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Blagojevich Seeks to Restrict Access to Violent Video Games

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Expression, continued from page 3

outweighs the students' right to expression. When students don T-shirts bearing messages deemed as controversial, it disrupts and offends their peers, they say. In other schools, officials have banned students from wearing T-shirts bearing pro-gay and anti-gay messages and cite this as proof that they are not discriminating against gay students.

Most school districts have policies prohibiting students from wearing T-shirts emblazoned with advertising for alcohol and tobacco.

Gay rights activists agree that T-shirts such as these are disruptive and should not be permitted on school grounds. However, they argue that T-shirts bearing pro-gay messages do not compare, because they can only do good.

"If Webb City High School were enforcing its own policies fairly and equally, we wouldn't have to take this to court at all," said Jolie Justus, one of the attorneys handling Mathewson's case.

Blagojevich Seeks To Restrict Access to Violent Video Games

By Andrew Dougherty

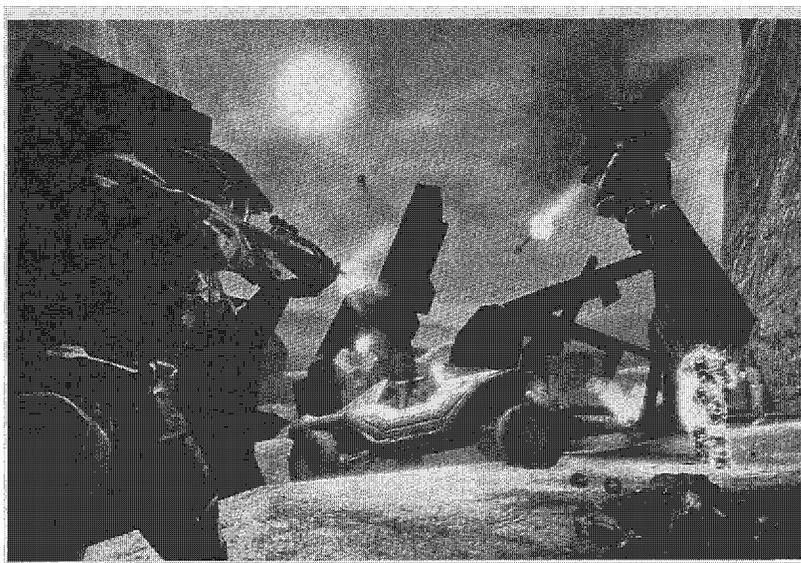
Illinois Governor Rod Blagojevich is taking aim at the manufacturers and retailers of violent and sexually explicit video games through a proposal that would prohibit the sale or rental of these video games to children under the age of 18 without parental consent.

If enacted, the legislation introduced in December 2004 would directly affect some of the most popular games on the market, such as *Grand Theft Auto: San Andreas* and *Halo 2*. The governor's proposal would also require manufacturers and retailers to post warning labels on certain games and in-store signs explaining the rating system of video games. Violators could face fines of up to \$5,000 and up to a year in prison.

Legislation of this kind is not unique. In recent years, St. Louis and Indianapolis, along with the state of Washington, have passed laws similarly designed to restrict access to violent and sexually explicit video games by children. Restrictions on access by children to sexually explicit video

games typically have not been challenged on constitutional grounds due to the Supreme Court's 1968 decision in *Ginsberg v. New York*, 390 U.S. 629, which found that sexually explicit images, although not considered obscene by community standards of adults, were harmful to children and thus upheld a law restricting access by minors to sexually explicit magazines. However, all laws restricting access by children to violent video games have been struck down in the courts as unconstitutional infringements of First Amendment rights.

Although the proposal is still in its nascent stages, it has already drawn the ire of a number of critics. For example, a January 17, 2005, editorial in the *Chicago Tribune* questioned "whether Blagojevich is manufacturing an issue for himself," noting that as a congressman in 1999, Blagojevich voted against legislation that would have prohibited the sale or rental of certain violent and sexually explicit media, including video games, to minors. Blagojevich has defended this vote on the basis that



Screen Shot of Halo 2
courtesy of www.bungie.net

Video Games, continued on page 5

Video Games, continued from page 4

the 1999 bill was much broader in scope, covering such other forms of expression as books, movies, and music.

Others have questioned the timing and practicality of the Governor's proposal. "It's financially irresponsible, considering our state's budget crisis, to propose legislation that is so clearly unconstitutional," said Edwin Yohnka, communications director for the ACLU of Illinois. "The decisions are clear. The legislation is unconstitutional under the First Amendment."

Gerardo Cardenas, Blagojevich's press secretary in Chicago, acknowledges the legal hurdles surrounding the proposal. "We are aware that previous attempts at this type of legislation have failed, but we are working hard to craft a solid bill and to avoid the same mistakes," Cardenas said. Cardenas expects that a formal bill will be drafted by the beginning of March 2005, and will be introduced during the current legislative term.

A Web site launched by Governor Blagojevich, at www.safegamesillinois.org, does offer some preliminary indication as to how the bill will be framed in an effort to withstand a legal challenge.

According to the site, the "purpose of the legislation is to protect children from the psychological harm exposure to violent media causes and to prevent seemingly arbitrary violence in society at large." Further, the site promises that the definitions of "violent" and "sexually explicit" will be narrowly drawn.

A number of these issues were squarely dealt with in Judge Richard Posner's unanimous opinion for the U.S. Court of Appeals for the Seventh Circuit in *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir. 2001). The case involved an Indianapolis city ordinance that prohibited unsupervised access by children to violent and sexually explicit video games in arcades.

In his opinion, Posner ruled that video games were protected speech and, therefore, the restriction on violent video games could only pass constitutional muster if the city could show that such video games actually caused harm to children or the public—the very same purpose cited by Blagojevich on his Web site.

Although the city of Indianapolis offered two psychological studies in support of its argument, the Seventh Circuit found the studies unpersuasive. First, the court found that the video games used in the studies were not similar to those restricted by the

"Modern video games 'with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes.'"

Judge Richard Posner

ordinance. Second, the court found that the studies failed to prove any instance of actual causation between the playing of violent video games and the commission of violent acts.

The court also compared the video games at issue to works of literature containing depictions of violence—such as *The Odyssey*, the stories of Edgar Allan Poe, and the fairy tales of the Brothers Grimm—and found that modern video games "with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes." The court also noted the potential ill-effects of the city's legislation: "To shield children right up to the age of 18 from exposure to violent depictions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."

Finally, the court brushed aside the contention that video games are distinguishable from other expressive forms due to their interactive component: "All literature (here broadly defined to include movies, television, and the other photographic media, popular as well as highbrow literature) is interactive; the better it is, the more interactive."

In light of *American Amusement*, it seems likely that Blagojevich's proposal will only withstand a First Amendment challenge if a causal link can be shown between video game playing and acts of violence by children. However, another possible avenue lies in the *American Amusement* decision itself. The court held open the possibility that if future video games "used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries . . . a more narrowly drawn ordinance might survive a constitutional challenge."

According to Edwin Yohnka, however, this is not the case with current crop of video games on the market. "They aren't using actors," Yohnka said. "The games are still cartoon-like, and the violence is still highly stylized and unrealistic."