Interactive Digital Software Ass'n v. St. Louis County: The First Amendment and Minors' Access to Violent Video Games

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Video games are an increasingly popular pastime for both children and adults. Technological advances have enabled developers to create realistic content whose complexity—and violence—rivals that of motion pictures. For example, the recently released game *Gladiator: Sword of Vengeance* by Acclaim Entertainment has been praised as "one of the most visceral experiences you can find in a [console game]." Acclaim markets *Gladiator'*s graphic content with slogans such as "Combo attacks—produce spectacular sequences and gorier deaths. The more fantastic the kill, the higher the Blood Meter rises" and "Finish him!—When stunned, your enemy is open to a specialized and gory coup de grace." Acclaim encourages players to "[g]ain experience through combat—the more you kill, the more abilities you learn." The game is rated *Mature* for "blood and gore" and "intense violence," yet it is available to any child to buy or rent from myriad game retailers and rental stores. The offering of such mature content coupled with the wide availability of these games presents problems for parents who wish to shield their children from potentially inappropriate material.

This Note assesses the current legal status of minors’ access to violent video games, focusing specifically on the recent decision in *Interactive Digital Software Ass’n v. St. Louis County.* In response to a challenge to a St. Louis County, Missouri, ordinance restricting the availability of violent video games to minors, the Eighth Circuit found that video games are speech under the First Amendment, and that the county had failed to prove...
compelling interests in shielding minors from violent games—a showing necessary to regulate speech.\(^6\) This Note analyzes the Interactive decision, and concludes that the court correctly defined video games as speech, but misapplied Supreme Court doctrine establishing that minors and adults have different constitutional rights. This Note suggests that the enactment of local legislation that enforces the industry's own labeling system is the best approach to the problem of children's exposure to video game violence.

Part I discusses the First Amendment's protection of the freedom of speech and details the Supreme Court's recognition that children have different speech rights than adults because of their developing mental and emotional status. Part I also summarizes the development of video game content and its treatment by the courts, as well as outlines the video game ratings regime. Part II discusses the facts and procedural history of the Interactive decision. Part III suggests that recent decisions regarding local regulation of video games failed to acknowledge the ability of local governments to protect parental rights and the welfare of children, and posits that sound public policy demands that the judiciary respect industry labeling and local regulation as tools to regulate minors' access to violent games. Finally, this Note examines the development of the motion picture industry ratings regime, and concludes that classification systems utilized by both industries can be strengthened by local legislation mandating that retailers enforce the ratings.

I. BACKGROUND

A. First Amendment

1. Protection Granted to Speech

The Free Speech clause of the First Amendment to the Constitution provides, "Congress shall make no law ... abridging the freedom of speech, or of the press."\(^7\) The guarantee of Free Speech is not absolute; courts recognize limited exceptions: libel and defamation,\(^8\) speech designed to incite imminent lawless action,\(^9\) fighting words,\(^10\) and obscen-

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6. Id.
7. U.S. CONST. amend. I, cl. 2.
9. In Brandenburg v. Ohio, 395 U.S. 444, 448 (1969), the court overturned an Ohio statute that criminalized speech that "advocate[d] or [taught] the duty, necessity, or propriety of violence 'as a means of accomplishing industrial or political reform.'" The Court held that only speech designed to "incite" "imminent lawless action," could be so
Moreover, the state may place reasonable limitations on the time, place, and manner of public speech provided that the restrictions are content-neutral (i.e., the regulations are not intended to prevent the speech because of its message).

Classification of content as speech is important because any law restricting speech will be reviewed under a strict scrutiny standard. In general, strict scrutiny applies when a law infringes a fundamental right guaranteed by the Constitution. Under strict scrutiny, the state or municipality defending the law in question must demonstrate a compelling interest for passing the legislation, and that the legislation is the least restrictive means of achieving that interest. In addition, the Supreme Court has suggested that there is a further hurdle for legislation that targets speech: the state must show that the legislation will in fact achieve its goal. The court in Interactive, for instance, relied upon this additional requirement to find that evidence that violent games harm minors was insufficiently conclusive. If content is not protected by the First Amendment, legislatures merely need to show a rational basis for passing laws restricting its availability.

punished. The holding is a descendant of the "clear and present danger" doctrine promulgated by Justice Holmes in Schenk v. United States, 249 U.S. 47, 52 (1919), which criminalized speech if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

13. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (holding that "[f]or the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").
14. See, e.g., Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (determining that "[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").
15. See id. at 126. The least restrictive means refers to the requirement that there be no other method by which the legislature could regulate speech that would provide more expressive leeway.
17. Interactive, 329 F.3d 954, 958 (8th Cir. 2003).
2. Children Have Different Speech Rights Than Adults

It is well established that children have different constitutional rights than adults. The Supreme Court announced this principle in the seminal case *Ginsberg v. New York*, and has extended it in recent cases. These cases demonstrate that minors' access to violent video games can be regulated despite the fact that the games should be treated as protected speech for adults.

In *Ginsberg*, the operator of a small retail store was charged with violating a New York statute establishing a more expansive obscenity standard for minors. The vendor sold "girlie" magazines, containing pictures "showing [the] female buttocks [and] breast . . . with less than a full opaque covering," to a sixteen-year-old boy in violation of the statute. The Nassau County District Judge determined that the magazines at issue were harmful to minors within the meaning of the statute for three reasons: the pictures at issue predominantly appealed to "the prurient, shameful or morbid interest of minors," they were "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors," and they were "utterly without redeeming social importance for minors." The New York State appellate courts upheld this reasoning, and the case ultimately reached the United States Supreme Court.

The Supreme Court directed its inquiry to "whether it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see." In upholding the decisions of the New York courts, Justice Brennan stated that the statute did not impermissibly restrict the free speech rights of minors because the state has greater authority to police the conduct of children than it does adults. The basis for this distinction is twofold: parents have a legitimate expectation that the state will aid them in rearing their children, and the described the test as "contain[ing] two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals." *Id.* (Marshall, J., dissenting).

