up only 12% of the total and “AO” titles (including the newly re-rated “Grand Theft Auto: San Andreas”) constituted less than 1%. See Entertainment Software Ratings Board, About ESRB - Fast Facts, http://www.esrb.org/about_facts.asp (last visited Apr. 5, 2006).
B. Current Legislation

Despite the sophistication and general success of the ESRB, many commentators have suggested that not enough has been done to keep objectionable games out of the hands of children. The "Hot Coffee" controversy brought this concern to a boiling point. Despite the ESRB quickly reclassifying "GTA: San Andreas" from Mature ("M") to Adults Only ("AO") once the modification was discovered, several states have passed, or at least proposed, legislation giving legal weight to what had been a private, informational system.

Illinois was the first state to respond with legislation. On July 25, 2005, Illinois governor Rod Blagojevich signed "The Safe Games Illinois Law" into effect. The law makes the sale of "violent" or "sexually explicit" video games to minors illegal, but offers an affirmative defense to protect vendors from liability where the game is labeled with a non-Mature ("M") or non-Adults Only ("AO") rating. It also mandates that all games carry labels, and that any store carrying video games must post an explanation of the ESRB's ratings in several places and offer brochures explaining the system in depth upon request. Governor Blagojevich indicated that the new law was a direct response to games such as "GTA: San Andreas" and proudly declared: "This law makes Illinois the first state in the nation to ban the sale and rental to children of violent and sexually explicit video games."


48. The law, Public Act 094-0315, has two sections. The first, the Violent Video Games Law, regulates the sale of violent games. The second, the Sexually Explicit Video Games Law, regulates sexually explicit games. See 720 ILL. COMP. STAT. ANN. 5/11-21 (LexisNexis 2006).

49. Id.

50. Id.

The Safe Games Illinois Law was the first successful legislative response to the “Hot Coffee” controversy, but it was quickly followed by others. Within a month, the Michigan legislature had introduced a similar package of bills that expressly outlawed the sale of Mature (“M”) or Adults Only (“AO”) video games to minors. Governor Jennifer Granholm signed the Violent Games Law with similar comments about “the graphic nature and wide availability of” games such as “GTA: San Andreas.”

Sale or Rental of Excessively Violent or Sexually Explicit Video Games to Minors Under Age 18 (July 25, 2005), available at http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=4170 (last visited Apr. 5, 2006). Illinois was also the first state in the nation to judicially reject such a ban when U.S. District Judge Matthew Kennelly overturned the law. See Kim Bell, Judge Overturns Ban on Video Games, ST. LOUIS POST-DISPATCH, Dec. 4, 2005, at C7 (“If controlling access to allegedly 'dangerous' speech is important in promoting the positive psychological development of children, in our society that role is properly accorded to parents and families, not the state,' Kennelly wrote in his 53-page ruling.”). Governor Blagojevich has indicated that “[t]his battle is not over” and plans to appeal. Id.

In the spring of 2005 the North Carolina legislature introduced a similar bill banning the sale of violent and explicit games to minors and requiring labeling and information about the ESRB system. S. 2, Reg. Sess. (N.C. 2005); see Sharif Durhams, Senate OK's Bill to Keep Kids from Gory Games, CHARLOTTE OBSERVER, Apr. 21, 2005, at B1. The bill did not pass in the 2005 term, but legislators have publicly pledged to bring the bill back in 2006. See Mark Schreiner, Roseman Hopes Video Games Bill Is Back in Play Next Session, WILMINGTON STAR (N.C.), Sept. 12, 2005, at B1.

Other states such as Delaware (see H.R. 221, 142d Gen. Assem., Reg. Sess. (Del. 2003)) and Minnesota (see S. 1140, 83d Leg., Reg. Sess. (Minn. 2003-04)) have made similar attempts to regulate based on ESRB ratings. Several other states have proposed similar bills which have not yet passed, including Indiana, see Ken Fisher, Indiana Latest to Try Game Law, Going for Phyrick Defeat, ARS TECHNICA, (Dec. 30, 2005), http://arstechnica.com/news.ars/post/20051230-5872.html, and Maryland, see Ray Rivera, Bills Target Brutal Video Games, WASH. POST, Jan. 19, 2006, at T3.


Perhaps appropriately, the "San Andreas" shake-up has also been felt in California. On October 7, 2005, Governor Schwarzenegger signed into law Assembly Bill 1179, which makes no explicit statement regarding the ESRB ratings, but does call for the labeling of games. Supporters of the bill, including James Steyer, the founder of Common Sense Media who played a major role in pushing the bill, have made it clear that the games affected would be "those rated M or higher."

Federal officials have made the link between legislative action and the ESRB ratings even more explicit. Senator Hillary Clinton has led the charge for federal regulation of video games, promising to "put some teeth into video game ratings."

In late November of 2005 the Michigan bill hit a snag when Judge George Steeh issued an injunction against the law, signed earlier but not scheduled to go into effect until December 2005. When issuing the injunction, the judge wrote:

[I]t is unlikely that the State can demonstrate a compelling interest in preventing a perceived ‘harm’ . . . the Act will likely have a chilling effect on adults’ expression, as well as expression that is fully protected as to minors. The response to the Act’s threat of criminal penalties will likely be responded to by self-censoring by game creators, distributors and retailers, including ultimately pulling ‘T’ and ‘M’-rated games off stores shelves altogether.


56. See CAL. CIV. CODE § 1746.2 (Deering 2006).

57. John M. Broder, Bill is Signed to Restrict Video Games in California, N.Y. TIMES, Oct. 8, 2005, at A11 ("The law does not refer to the existing rating system, but James Steyer, founder of Common Sense Media, a group that pushed for the law, said video games affected by the law would be those rated ‘M’ or higher."); cf. Common Sense Media, http://www.commonsensemedia.org (last visited Mar. 5, 2006) (reporting that seven other states and the District of Columbia are considering similar bills). As in Illinois and Michigan, the California courts have also issued a preliminary injunction against the law. See Lynda Gledhill, Judge Blocks Ban on Sale of Violent Video Games to Minors, S.F. CHRON., Dec. 23, 2005, at A1.

