

**CENSORSHIP IN THE VIDEO GAME INDUSTRY:
GOVERNMENT INTERVENTION OR PARENTAL CONTROLS?**

By: Richard J. Hunter, Jr.,*
Hector R. Lozada,** and
Ann Mayo***

“Surely this is to ‘burn the house to roast the pig.’”¹
(Justice Felix Frankfurter)

I. INTRODUCTION

There should be no doubt that the video game industry² is a “major player” in the American economy. Consider these facts: The percentage of households in the United States that play video games is approximately sixty-five percent.³ The average time spent per week by video gamers is eighteen hours.⁴ ABI Research notes that “[g]aming has become a mass-market entertainment industry on a par with TV, movies and music.”⁵ United States computer and video game software sales grew six percent in 2007 to \$9.5

* Professor of Legal Studies, Seton Hall University, South Orange, New Jersey.

** Associate Professor of Marketing and International Marketing, Seton Hall University, South Orange, New Jersey.

*** Senior Faculty Associate and Director of the Center for Sports Management, Seton Hall University, South Orange, New Jersey.

¹ See *Butler v. Michigan*, 352 U.S. 380, 384 (1957) (holding that a Michigan penal law “arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society”).

² Ben Sawyer, President and founder of *Digitalmil*, a technology project consulting firm in Portland, Maine, has noted that the video game industry “value chain” is made up of six connected and distinctive layers:

1. Capital and publishing layer: involved in paying for development of new titles and seeking returns through licensing of the titles.
2. Product and talent layer: includes developers, designers and artists, who may be working under individual contracts or as part of in-house development teams.
3. Production and tools layer: generates content production tools, game development middleware, customizable game engines, and production management tools.
4. Distribution layer: or the “publishing” industry, involved in generating and marketing catalogs of games for retail and online distribution.
5. Hardware (or Virtual Machine or Software Platform) layer: or the providers of the underlying platform, which may be console-based, accessed through online media, or accessed through mobile devices such as the iPhone. This layer now includes non-hardware platforms such as virtual machines (e.g. Java or Flash), or software platforms such as browsers or even further Facebook, etc.
6. End-users layer: or the users/players of the games. See TERRY FLEW & SAL HUMPHREYS, *GAMES: TECHNOLOGY, INDUSTRY, CULTURE*, IN *NEW MEDIA* 101-14 (2d ed. 2005).

³ *Id.*

⁴ *Id.*

⁵ Nich Maragos, *Game Industry Revenue Expected To Double by 2011*, GAMASUTRA, http://www.gamasutra.com/view/news/8205/Game_Industry_Revenue_Expected_To_Double_By_2011.php (last visited Oct. 30, 2010).

billion—more than tripling industry software sales since 1996.⁶ In 2006, the entertainment software industry's value added to U.S. Gross Domestic Product (GDP) was \$3.8 billion.⁷ By 2009, the industry supported over a quarter-million American jobs. Computer games sales were \$910.7 million, with 36.4 million units sold.⁸ Video game dollar sales were \$6.46 billion (2006) and \$8.64 billion (2007).⁹ Computer games dollar sales were \$0.98 billion (2006) and \$0.91 billion (2007).¹⁰ Video game unit sales were 201.8 million (2006) and 231.5 million (2007); and computer game unit sales were 39.7 million (2006) and 36.4 million (2007).¹¹

Global video game industry sales are expected to increase at an annual rate of 10.3% and reach \$68.3 billion in 2012, up from \$41.9 billion last year, according to data provided by PricewaterhouseCoopers' Global Entertainment and Media Outlook.¹² In the United States, video game industry revenue is projected to rise at a bit more modest rate of 7.9% annually, to \$17.7 billion in 2012, from \$12.1 billion last year.¹³ Online video ad spending is expected to rise to \$4.6 billion in 2013, up from \$587 million in 2008.¹⁴ Global console game sales are expected to reach \$34.7 billion in 2012, growing at a 6.9% compound annual growth rate.¹⁵ Online game sales will rise at a 16.9% growth rate, from \$6.6 billion to \$14.4 billion in 2012; while mobile games will experience a 19% growth rate, from \$5.6 billion to \$13.5 billion in four years.¹⁶

At the same time as the industry has experienced a period of unprecedented (but not entirely unexpected) growth, concerns have surfaced over the content and delivery of video and computer games—especially to minors. In July 2005, in an attempt to protect minors from the dangerous impact of certain video games, the State of Illinois enacted Public Act 94-0135, the Illinois Sexually Explicit Video Game Law, which was comprised of the Violent Video Game Law (VVGL)¹⁷ and the Sexually Explicit Video

⁶ Statistics for the video game industry are provided by the website *Grabstats*, <http://www.grabstats.com/statcategorymain.asp?StatCatID=14> (last visited Nov. 27, 2010) and *Geeks Are Sexy*, <http://www.geeksaresexy.net> (last visited Dec. 15, 2010).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Mark Hefflinger, *Report: Global Video Game Sales to Reach \$68.3 Billion in 2012*, DIGITAL MEDIA WIRE (June 18, 2008), [http://www.dmwmmedia.com/news/2008/06/18/report:-global-video-game-sales-reach-\\$68.3-billion-2012](http://www.dmwmmedia.com/news/2008/06/18/report:-global-video-game-sales-reach-$68.3-billion-2012). ABI expects revenues to reach \$65.9 billion in 2011. Maragos, *supra* note 5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ For a discussion of the issues surrounding violent video games, see Timothy Dylan Reeves, *Tort Liability for Manufacturers of Violent Video Games: A Situational Discussion of the Causation Calamity*, 60 ALA. L. REV. 519 (2009); see also *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009). Plaintiffs were video game trade associations which sought declaratory relief claiming Cal. Civ. Code §§ 1746-1746.5, which imposed restrictions and a labeling requirement on the sale or rental of violent video games to minors, violated First and Fourteenth Amendments rights. The U.S. District Court for the Northern District of California granted summary judgment in favor of the associations. Defendant California state officials appealed and the Court of Appeals affirmed the decision of the District Court. The U.S. Supreme Court granted certiorari on April 26, 2010. See *Schwarzenegger v. Entm't Merchs. Ass'n*, No. 08-1448, 2010 U.S. LEXIS 3573 (2010).

Game Law (SEVGL). The SEVGL required video game retailers to place a four square-inch label with the numerals “18” on any “sexually explicit” video game.¹⁸ The law also required a video game retailer to place signs on their stores explaining the video game rating system and to provide customers with brochures which explain the video game rating system.¹⁹ This article primarily questions the constitutionality of the SEVGL and suggests that a recent Seventh Circuit ruling on the matter may prove to be the model for future determinations concerning regulation of the Video Game Industry for minors.