22. *Id.* at 631-32.
23. *Id.* at 631-33.
24. *Id.* at 633.
25. *Id.* at 636-37.
26. *Id.* at 638.
state "has an independent interest in the well-being of its youth." The Court noted that even commentators who generally oppose obscenity exceptions as contrary to the First Amendment supported a different standard for children:

The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules . . . [R]egulations of communication addressed to them need not conform to the requirements of the First Amendment in the same way as those applicable to adults.

Thus, the Supreme Court determined that the special developmental circumstances of childhood allow states to limit children's speech rights in a manner that would be impermissible if applied to adults.

The Court next addressed the evidentiary standard needed to sustain a broader definition of obscenity as applied to minors. It declared that New York merely needed to show that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." Significantly, the Court stressed that the legislature did not need to show conclusive evidence that the magazines harmed minors. Justice Brennan stated, in reference to that statute's assertion that the material caused injury, that "it is very doubtful that this finding expresses an accepted scientific fact." Justice Brennan continued, "while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either."

In sum, Ginsberg embodies the proposition that the Constitution affords minors less expansive speech rights because of their special developing status. Consequently, regulations restricting children's access to speech can be constitutional even though the same restrictions as applied to adults might violate the First Amendment. Obscenity, as applied to adults, is a narrowly drawn, relatively static area of speech defined by the courts' interpretation of the First Amendment, and is not malleable by

27. Id. at 639.
28. Id. at 638, n.6 (quoting Thomas Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 938-39 (1963)).
29. See id.
30. Id. at 641.
31. Id.
32. Id. at 642.
33. See, e.g., FW/PBS v. City of Dallas, 493 U.S. 215, 252 (1990) (Scalia, J., concurring in part and dissenting in part) (explaining "the very stringency of our obscenity test, designed to avoid any risk of suppressing socially valuable expression"); Miller v.
legislatures except upon satisfaction of strict scrutiny. By contrast, legislatures have more leeway in structuring the boundaries of obscenity as applied to minors because of their less expansive First Amendment guarantees.

FCC v. Pacifica Foundation and Sable Communications v. FCC are two more recent Supreme Court decisions that build upon Ginsberg to expand the notion that minors' special developing status demands that society treat their speech rights with less deference than those of adults.

In Pacifica, the Court faced the question of whether the Federal Communications Commission "has any power to regulate a radio broadcast that is indecent but not obscene." The case arose over a radio station's afternoon broadcast of a prerecorded monologue by comedian George Carlin on "words you couldn't say on the public... airwaves." Justice Stevens explained that the FCC can regulate merely indecent speech because of society's responsibility to shield children from inappropriate material. He stated that:

We held in [Ginsberg] that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.

In Sable Communications v. FCC, the Supreme Court again addressed the issue of minors' speech rights. While the Sable Court ultimately found that legislation that prohibited all indecent interstate telephone messages was not narrowly tailored to serve the compelling interest of shielding minors from inappropriate content, Justice White positively reflected upon the status of Ginsberg:

California, 413 U.S. 15, 24 (1973) (establishing "contemporary community standards" test for obscenity).

34. But see Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125 (1989) (suggesting that local standards may lead to different definitions of obscenity).


38. Pacifica, 438 U.S. at 729.

39. Id.

40. Id. at 749.

41. Sable, 492 U.S. at 115.

42. Id. at 131.
We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."43

Justice White further noted that "[t]here is no constitutional barrier under [Miller v. California44] to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others."45 This declaration supports the policy argument that localities, by referencing community mores, are best able to provide appropriate legislation for protecting children, provided that the localities have rational reasons for limiting minors' speech rights.46

B. Video Games

1. Legal History

Courts first addressed the protected status of games in suits brought against municipalities that passed ordinances dealing with the zoning and licensing of video arcades.47 They typically concluded that video games do not contain expressive or informational elements apart from their design to entertain.48 According to the court in one representative case, America's Best Family Showcase Corp. v. City of New York, Department of Buildings:

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 ... [T]herefore ... although video games may be copyrighted, they "contain so little in the way of particularized form

43. Id. at 126 (internal citations omitted) (emphasis added).
44. 413 U.S. 15 (1973).
45. Sable, 492 U.S. at 125.
46. See infra Part III.C for a policy proposal for a bifurcated regulatory regime.
of expression' that [they] cannot be fairly characterized as a form of speech protected by the First Amendment. 49

Contemporaneous decisions of other courts emphasized the same logic, finding that video games lacked expressive, communicative, or informational content that would place them within the ambit of the First Amendment. 50

Courts adjudicated the majority of these cases in the early 1980s, when the video game industry was in its infancy. Technological constraints prevented game developers from designing games that featured storylines and additional content apart from the limited interaction of the user and a graphical interface. 51 Examples of video games from the early 1980’s include *Pac-Man*, in which players attempt to navigate a simple maze and consume dots with “Pac-Man” while avoiding ghosts, and *Space Invaders*, in which players move a fighter jet in two dimensions while firing at rows of slowly encroaching aliens. 52 The court in *Caswell v. Licensing Commission for Brockton* specifically examined *Space Invaders* and found that despite the “theme” of saving the planet from alien invasion, the plaintiff, seeking to overturn a regulatory ordinance, “failed to demonstrate that video games import sufficient communicative, expressive or informative elements to constitute expression protected under the First Amendment.” 53

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49. *Id.* at 174.


In the late 1990s, a consensus began to emerge that games were forms of speech, likely driven by technological advances that allowed software developers to offer more content in video games. The changing attitude toward the content of games occurred in the context of cases challenging local regulations that sought to control violent and sexually explicit video games, as well as tort suits against game manufacturers and distributors. Courts began to find that video games have "message[s], even ideolog[ies]." In Interactive, the court noted that the fact that the county sought to regulate games because of their purported impact on the emotional and mental health of children was telling evidence of their expressive content.