58. Press Release, Senator Hillary Rodham Clinton, Senator Clinton Announces Legislation to Keep Inappropriate Video Games Out of the
this end, Senator Clinton and Senator Joseph Lieberman have proposed "The Family Entertainment Protection Act" which will make selling any game labeled "M" or "AO" to a minor a federal offense.  

Each of these statutes has unique wrinkles and will be challenged in different jurisdictions, but two common elements exist in all of them. First, every law requires some sort of labeling on all games. This can either be the ESRB's label (accompanied by an explanation of the label's meaning in the store) or specific, government mandated labels that differ in form, if not function, from the existing labels. Second, and more significantly, each of the laws criminalizes the sale of Mature ("M") and Adults Only ("AO")-rated games to minors. Both Senator Clinton's proposed law and Michigan's Violent Games Law explicitly criminalize the sale of games with "M" or "AO" ratings to minors. The Illinois law leaves classification up to the jury, but provides an affirmative defense where a game is not rated "M" or "AO." This has essentially the same effect of making "M" and "AO" games unsafe to sell based on their ratings, since they are the only games unprotected by the defense. Even the California law, which does not expressly mention the ESRB, clearly had those ratings as its underpinning since it both requires labeling and punishes the sale of games based on language almost identical to that used for "M" and "AO" games. Further, even in the absence of explicit text, it is almost impossible to imagine a judge or jury not treating the industry label as prima facie evidence of violent or explicit content. In short, post-"Hot Coffee" legislative regulation of games seems to center around two interrelated elements: a) ESRB label


60. The three laws that have already been passed have been challenged by the ESA. If or when other state and federal statutes pass, they are certain to be challenged as well. See Entertainment Software Association, http://www.theesa.com/ (last visited Apr. 5, 2006).

61. See statutes cited supra at notes 48-56.
requirements on all games and b) government sanctions if games are sold to customers below the age indicated by those labels.

II. THE LEGAL STATUS OF VIDEO GAMES

A. Video Games are Protected by the Free Expression Clauses of the First Amendment

A decade ago, the question of video games’ status under the First Amendment was very much in doubt. Indeed, in the early 1980s, several cases seemed to suggest that video games might be per se unprotected. For example, in 1982, a New York restaurant owner sought a preliminary injunction against the city’s zoning laws regulating coin-operated games. In *America’s Best Family Showplace v. New York*, the Eastern District Court of New York rejected the injunction and held that video games were not protected expression. The following year a Massachusetts district court, relying on *America’s Best*, came to the same conclusion.


63. *Id.* at 174.

In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element.... I find, therefore, that [video games] ‘contain so little in the way of particularized form of expression’ that video games cannot be fairly characterized as a form of speech protected by the First Amendment.

*Id.* (quoting Stern Electronics, Inc., v. Kaufman, 669 F.2d 852, 857 (2d Cir. 1982)).

64. Malden Amusement Co., Inc. v. City of Malden, 582 F. Supp. 297, 299 (D. Mass. 1983) (“The court in *Showplace* undertook a thorough examination of First Amendment law and held that video amusement games are not protected under the First Amendment to the United States Constitution. I find that analysis persuasive, and I hold on the merits of the present case that video games are not protected speech within the First Amendment....”).
Several other courts followed suit, ruling generally in the context of zoning laws, that video games were unprotected expression that could not overcome the zoning determinations of a city. However, in *Marshfield Family Skateland v. Marshfield*, one Massachusetts court held that although existing games were not expressive, future games might very well advance to become communicative media, and some scholarship came to the same conclusions. A very small number of cases did find that video games were protected. Nonetheless, the general legal consensus was that pinball machines and coin-operated arcade games like Pac Man simply did not tell stories or express ideas to the degree necessary for First Amendment protection.

By 1994, as the congressional hearings that spurred the creation of the ESRB were taking place, legal scholars and a few courts, most notably the Seventh Circuit Court of Appeals in the case of *Rothner v. Chicago*, had begun seriously wrestling with the

65. See, e.g., People v. Walker, 354 N.W.2d 312 (Mich. App. 1984) (holding that pinball arcade owner had failed to show communicative elements in his games); City of St. Louis v. Kiely, 652 S.W.2d 694 (Mo. Ct. App. 1983) (rejecting adult book store’s claim and holding that coin-operated games cannot be characterized as a form of speech protected by the First Amendment).


70. 929 F.2d 297 (7th Cir. 1991). In many ways, *Rothner* picked up where *Marshfield* left off. Again the court concluded that the types of arcade games at issue in the case were not protected. However, the *Rothner* court not only indicated that future hypothetical games might be protected, but seemed to suggest that such expressive games might in fact exist at the time. The court observed:

*We are aware that several district courts... have held that video games are not protected by the [F]irst...*
question of whether video games were an expressive medium due some constitutional protection. Games had moved from smoky downtown arcades into family living rooms and offices. The same graphics permitting the images that so alarmed Senator Lieberman also enabled characters with detailed facial expressions and nuanced body language. The ability to save and return to a game over the course of days and weeks enabled storylines and character arcs that were complex and epic in a way that had been impossible before. It appeared as if the Marshfield court's prediction may have come to pass.

This legal and scholarly debate remained fairly quiet as the creation of the ESRB originally mollified many critics and seemed to suggest that a regime of industry regulations would replace the threat of government action. However, after several cases of high profile juvenile violence in the 1990s, a spate of lawsuits and bills

again raised the issue of violence in video games. Scholarships first focused on tort liability for game manufacturers or the general question of constitutional protection for computer code. But by 2001, the courts began to seriously revisit the issue of First Amendment protection for video games.

The first case to examine modern games began cautiously but ended powerfully. Indianapolis had fashioned an ordinance restricting violent and sexually explicit video games based on the principle that no video games should be protected by the First Amendment; and if some were, the type of games encompassed by the statute should be classified as "obscene." Following the path laid out by Marshfield and Rothner, Judge Posner, in the ground-

72. See Kent, supra note 28, at 544-56; see also Heather Chaplin & Aaron Ruby, Smart Bomb: The Quest for Art, Entertainment, and Big Bucks in the Videogame Revolution 89-126 (2005). The case of James v. Meow Media, Inc., 90 F. Supp. 2d 798, 818-19 (W.D. Ky. 2000), established that game manufacturers could not be held liable on distinct First Amendment grounds and did not directly address the First Amendment status of video games. The court stated:

The theories of liability sought to be imposed upon the manufacturer of a [video] game would have a devastatingly broad chilling effect on expression of all forms. . . . Atrocities have been committed in the name of many of civilization's great religions, intellectuals, and artists, yet the first amendment does not hold those whose ideas inspired the crimes to answer for such acts. To do so would be to allow the freaks and misfits of society to declare what the rest of the country can and cannot read, watch and hear.