A. The ESRB

The Entertainment Software Rating Board (ESRB) is an industry organization that has developed a comprehensive rating system for computer, Internet, and video games. ESRB ratings are comprised of three parts: *rating symbols* suggest age appropriateness for the game; *content descriptors* indicate elements in a game that may have triggered a particular rating and/or may be of interest or concern; and more detailed *rating summaries* that are available through the ESRB website.²⁰ For the ESRB rating system to be effective, a parent or guardian must check the rating symbol on the front of the game box, the content descriptors on the back of the game box, and they should also read the rating summaries for the game. The following rating summaries are provided by the ESRB:



Early Childhood (EC): Early Childhood rated games have content that may be suitable for persons ages three and older. Titles in this category contain no material that parents would find inappropriate.



Everyone (E): Everyone rated games have content that may be suitable for persons ages six and older. Titles in this category may contain minimal violence and some comic mischief and/or mild language.



Everyone 10+ (E10+): Titles rated E10+ have content that may be suitable for ages ten and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language, and/or minimal suggestive themes.

¹⁸ See 720 ILL. COMP. STAT. § 5/12B-25(a) (2005), *invalidated by* Entm’t Software Ass’n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

¹⁹ See 720 ILL. COMP. STAT. §§ 5/12B-30(a), 35(a) (2005), *invalidated by* Entm’t Software Ass’n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

²⁰ See Entertainment Software Board, <http://www.esrb.org/ratings/faq.jsp> (last visited Oct. 30, 2010). “The Entertainment Software Rating Board (ESRB) is a non-profit, self-regulatory body established in 1994 by the Entertainment Software Association (ESA), formerly known as the Interactive Digital Software Association (IDSA). ESRB assigns computer and video game content ratings, enforces industry-adopted advertising guidelines and helps ensure responsible online privacy practices for the interactive entertainment software industry.”

The ESRB was established in 1994 by the Entertainment Software Association (formerly the Interactive Digital Software Association). By late 2009, it had assigned nearly 18,000 ratings to titles submitted by more than 350 publishers. It is worth noting that eighty-five percent of all games sold in 2007 were rated “E” for Everyone, “T” for Teen, or “E10+” for Everyone 10+. Ninety-four percent of game players under the age of 18 reported that their parents were present when they purchased or rented games.



Teen (T): Teen rated games have content that may be suitable for persons ages thirteen and older. Titles in this category may contain violent content, mild or strong language, and/or suggestive themes.



Mature (M): Mature rated games have content that may be suitable for persons ages seventeen and older. Titles in this category may contain mature sexual themes, more intense violence and/or strong language.



Adults Only (AO): Adults Only rated games have content suitable only for adults. Titles in this category may include graphic depictions of sex and/or violence. Adults Only products are not intended for persons under the age of eighteen.



Rating Pending: Used only for advertising and/or marketing materials created for titles that have been submitted to the ESRB and are awaiting a final rating.

Content Descriptor: Over thirty standardized phrases that indicate content that triggered a particular rating and may be of interest or concern.²¹

²¹ This list includes the following:

- **Alcohol Reference** – Reference to and/or images of alcoholic beverages;
- **Animated Blood** - Discolored and/or unrealistic depictions of blood;
- **Blood** - Depictions of blood;
- **Blood and Gore** - Depictions of blood or the mutilation of body parts;
- **Cartoon Violence** - Violent actions involving cartoon-like situations and characters. May include violence where a character is unharmed after the action has been inflicted;
- **Comic Mischief** - Depictions or dialogue involving slapstick or suggestive humor;
- **Crude Humor** - Depictions or dialogue involving vulgar antics, including bathroom humor;
- **Drug Reference** - Reference to and/or images of illegal drugs;
- **Edutainment** - Content of product provides user with specific skills development or reinforcement learning within an entertainment setting. Skill development is an integral part of product;
- **Fantasy Violence** - Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life;
- **Informational** - Overall content of product contains data, facts, resource information, reference materials or instructional text;
- **Intense Violence** - Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death;
- **Language** - Mild to moderate use of profanity;
- **Lyrics** - Mild references to profanity, sexuality, violence, alcohol, or drug use in music;
- **Mature Humor** - Depictions or dialogue involving "adult" humor, including sexual references;
- **Mature Sexual Themes** - Explicit and/or frequent references to sex or sexuality, including nudity;
- **Nudity** - Graphic or prolonged depictions of nudity;
- **Partial Nudity** - Brief and/or mild depictions of nudity;
- **Real Gambling** - Player can gamble, including betting or wagering real cash or currency;
- **Sexual Content** - Non-explicit depictions of sexual behavior, possibly including partial nudity;
- **Sexual Themes** - References to sex or sexuality;
- **Sexual Violence** - Depictions of rape or other violent sexual acts;
- **Simulated Gambling** - Player can gamble without betting or wagering real cash or currency;

In addition to the detailed rating system, the ESRB's Advertising Review Council (ARC) has developed a list of *Principles and Guidelines* designed to provide responsible advertising practices by the video game industry. ARC is also responsible for responding to concerns or complaints raised by consumers regarding the marketing of video games.²² Would these self-imposed "controls" insulate the industry from legislative action designed to protect minors from sexually explicit depictions?

B. A Law Suit is Initiated

Perhaps most significantly, the SEVGL criminalizes the sale or rental of sexually explicit video games to minors.²³ The statute imposes criminal penalties on any "person who sells, rents, or permits to be sold or rented, any sexually explicit video games to any minor"²⁴ The SEVGL defines the term "sexually explicit" video games as:

[T]hose that the average person, applying contemporary community standards would find, with respect to minors, is designed to appeal or pander to the prurient interest and depict or represent in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual conduct, an actual or simulated normal or perverted sexual act or lewd exhibition of the genitals or post-pubescent female breast.²⁵

Associations representing video game manufacturers and retail sellers of video games, including the Entertainment and Software Association, Video Software Dealers Association, and the Illinois Retail Merchants Association, challenged the constitutionality of the law in the U.S. District Court for the Northern District of Illinois.²⁶ At the outset of the litigation, the plaintiffs moved for a preliminary injunction to stop enforcement of the law and the defendants moved to dismiss the lawsuit. The

-
- Some Adult Assistance May Be Needed - Intended for very young ages;
 - **Strong Language** - Explicit and/or frequent use of profanity;
 - **Strong Lyrics** - Explicit and/or frequent references to profanity, sex, violence, alcohol, or drug use in music;
 - **Strong Sexual Content** - Explicit and/or frequent depictions of sexual behavior, possibly including nudity;
 - **Suggestive Themes** - Mild provocative references or materials;
 - **Tobacco Reference** - Reference to and/or images of tobacco products;
 - **Use of Drugs** - The consumption or use of illegal drugs;
 - **Use of Alcohol** - The consumption of alcoholic beverages;
 - **Use of Tobacco** - The consumption of tobacco products;
 - **Violence** - Scenes involving aggressive content. May contain bloodless dismemberment; and
 - **Violent References** - References to violent acts.