2. IDSA and the ESRB: Development of a Video Game Ratings System

In response to Congressional inquiries into the violent content of some video games in the early 1990s, the video game industry formed the Interactive Digital Software Association ("IDSA") in 1994, which became the Entertainment Software Association ("ESA") in June 2003. Practically all major game developers, publishers, and distributors are members of the ESA. Intending to stave off government regulation, the IDSA in turn...
spawned the Entertainment Software Rating Board ("ESRB") in 1994 as an industry mechanism for self-regulation. The ESA and ESRB parallel the equivalent organizations in the motion picture industry: the Motion Picture Association of America (MPAA) in conjunction with the National Association of Theater Owners ("NATO"); and the Classification and Ratings Administration ("CARA"). Together, the NATO and the MPAA implement the motion picture ratings system, a system developed for the same reason as the ESRB—to preempt government regulation.

The ESRB rates games using one of the following categories: "EC" for Early Childhood; "E" for Everyone; "T" for Teen; "M" for Mature; "AO" for Adults Only; and "NR" for Not Rated. In addition to these letter-keys, the ESRB provides a variety of content descriptors such as "Blood and Gore" (meaning that the game contains "depictions of blood or the mutilation of body parts"); "Strong Language" (referring to "profanity and explicit references to sexuality, violence, alcohol, or drug use"); and "Use of Drugs" (signifying "consumption or use of illegal drugs"). The ESRB ratings system is comprehensive, and virtually every video game on console systems (e.g., Sony's Playstation®, Nintendo's GameCube®, and Microsoft's Xbox®) and personal computers (including Microsoft Windows®, Macintosh, and Linux platforms) is rated. The ESRB provides several tools for parents and children to find ratings, such as a searchable database at its website, an "online-hotline" service through which consumers can send email inquiries to the ESRB, and a toll-free ratings hotline.


60. For more information about the MPAA, see the organization's website at http://www.mpaa.org (last visited Feb. 11, 2004).

61. For more information about the NATO, see the organization's website at http://www.natoonline.org (last visited Feb. 11, 2004).

62. For more information about the CARA, see the organization's website at http://www.filmratings.com (last visited Feb. 11, 2004).

63. See About MPA, Motion Picture Ass'n of Am., at http://www.mpaa.org/about/index.htm (last visited Feb. 11, 2004). For a more in-depth discussion of the motion picture industry's ratings regime, see infra Part III.C.2.


65. Id.

66. FTC REPORT, supra note 58, at 37.


68. Id.
In response to public and Congressional concern prompted in part by the Columbine school shootings of 1999, President Clinton commissioned the Federal Trade Commission (FTC) to conduct a special report on violence in the media in 1999. The FTC released its findings in 2000 (with three follow-up studies in 2001 and 2002), singling out the ESRB as "the most comprehensive of the three industry systems (movies, music, and games) studied by the Commission." The FTC noted the substantial compliance by industry members, and the adaptability of the system "to address new challenges, developments, and concerns regarding the practices of its members." Regarding enforcement of ESRB policies, the Commission remarked that the IDSA was taking steps to ensure compliance by maintaining communication with publishers and asking association members to conform to guidelines when notified of violations.

II. THE INTERACTIVE DECISION

On October 26, 2000, St. Louis County, Missouri, passed an ordinance making it unlawful for any person to knowingly sell, rent, or make available graphically violent video games to minors or to allow minors to play such games without a parent's or guardian's consent. The county sought to protect the emotional and mental health of its children, and assist parents to do the same. It relied on disputed psychological testimony that purported to show that children who play violent video games may act more violently.

A group of video game publishers, distributors, and operators filed suit in the Federal District Court for the Eastern District of Missouri in 2002 to have the ordinance declared unconstitutional as an infringement of the First Amendment. The district court denied the injunction request after holding that video games were not speech for purposes of the First Amendment. Likening them to "baseball and bingo," the court found that games did not "express ideas, impressions, feelings or information unre-

69. FTC REPORT, supra note 58, at i.
70. Id. at 37.
71. Id.
72. Id. at 40.
74. Interactive, 329 F.3d 954, 958-59 (8th Cir. 2003).
75. Interactive I, 200 F. Supp. 2d at 1141.
lated to the game itself.” Alternatively, even if regulation of video games warranted strict scrutiny, the court found that the county demonstrated that the ordinance was narrowly tailored to further compelling interests in protecting the psychological well-being of children and aiding parents in that endeavor.

On appeal, the Eighth Circuit reversed, holding that video games contain expressive elements that qualify as speech and that St. Louis County had failed to present sufficient evidence of compelling interests in regulating violent video games. Judge Morris Arnold analogized video games to other forms of entertainment, finding that “these ‘violent’ video games contain stories, imagery, ‘age-old themes of literature’ and messages, ‘even an ideology,’ just as books and movies do.” He found that the medium by which expression is conveyed is irrelevant for First Amendment purposes. Citing Hurley v. Irish-American Gay, Lesbian, & Bisexual Group, the court declared that “a particularized message is not required for speech to be constitutionally protected,” challenging the district judge’s logic that “because video games are a new medium, they must be ‘designed to express or inform.’” Relying on Supreme Court precedent, the Eighth Circuit noted that the First Amendment “protects ‘entertainment, as well as political and ideological speech.’”