Id. (quoting Watters v. TSR, Inc., 715 F. Supp. 819, 822 (W.D. Ky. 1989)).


breaking *Kendrick* case, rejected the notion that games were not protected expression. 76 Posner quickly rejected the ordinance’s linguistic sleight-of-hand that attempted to sneak images of simulated violence into the highly limited category of obscenity. 77 He also dismissed the notion that video games’ interactivity somehow limited their First Amendment protection. “All literature,” he observed, “is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.” 78

Significantly, Judge Posner went a step further and based his ruling not only on the expressive quality of the games themselves, but also on the First Amendment rights of minors. As plainly as possible, Posner stated that “children have First


77. *Kendrick*, 244 F.3d at 575-76 (reminding the legislature that “[t]he notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity”).

78. *Id.* at 577; see also HAROLD SCHECHTER, *SAVAGE PASTIMES: A CULTURAL HISTORY OF VIOLENT ENTERTAINMENT* 156-57 (2005) (discussing the longstanding tradition of violence in entertainment from the grisly public executions that made up popular entertainment in European history, to the sadistic stories of Edgar Allen Poe and the ultra violent westerns of the 1950s). Indeed, Schechter notes that:

Nothing was more interactive than the ‘violent’ play of my own 1950s boyhood, when our targets were not animated pixels but live human beings who would shoot back at us with cap pistols, dart guns, ping-pong-ball rifles, and rubber tipped arrows. If there’s one legitimate complaint that parents can make about video games, it is that they are not active enough. They are too sedentary. They don’t encourage kids to run around outdoors and shoot each other in the healthy way we did in the past.

*Id.* (emphasis in original).
Amendment rights.”⁷⁹ These rights, Posner noted, are not the conclusion of an academic syllogism, but the foundation for the very heart of First Amendment protection: an informed and critical electorate.⁸⁰ Posner noted:

Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old’s right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.⁸¹

*Kendrick* stands as the defining opinion on the rights of game makers and the rights of game players, both adults and minors. It sounds a powerful note for the protection due to this new medium, one that should not be treated as a second-class citizen in the society of free expression. It also indicates that the ideas and ideology of games should no more be muted on the basis of the age of the recipient than a great book or a controversial film.

The *Kendrick* court’s message is harmonious with other decisions as well. That same year in *Sanders v. Acclaim*,⁸² a Colorado district court held, in a suit brought after the infamous Columbine shootings, that video games deserved nothing less than

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⁸⁰. *Kendrick*, 244 F.3d at 577.
⁸¹. *Id.* (second emphasis added).
⁸². 188 F. Supp. 2d 1264 (D. Colo. 2002).
full protection under the First Amendment. Kendrick's echoes were also heard in a Connecticut district court in Wilson v. Midway, where the court found some games to be "analytically indistinguishable from other protected media... which convey information or evoke emotions by imagery..." Kendrick's message also resonated with the Eighth Circuit. In Interactive Digital Software Association v. St. Louis County the court evaluated an ordinance that regulated violent video games and concluded that such laws should be analyzed as content-based regulations and thus subject to strict scrutiny. As such, the court held that the government cannot silence protected expression "by wrapping itself in the cloak of parental authority."
Since 1983, there has not been a single significant case rejecting per se the First Amendment viability of video games that has survived appeal. Several cases, most notably *Kendrick* and *IDSA*, make it clear that games are exactly the type of expression that is protected by the First Amendment and that regulations must pass the high bar of strict scrutiny. Numerous scholars have agreed with these judicial assessments. While the United States Supreme Court has yet to rule on this issue, recent case law suggests that video games are an expressive medium that fall well within the ambit of the First Amendment. Therefore, like other media recognized under the First Amendment, the legal test for legislation that silences that expression would be strict scrutiny.

**B. The Constitutionality of Government Ratings**

1. Ratings in other Contexts: The Motion Picture Association of America

Concluding that video games are protected expression hardly ends the discussion of whether or not the recent legislation is constitutional. The unconstitutional regulation of all games, or of “violent” games when no specific definition has been given for “violence,” may be different than regulations based on the ratings assigned by the ESRB. After all, if the industry itself decides that a game is not appropriate for minors, perhaps that judgment should be enough to permit regulation. Such an “instant” analysis has the

advantages of both being readily available – since almost all games already carry an ESRB rating – and carrying the imprimatur of the industry itself. Fortunately, this is not an abstract question to be answered with nothing more than conjecture. Several courts, including the United States Supreme Court, have evaluated the constitutionality of ratings systems in a closely analogous context: movies.

The ratings system used by the Motion Picture Association of America (MPAA) provided the basis for the ESRB’s ratings when they were crafted in 1994. This model was appropriate since the same turmoil that threatened the video game industry at the time had been confronted by the motion picture industry thirty years earlier. In response, the MPAA introduced a system using letter descriptors to indicate the age for which a given movie is appropriate. Like the ESRB, the MPAA relies on a board of parents, the Classification and Ratings Administration (CARA), who are unaffiliated with the industry to assign ratings. This board views the film and votes on a rating. Also like the ESRB, no film is technically required to submit to the ratings process or to carry the rating assigned. However, in light of the fact that more than 85% of theaters require ratings, including almost every major chain,


91. There have been several changes to the ratings over the years with “M” and “X” ratings being dropped and “PG-13” and “NC-17” ratings added. The current ratings are “G” for “General Audiences,” “PG” for “Parental Guidance Suggested,” “PG-13” for “Parents Strongly Cautioned,” “R” for “Restricted,” and “NC-17” for “No One 17 And Under Admitted.” For a full discussion of these ratings, see Motion Picture Association of America: Ratings History, supra note 90.


refusing a rating in most cases is tantamount to choosing commercial failure.⁹⁴

Despite the economic incentives for labeling, the MPAA’s system is ostensibly voluntary for both film-makers and studios, and there is no legal duty for films to carry a label or for theaters to enforce the ratings. There have been several cases in which MPAA ratings were substituted for thorough First Amendment analysis, and courts have almost uniformly reached the same conclusion: such use is unconstitutional.