²² Parents can also sign up for a bi-weekly list of new titles, including ratings and content summaries, in the ESRB's newsletter *ParentTools*.

²³ See 720 ILL. COMP. STAT. § 5/12B-15 (2005), *invalidated by* Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

²⁴ *Id.*

²⁵ See 720 ILL. COMP. STAT. § 5/12B-10(e) (2005), *invalidated by* Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

²⁶ Entm't Software Ass'n v. Blagojevich 469 F.3d 641 (7th Cir. 2006).

motion to dismiss was denied, and the trial court conducted a three-day trial.²⁷ Interestingly, during the trial, the State introduced screen shots from three video games: (1) *Grand Theft Auto: San Andreas*, (2) *Leisure Suit Larry: Magna Cum Laude*, and (3) *The Guy Game: Uncut and Uncensored*.²⁸ The State maintained that each of the games contained features of various images that the State alleged were covered by the law—ranging from digital drawings of exposed breasts to digital animations of sex acts. Plaintiffs countered and introduced the game *God of War*, a video game taking place in ancient Greece that “roughly tracks Homeric themes.”²⁹ Plaintiffs contended that this game, which contained only one scene depicting two bare-chested women in Ancient Greece, was an example of a game that had been unconstitutionally criminalized by the Illinois law.³⁰ At the conclusion of the trial, the district court issued a permanent injunction against enforcement of the law³¹ and the State of Illinois filed an appeal.³²

This article concerns the decision of the Seventh Circuit in *Entertainment Software Association v. Blagojevich*,³³ in which the court affirmed the decision of the district court on grounds that the Illinois law was not “sufficiently narrowly tailored” to withstand constitutional challenge.³⁴ In so doing, the circuit court applied a strict scrutiny standard to the statutes in striking down both the VVGL and the SEVGL³⁵. The decision of the Seventh Circuit is potentially critical in the development of judicial standards for the video game industry in dealing with sexually explicit materials, which while not obscene, may nonetheless be judged to be harmful to minors.

II. APPLICATION OF STRICT SCRUTINY: A BRIEF RETROSPECTIVE

“Strict scrutiny” is the most rigorous standard utilized by the U. S. Supreme Court and other federal courts in exercising their role of judicial review of constitutional challenges to a statute or administrative rule or regulation.³⁶ The strict scrutiny standard is a part of a descending hierarchy of standards that courts have employed in order to weigh an asserted governmental interest against an asserted constitutional right or principle. In addition to the strict scrutiny standard, courts have also employed a lower standard of review, termed “rational basis” review, and an intermediate level of scrutiny in certain constitutional cases.

²⁷ *Id.* at 644.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *State to Pay \$510,000 Over Video Game Bans*, L.A. TIMES (Aug. 12, 2006), available at <http://articles.latimes.com/2006/aug/12/nation/na-briefs12.2>. At the conclusion of the trial, Judge Kennedy ordered the State of Illinois to pay \$510,000 to the Illinois video game industry to cover the costs of plaintiffs’ attorneys’ fees. Of course, the name of the defendant has now become famous—but in a very different context! See generally *Entm’t Software Ass’n*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

³² *Entm’t Software Ass’n v. Blagojevich* 469 F.3d 641, 644 (7th Cir. 2006).

³³ See *Entm’t Software Ass’n v. Blagojevich* 469 F.3d 641 (7th Cir. 2006).

³⁴ *Id.* at 650.

³⁵ *Id.* at 651.

³⁶ See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

A. Rational Basis Analysis

The rational basis test is a standard of review that examines whether a legislature had a reasonable—and not an arbitrary—reason or ground for enacting a particular statute or law. The U. S. Supreme Court has articulated the rational basis test in cases where a plaintiff alleges that the legislature has made an arbitrary or irrational decision. As a practical matter, the employment of the rational basis test usually results in the court upholding the constitutionality of the law or governmental policy, because the test gives great deference and weight to decisions of the legislative branch.³⁷ It provides a strong presumption that the law or policy under review is valid.³⁸ The burden of proof in rational basis analysis falls on the party making the challenge to a law or policy to show that the law or policy is unconstitutional. In order to meet this burden, the party making the challenge must demonstrate by a preponderance of the evidence that the law or policy does not have a rational or reasonable basis.³⁹

The U.S. Supreme Court first articulated the rational basis test under the Equal Protection Clause of the Fourteenth Amendment in *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*.⁴⁰ The Court stated that "it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification."⁴¹ However, the Court continued, it must appear that a classification is "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."⁴² Where a constitutionally suspect classification such as race, religion, alienage, or national origin are *not* at issue, nor are any fundamental constitutional rights at stake, "[when] the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time that the law was enacted must be assumed."⁴³ In *Lindsley v. National Carbonic Gas Co.*,⁴⁴ the Court outlined this rather deferential approach to most government regulation based on the rational basis standard of review:

The equal protection clause [does] not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety, or because

³⁷ See, e.g., *Baccus v. Karger*, 692 F. Supp. 290, 298 (S.D.N.Y., 1998).

³⁸ See, e.g., *Medeiros v. Atl. States Marine Fisheries Comm'n*, 327 F. Supp. 2d 145, 151 (2004) (citing *FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 314 (1993)).

³⁹ See, e.g., *Las Lomas Land Co., LLC v. City of Los Angeles*, 177 Cal. App. 4th 837, 859 (2009) (noting "Proving the absence of a rational basis can be an exceedingly difficult task. In some circumstances involving complex discretionary decisions, the burden may be insurmountable.).

⁴⁰ *Gulf, Colo. & Santa Fe R.R. Co. v. Ellis*, 165 U.S. 150 (1897).

⁴¹ *Id.* at 155.

⁴² *Id.* at 165-67.

⁴³ See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980) (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911)).

