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# DEFINING SPEECH IN AN ENTERTAINMENT AGE: THE CASE OF FIRST AMENDMENT PROTECTION FOR VIDEO GAMES

Patrick M. Garry\*

## I. INTRODUCTION

IN *Interactive Digital Software Ass'n v. St. Louis County*, the Eighth Circuit overturned an ordinance that restricted children's access to violent video games.<sup>1</sup> As the court stated, "we are obliged to recognize that [video games] 'are as much entitled to the protection of free speech as the best of literature.'"<sup>2</sup> However, this decision probably doesn't mean the end of the video game controversy. Pending in Congress is a bill that would criminalize the sale or rental of violent video games to minors,<sup>3</sup> and shortly after *Interactive Digital* was handed down, a lawsuit was filed in a Seattle federal court seeking to overturn a Washington statute regulating violent video games.<sup>4</sup>

This spurt of regulatory interest in violent video games follows, in part, from the belief that such games were a causal factor in various high school shootings that have occurred in recent years. In addition to challenging various state regulations, the makers of video games have been in court defending themselves against wrongful death lawsuits brought by the families of children killed in those school shootings. At issue in those cases was whether the violence in the video games had caused the violence later committed by the boys who had played those games. The courts also had to address another issue—whether video games constitute protected speech under the First Amendment. It is this issue that occupies the focus of this article.

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1. 329 F.3d 954 (8th Cir. 2003).

2. *Id.* at 958.

3. Protect Children from Video Game Sex and Violence Act of 2003, H.R. 669, 108th Cong. (2003).

4. Ian Ith, *Judge Blocks Law Restricting Sale of Violent Video Games*, SEATTLE TIMES, July 11, 2003, at B1. The Video Violence Law would impose a fine of up to \$500 on anyone who sells or rents to any minor any game that depicts violence against police officers. H.B. 1009, 58th Leg., 1st Reg. Sess. (2003). The lawsuit, *Video Software Dealers Ass'n v. Maleng*, No. C03-1245L (W.D. Wash. filed June 5, 2003), seeks to have this law declared unconstitutional.

Recently the courts have reversed direction from their earlier decisions in which video games were not seen as protected speech;<sup>5</sup> and they have made this reversal in a rather cursory manner. The judicial opinions have rested more on mere presumptions than on any real examination of what kind of speech the First Amendment aims to protect. These decisions carry implications far beyond the entertainment realm of video games because they set a precedence for how the courts will determine whether new forms of technology constitute protected speech. They set the mold for future cases that must deal with even newer technologies and even more unexpected forms of entertainment. In the media society America has become, the one sure thing is that there will continue to be new and different technologies of entertainment. If every new technology is automatically given First Amendment status, as seems to be the case with video games, then there is a risk that the First Amendment may become meaningless through an endless process of dilution.<sup>6</sup>

A half century ago, Alexander Meiklejohn published a series of influential writings in which he proposed a novel theory of free speech.<sup>7</sup> According to Meiklejohn, the First Amendment protects only political speech—the speech necessary for self-government.<sup>8</sup> When he first articulated his theory, he was focusing on the dangers of censoring dissident political speech during the Cold War. Meiklejohn saw political speech as being at the core of the First Amendment, and yet it was political speech that was being targeted.<sup>9</sup> Even though such radical political speech is no longer in the censorship crosshairs, Meiklejohn's theory may be more relevant than ever. Indeed, the danger to political speech today may not be from direct censorship, but from a kind of censorship-by-crowding-out. With the rapid increase of media content, brought on by the explosion of new communications technologies, political speech seems to be declining in market share. Entertainment and advertising seem to be steadily pushing political speech aside, and the video game controversy illustrates this problem.

Are video games to be given the same constitutional recognition as political speech and thereby granted even more power and opportunity to squeeze political speech further into the corners of the public's attention? Rather than just automatically categorizing each new entertainment technology as protected speech, should not courts actually examine the issue and come to some sort of modern definition of First Amendment speech? If left alone, the mere onslaught of technology threatens to eventually smother the more traditional forms of political speech. Is it not time,

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5. See *infra* notes 79-82 and accompanying text.

6. See also JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* 100 (1996). "If we define [free speech] too broadly we will weaken the First Amendment protection by spreading it too thin." *Id.*

7. See *infra* notes 130-37 and accompanying text.

8. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 107 (1960).

9. *Id.* at 107-13.

during the Entertainment Age and a time of media abundance, that the courts finally define the types of speech most deserving of First Amendment protection?