In Interstate Circuit, Inc. v. City of Dallas,⁹⁵ the United States Supreme Court struck down a Texas alternative classification system very similar to the MPAA that was backed by the force of law.⁹⁶ Dallas had established its own board to classify films as either appropriate or inappropriate for young people. Films rated as inappropriate could not be shown in the city unless exhibitors had obtained a license based on several conditions, including a promise that they would not admit anyone under sixteen years of age.⁹⁷

Justice Marshall began his opinion for an 8-1 majority by restating the established rule that “[p]recision of regulation must be the touchstone [based on] rigorous insistence upon procedural safeguards and judicial superintendence of the censor’s action.”⁹⁸ Justice Marshall continued:

Vagueness and the attendant evils we have earlier described are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression. . . . Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted

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⁹⁶ See id. at 678-79 (fully describing the system); see also Freedman v. Maryland, 380 U.S. 51, 58-59 (1965) (noting that when classifying films, (1) the burden is on government to establish that film is unprotected; and (2) the rating must be subject to prompt judicial review).
⁹⁷ Interstate Circuit, 390 U.S. at 678.
⁹⁸ Id. at 682 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children. 99

Based on these concerns, Justice Marshall ruled that such a system was unconstitutional because it was not "narrowly drawn, reasonable and definite." 100

Armed with this somewhat vague standard, several courts have confronted the issue of private movie ratings transformed into public law. In 1970, a pair of cases decided by courts in Pennsylvania and Wisconsin directly addressed this issue. MPAA, Inc. v. Specter 101 dealt with a statute that adopted the MPAA ratings as its standard. Although there was some question as to whether the statutory language was in harmony with the MPAA ratings, the court went out of its way to note that "[t]he evidence clearly established that the Code and Rating Administration of the [MPAA] has itself no defined standards or criteria against which to measure its ratings." 102 As such, the court concluded that the law was "so patently vague and lacking in any ascertainable standards and so infringes upon the plaintiffs' rights to freedom of expression . . . as to render it unconstitutional." 103

That same year, in Engdahl v. City of Kenosha, 104 a Wisconsin court reached a similar result in a case dealing with regulation of films deemed unsuitable for minors based explicitly on the MPAA ratings. Because prior restraints carry such a heavy burden for expression, the court reasoned, such regulations require a tremendous amount of specificity and reliability. 105 As such, the

99. Id. at 688-89.
100. Id. at 690 (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)).
102. Id. at 825.
103. Id. at 826 (citing Interstate Circuit, 390 U.S. 676 (1968)).
105. Id. at 1135 (citing Bantam Books v. Sullivan, 372 U.S. 58 (1963) and Ginsberg v. New York, 390 U.S. 629 (1968)).
delegation of these classifications to a private agency, the MPAA, was found to be unconstitutional.\footnote{Id. at 1135-36.}

The 1983 Swope case followed this thread into the area of funding for college organizations.\footnote{Swope v. Lubbers, 560 F. Supp. 1328 (D. Mich. 1983).} Students in a film club requested funds for a number of films with various ratings, including one film with an X rating.\footnote{Id. at 1329.} After the request was made, the Student Board quickly passed a resolution that student funds could not be used for X-rated films. The court concluded that refusing funds for obscene movies (under the legal definition of obscenity) would be entirely permissible, but "it is well-established that the Motion Picture ratings may not be used as a standard for a determination of constitutional status."\footnote{Id. at 1329.} Thus, the resolution was found to be unconstitutional.\footnote{Id. at 1334 (citing Motion Picture Ass'n. of Am., Inc. v. Specter, 315 F. Supp. 824 (E.D. Pa. 1970) and Kenosha, 317 F. Supp. at 1133).}

The following year in South Carolina, another controversy arose concerning the X-rating. In the Wasson case, the South Carolina Supreme Court examined a law levying a 20% tax on X-rated and unrated films.\footnote{E. Fed. Corp. v. Wasson, 316 S.E.2d 373, 374 (S.C. 1984).} Citing an earlier South Carolina case which held it impermissible to exempt from prosecution theaters showing MPAA-approved films,\footnote{State v. Watkins, 191 S.E.2d 135 (S.C. 1972).} the Court easily ruled that this tax was also an unconstitutional delegation of legislative authority.\footnote{Wasson, 316 S.E.2d at 452.} Once again, a court found impermissible legislation that relied on the MPAA's determinations to classify a film's legal status.

The only case that runs against the current of this stream of cases is Borger v. Bisciglia.\footnote{888 F. Supp. 97 (E.D. Wis. 1995).} In this case, several high school
teachers requested permission to take their students to a local theater to see the R-rated film "Schindler's List." They were denied based on a school board policy that no R or NC-17 rated films could be shown to students under the aegis of the school. A district court upheld the policy based on the school board's unique "discretion to construct curriculum." Because the schoolroom setting was a non-public forum outside the general marketplace of expression, the court held that the regulation needed only bear a reasonable relation to a legitimate pedagogical purpose. The court ruled that use of the R rating in this case met that lower burden.

The law of private ratings, then, is fairly straightforward. Beginning with the Supreme Court's opinion in *Interstate Circuit v. Dallas*, courts have unanimously ruled that ratings which are not "narrowly drawn, reasonable, and definite" may not be used to fashion legal classifications. Courts also seem to agree that the MPAA's ratings system does not meet that test. Regulations that do use the MPAA system to regulate expression must pass the high hurdle of strict scrutiny and have a very strong probability of being an unconstitutional delegation of legislative authority. This sentiment, echoed by several scholars, has not been questioned by

115. *Id.* at 99.
116. *Id.* at 100 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)).
117. *Id.*
118. 390 U.S. 676 (1968).
119. Beyond the cases discussed above, the New York Superior Court wrote a scathing opinion of private industry ratings as a stand-in for legal classification. Miramax Films Corp. v. Motion Picture Ass'n of Am., Inc., 560 N.Y.S.2d 730, 731 (1990). The *Miramax* court noted:

The manner in which the MPAA rates all films . . . causes this Court to question the integrity of the present rating system. . . . The standard is not scientific . . . nor is any professional guidance sought to advise the board members regarding any relative harm to minor children. . . . This Court concludes that reliance upon a non-professional rating board is misplaced . . .