Along the same lines, the court found immaterial the fact that interactivity allows game players (and DVD and videocassette viewers) to fast forward through storylines and view only violent content. “Video games... are ‘analytically indistinguishable from protected media such as motion pictures,’” and to allow interactivity to disqualify them from protection would be unfounded. Thus, the fact that a viewer may use a DVD or VCR to only view violent scenes of a movie does not disqualify the movie from First Amendment protection, and therefore the same should hold true for video games. Relying on Judge Posner’s opinion in American Amuse-

76. __Id._ at 1134.
77. __Id._ at 1136-37.
78. Interactive, 329 F.3d at 958.
79. __Id._ at 957 (citing Kendrick II, 244 F.3d 572, 577 (7th Cir. 2001)).
80. __Id._ (“The mere fact that they appear in a novel medium is of no legal consequence.”).
82. Interactive, 329 F.3d at 957.
83. __Id._ (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981)).
84. __Id._
85. __Id._ (quoting Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 181 (D. Conn. 2002)).
ment Machine Ass'n v. Kendrick,86 the court noted that “literature is most successful when it ‘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’”—in other words, when it is interactive.87

The court noted that the county’s desire to regulate games because of their purported impact on the emotional and mental health of children was telling evidence of the games’ expressive, communicative, and informational content.88 It reasoned that if video games did not contain such elements, they could not affect the mental and emotional well-being of children.89 Thus, the county’s position was untenable unless games are speech. The court then applied a strict scrutiny standard of review because the county ordinance seemed to target the content of video games.90 It observed that violence absent sexual material cannot be “obscene” in the legal sense, even as applied only to children.91

The court next determined that the county failed to prove its first alleged compelling interest of protecting the mental and emotional well-being of children.92 While the Eighth Circuit did not doubt the county’s sincerity in seeking to protect children, it found the county’s evidence purporting to show harm from violent games deficient.93 The court required the county to “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”94 The county, in the court’s view, merely demonstrated a “vague generality” that violent video games harm minors.95

The county relied on Ginsberg96 in asserting its second compelling interest: aiding parents in protecting their children’s well-being.97

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86. 244 F.3d 572 (7th Cir. 2001).
87. Interactive, 329 F.3d at 957 (quoting Kendrick II, 244 F.3d 572, 577 (7th Cir. 2001)).
88. Id.
89. See id.
90. Id. at 958.
91. Id. at 958 (citing Video Software Dealers Ass’n v. Webster, 968 F.2d 684, 689 (8th Cir. 1992)).
92. Id. at 958-59.
93. Id.
94. Id. at 958 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994)).

For a brief description of the evidence presented by St. Louis County, see infra note 121.
95. Id. at 959. For a summary of the evidence cited by the county, see infra note 121.
96. 390 U.S. 629 (1968).
Eighth Circuit, however, distinguished *Ginsberg* as a case that did not involve protected material, in contrast to the video games at issue, which the court classified as speech. Judge Arnold declared:

> Nowhere in *Ginsberg* (or any other case that we can find, for that matter) does the Supreme Court suggest that the government’s role in helping parents to be the guardians of their children’s well-being is an unbridled license to governments to regulate what minors read and view. We do not mean to denigrate the government’s role in supporting parents, or the right of parents to control their children’s exposure to graphically violent material. We merely hold that the government cannot silence protected speech by wrapping itself in the cloak of parental authority.

In brief, the Eighth Circuit held, contrary to the district court, that video games are protected by the First Amendment because they contain the requisite expressive elements, and that St. Louis County failed to prove that violent video games actually harm minors.

### III. ANALYSIS

The Eighth Circuit correctly held that video games are entitled to First Amendment protection; however, it failed to properly apply Supreme Court precedent establishing different standards of speech for minors and adults. Section A justifies the treatment of video games as speech. Section B reiterates the precedent establishing the “special status of children,” and highlights the errors made by the *Interactive* and *Kendrick* courts in failing to appreciate this principle. Section C explains why industry bodies such as the ESRB are the proper vehicles for assessing the content of media. Comparing this system to the regulatory experience of the motion picture industry, this Section concludes that the best method for shielding children from inappropriate content is a combination of industry ratings and local legislation mandating that vendors adhere to the ratings in the absence of parental consent.

#### A. Games Have Properly Been Treated as Speech

Technological advances have allowed game developers to include ever more expressive and informational content in games. In addition, game developers have intertwined games, movies, and music to create multime-

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97. *Interactive*, 329 F.3d at 959; see supra notes 19-45.
98. *Interactive*, 329 F.3d at 959.
99. Id. at 959-60.
products whose constituent elements of music and movies enjoy a long pedigree of First Amendment protection.

A current trend in the video game industry is the confluence of content across media, captured perhaps most vividly by the Matrix franchise. The Matrix was released in theaters in 1999, and became a blockbuster hit, grossing over $450 million worldwide. A sequel, The Matrix Reloaded, was released March 2003, and attained similar success. The Matrix Reloaded team made groundbreaking use of video games to expand the storyline beyond the movie. According to a description of the video game Enter the Matrix, a corollary to The Matrix Reloaded, on Sony PlayStation's website:

Enter the Matrix is a revolution in interactive entertainment—a third-person action game that effectively blurs the line between Hollywood blockbuster films and next generation video games. The game is produced, directed and features a script written by the Wachowski brothers, writers/directors of The Matrix film trilogy, creating the most intensive collaboration between a video game publisher and a movie studio to date.

In addition, the game contains "hours of additional Matrix film footage and "cineractives" shot exclusively for the game, starring the cast of The Matrix Reloaded."

The Matrix franchise is simply one example of the rise of tie-ins with other media and sports. For example, music stars 50-Cent and Mya have released new music on video game soundtracks up to a week before their albums debuted to boost sales of the video games and generate interest in the albums. The group INXS recorded new music solely for the video game Rugby 2004, produced by Electronic Arts and released September 2003.