## II. THE CONCERNS GIVING RISE TO THE VIDEO GAME CONTROVERSY

A series of school shootings provided the spark to a public backlash against violent video games. In 1997, Michael Carneal opened fire on a prayer group at his school, killed three girls, and wounded five people.<sup>10</sup> On March 24, 1998, thirteen-year-old Mitchell Johnson and eleven-year-old Andrew Golden shot and killed four girls and a teacher while they were evacuating school during a fire alarm.<sup>11</sup> Kip Kinkel went on a shooting spree in his school's cafeteria on May 21, 1998, killing two students and wounding twenty-two others.<sup>12</sup> Less than a year later, on April 20, 1999, in the worst school shooting in history, Eric Harris and Dylan Klebold killed twelve students and a teacher at Columbine High School, before committing suicide themselves.<sup>13</sup>

In the aftermath of these shootings, victims, commentators, and psychologists alike blamed the graphic violence in video games that the shooters were found to have frequently played.<sup>14</sup> The families of many of the victims filed personal injury lawsuits against the publishers of various video games.<sup>15</sup> These lawsuits relied on research that characterized violent video games as "firearms trainers" and "murder simulators."<sup>16</sup> Various studies had painted video games as vehicles for "operant conditioning" (in which players are rewarded for killing) and "stimulus addiction" (whereby players come to crave the emotional response they

10. These killings led to a wrongful death action against video game manufacturers. *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000).

11. *See Golden v. State*, 21 S.W.3d 801 (Ark. 2000).

12. *See State v. Kinkel*, 56 P.3d 463 (Or. Ct. App. 2002).

13. *See Bill Dedman, Bullying, Tormenting Often Led to Revenge in Cases Studied*, CHI. SUN-TIMES, Oct. 15, 2000, at 14.

14. Carneal liked to play *Doom*, *Quake*, *Redneck Rampage*, and *Resident Evil*—games in which the player hunts down and shoots enemies. *James v. Meow Media, Inc.*, 300 F.3d 683, 687-88 (6th Cir. 2002). Mitchell Johnson used to rent "Mortal Kombat," a brutal fighting game. John Cloud, *Of Arms and the Boy*, TIME, July 6, 1998, at 58. Harris and Klebold were described as "avid, fanatical and excessive consumers of violent . . . video games." *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1268 (D. Colo. 2002). But even before the Columbine massacre occurred, senators concerned about children's exposure to video game violence had introduced the Video Game Rating Act of 1994. Video Game Rating Act of 1994, S. 1823, 103d Cong. (1994).

15. In *James*, the families of the murdered girls sued several video game publishers, alleging that the games essentially caused Michael Carneal to go on his shooting spree. 90 F. Supp. 2d at 801. In 2001, relatives of the victims of the Columbine shootings filed suit against many of the same video game companies named in the *James* suit, alleging that video games had made violence pleasurable to Harris and Klebold and had trained them to shoot and kill. *Sanders*, 188 F. Supp. 2d at 1269.

16. DAVE GROSSMAN & GLORIA DEGAETANO, *STOP TEACHING OUR KIDS TO KILL: A CALL TO ACTION AGAINST TV, MOVIE & VIDEO GAME VIOLENCE* 111 (1999).

feel when engaging in virtual violence).<sup>17</sup> Some psychologists even claimed that playing violent video games effectively desensitizes players to killing and to death in general.<sup>18</sup>

Empirical studies looking at the effects of violent video games on children have asserted that “a preference for violent games is correlated with adjustment problems and negative self-perceptions in some groups of children.”<sup>19</sup> The playing of video games “is positively related to aggressive behavior and delinquency.”<sup>20</sup> Several experts suggest that this relation could be similar to the relation between tobacco use and cancer. Just as not every smoker will develop cancer, neither will every video game user behave more violently. However, a direct correlation exists, similar to the connection of tobacco use with cancer, between the playing of violent video games and developing aggressive behavior.<sup>21</sup>

Although much of the research regarding violence in video games mirrors and builds upon the larger body of work regarding the effects of television violence,<sup>22</sup> there is evidence that the interactive nature of violent video games creates an even greater detrimental effect on the behavior of those who play them than does the passive nature of television or motion pictures.<sup>23</sup> In a joint statement on the impact of video game violence on children, the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychological Association, American Medical Association, American Academy of Family Physicians, and American Psychiatric Association all declared that the negative effects of interactive entertainment such as video games “may be significantly more severe than that wrought by television, movies, or mu-

17. See Scott Whittier, *School Shootings: Are Video Game Manufacturers Doomed to Tort Liability?*, 17 WHITTIER ENT. & SPORTS LAW. 11, 14-15 (2000); see also Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 604-07 (2000).