*Id.* at 733-34.
any court, except, arguably, in Borger. Even there, the court took pains to indicate that only the unique circumstances of the schoolroom setting, which is quite distinct from law regarding the First Amendment rights of minors generally as in Engdahl, permitted such robust discretion that justified the policy. As such, it appears that in the context of MPAA ratings, legal adoption and reliance is not constitutionally appropriate.

2. Rating Video Games

If MPAA ratings do not pass muster, where does that leave ESRB ratings? There are, after all, significant distinctions between the nature of the two media and the nature of the ratings systems themselves. Many of the common distinctions, such as interactivity or the "obscenity" of video game violence, have been explicitly rejected by the courts. Beyond those dismissed by the courts, three potentially significant distinctions exist between the MPAA and ESRB ratings: (1) ESRB's lack of a venerable pedigree, (2) ESRB's use of detailed descriptors, and (3) ESRB's use of trailers.

The first distinction was suggested in an article responding to IDSA v. St Louis. Arguing that use of the ESRB's ratings by legislators was permissible, the author differentiated the two rating systems based on the ESRB's "far weaker lineage of self-

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121. See Borger v. Bisciglia, 888 F. Supp. 97, 100. The court stated:

It is true that a private organization's rating system cannot be used to determine whether a movie receives constitutional protection [however] schools and classrooms are non-public forums, outside the general marketplace of expression, and school boards have more discretion to censor within that environment than do bodies governing the public sphere.

Id. at 100.

122. See supra notes 76-89 and accompanying text.

While the ESRB does have a more recent pedigree than the MPAA, no evidence has been put forward to suggest that it has been less effective. Indeed, numerous commentators have praised the ESRB as the most successful form of self-regulation in use today.

Superficially, the second distinction, the ESRB’s use of content descriptors, is a significant difference. After all, a simple "R" rating fails to differentiate between a historically significant masterpiece like "Schindler’s List" and the latest “shoot ‘em up” summer blockbuster. An ESRB rating of “M: Blood and Gore, Intense Violence, Nudity, Strong Language, Strong Sexual Content, Use of Drugs” reveals quite a bit more. Unfortunately, this distinction does not address the problem identified by the cases cited above.

The problem that courts have identified with the MPAA regime is not that the ratings themselves are too vague but that the process by which titles are rated is not sufficiently sophisticated or precise to create legal standards. The determination of a small group of parents with no training or background in the law may be quite helpful to other parents as they decide whether or not to make a purchase for their children. It is in no way sufficient to define standards by which First Amendment questions are parsed. The ESRB has pioneered an excellent method of informing parents about the media their children consume. It would be illogical and

124. Id. at 610. The article suggests an additional distinction based on the flaws and inconsistencies in the MPAA’s enforcement. Id. at 609.
125. See discussion supra note 41.
126. This is the rating of “Grand Theft Auto: San Andreas.”
127. See, e.g., Interstate Circuit v. Dallas, 390 U.S. 676, 685 (1968) (“Vague standards . . . encourage erratic administration [because] ‘individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law.’”) (citing Kingsley Int’l Pictures Corp. v. Regents, 360 U.S. 684, 701 (Clark, J., concurring)); Engdahl v. Kenosha, 317 F. Supp. 1133, 1136 (E.D. Wis. 1970) (“The line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn. [As such,] the separation of legitimate from illegitimate speech calls for sensitive tools.”) (citation omitted).
pervasive to reward that initiative with heightened scrutiny and more severe regulations.

Finally, the third potential distinction between the MPAA regime and that of the ESRB is the use of trailers to rate the games. Movies that go before CARA are shown in full. Thus, their ratings reflect the entire film in context. In contrast, video games come to the ESRB in the form of a trailer including some "typical" game play and the scenes that the producer feels may be the most objectionable.128 This is also not a persuasive reason for permitting ESRB ratings to define legal standards. If anything, this distinction suggests that video game ratings are less reliable than movie ratings. The ability of raters to make "narrowly drawn and reasonable" classifications is hindered by this aspect of the medium.

Having examined these three distinctions, it appears that the MPAA model is closely analogous to the ESRB. The same legal issues exist with each, and use of ESRB ratings for "instant" legislative determinations can be expected to present very similar concerns. Where differences do exist, they tend to suggest that ESRB ratings would be even more difficult to adopt as legal standards.

III. CONSTITUTIONALITY OF THE PROPOSED LEGISLATION

A. Required Labeling

The first aspect of the current legislation is open to some debate. The issue of required labeling will probably turn on the question of how a court classifies the expression. The general rule

128. This distinction is probably an unavoidable effect of the differences in media. After all, it would be unreasonable to expect a group of parents to play through an entire game that might take a hard-core gamer weeks to finish just to rate one game. In any event, simply playing through a game would entirely miss many of the hidden "extras" that players can unlock either through exemplary or clever play or through modifications like the "Hot Coffee" mod discussed earlier.
for video games, as we have seen, is strict scrutiny. Since many of the largest retailers refuse to stock games with an "M" rating — and almost none will stock "AO" rated titles — it could be argued that required labels, even with no further state action, enforce a de facto censorship that mandates strict scrutiny by the courts. Indeed, many scholars have made such an argument about MPAA ratings. Labels are, by their very nature, content-based, and if it can be shown that this content-based evaluation directly closes off a significant part of the marketplace for protected expression, strict scrutiny may be the proper mode of analysis.


130. See Mary Jane Irwin, What's So Wrong With the ESRB, 1UP.COM, Feb. 2, 2006, http://www.1up.com/do/feature?cld=3147767 (stating that Gamestop, the largest game retailer in the nation, simply does not carry AO games at all as a company policy). Even conservative watchdog group the National Institute for Media and the Family recognizes that "[t]he 'AO' rating is a death sentence for a game . . . only 18 games of 10,000 have ever been rated 'Adults Only'." Id.; see also Allie Shah, 'San Andreas' Gets Adult Rating, MINN. STAR TRIBUNE, July 21, 2005, at A1. ("Like most video game retailers, Target and Best Buy do not sell 'AO'-rated games . . . . [M]ost observers agree that an 'AO' rating is rare for video games and that it is the commercial kiss of death.").