101. Id.
103. Id. The Matrix producers use the phrase "cineractive" to refer to computer-generated scenes they directed that appear in the video game.
In short, it is becoming increasingly difficult to separate out the unadulterated gaming element within video games. Music and movies have a long history of free speech protection, and it is unreasonable to conclude that video games that blend movies and music with gaming content are not entitled to similar First Amendment treatment. The district court's conclusion in Interactive that games are not protected speech is simply inconsistent with the attributes of modern games, as well as with the recent decisions of other courts that have addressed the issue. The court's likening of video games to nothing more than digital "bingo" comports with decisions handed down in the early 1980's, but fails to appreciate advances and changes that have occurred in the video game industry since that time.

B. Minors' Access to Violent Video Games Can Be Restricted According to Supreme Court Precedent

The Constitution prohibits St. Louis County from preventing the acquisition or use of violent games by all citizens because violence alone cannot be obscene. However, St. Louis County only sought to limit access to violent games by children whose parents did not approve of their exposure to violent material. In Bellotti v. Baird, the Supreme Court recognized that children and adults have different constitutional rights. The Court noted that:

The unique role in our society of the family, the institution by which we inculcate and pass down many of our most cherished values, moral and cultural, requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed,

107. See supra note 54 for court decisions finding that games are protected speech.
109. See Miller v. California, 413 U.S. 15 (1973) (requiring an element of sexual content that appeals to people's prurient interests to qualify as obscenity).
mature manner; and the importance of the parental role in child rearing.\textsuperscript{110}

Each of these three policy reasons for the disparate treatment of children’s constitutional rights vis-à-vis those of adults’ supports the St. Louis County ordinance. First, the vulnerability of children as a consequence of their developing mental status\textsuperscript{111} implies that graphic video game violence could have more drastic consequences for them than for mature adults. Indeed, this is precisely the view of the psychologists who testified before the St. Louis County Council’s Justice, Health, and Welfare Committee prior to passage of the ordinance.\textsuperscript{112} Second, the cited inability of children to make informed decisions clearly encompasses their incapacity to select video games appropriate for their age-group. Finally, by protecting the importance of the role of parents in child rearing, St. Louis County’s ordinance was not only legal, but also sound public policy. There is no better method for ensuring that parents’ wishes are satisfied than by granting them the power to permit or deny their children exposure to presumptively inappropriate material.

As described above, substantial Supreme Court jurisprudence, of which \textit{Ginsberg} is a part, establishes that the definitional boundaries of material inappropriate for children are larger than that for adults and more readily modifiable by legislatures.\textsuperscript{113} Both parents and the state have interests in ensuring the physical and mental health of children. Thus, laws rationally related to this end may be constitutional, even if the same laws as applied to adults would not.\textsuperscript{114}

\textit{1. The Seventh and Eighth Circuits Misapplied These Principles}

The Eighth Circuit’s \textit{Interactive} opinion is misguided from both a legal and policy standpoint. The court attempted to distinguish \textit{Ginsberg} on the ground that \textit{Ginsberg} did not address protected speech and, thus, the New York statute at issue was constitutional if the legislature could demonstrate a rational basis for its enactment.\textsuperscript{115} Judge Morris Arnold explained that \textit{Ginsberg} is “inapposite because it invokes the much less ex-

\textsuperscript{110} Bellotti v. Baird, 443 U.S. 622, 634 (1979) (internal quotation and citation omitted).

\textsuperscript{111} See \textit{Ginsberg v. New York}, 390 U.S. 629, 638 (1968) (discussing the special status of children); \textit{supra} notes 21-45 and accompanying text.

\textsuperscript{112} Interactive, 200 F. Supp. 2d at 1129. For a summary of the evidence used by the County, see infra note 121.

\textsuperscript{113} See \textit{supra} notes 21-45 and accompanying text.

\textsuperscript{114} See \textit{Ginsberg}, 390 U.S. at 641.

\textsuperscript{115} Interactive, 329 F.3d 954, 959 (8th Cir. 2003).
acting 'rational basis' standard of review." The error of this logic lies in the fact that Ginsberg did involve protected material; the "girlie" magazines were not obscene to adults. New York simply adjusted the boundaries of obscenity as applied to children because it rationally concluded that the material at issue affected children differently than adults. The Supreme Court concluded that this adjustment was sensible, despite observing that there remained "an ongoing controversy whether obscene material will create a danger of antisocial conduct." The Court was satisfied that, despite the debate, "a medical practitioner recently suggested that the possibility of harmful effects to youth cannot be dismissed as frivolous."

Similarly, St. Louis County rationally concluded that violent video games were harmful to minors after reviewing contemporary psychological studies that showed a correlation between violent video games and antisocial behavior. The studies' conclusions that video game violence was harmful to children were more than "vague generalities" and the county's reliance upon them did not make its assertion that violent video games have deleterious effects on the well-being of minors "simply unsupported in the record," as the Eighth Circuit dismissively declared. The Supreme Court in Ginsberg repeatedly stated that legislatures do not need to prove causality, but merely need to demonstrate that studies do not disprove the legislature's justifications, at least in the context of protecting the well-being of minors. New York was not required to conclusively

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116. Id.
117. Ginsberg, 390 U.S. at 634.
118. Id. at 643, n.10.
119. Id.
121. Interactive, 329 F.3d at 958. St. Louis County primarily relied upon a study that concluded that violent television and movies are associated with heightened levels of aggression in minors, and postulated that violent video games cause similar effects. Craig A. Anderson & Brad J. Bushman, Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature, 12 PSYCHOL. SCI. 5, 353 (2001). Because longitudinal studies of violent video games were unavailable, Anderson and Bushman were unable to offer as strong proof of antisocial effects associated with violent games as compared with violent television and movies. Id. They did reason that it would be highly unlikely for violent video games to not have analogous effects given the similarity of the cognitive processes affected by both types of media. Id.