18. See Whittier, *supra* note 17, at 14-15. A fourteen-year-old video game player from New York, who lists “Grand Theft Auto 3” as his favorite game, says: “‘You could just go home and play ‘Grand Theft Auto’ and come out refreshed . . . . If you’re mad, you can just play the game and run over people and kill people it’s like an escape from reality.’” Kristina Nwazota, *Video Games Facing a Ban*, BUFFALO NEWS, Aug. 27, 2003, at N4. “One of his favorite games, ‘Matrix Reloaded,’ . . . allows players to shoot characters and watch them die in slow motion.” *Id.*

19. See *Marketing Violence to Children: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 106th Cong. app. A, at 4-5, 12 (1999) [hereinafter *Marketing Violence*]; see also Scott A. Pyle, *Is Violence Really Just Fun and Games? A Proposal for a Violent Video Game Ordinance that Passes Constitutional Muster*, 37 VAL. U. L. REV. 429, 430 (2002).

20. *Marketing Violence*, *supra* note 19, at 12.

21. *Id.* at 2.

22. See, e.g., L. R. Huesmann et al., *Longitudinal Relations Between Children’s Exposure to TV Violence and Their Aggressive and Violent Behavior in Young Adulthood: 1977-1992*, 39 DEV. PSYCH. 201 (2003). This 15-year study links children’s viewing of violent TV shows to later aggression as young adults, for both males and females. The findings apply to children from any family, regardless of the child’s initial aggression levels, their intellectual capabilities, their social status as measured by their parents’ education or occupation, their parents’ aggressiveness, or the mother’s and father’s parenting style.

23. See Craig A. Anderson, Ph.D., *The Impact of Interactive Violence on Children*, 2000 WL 11070122, at \*3-5 (Mar. 21, 2000).

sic.”<sup>24</sup> The joint statement also asserts that in some children there is actually a causal connection between video violence and aggressive behavior.<sup>25</sup> Or, as one psychologist put it, “[a]t the most, video games cause children to disregard their natural aversion to killing while at the very least they train children in the art of killing.”<sup>26</sup> Others have said that such games “train video game players to shoot and kill in real life.”<sup>27</sup>

Besides showing the harmful behavioral effects of violent video games, studies have demonstrated the ways in which those games are marketed to children. With the average child playing ninety minutes of video games each day,<sup>28</sup> experts have estimated that children comprise up to 60% of the video game audience.<sup>29</sup> A Federal Trade Commission study released in December of 2001 showed that retailers allowed 78% of unaccompanied underage shoppers, including 66% of their thirteen-year-old customers, to purchase M-rated games.<sup>30</sup> That same study revealed that 24% of children between ages eleven and sixteen included at least one M-rated game when asked to state their three favorite video games.<sup>31</sup> Other studies have found that “over seventy percent of ‘M’ rated games are marketed to children younger than age seventeen.”<sup>32</sup>

Not only are the games violent, but their advertisements, apparent to anyone who walks down the video game aisle of a toy store, are filled with violent messages.<sup>33</sup> *Carmageddon* claims it is “as easy as killing babies with axes.” *Point Blank* asserts that “it is more fun than shooting your neighbor’s cat.” *Die by the Sword* proclaims: “Escape. Dismember. Massacre.” Although these are obviously blatant examples, they are indicative of the use of violence to attract buyers. One governmental study found that 89% of the M-rated games and 96% of the T-rated games had violence-related content descriptors.<sup>34</sup>

In response to the rash of school shootings and the subsequent public outrage against violent video games, the City of Indianapolis, Indiana en-

24. AM. ACAD. OF PEDIATRICS, JOINT STATEMENT ON THE IMPACT OF ENTERTAINMENT VIOLENCE ON CHILDREN, CONGRESSIONAL PUBLIC HEALTH SUMMIT 2 (July 26, 2000).

25. *Id.*

26. Kevin E. Barton, *Game Over! Legal Response to Video Game Violence*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 133, 143 (2002).

27. Tara Campbell, *Did Video Games Train the School Shooters to Kill?*, 84 MARQ. L. REV. 811, 814 (2001).

28. *See Marketing Violence*, *supra* note 19, at 1.

29. FED. TRADE COMM’N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES app. D, at 5 (Sept. 2000) [hereinafter FTC VIOLENCE RPT.].