131. See, e.g., Friedman, supra note 120, at 239 (arguing that the MPAA's ratings system "violates the rights of film makers, distributors, parents, and audiences young and old."); Richard P. Salgado, Regulating a Video Revolution, 7 YALE L. & POL'Y REV. 516, 537 (1989) (concluding that it is unconstitutional for legislators to "abdicat[e] the responsibility for doing the dirty work of video evaluation to private organizations"); Septimus, supra note 94; see also Roy Eugene Bates, Private Censorship of Movies, 22 STAN. L. REV. 618, 637 (1970) ("[A] realistic appraisal of the overall effect of the [MPAA] ratings leads to the conclusion that a form of covert censorship in fact exists.").

132. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 (1963) ("[I]nformal censorship relying on the 'cooperation' of those supposedly protected by the First Amendment is unconstitutional where the coercive and intimidating elements of the system amount in effect to a scheme of censorship devoid of constitutionally required safeguards."). Justice Brennan also observed that "[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging, yet barely visible encroachments." Id. at 66.
At least one scholar has suggested an interesting alternative to strict scrutiny review. In a 2002 article on the subject of labeling potentially violent media generally, Shannon McCoy argued that such labels should be evaluated as a regulation of commercial expression. In cases where the state does not ban any games, McCoy might argue that required labels are analogous to warning labels on any other commercial products. McCoy concedes that "the current [MPAA] system does not provide adequate information for consumers to make informed decisions," and the ESRB arguably raises similar concerns. Even conceding arguendo that the ESRB regime is distinguishable, some question exists as to the strength of a claim under the commercial expression doctrine.

Commercial expression is generally analyzed using the four-part Central Hudson test. The Supreme Court has ruled that truthful, non-misleading expression (the first prong) demands strict scrutiny, but other commercial expression needs only pass intermediate scrutiny. Legislation mandating a rating for all video games clearly concerns lawful activity and, outside of the "Hot Coffee" mod, there has been little evidence that the advertising or packaging of games is misleading. Absent a showing to the

At least one court seems to have followed this analysis in modern cases, evaluating regulation based on ESRB ratings. Issuing an injunction against Michigan's video game law, Judge Steeh concluded that "the response to the Act's threat of criminal penalties will likely be responded to by self-censoring by game creators, distributors and retailers, including ultimately pulling 'T' and 'M'-rated games off stores shelves altogether." Entm't Software Ass'n v. Granholm, 404 F. Supp. 2d 978, 982-83 (E.D. Mich. 2005).


134. A case that exists in none of the jurisdictions where legislation is being considered or has been enacted.

135. McCoy, supra note 133, at 243.

136. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of Ohio, 447 U.S. 557 (1980). The test presents four factors to be weighed: a) does the expression at issue concern lawful activity and is it not misleading?; b) is the government interest substantial?; c) does the regulation directly advance that interest?; and d) is the regulation more extensive than necessary to serve that interest? Id. at 570-71.

contrary, strict scrutiny is appropriate even for commercial expression.

For the other prongs, courts have long recognized that the government has a substantial interest in protecting children from violent media, presumably including video games, and it seems clear that ratings do directly advance that interest. The best argument against such required labeling is based on the fourth factor: to survive, a regulation must be no more extensive than necessary. As evidence of the necessity of regulation, McCoy points to a 2000 FTC study concluding that violent media, including video games, are marketed to children. However, the study itself concludes that the appropriate response to such concerns is self-regulation. If self-regulation is an effective response, then it is difficult to argue that state action is not "more extensive than necessary."

Overall, the question of required labels is complex and open to a great deal of debate. Evaluating the constitutionality of a statute requiring all games to carry a rating must begin with the

138. See, e.g., Sable Commc'n, Inc. v. FCC, 492 U.S. 115, 126 (1989); see also Reno v. ACLU, 521 U.S. 844, 875 (1997) (stating that "[w]e have repeatedly recognized the governmental interest in protecting children from harmful materials").

139. McCoy, supra note 133 (citing FTC REVIEW, supra note 41, at App. G3).

140. See Jerome A Barron, The Open Society and Violence in the Media, 33 MCGEORGE L. REV. 617, 635-640 (2002). Barron noted:

The FTC made a number of specific recommendations, all designed to improve the workings of the self-regulatory systems already in place in each industry . . . . For First Amendment reasons, the FTC said the affected industries were in the best position both to monitor compliance and to sanction noncompliance.

Id. at 638. Barron also discussed the FTC's 2001 follow-up report which "continued to emphasize self-regulation." Id. (citing FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIX-MONTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES at iii (Apr. 2001) ("[V]igilant self-regulation is the best approach to ensuring that parents are provided with adequate information to guide their children's exposure to entertainment media with violent content.").
concerns described above. It may nonetheless be possible, at least under the commercial expression interpretation, to draft a statute requiring the use of the ESRB’s labels that negotiated these hurdles.

B. Bans on M-Rated Games

Where the first prong of the statute is complex and open to several interpretations, the second prong is exactly the opposite. Bans on the sale of “M” and “AO”-rated games represent a patently content-based restriction of fully-protected expression under cases such as Kendrick. Strict scrutiny therefore applies, and borrowing the classifications of parents hired by the ESRB is every bit as problematic as doing the same thing with the MPAA’s ratings.

The only significant limiting factor here is that minors are involved. The case that is most on point is Engdahl which clearly counsels for the unconstitutionality of the statutes at issue here. That conclusion is bolstered by Judge Posner’s specific language in Kendrick, suggesting that the rights implicated by these statutes are more than just the right to see stimulating content. Actually, at issue are the rights of minors to confront difficult ideas and images as they develop the cognitive facilities required for mature and complete participation in the marketplace of ideas and, eventually, the arena of political decision-making. This development is crucial, Posner reminds us, for a vibrant, robust society.