⁴⁴ *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

in practice it results in some inequality. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.⁴⁵

In addition, the Court does not require a legislature to articulate its reasons for enacting a statute, holding that "[i]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."⁴⁶ The Court stated that a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."⁴⁷ In effect, this means that a court is permitted to find a rational basis for a law, even if it is one that was not articulated by the legislature.

The Supreme Court has explained the purpose behind an application of the rational basis test. As stated by Justice Clarence Thomas in *Beach Communications*:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.⁴⁸

Justice Thomas continued: "Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'"⁴⁹ He concluded: "This standard of review is a paradigm of judicial restraint."⁵⁰ In *Vance v. Bradley*,⁵¹ the Court stated: "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."⁵²

This rather benign view of the role of the courts in a constitutional challenge to a statute, rule, or practice is not universally shared. For example, in *Royster Guano Co. v.*

⁴⁵ *Id.* at 78-79.

⁴⁶ *See* FCC v. Beach Commc'n, Inc., 508 U.S. 307, 315 (1993).

⁴⁷ *Id.*

⁴⁸ *Id.* at 313 (*citing* Sullivan v. Stroop, 496 U.S. 478, 485 (1990) (upholding the Secretary of Health and Human Services regarding children's insurance benefits); Bowen v. Gilliard, 483 U.S. 587, 600-603 (1987) (upholding the welfare reform law); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174-179 (1980) (upholding a section of the Railroad Retirement Act); Dandridge v. Williams, 397 U.S. 471 (1970) (upholding Maryland's Aid to Families With Dependent Children Act)).

⁴⁹ *Id.* (*citing* Beach Comm'n's, 508 U.S. at 313-314); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. at 179)).

⁵⁰ *Id.*

⁵¹ *Vance v. Bradley*, 440 U.S. 93 (1979).

⁵² *Id.* at 97.

Virginia,⁵³ the Supreme Court suggested a different role for the judiciary. The Court noted a slightly different approach and stated: “[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”⁵⁴ Is this a distinction without a difference?

B. Intermediate Scrutiny

Intermediate scrutiny is the standard under the Equal Protection Clause that federal courts utilize to assess the constitutionality of government action based on sex (gender) and illegitimacy. This type of analysis is also referred to as “heightened” or “semi-suspect” scrutiny. An application of the intermediate scrutiny standard requires that governmental action be “substantially” related to an “important” government interest. The “important government objective” which is offered to justify a categorization based on gender must be genuine—not one that is hypothetical. The government’s justification must not rely on overly broad generalizations about males and females. As an example of cases which one passed Supreme Court scrutiny before the adoption of the higher “intermediary” standard of proof, we may cite *Bradwell v. Illinois*,⁵⁵ where the Court, in upholding a law denying women the right to practice law, explained: “[the] natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfil [sic] the noble and benign offices of wife and mother. This is the Law of the Creator.”⁵⁶ In *Muller v. Oregon*,⁵⁷ the Supreme Court upheld a law barring factory work by women for more than ten hours a day, reasoning that “as healthy mothers are essential to vigorous offspring, the physical well-being of a woman becomes an object of public interest and care.”⁵⁸

Intermediate scrutiny differs from both strict scrutiny and rational basis scrutiny in determining whether governmental classifications under the Equal Protection Clause

⁵³ F.S. Royster Guana Co. v. Com. of Virginia, 253 U.S. 412 (1920).

⁵⁴ *Id.* at 415.

⁵⁵ *Bradwell v. Illinois*, 83 U.S. 130 (1873).

⁵⁶ *Id.* at 141.

⁵⁷ *Muller v. Oregon*, 208 U.S. 412 (1908).

⁵⁸ *Id.* at 421; *see also* *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding a law denying a bartender’s license to most women, reasoning that “the fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic”); *Hoyt v. Florida*, 368 U.S. 57, 62 (sustaining a law placing women on a jury list only if they made special request, stating that “woman is still regarded as the center of home and family life”).

In contrast, *See United States v. Virginia*, 518 U.S. 515 (1996) (invalidating a state military school’s policy of admitting only men); *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating a state law that preferred men over women as between persons otherwise equally qualified under state law to administer estates); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating a federal statute limiting a servicewoman’s right to a dependency benefit for her husband by requiring proof of actual dependency upon her for support, whereas a serviceman could obtain similar benefits for his wife without such proof). Justice Brennan framed the issue quite differently than did the Court in *Bradwell*, *Cleary*, and *Muller*: “[O]ur Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women not on a pedestal, but in a cage.” *Id.* at 684.

pass constitutional muster. Intermediate scrutiny analysis dates from 1976, and may be found in the U.S. Supreme Court's decision in *Craig v. Boren*,⁵⁹ where the Court stated: “[T]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”⁶⁰

Justice Sandra Day O’Connor wrote the opinion and cast the deciding vote in *Mississippi University for Women v. Hogan*,⁶¹ making it clear that the Equal Protection Clause of the Constitution provides strong protection against sex discrimination in government policies and programs. Justice O’Connor, considered by many as the leading proponent of the “heightened scrutiny” standard, reaffirmed the standard of “heightened scrutiny” for sex discrimination. Justice O’Connor emphasized the Court’s prior decisions holding that a law discriminating on the basis of sex requires “an exceedingly persuasive justification.”⁶² The Court ruled 5-4 that this standard was not met by a state university that excluded men from admission to its nursing school based on gender stereotypes.⁶³

C. Strict Scrutiny Applied

The application of a strict scrutiny standard was an important element of the determination of the Seventh Circuit in striking down the Illinois statutes as unconstitutional.

The notion of "levels of judicial scrutiny," including strict scrutiny, was introduced into constitutional parlance in footnote 4 to *United States v. Carolene Products* in 1938.⁶⁴ Strict scrutiny was first applied in the controversial opinion of Justice

⁵⁹ *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating a law that authorized the serving of beer to females over eighteen years of age old but not to males over twenty-one and announcing that sex-based classifications were subject to stricter standards of review under the Equal Protection Clause of the Fourteenth Amendment). Noted the Court in *Boren*: “Decisions following *Reed* [have] rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications.” *Id.* at 198.

⁶⁰ *Id.* at 197.

⁶¹ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

⁶² *Id.* at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455 (1981)).

⁶³ *Id.* at 724 (“The burden is met only by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”) (citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

⁶⁴ *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). The original text of footnote 4 (with internal footnotes as found in the original) is revealing:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. *See Stromberg v. California*, 283 U.S. 359, 369-70; *Lovell v. Griffin*, 303 U.S. 444, 452).