Arguably, this evidence is more significant than the Eighth Circuit's characterization of it as vague and conjectural. See Interactive, 329 F.3d at 958.
122. See supra notes 21-45 and accompanying text.
prove that the magazines' material caused harm to minors, and by extension, the Eighth Circuit was incorrect in finding that the studies used by St. Louis County were insufficient. In mandating a higher standard of proof, the court violated Ginsberg's clear directive that the judiciary "not demand of legislatures scientifically certain criteria of legislation."

The Eighth Circuit's misapplication of Ginsberg is not without precedent. In Kendrick, the Seventh Circuit addressed an issue nearly identical to that presented in Interactive: whether an Indianapolis ordinance that sought to restrict minors’ access to violent video games violated the Constitution. In fact, Judge Arnold relied heavily upon Kendrick in drafting his Interactive opinion.

Paralleling the Interactive litigation, the district court in Kendrick initially upheld the Indianapolis ordinance as defensible under Ginsberg. Nonetheless, the Seventh Circuit reversed the district court, avoiding Ginsberg by invoking the First Amendment rights of children and the fact that the "cartoon characters and stylized mayhem [of the violent video games at issue] are continuous with an age-old children's literature on violent themes. The exposure of children to the 'girlie' magazines involved in the Ginsberg case was not." Judge Posner explained his approach to the case with reference to Ginsberg:

The Court in Ginsberg was satisfied that New York had sufficient grounds for thinking that representations of nudity that would not constitute obscenity if the consumers were adults were harmful to children. We must consider whether the City of Indianapolis has equivalent grounds for thinking that violent video games cause harm either to the game players or (the point the City stresses) the public at large.

Immediately after this declaration, Posner insisted that because children have First Amendment rights, "the grounds must be compelling and not merely plausible."

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123. Ginsberg, 390 U.S. at 642-43.
124. Id.
125. Kendrick II, 244 F.3d 572 (7th Cir. 2001).
126. Interactive, 329 F.3d at 957, 959 (citing Kendrick for the proposition that games should be treated as speech and that the county failed to produce sufficient support for its contention that violent games harm minors).
128. Kendrick II, 244 F.3d at 578.
129. Id. at 576.
130. Id.
This decision is inconsistent with Ginsberg’s guidelines. The Ginsberg Court, in refusing to require compelling grounds, declared that “[w]e do not regard New York’s regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors’ constitutionally protected freedoms.” As asserted earlier, Ginsberg only requires plausible grounds for regulation—a threshold that Posner’s edict directly rebukes.

2. Ginsberg’s Principles Extend Beyond Obscenity

As discussed, Ginsberg was not a case simply about obscenity; the First Amendment protected adults’ access to the material at issue. The magazines only became “obscene” to minors when the legislature found a rational reason for adjusting the standards for defining what constitutes obscenity to children. Had the magazines been obscene to all citizens, they would not have been speech protected by the First Amendment, and there would not have been an issue regarding the legislature’s regulation of the content. Even assuming that Ginsberg was in fact isolated to obscenity, Pacifica and Sable reaffirm that the basis for the Ginsberg decision was the special developing status of children, and that this rationale extends to content that is not obscene.

In Pacifica, the Supreme Court relied on Ginsberg in justifying the constitutionality of restrictions on broadcast content that was merely “indecent.” The special availability of broadcasting does not affect the application of this standard to video games. Home video game systems are a ubiquitous feature of American households, and innumerable video rental stores and arcades can be found in every American city, making video games nearly as accessible as radio broadcasts. Moreover, the trend in

132. Id. at 638.
133. See supra notes 21-45.
134. See Roth v. United States, 354 U.S. 476 (1957) (holding that obscenity is not protected by the First Amendment).

At least one survey places the number of American households with a video game console at 49.2 million in 2001. See, e.g., Playstation 2 Defeats Xbox and Gamecube in Battle for the Living Room in 2002, Ziff Davis Media Game Group, Aug. 6, 2002, at http://gamegroup.ziffdavis.com/presscenter/pr20020806.html. Certainly the number of households with the capacity to play video games is higher when one counts
the entertainment industry is to offer more content online, in real-time—essentially transforming the delivery of content into a broadcast that may be tapped by anyone connected to the Internet.\textsuperscript{137} Regulating video game content thus promises to be a dynamic endeavor. The expanding availability of games provides more incentive to establish safeguards to ensure that children may only view content appropriate to their age group or consistent with their parents' imperatives. St. Louis County's attempted regulations pertaining to the availability of video games at brick and mortar vendors provide a blueprint for dealing with on-demand content.

In \textit{Sable}, Justice White's pronouncement of the existence of a compelling interest in shielding minors from inappropriate literature (that is by no means obscene)\textsuperscript{138} surely extends to video games. As explained above in the \textit{Interactive} discussion, video games "are as much entitled to the protection of free speech as the best of literature."\textsuperscript{139} If certain literature can be inappropriate for children, so can certain video games. The Supreme Court rejected the regulations in \textit{Sable} because the Federal Communications Commission's blanket prohibition of indecent calls was not the least restrictive means of safeguarding minors.\textsuperscript{140} However, the regulations promulgated by St. Louis County were far less restrictive of adults' speech rights than those presented by the Communications Act.\textsuperscript{141} The county merely required parental consent for a minor to purchase, rent, or play a violent game while preserving the absolute availability of games to anyone over eighteen.\textsuperscript{142}

\begin{itemize}
  \item personal computer ownership and accounts for increases in console ownership since the survey was conducted.
  \item \textsuperscript{137} For an example of broadcast gaming, see \textit{Yahoo! Games on Demand}, Yahoo!, Inc., at \url{http://gamesondemand.yahoo.com/play} (last visited Feb. 19, 2004).
  \item \textsuperscript{138} See \textit{Sable}, 492 U.S. at 126.
  \item \textsuperscript{139} \textit{Interactive}, 329 F.3d 954, 958 (8th Cir. 2003) (citing \textit{Winters v. New York}, 333 U.S. 507, 510 (1948)).
  \item \textsuperscript{140} \textit{Sable}, 492 U.S. at 128-31 (noting that prior, less restrictive, FCC proposals to certify the age of dial-a-porn call recipients, such as credit card verification, may have been constitutional).
  \item \textsuperscript{141} See \textit{Interactive}, 329 F.3d at 956. Under the ordinance, a child could purchase a presumptively inappropriate game if he or she had parental consent. The FCC regulations did not have a consent mechanism to allow indecent calls to those who did not object. \textit{Sable}, 492 U.S. at 128-31.
  \item \textsuperscript{142} \textit{Interactive I}, 200 F. Supp. 2d 1126, 1129-31 (E.D. Mo. 2002).
\end{itemize}
C. The Solution: Industry Classification Enforced by Local Legislation