143. Id.
144. Id. at 577 (noting that “the murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion.”); see also Keyishian v. Bd. of Regents of Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) (“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.”) (quoting United States v. Associated Press, D.C., 52 F. Supp. 362, 372 (1943)); Robert B. Keiter, Judicial Review of
The Supreme Court has made it clear that minors must be allowed to exercise their right to free expression as legal actors.\textsuperscript{145} In the case of minors and challenging expression, another kind of "exercise" is also implicated by the First Amendment. If the state denies a group that, as Judge Posner notes, are "future voters," access to the mental and moral calisthenics of difficult and challenging expression, the body politic will atrophy.\textsuperscript{146}

\textit{Student First Amendment Claims: Assessing the Legitimacy/Competency Debate,} 50 Mo. L. Rev. 25, 36 (1985). Keiter noted:

\[T\]he individual develops his intellectual and analytical abilities through exposure to a broad range of information and open, frank discussion of ideas. Likewise, societal progress depends upon the aggregation of individual contributions to the community of knowledge . . . some degree of freedom is advisable to prepare the child for a more substantial participatory role once he achieves full maturity and gains additional experience. Sitting on the sidelines without the benefit of a spectrum of information hardly prepares the child for this role.

\textit{Id.}

145. \textit{See, e.g., Erznoznik v. Jacksonville,} 422 U.S. 205, 213-14 (1975) ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.").

146. \textit{Kendrick,} 244 F.3d at 577 ("To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."); \textit{see also Marjorie Heins, Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth} 256-57 (2001). Heins argued:

The ponderous, humorless overliteralism of so much censorship directed at youth not only takes the fun, ambiguity, cathartic function, and irony out of the world of imagination and creativity; it reduces the difficult, complicated, joyous, and sometimes tortured experience of growing up to a sanitized combination of adult moralizing and intellectual closed doors. It also deprives youngsters of the ability to confront and work
Beyond their ability to present thoughtful, challenging concepts just like other media, several scholars have argued that video games are structurally unique tools for enhancing general cognitive development in specific areas and overall mental sophistication through what Steven Johnson has called "collateral learning." Psychological evidence about the effect of violence in children's media is, at best, conflicting, but psychologists such as

through the messiness of life - the things that are gross, shocking, embarrassing or scary. . . . Intellectual protectionism frustrates rather than enhances young people's mental agility and capacity to deal with the world.


147. See JAMES PAUL GEE, WHAT VIDEO GAMES HAVE TO TEACH US ABOUT LEARNING AND LITERACY (2004); see also MARK PRENSKY, DIGITAL GAME-BASED LEARNING (2004); cf. Rene A. Guzman, Families That Play Together: Video Games Can Be Bonding Tool, SAN ANTONIO EXPRESS-NEWS (Tex.), Feb. 27, 2004, at 1F.

148. STEVEN JOHNSON, EVERYTHING BAD IS GOOD FOR YOU 31-62 (2005) (describing the theory that, more than the specific content of games, the ever-increasing levels of complexity and sophistication required for success in games challenges the mind to grow neurologically).

149. See, e.g., Coleen Carey, The Blame Game: Analyzing Constitutional Limitations Imposed On Legislation Restricting Violent Video Game Sales To Minors After St. Louis, 25 PACE L. REV. 127, 141-50 (2004); Robert MacMillan, A Replayable Debate on Game Violence, WASH. POST, Aug. 18, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/08/18/AR2005081800656.html (discussing the release of two studies reaching opposite conclusions about the potential dangers of exposure to violent video games); see also Calvert, supra note 76, at 18-21 (discussing Kendrick's rejection of general social science data as a justification for increased censorship); Marjorie Heins, On Protecting Children - From Censorship: A Reply to Amiutai Etzioni, 79 CHI.-KENT L. REV. 229, 244-49 (2004); FTC REVIEW, supra note 41, at 8 (concluding that "[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and it is not the sole, or even necessarily the most important, factor contributing to youth aggression, antisocial attitudes, and violence).

Child psychologist Jonathan Kellerman puts a finer point on the issue: "Not a single causal link between media violence and criminality has ever been produced." JONATHAN KELLERMAN, SAVAGE SPAWN: REFLECTIONS OF VIOLENT CHILDREN 72 (1999). "[V]irtually all the studies that purport to
Bruno Bettelheim\textsuperscript{150} have demonstrated how children use challenging ideas and images in their fantasy play, including violent video games,\textsuperscript{151} to confront difficult ideas and master them. In any event, it is crystal clear that in the decade since "Mortal Kombat" and company first appeared, violent crime rates have fallen every year, culminating with their lowest levels ever in 2004.\textsuperscript{152} In light of these numbers, showing a link between the increasing prevalence and severity of violent games and real-world violent crime would be very difficult, to say the least.

The weight of precedent, science, and the First Amendment tilts the scales heavily against a ban on the sale of games based on the ratings assigned by the ESRB. Any content-based ban on expression is constitutionally suspect, and a ban that relies on the vagaries of three parents with no legal experience should not withstand strict scrutiny.

CONCLUSION

Negotiating the Byzantine assortment of rules, tests, and precedent established by the courts in First Amendment cases is a task that can leave even an experienced lawyer scratching his or her head. It also requires that we hold our nose and protect a lot of expression that is unpopular or unpalatable. As such, many legislators may find delegating these abstruse and delicate legal equations to three civic-minded parents as tempting as a "dog ate..."
my homework” story for an unprepared student. But, like the hypothetical student, legislators have tried this excuse before in cases such as Specter and Engdahl, and the courts should be as skeptical as any teacher. In cases where meaningful expression may be silenced, the First Amendment demands that our lawmakers chart the points and vectors of the law with geometric precision and that they show their work.

In general, delinquent politicians looking to copy off of the ESRB’s paper should result in little more than judges who are forced to red pen a few more assignments. The most significant problem facing the law of video games today is simpler but more fundamentally challenging. In this area, bad law is most often the result of simple ignorance and not the result of malice or a desire to evade political responsibility.

Many politicians do not seem to follow the First Amendment calculus of video game law, perhaps because they lack a current understanding of the medium’s level of sophistication. For many legislators and judges, the term “video game” still conjures up images of “Pac Man” wakka wakka wakka-ing around a primitive maze munching dots or the rectangle of a “Pong” paddle sliding up to catch a pixilated square. This problem of defining a new medium based on its original and “primitive form” has been described by scholars as an “incubus on understanding” that can stunt the growth of that medium and seriously harm First Amendment freedoms.