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, *see Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, *see Near v. Minnesota*, 283 U.S. 697, 713-14, 718-20, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin*, *supra*; on interferences with

Black in *Korematsu v. United States*,⁶⁵ in which the U.S. Supreme Court held that racial discrimination against Japanese Americans during World War II had met the standard of

political organizations, *see* *Stromberg v. California*, *supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-78; *Herndon v. Lowry*, 301 U.S. 242, *and see* *Holmes, J.*, in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, *see* *De Jonge v. Oregon*, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 284, or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. *Compare* *McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 185 n.2, and cases cited.

⁶⁵ *Korematsu v. United States*, 323 U.S. 214 (1944). In May 1942, 120,000 U.S. residents of Japanese ancestry who were both citizens and non-citizens of the United States were ordered into resettlement camps following Japan's December 7, 1941, attack on Pearl Harbor in Hawaii. Fred Korematsu was a U.S.-born Japanese American citizen who decided to remain in San Leandro, with his girlfriend after his parents had been removed from their home. Evidence indicated that Korematsu had knowingly violated Civilian Exclusion Order No. 34 issued by the United States Army, Korematsu contended that the Order was unconstitutional as a violation of the Fifth Amendment. The background which spawned the controversy was explained by the Court:

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan. *Id.* at 218-19.

Korematsu was tried and convicted in federal court on September 8, 1942, for a violation of Public Law No. 503, which criminalized such violations of military orders issued under the authority of Executive Order 9066. 7 Fed. Reg. 1407. He was placed on five years' probation. He and his family were placed in the Central Utah War Relocation Center situated at Topaz, Utah. Korematsu appealed his conviction to the U.S. Court of Appeals. They granted review on March 27, 1943 but upheld the original verdict on January 7, 1944. 140 F.2d 289 (9th Cir. 1943). Korematsu appealed again and brought his case to the U.S. Supreme Court, which granted certiorari on March 27, 1944. On December 18, 1944, in a 6-3 decision authorized by Justice Hugo Black, the Supreme Court held that compulsory exclusion, though constitutionally suspect, is justified during circumstances of "emergency and peril." 323 U.S. at 220. Justice Black stated further:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders as inevitably it must, determined that they should have the power to do just this. *Id.* at 223.

Without any doubt, the Korematsu Case stands as one of the most controversial and criticized cases in the modern history of the U.S. Supreme Court. *See, e.g.*, MARK TUSHNET, I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES 124 (2008). Korematsu's conviction for

strict scrutiny. The Supreme Court has determined that strict scrutiny review arises in two basic contexts:

- When a "fundamental" constitutional right is infringed—especially those right explicitly found in the Bill of Rights and those rights that the Supreme Court has deemed to be a fundamental right protected by the "liberty" provision of the 14th Amendment (for example, the right to vote,⁶⁶ the right to interstate travel,⁶⁷ and the right to privacy⁶⁸);

evading the internment order was ultimately overturned on November 10, 1983, after Korematsu challenged the earlier decision by filing for a writ of *coram nobis*. In a decision by Judge Marilyn Hall Patel, the United States District Court for the Northern District of California granted the writ and voided Korematsu's original conviction. Judge Patel found that in Korematsu's original case, the government had knowingly submitted false information to the U.S. Supreme Court that had a material effect on the decision of the Court. *See* *Korematsu v. United States*, 584 F. Supp. 1406 (1984). In 1988, President Reagan declared the internment a "grave injustice" and signed legislation authorizing reparations of \$20,000 each to thousands of surviving internees, including Korematsu. In 1999, President Clinton awarded Korematsu a presidential Medal of Freedom, the nation's highest civilian honor. Korematsu died on March 30, 2005 at the age of 86. Professors Lockhart, Kamisar, and Choper comment that "*Hirabayashi* and *Korematsu* have been the last instances in which the Court has failed to invalidate intentional (or "de jure") government discrimination against a racial or ethnic minority." WILLIAM B. LOCKHART, YALE KAMISAR & JESSE H. CHOPPER, *THE AMERICAN CONSTITUTION* 850 (5th ed. 1981).

⁶⁶ *See, e.g.,* *Dunn v. Blumstein*, 405 U.S. 330 (1972) (state durational and residency requirements of one year in the state and three months in the county in order to vote failed under a strict scrutiny analysis). In *San Antonio Ind. School Dist. v. Rodriguez*, Justice Marshall noted: "[T]he right to vote in state elections has been recognized as a 'fundamental political right,' because the Court concluded very early that it is 'preservative of all rights.'" 411 U.S. 1, 101 (1973) (Marshall, J., dissenting) (*citing* *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Justice Marshall continued: "For this reason, 'this Court has made it clear that a citizen has a *constitutionally protected right* to participate in elections *on an equal basis with other citizens in the jurisdiction.*" *Id.* (*citing* *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (emphasis in the original)).

⁶⁷ *See, e.g.,* *United States v. Guest*, 383 U.S. 745 (1966). The right to travel has been held to encompass the right of citizens (1) to enter and leave another state; (2) to be treated as welcome visitors; and (3) to be treated equally if they become permanent residents of that state. *Saenz v. Roe*, 526 U.S. 489, 490 (1999). The right to international travel has been held to be part of the "liberty" guaranteed by due process. *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (holding that the Secretary of State had exceeded its authority in refusing to issue passports to Communists for foreign travel). However, the right to international travel is not unqualified and may be regulated within the parameters of due process under the rational basis test. In general, this is an example of the courts deferring to the judgment of the political branches (executive and legislative) on matters relating to foreign policy. *See* *Regan v. Wald*, 468 U.S. 222, 223 (1984). Included in rationally based restrictions have been the denial of social security benefits when recipients are *outside* of the United States, *Califano v. Aznavorian*, 439 U.S. 170, 178 (1978) (emphasis added), revocation of a passport of a person whose conduct in foreign countries presents a serious danger to national security, *Haig v. Agee*, 453 U.S. 280, 281-82 (1981) (Secretary of State revocation of the passport of an ex-CIA employee who was exposing the identity of undercover CIA agents in foreign countries), and imposition of reasonable "area restrictions" for passports prohibiting travel to certain countries or danger zones, *Zemel v. Rusk*, 381 U.S. 1, 8 (1965) (regarding the denial of a passport to Cuba).