30. FED. TRADE COMM’N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN 33 (Dec. 2001). M-rated games are suitable, according to the ratings, to persons ages 17 and older.

31. *Id.* at 47.

32. Campbell, *supra* note 27, at 818.

33. *See generally Marketing Violence*, *supra* note 19 (testimony of Sen. Joe Lieberman).

34. *See* FTC VIOLENCE RPT., *supra* note 29, app. D, at 5. Games rated “Teen (T)” have content suitable for persons ages 13 and older.

acted an ordinance in July of 2000 that restricted minors' access to violent video games in arcades and other public establishments.<sup>35</sup> This ordinance, however, never went into effect because of a successful constitutional challenge by the video game industry.<sup>36</sup> A similar ordinance, enacted by St. Louis County, was struck down in *Interactive Digital Software Ass'n v. St. Louis County*.<sup>37</sup> A third such statute is currently being challenged in a federal court in Seattle.<sup>38</sup> Thus, it appears that no matter how the courts rule on this issue, regulators will continue to target certain video games.

### III. VIDEO GAME CASE LAW

In *Interactive Digital*, the Eighth Circuit ruled unconstitutional an ordinance prohibiting any person from providing graphically violent video games to minors.<sup>39</sup> The court overruled the lower court's finding that video games were not a protected form of speech.<sup>40</sup> Although the district court had held that games needed to "express or inform" before they were entitled to First Amendment protection,<sup>41</sup> the Eighth Circuit ruled that the First Amendment protects "[e]ntertainment, as well as political speech" . . . and that a 'particularized message' is not required for speech to be constitutionally protected.<sup>42</sup> Noting that the First Amendment was versatile enough to protect the paintings of Jackson Pollock and the verse of Lewis Carroll, the court saw no reason why video games should not be entitled to the same protection. It found that the violent video games at issue contained "stories, imagery, [and] 'age-old themes of literature' . . . 'just as books and movies do.'"<sup>43</sup> The court also saw the interactivity of video games as similar to that of literature: "indeed, 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.'"<sup>44</sup> Thus, the court concluded, "[w]hether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the first amendment, we are obliged to recognize that 'they are as much entitled to the protection of free speech as the best of literature.'"<sup>45</sup>

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35. Indianapolis, Ind., Ordinance 72 (July 17, 2000).

36. See Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

37. 329 F.3d 954, 960 (8th Cir. 2003).

38. See *supra* text accompanying note 4.

39. 329 F.3d at 954.

40. *Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp. 2d 1126, 1135 (E.D. Mo. 2002).

41. *Id.* at 1132. U.S. District Judge Stephen Limbaugh rejected plaintiffs' argument that video games have sufficient expressive elements to trigger the First Amendment's protections: "It appears to the Court that either a 'medium' provides sufficient elements of communication and expressiveness to fall within the scope of the First Amendment, or it does not." *Id.* at 1134. After reviewing four games presented to the court—*Resident Evil*, *Mortal Kombat*, *DOOM*, and *Fear Effect*—Judge Limbaugh concluded that the games convey no "ideas, expression or anything else that could possibly amount to speech." *Id.*

42. *Interactive Digital*, 329 F.3d at 957.

43. *Id.*

44. *Id.*

45. *Id.* at 958.

The Eighth Circuit placed great emphasis on its finding that video games possess some kind of story line, as if this was the vital component of protected speech. However, this was really the only element or characteristic of speech mentioned by the court. Though it stated that protected speech was not required to have a particularized message, the court specified no traits that would have to exist for the First Amendment to apply. The court more or less assumed that video games constituted protected speech. It brushed off any concerns about the kinds of images and graphics in video games with the comment that “[t]he mere fact that they appear in a novel medium is of no legal consequence.”<sup>46</sup> Yet it was almost as if the novelty of the medium served as an automatic qualifier for First Amendment protection, as if the mere newness of video games was enough to warrant full constitutional coverage.