As has often been the case with video games, the history of movies is a useful analogy. In 1915, less than two decades after

153. Certainly legal actors are not the only group that can be dizzyingly ignorant about video games. Despite some informed and insightful treatment, most media coverage has been tremendously sensationalistic and regularly inaccurate. For a discussion of this problem, see John Davison, Pop Culture Pariah: Why Are Video Games the Favorite Demon of the Mainstream Media?, 1UP.COM, Sept. 3, 2005, http://www.1up.com/do/feature?cld=3143349. Even beyond slanted or ill-informed news coverage, popular dramas such as “CSI: Miami” have painted game-players as out-of-control teens led to acts of murder and mayhem by the siren song of violent video games. See, e.g., CSI Files, Urban Hellraisers, http://www.csifiles.com/news/201105_01.shtml (last visited Apr. 5, 2006).

movies first became popular, the Supreme Court examined the nickelodeons lining the penny arcades of often poor immigrant neighborhoods and declared that those entertainment machines were a "business, pure and simple," analogous to other sensationalistic diversions and undeserving of First Amendment protection. In the Mutual Film case, Justice McKenna, for a unanimous Court, upheld an Ohio law that created a board to rate all films as appropriate or inappropriate for the young. This decision was reached by a Court almost completely ignorant of the content and character of the new technology and it would be almost four decades before movies were finally welcomed into the family of the First Amendment.

155. See Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915).
156. Id.
157. Id. at 244.
159. See Burstyn v. Wilson, 343 U.S. 495 (1952). Another media analogy also sheds light on the problem of enforcing a "child-safe" standard on a young medium. At the same time as the Supreme Court was handing down the Burstyn opinion, comic books were facing a Senate investigation into their content. Unlike movies, and, thus far, video games, the comics publishers responded to government pressure by adopting The Comic Books Code that simply prohibited any material not suitable for children. See BRADFORD W. WRIGHT, COMIC BOOK NATION: THE TRANSFORMATION OF YOUTH CULTURE IN AMERICA 165-79 (2001). Although this draconian response mollified critics for a time, "publishers had given up much of the creative latitude that had made their products so popular," and the code ushered in the largest recession the industry has ever seen. Id. at 181.

Of greater concern, "by stripping away the freedom of writers and artists . . . the code confined comic books to a supervised, puerile level. . . . Comic books now stood to become a strictly pre-adolescent pastime at best or an outmoded nostalgic curiosity at worst." Id. at 179. There has been success of comic books such as the Pulitzer Prize-winning "Maus: A Survivor's Tale" and there the is global recognition of many nations that the medium can be as full and robust as any other form of art or literature. See, e.g., SUSAN J. NAPIER,
These lazy comparisons to non-expressive diversions have been echoed in cases dismissing the First Amendment value of video games. Such judicial ignorance is doubly problematic when the only examples of a new medium lawmakers and judges have are cherry picked by would-be censors hoping to highlight the worst examples of the medium. Conceptualizing video games as "Pong" and "Pac Man" today is just as misleading as conceptualizing movies as the silent films of the 1920s. In both cases, a legislator or judge with such a misconception is simply not equipped to evaluate the legal merits of the medium. The best analysis must come from legal actors who have real experience with games, like Judge

ANIME FROM AKIRA TO PRINCESS MONONOKE: EXPERIENCING CONTEMPORARY JAPANESE ANIMATION 7 (2000) ("[U]nlike cartoons in the West, anime in Japan is truly a mainstream pop cultural phenomenon."). American audiences still presume that comics are a medium appropriate only for children, and most comics still conform to this assumption. This is the legacy of the comics Code, and laws that limit the expressive possibilities of video games can be expected to have a similar effect on that medium, confining what is already establishing itself as a diverse and mature medium to the banality of toothless, "child-friendly" content.

Harold Schecter noted that "[o]ne thing that the anti-comics crusade had no effect on at all was the rate of juvenile violence, which actually rose during the latter years of the 1950s and throughout the 1960s." SCHECHTER, supra note 78, at 149.

160. See, e.g., Rothner v. City of Chicago, 929 F.2d 297, 301-03 (7th Cir. 1991) (suggesting that video games may be no more than "modern day pinball machines").

161. One of the most notorious cases is an opinion by Judge Steven Limbaugh which dismissed the First Amendment viability of games altogether. See Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1135 (E.D.Mo. 2002), rev'd, 329 F.3d 954 (8th Cir. 2003) ("[T]he Court finds that plaintiffs failed to meet their burden of showing that video games are a protected form of speech under the First Amendment."). He reached this conclusion having seen a videotape of only four games, and he badly mangled the names of even those in his opinion, referring to the game "Resident Evil" as "The Resident of Evil Creek" and misspelling another. Id. at 1131; see also Wagner James Au, Playing Games With Free Speech, SALON.COM, May 6, 2002, http://www.salon.com/tech/feature/2002/05/06/games_as_speech/index.html.
Korzinski, or from those who work to educate themselves about a technology, like Judge Posner.

Regardless of whether the “Hot Coffee” mod is enabled, a game like “Grand Theft Auto: San Andreas” is not appropriate for young children. Neither is a film like “The Godfather.” Nevertheless, both have serious value as entertainment and as articulations of complex and valuable expressive ideas. The First Amendment rights of neither should rest on the inexact and unpredictable impressions of a small group of lay people or the myopic misunderstandings of lawmakers with no experience or first-hand knowledge of the medium.

Replacing reasoned legal and constitutional analysis with the gut feelings of a three-parent panel hired by the industry should leave as bitter a taste in our mouths as replacing gourmet Colombian beans with day-old gas station grounds. To pass constitutional muster, legislators must provide fresh, thoughtful First Amendment analysis instead of the strange brew they have served up thus far.

162. Judge Alex Kozinski was appointed by President Reagan to the Court of Appeals for the Ninth Circuit and is an avid gamer. He has even written reviews of games for the Wall Street Journal. See, e.g., Alex Kozinski, Trouble in Super Mario Land, WALL ST. J., July 27, 1990, at A9.


164. See United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 818 (2000). The court noted:

The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed . . . . Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

Id.