⁶⁸ *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113, 129 (1973) (holding that the right to privacy is implicit in the concept of "liberty" within the protection of the Due Process Clause). The right to privacy has been held to include the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that the right to marry is a "basic civil right"), the right to procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (invalidating a law requiring the sterilization of habitual criminals), the right of parents to make decisions concerning the care, custody, and control of their children, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), the right of related persons to live together in a single household, *Moore v. City of East Cleveland*, 431 U.S. 494, 505-6 (1977), and the right of fully consenting adults to engage in private intimate sexual conduct that is *not* commercial in nature. *Lawrence v. Texas*, 539 U.S. 558, 575

- When the government action involves the use of a "suspect classification" such as race⁶⁹ or national origin⁷⁰ that may render it void under the Equal Protection Clause.⁷¹

In order to pass strict scrutiny muster, the law or policy must satisfy three prongs. First, the policy or law must be justified by a "*compelling governmental interest*." Second, the law or policy must be *narrowly tailored* to achieve that goal or interest. Third, the law or policy must be the *least restrictive means* for achieving that compelling governmental interest. The SEVGL would be judged according to these standards.⁷²

III. CONSTITUTIONALITY OF THE SEVGL

The State of Illinois conceded that the SEVGL is a content-based restriction on speech. As such, the Appellate Court was required to apply strict scrutiny analysis in assessing the constitutionality of the Act.⁷³ In order to survive strict scrutiny analysis, the SEVGL must be "narrowly tailored to promote a compelling Government interest."⁷⁴ In general, a statute would meet this test "only if it targets and eliminates no more than the

(2003) (invalidating a state law making it a crime for members of the same sex to engage in consensual sodomy and overruling *Bowers v. Hardwick*, 478 U.S. 573 (1986)).

Justice Stewart, joined by Justice Black, expressed a contrary view:

"What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy 'created by several fundamental constitutional guarantees.' I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." *Griswold*, 381 U.S. at 530 (Stewart, J., dissenting).

⁶⁹ See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880) (invalidating a law forbidding African-Americans from serving on grand or petit juries).

⁷⁰ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating the denial of laundry licenses only to persons of Chinese origins); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (concerning discrimination against Mexican-Americans in respect to service on a jury). Generally, the application of "strict scrutiny" requires that the government exhibit a discriminatory purpose. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (challenging the implementation of a test that was failed disproportionately by African-Americans). Such discrimination may be shown on its face; through unequal administration; or where the legislative motive was to discriminate against racial or ethnic minorities. *Id.* at 239

⁷¹ The Fourteenth Amendment provides (in part): "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

⁷² Professor Brenner framed the issue as follows:

Content-based regulations are presumptively invalid and are upheld only if they survive strict scrutiny; under this test, a statute must be narrowly tailored to promote a compelling government interest, and 'if a less restrictive alternative would serve the Government's purpose . . . [it] must use that alternative.' Content-neutral regulations are upheld if they satisfy three requirements: [1] if they further 'an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; [3] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 286-87 (2003).

⁷³ *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000); *FCC v. Pacifica*, 438 U.S. 726, 751 (1978).

⁷⁴ *Playboy*, 529 U.S. at 811.

exact source of the ‘evil’ it seeks to remedy.”⁷⁵ The Supreme Court in *United States v. Playboy Entertainment Group* noted that a statute is not narrowly tailored “[if] a less restrictive alternative would serve the Government’s purpose.”⁷⁶

The State of Illinois clearly identified the purpose of the SEVGL as “shielding children from indecent sexual material and in assisting parents in protecting their children from that material.”⁷⁷ Whatever might be the societal debate concerning the nature and effect of pornography, the legal issue has been addressed several times by the U.S. Supreme Court. As noted in *Ashcroft v. ACLU*: “[t]o be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials.”⁷⁸ Likewise, in *Sable Communications of California v. FCC*, the Supreme Court stated: “[w]e have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”⁷⁹

Having identified the interest of the State of Illinois as “compelling,”⁸⁰ the Court of Appeals correctly noted that the burden of proof fell on the State of Illinois to demonstrate that the SEVGL is *narrowly tailored* to achieving this purpose.⁸¹

A. Obscene vs. Indecent

None of the parties to the dispute contended that the games affected by the SEVGL were “obscene.” Rather, the State of Illinois contended that the games were “indecent,” and thus subject to appropriate legislation which would limit their distribution to minors.⁸² The Court of Appeals quoted with approval from the seminal case of *Interstate Circuit, Inc. v. City of Dallas*:⁸³ “[B]ecause of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults.”⁸⁴ As a result, the State may regulate the dissemination of sexually-oriented material that is “indecent” with respect to minors, even if the material is not considered “obscene” under

⁷⁵ *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

⁷⁶ *Playboy*, 529 U.S. at 813.

⁷⁷ 469 F.3d at 646 (citing Governor’s Br. at 16).

⁷⁸ *Ashcroft v. ACLU*, 542 U.S. 656, 675 (2004).

⁷⁹ *Sable Comm’n of California v. FCC*, 492 U.S. 115, 126 (1989).

⁸⁰ The Circuit Court simply stated: “[w]e need not spend time determining whether this is a compelling interest; it clearly is.” 469 F.3d at 646.

⁸¹ *Id.* The opinion took a rather unexpected turn when Judge Williams veered into the area of First Amendment *rights* for children. *Id.* The Court stated: “[t]he Constitution also requires us to ask whether legislation unduly burdens the First Amendment rights of minors.” *Id.* This statement reflects the position enunciated in *American Amusement Machine Association v. Kendrick* that “history has shown the dangers of giving too much censorship power to the State over materials intended for young persons.” *Kendrick*, 244 F.3d 572, 577 (7th Cir. 1973) (“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.”). *Kendrick*, however, can be distinguished from *Entertainment Software Association* because “[v]iolence and obscenity are distinct categories of objectionable depiction” which are subject to a different constitutional inquiry and standard. *Id.* at 574.

⁸² The Court was clear that under circumstances where the games would be considered “obscene,” the State would have no power to limit their sales to adults. *See Playboy*, 529 U.S. at 811.

⁸³ 390 U.S. 676 (1968).