1. The Entertainment Industries are Best Suited to Evaluate Their Content

*Kendrick* provides a germane illustration of why judges are inappropriate evaluators of content, and why the better solution is a bifurcated regime of industry self-evaluation and local legislation requiring enforcement of industry labels.

In *Kendrick*, Judge Posner simultaneously adopted the role of judge, psychologist, and media critic in evaluating Indianapolis' ability to regulate violent video games. To diminish the evidence proffered by Indianapolis that violent games harm minors, he isolated one game, *House of the Dead*, critiqued its fantastical nature, and used this to claim that video game violence is merely stylish, and impliedly cannot reasonably be expected to negatively affect children. In spite of this assertion, he later stated that "if the games used actors and simulated real death and mutilation convincingly... a more narrowly drawn ordinance might survive a constitutional challenge." As explained, games are becoming more realistic in their portrayals of violence, and game developers frequently advertise the heightened realism of their games' content. Posner's conclusion that violent video games are merely "cartoonish and stylized" is misplaced, and a poor basis for determining the broader constitutional question of the propriety of regulating access to violent video games. Judges are neither well-suited nor qualified to form conclusions on the psychological effects of media based upon their limited personal observations.

Ad hoc judicial determinations of the levels of realism and violence necessary to trigger regulation promise to be an unsatisfactory, unwieldy, and arbitrary approach to the problem. Society and the video game industry itself, through the ESRB, are better situated to determine precisely the method by which obscenity is defined in relation to its contravention of

143. The players shoot at "an unending succession of hideous axe-wielding zombies." *Kendrick II*, 244 F.3d 572, 577 (7th Cir. 2001).
144. *Id.* at 577-78.
145. *Id.* at 579-80.
community standards of decency.\textsuperscript{147} While judges may ultimately decide the boundaries of obscene speech, they do so only because the Constitution ensures that all but the most offensive speech is protected.\textsuperscript{148} Thus, there is a small core of obscene speech, unprotected by the Constitution, whose boundaries are framed by judges acting as agents of the Constitution. Once outside the realm of adult obscenity, parents are free to define the boundaries of content appropriately viewed by their children, and legislatures may aid them in this endeavor by establishing statutory presumptions that material classified in certain ways (e.g., \textit{Mature} by the ESRB) is inappropriate for selected age-groups.

St. Louis County's ordinance attempted to implement such a system whereby industry standards governed the coverage of the ordinance. Games rated \textit{Mature} or \textit{Adults Only} by the ESRB were presumptively inappropriate for minors, absent parental consent.\textsuperscript{149} This presumption is logical unless one views the ESRB's ratings as entirely arbitrary and gratuitous. The industry would not bother labeling games if the content of "M" or "AO" games did not have a different effect on minors than on adults, and the music and movie industries would similarly abandon their ratings systems. Obviously, ratings regimes are well-established, reflecting society's reasonable conclusion that certain material is better suited to adults. Parents who nevertheless approve of their children playing violent games may simply consent to their children's purchase of such games.

2. \textit{The Parallel Story of Movie Ratings}

The evolution of the video game industry has mimicked that of its more mature motion picture counterpart, and the ratings systems used by the two industries are very similar. St. Louis County's attempted ordinance did nothing more than require proof that children had their parents' consent before playing, renting, or purchasing a game with a rating of "M" or above, equivalent to theaters demanding proof that patrons are over seventeen, or have parental consent, before granting admission to an "R"-rated film.\textsuperscript{150} Judging by the label hierarchies of the MPAA and the ESRB, "R"-rated film content roughly correlates to "M"-rated video game content. The self-regulatory experience of the movie industry thus provides a

\textsuperscript{147} See Miller v. California, 413 U.S. 15, 23-25 (1973) (noting the "inherent dangers of undertaking to regulate any form of expression," and the care which must be taken in writing antiobscenity statutes).

\textsuperscript{148} See FW/PBS v. City of Dallas, 493 U.S. 215, 252 (1990) (Scalia, J., concurring in part and dissenting in part) (explaining "the very stringency of our obscenity test, designed to avoid any risk of suppressing socially valuable expression").

\textsuperscript{149} Interactive I, 200 F. Supp. 2d. 1126, 1130 (E.D. Mo. 2002).

\textsuperscript{150} Id.
template for analyzing the development of the video game industry's self-regulatory endeavors.

The rising popularity of motion pictures in the early decades of the Twentieth century sparked efforts to regulate their content. In 1915, the Supreme Court responded to a lawsuit challenging the constitutionality of an Ohio board of movie censors by holding, in *Mutual Film Corp. v. Industrial Commission of Ohio*, that movies were not part of the nation’s press, and hence not protected by the First Amendment.\(^{151}\) State censorship of movies, even for adults, remained legal until the Supreme Court’s ruling that movies are speech in *Burstyn v. Wilson* in 1958.\(^{152}\) Concerned about excessive local regulation sanctioned by the *Mutual* decision, the entertainment industry formed a trade association in 1922, and implemented stringent guidelines for movie producers in 1930 (the Hay’s Production Code)—guidelines that remained in place until the MPAA substituted them with the modern labeling regime in the late 1960’s.\(^{153}\)

Currently, movies are evaluated by a board comprised of eight to thirteen unidentified parents that sorts them into the familiar “G,” “PG,” “PG-13,” “R,” and “NC-17” categories.\(^{154}\) In addition to the letter-label, the

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152. 343 U.S. 495 (1952).