⁸⁴ 469 F.3d at 647 (citing *Interstate Circuit*, 390 U.S. at 690).

the Court's formulation for adults—but only if the State can demonstrate that the regulation or statute in question is narrowly tailored to serve a compelling governmental interest. As the U.S. Supreme Court noted in *Sable Communications*, “[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*.”⁸⁵

B. Ginsberg⁸⁶ and Miller⁸⁷ Revisited⁸⁸

In 1968, in *Ginsberg v. New York*,⁸⁹ the United State Supreme Court upheld a New York statute that criminalized the sale of certain materials to persons under the age of seventeen. The statute in question in *Ginsberg* made the distribution criminal if the material “(i) predominantly appeal[ed] to the prurient, shameful or morbid interest of minors, and (ii) [wa]s patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable materials for minors, and (iii) [wa]s utterly without redeeming social importance for minors.”⁹⁰ The Court concluded that the protection of children's psychological health was a permissible basis for restricting minors' access to non-obscene, sexually oriented materials as well.⁹¹

In 1973, the Supreme Court once again entered into the debate concerning the extent of governmental power in *Miller v. California*.⁹² In *Miller*, the Court enunciated a three-prong test in order to determine whether a state could criminalize the distribution of obscene materials to adults. The Supreme Court established: “The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,⁹³ (b) whether the work depicts or describes, in a patently offensive way, sexual conduct

⁸⁵ 492 U.S. 115, 126 (1989) (emphasis added).

⁸⁶ *Ginsberg v. New York*, 390 U.S. 629 (1968). Ginsberg and his wife operated Sam's Stationery and Luncheonette in Bellmore, Long Island where they sold magazines, including those deemed at that time by the Supreme Court to be "girlie." (How times have changed!) Ginsberg was prosecuted when he personally sold two 16 year old boys involved in a "sting" operation the "girlie" magazines. Ginsberg was tried in Nassau County District Court and found guilty. The court found that the pictures were harmful to minors under the New York law.

⁸⁷ *Miller v. California*, 413 U.S. 15 (1973). Marvin Miller owned a small, 60-employee publishing company that printed and distributed hard-core pornographic booklets in Los Angeles, California. Sometime in 1967, Miller's company inadvertently mailed five sexually explicit booklets to a restaurant. The restaurant filed a complaint with the local police, which resulted in the filing of misdemeanor charges against the publisher for violations of California Penal Code 311 and 311.2(a), which made it a criminal offense to distribute obscene material.

⁸⁸ The authors have previously dealt with the broader constitutional issues surrounding obscenity and indecency in the context of regulation of the Internet. See Richard J. Hunter, Jr., Hector Lozada & Ann Mayo, *The Supreme Court as the "Grand Mediator" in Social Regulation of the Media*, 32 HASTINGS COMM. & ENT. L.J. 41 (2009).

⁸⁹ 390 U.S. 629 (1968).

⁹⁰ *Id.* at 632-33.

⁹¹ *Id.* at 633.

⁹² 413 U.S. 15 (1973).

⁹³ A dictionary definition of "prurient" is anything "causing lascivious or lustful thoughts." A similarly vague legal definition of prurient interest is a "shameful and morbid interest in nudity, sex, or excretion." See, e.g., www.leclaw.com (last visited December 23, 2010).

specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."⁹⁴

The Appellate Court in *Entertainment Software Association* noted that the *Miller* Court had rejected an earlier formulation of *Memoirs v. Massachusetts* that contained the phrase "utterly without redeeming social importance."⁹⁵ *Memoirs* also articulated two other prongs to its definition of obscenity. Material was obscene if "(a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; [and] (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters" ⁹⁶ The statute in *Ginsberg* was upheld because it had appropriated the "exact language of *Memoirs*" and had appended "the words 'for minors'" to each prong of the *Memoirs* test.⁹⁷ The Appellate Court continued: Seemingly implicit then in the *Miller* Court's amendment of the *Memoirs* test was that the test of "obscenity for minors," or indecency, was amended to include the requirement that the material regulated "taken as a whole, do[es] not have serious literary, artistic, political, or scientific value" for minors.⁹⁸

However, it was not clear what effect the *Miller* amendment of the *Memoirs* test might have on *Ginsberg*.⁹⁹ The Seventh Circuit concluded that the question was basically irrelevant because "either *Ginsberg* or *Miller*"¹⁰⁰ had provided the third prong in formulating an "appropriate standard for what material can be regulated in the manner of the SEVGL."¹⁰¹ The court stated that "somewhere between *Ginsberg* and *Miller* we arrive at the basement for constitutionality of a statute criminalizing the distribution of sexually oriented materials to minors."¹⁰² "Inexplicably," noted the court, "the State of Illinois chose to ignore both *Ginsberg's* and *Miller's* third prongs" in creating the SEVGL's definition of "sexually explicit."¹⁰³ Thus, the State of Illinois had failed to narrowly tailor the statute as required under a strict scrutiny analysis and had created a statute that was unconstitutional and thus unenforceable.

C. *Miller and Ginsberg Applied to the SEVGL: The Fatal Flaws*

While the court recognized that the SEVGL's definition of "sexually explicit" was modeled after the first two prongs of the *Ginsberg/Miller* test, the SEVGL did not include either the "utterly without redeeming social importance for minors" language of *Ginsberg* or the "taken as a whole, do not have serious literary, artistic, political, or scientific value" language of *Miller*. Both omissions were fatal flaws to the enforcement

⁹⁴ *Miller*, 413 U.S. at 24.

⁹⁵ 383 U.S. 413, 418 (1966).

⁹⁶ *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 648 (7th Cir. 2006) (citing *Memoirs*, 383 U.S. at 418).

⁹⁷ *Id.*

⁹⁸ *Id.* (citing *Miller*, 413 U.S. at 24).

⁹⁹ See *Pacifica*, 438 U.S. at 767 (Brennan, J., dissenting) ("[w]e have not had the occasion to decide what effect *Miller*... will have on the *Ginsberg* formulation"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.10 ("In *Miller*... we abandoned the *Roth-Memoirs* test for judging obscenity with respect to adults. We have not had the occasion to decide what effect *Miller* will have on the *Ginsberg* formulation.").

¹⁰⁰ *Entm't Software Ass'n*, 469 F.3d at 648.

¹⁰¹ *Id.*

¹⁰² *Id.* at 648-49.

¹⁰³ *Id.* at 649.

of the SEVGL.¹⁰⁴ As a result, this deficiency, combined with the SEVGL's lack of incorporation of the third *Ginsberg-Miller* prong, made it likely that there would be criminal prosecutions for the sale of video games that were "beyond the scope of the State's compelling interest—games that have 'social importance for minors.'"¹⁰⁵

The Seventh Circuit cited the example of the game *God of War* as an illustration of the potential criminalization of a game that featured exposed breasts without taking into consideration of the game in its entirety, including its potential social value for minors. The distribution of *God of War* would be potentially illegal and criminal—in spite of the fact that the game tracked the Homeric Epics found in the *Odyssey* in both content and theme.¹⁰⁶ Pointedly, the Circuit Court noted that it would be highly unlikely that a statute which potentially criminalizes distribution of a work that contained only brief—and quite frankly, peripheral—flashes of nudity, would meet the test of being "narrowly tailored." What seems clear is that the Seventh Circuit was adopting the view found in *Cohen v. California*¹⁰⁷ that: "It is clear, however, that under any test of obscenity to minors not all nudity would be proscribed. Rather, to be obscene 'such expression must be, in some significant way, erotic.'"¹⁰⁸

Judge Williams commented that the SEVGL allowed criminal prosecution solely on the basis of applying "contemporary community standards" with regard to alleged lasciviousness of any depiction of "post-pubescent female breasts."¹⁰⁹ While it is certainly true that *Miller* had reaffirmed the inclusion of a "contemporary community standards" test, Judge Williams commented further that the point of *Miller* was to free individuals from the possibility of criminal prosecution based on widely divergent local standards. Quoting from *Ashcroft*, Judge Williams attempted to bring a proper *focus* and an important *limitation* to the development of the "contemporary community standards" test: "The serious value requirement 'allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value.'"¹¹⁰

IV. A RETURN TO THE IDEA OF "LESS RESTRICTIVE ALTERNATIVES"

The real import of *Entertainment Software Ass'n v. Blagojevich* may lie in its return to what are sometimes called "first principles"—that is, that the choice and selection of what minors may view should be left to their parents or other "responsible adults"—and not to the government through regulation or legislation. Although the case

¹⁰⁴ See *Ashcroft v. ACLU*, 542 U.S. 656, 679 (2004) (Breyer, J., dissenting) (describing the words "lacks serious literary, artistic, political, or scientific value" as "critical terms").

¹⁰⁵ 469 F.3d at 650 (citing *Reno v. ACLU*, 521 U.S. 844, 865-66 (1997)).

¹⁰⁶ *God of War* is a video game for the PlayStation 2 console. It was released on March 22, 2005. It is an action adventure game based on Greek mythology. *God of War* was developed by Sony Computer Entertainment's Santa Monica division.

¹⁰⁷ *Cohen v. California*, 403 U.S. 15, 26 (1971) (noting that "absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.").

¹⁰⁸ See *Erznoznik*, 422 U.S. at 214 n.10 (quoting *Cohen v. California*, 403 U.S. at 20)).

¹⁰⁹ See 720 ILL. COMP. STAT. ANN. § 5/12B-10(e) (2005)

¹¹⁰ 469 F.3d at 650 (citing *Ashcroft v. ACLU*, 535 U.S. at 579 and quoting *Reno v. ACLU*, 521 U.S. at 873)).

did not deal with issues of indecency, the Circuit Court cited with approval the opinion of the U.S. Supreme Court in *Liquormart, Inc. v. Rhode Island*, where the Court stated: “It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance . . . educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.”¹¹¹ In addition, it is clear that the Circuit Court preferred the approach found in *Linmark Assocs., Inc. v. Willingboro Twp.* where the Court had suggested that as an alternative to speech regulations, the municipality might “continue ‘the process of education’ it has already begun” through sponsored speech targeted at raising awareness of the municipality’s views on the local housing market.¹¹²

In *Ashcroft v. ACLU*, the U.S. Supreme Court indicated that “when plaintiffs challenge a content-based speech regulation, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.”¹¹³ The *Ashcroft* Court reiterated what some call the “*more speech*” solution to many issues involving the First Amendment. As Supreme Court Justice Louis Brandeis commented in his oft-quoted opinion in *Whitney v. California* in 1927: “If there is time to expose through discussions the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”¹¹⁴

What may have convinced the Seventh Circuit that the SEVGL could not withstand a constitutional challenge was the district court’s finding that the voluntary ratings regime was effective. The district court found that eighty-three percent of the video games purchased for minors had parental involvement—in effect, the parents were “speaking” in support of proper standards for their children¹¹⁵. Illinois had options available to it in order to increase parental involvement and awareness of the ESRB system through the use of a “wide media campaign.”¹¹⁶ Judge Williams concluded incisively: “Nothing on the record convinces us that this proposal would not be at least as effective as the proposed speech restrictions. In short, the SEVGL is overbroad, it is not narrowly tailored, and it cannot survive strict scrutiny.”¹¹⁷

V. CONCLUSIONS AND OBSERVATIONS: LESSONS FOR THE FUTURE— MODELING REGULATION OF THE VIDEO GAME INDUSTRY

It is clear that the State has a “compelling interest” in shielding children from indecent sexual material on both physical and psychological grounds. As well, states like Illinois have made it plain that it is a core function of the government to assist parents in

¹¹¹ *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, at 507 (1966) (law banning the advertisement of alcohol except at the place of sale held unconstitutional as a violation of the First Amendment on grounds that the state lacked a compelling interest in enacting the ban).

¹¹² *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85 (1977) (finding that restricting the posting of “for sale” and “sold” signs on real estate within the town violated the First Amendment to the U. S. Constitution protections for commercial speech).

¹¹³ 469 F.3d at 651 (*citing* *Ashcroft*, 542 U.S. at 665).

¹¹⁴ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹¹⁵ 469 F.3d at 651.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

protecting their children from the negative effects of such materials through dissemination of timely, accurate, and objective information.

But not all measures taken or adopted by states will pass judicial muster. We know, for example, that a state bears a heavy constitutional burden in attempting to ban certain video games or in criminalizing their sale in demonstrating that any law is “narrowly tailored” to achieving this legitimate purpose. In the end and with due deference to the legitimate rights of producers to make and develop a wide range of video products as well those of individuals—including minors—to view materials of *their* choosing—and *not* the government—to regulate the content of otherwise constitutionally protected speech, the states must choose the least restrictive means at their disposal.

What courts, and especially the Seventh Circuit, have clearly stated is that both *Ginsberg* and *Miller* are relevant—especially their so-called “third prong” in determining the constitutionality of a regulation or a criminal statute: whether the work, “taken as a whole, do[es] not have serious literary, artistic, political, or scientific value” [*Miller*] or that the material be “utterly without redeeming social importance for minors” [*Ginsberg*].

Finally, and perhaps more critical from a societal perspective, a state should indeed focus on an important first principle: the choice and selection of what minors should view should be left to educated and well-informed parents or other responsible adults through a verifiable system that in fact has been shown to be working.