153. *A Brief History of Movie Ratings*, psvratings.com, at http://www.psvratings.com/history-of-movie-ratings.html (last visited Feb. 11, 2004). The Production Code was heavily influenced by Catholic doctrine. In fact, it was the formation of the League of Decency by the Catholic Church in 1934 that stimulated adherence to the Production Code. The League of Decency co-opted the Production Code and used its influence to demand obedience to the guidelines, something the Motion Picture Producers and Distributors of America (“MPPDA,” the precursor of the MPAA) had failed to accomplish for lack of a devoted constituency. For more on the history of the MPPDA and the League of Decency, see *Film Censorship in the 20th Century*, at http://www.stolaf.edu/depts/cis/wp/langes/censorship.html (last visited Feb. 11, 2004).


The ratings translate as follows: “G,” inviting general audiences; “PG,” suggesting that some material may not be suitable for children and inviting parental guidance; “PG-13,” providing a stronger warning to parents that some material may not be suitable for children; “R,” restricting minors’ access without parental permission; and “NC-17,” prohibiting the admission of minors even with parental consent. Jack Valenti, *How It All Begain* (2000), at http://www.mpaa.org/movieratings/about/index.htm (last visited Feb. 11, 2004).
board provides a brief description of the content that influenced the classification decision, such as "Sexual Content," or "Drug References." Although the present ratings system is completely voluntary, nearly all movies are rated by the board, and admission to their viewing is generally enforced by NATO member theaters due to the dynamics of the industry. The video entertainment industry, including some video game retailers, has a parallel organization that is similarly well-connected to the MPAA and is committed to a system of voluntary ratings enforcement.

In 1999, the NATO responded to a plea from President Clinton to begin "carding" people seeking access to "R"-rated films. Significantly, this change in enforcement essentially transformed movie admissions-regulation into a system similar to that proposed by St. Louis County for video games. Just as patrons seeking admission to an "R"-rated movie need verification of their age at the direction of the government, the county sought to require customers of video game retailers to similarly provide proof that they were either over the requisite age or had parental consent to purchase an "M"-rated game.

3. Need for Legislation

There are two reasons why St. Louis County's regulations are sound policy and a more laissez-faire approach akin to that used by the movie industry will not suffice for video games. First, despite the purported commitment by the NATO and the MPAA to ensure adherence to the ratings system, there are many flaws. For example, not all theaters are members of the NATO and therefore do not need to adhere to the NATO's guidelines. Moreover, as any teenager can attest, even NATO members rarely strictly enforce the ratings system. Undoubtedly theater operators would be more inclined to tighten their practices if faced with legal action for violating an ordinance that mandated adherence to the ratings.

159. Interactive 1, 200 F. Supp. 2d. 1126, 1130 (E.D. Mo. 2002).
Second, the video game industry has a far weaker lineage of self-regulation than its movie industry counterpart. Indeed, the ISA was founded merely ten years ago in 1994, while the MPAA traces its roots back to 1922. Video arcades do not have a strong industry association like the NATO to guide their conduct, nor have retailers adopted a method of “carding” purchasers of “M”-rated games. Enforcement of the movie ratings would undeniably improve with the passage of statutes requiring adherence by theaters. By extension, ordinances enforcing ESRB standards would be of even greater utility in the less-centralized video game industry. A system to verify either purchasers’ ages or parental consent would presumably be relatively easy to institute, especially given the predominance of large chain retailers in the video game market.

Granted, such laws will never be an absolute barrier to minors’ acquisition of violent games against their parents’ wishes. Online ordering is one way to bypass these proposed laws. However, the fact that minors can sneak into movie theaters, watch “R”-rated movies at friends’ homes without parental consent, and view mature content online does not render the movie ratings system moot. The St. Louis County ordinance at issue in Interactive did nothing more than make it more difficult for children whose parents desired to shield them from violent media to obtain such material, effectively instituting a system similar to that used by the movie industry to restrict access to “R”- and “NC-17”-rated movies.

IV. CONCLUSION

Video games have changed dramatically over the past thirty years, becoming expressive, informational, and communicative media often more complex than movies and books. Content increasingly is blended together across movies, television, games, and music. For these reasons, games should be treated just like books and movies for First Amendment purposes—as speech. The Eighth Circuit’s Interactive decision properly applied this analysis, but improperly determined that St. Louis County’s ordinance limiting minors’ access to violent video games without parental consent was unconstitutional. The court failed to recognize that minors and adults have different constitutional rights. Under Ginsberg and its progeny, protected material not obscene to adults may be classified as obscene to children if the legislature can demonstrate a rational basis for regarding the material as harmful to minors. St. Louis County presented a

161. FTC REPORT, supra note 58, at 37.
162. A Brief History of Movie Ratings, supra note 153.
163. See supra note 137.
rational basis for believing that violent video games are harmful to the mental and emotional health of children, and hence could be regulated based upon the goals of protecting minors’ well-being and aiding parents in shielding their children from harmful material. In effect, St. Louis County’s ordinance did nothing more than codify a regulatory regime, similar to that employed by the movie industry, through which children’s access to certain violent material, as classified by the industry, is prohibited absent parental consent. This dual-natured system of regulation whereby the industry self-evaluates its content and distributors enforce the ratings according to local legislation is the best answer to dealing with the growing problem of children’s exposure to increasingly realistic violent video games.
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