The opinion in *Interactive Digital* relied heavily on a case previously decided by the Seventh Circuit. *American Amusement Machine Ass’n v. Kendrick* involved a constitutional challenge to an Indianapolis ordinance that sought to limit access of minors to violent video games.<sup>47</sup> In overturning the ordinance, and holding that video games qualified for full First Amendment protection, the Seventh Circuit declined to carve out a constitutional exception for violence, such as exists for obscenity.<sup>48</sup> It refused to treat violence like obscenity, insofar as it could be placed on the list of expressive forms that can be regulated on the basis of their content.<sup>49</sup> The reason obscenity was not protected speech was not because it affected anyone’s conduct (as was alleged in connection with violent video games), but because it violated “community norms regarding the permissible scope of depictions of sexual . . . activity.”<sup>50</sup> Thus, offensiveness, not harmfulness, was why obscenity lacked any constitutional protection. This distinction, the court said, undercut any attempt to carve out a violence exception to protected speech, similar to that of obscenity.<sup>51</sup>

Furthermore, the court added, violence was an historic element of cultural expression. “Classic literature and art . . . are saturated with graphic scenes of violence, whether narrated or pictorial,” the court said,<sup>52</sup> likening violent video games to the portrayals of violence in *The Odyssey* (“with its graphic descriptions of Odysseus’s grinding out the eye of Polyphemus”), *The Divine Comedy* (“with its graphic descriptions of the tortures of the damned”), *War and Peace* (“with its graphic descriptions of execution by firing squad”), and the stories of Edgar Allen Poe.<sup>53</sup> Vio-

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46. *Id.* at 957.

47. 244 F.3d 572 (7th Cir. 2001).

48. *Id.*

49. *Id.* at 574 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

50. *Id.*

51. *Id.* at 575. “But offensiveness is not the basis on which Indianapolis seeks to regulate violent video games.” *Id.* The basis of the ordinance, instead, was a belief that violent video games led to violent behavior. *Id.*

52. *Id.*

53. *Id.* at 577.



lence, according to the court, has always been a central interest of humankind and a recurrent theme of culture; therefore, violent video games are just doing what countless authors have done before. Going even further, the court indicated that such games may be a key component of individual development. According to the court, “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”<sup>54</sup> The court asserted that exposure to violent images is something that minors should not be shielded from until they turn eighteen, since it “would not only be quixotic, but deforming” to leave a minor unequipped to cope with the harsh reality of a culture in which violence has become a permanent fixture.<sup>55</sup> Thus, in the court’s view, video games are a necessary tool in the nurturing of future citizens and voters, so that young “minds are not a blank when they first exercise the [vote].”<sup>56</sup>

This viewpoint contrasts sharply with that of the D.C. Circuit toward indecent television programming. In a ruling upholding an FCC regulation confining indecent broadcast programming to the hours between 10 p.m. and 6 a.m., the court likewise recognized that “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.”<sup>57</sup> Contrary to *Kendrick*, the court took a completely different approach to aid the development of society’s children. It upheld legislation shielding children from what was seen to be harmful speech.<sup>58</sup> Furthermore, the court ruled, “a scientific demonstration of psychological harm is [not] required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.”<sup>59</sup> “Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material.”<sup>60</sup> These same arguments, obviously, could be used in

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54. *Id.*; see also David C. Kiernan, *Shall the Sins of the Son Be Visited upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 219 (2000) (arguing that “not recognizing video games as a form of protected entertainment deprives citizens access to aesthetic, political, social, moral, and other ideas and experiences that are or may be intertwined with the video game”).

In addition, freedom of expression is essential to the promotion of self-fulfillment and autonomy by protecting and encouraging the exercise of the creative capacities “central to human rationality.” Thus, protecting video games fosters and protects the personal autonomy and self-fulfillment interest of the video game designers who painstakingly exercise their creative capacities in developing storylines, plots, characters, and rich animation.

Kiernan, *supra*, at 219.

55. *Kendrick*, 244 F.3d at 577-78.

56. *Id.* at 577.

57. *Action for Children’s Television v. FCC*, 58 F.3d 654, 661 (D.C. Cir. 1995).

58. *Id.* (“[I]t is [in] the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens.” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944))).

59. *Id.* at 661-62.

60. *Id.* at 662-63 (adding that the “Supreme Court has reminded us that society has an interest not only in the health of its youth, but also in its quality”).

support of regulations limiting minors' access to violent video games.

As with the opinion in *Interactive Digital*, the *Kendrick* decision made numerous presumptions about the speech qualities of video games. In one paragraph, the court equated video games with the greatest works of literature in human history.<sup>61</sup> Moreover, the court decided that the interactivity of video games, instead of setting them apart from literature, actually made them more akin to literature.<sup>62</sup> After all, the court noted, it was “[p]rotests from readers [that] caused Dickens to revise *Great Expectations* to give it a happy ending;” and as further evidence of the interactivity of literature, the court stated that “tourists visit sites in Dublin [where] the fictitious events of *Ulysses* are imagined to have occurred.”<sup>63</sup> One thing certainly has to be said about the *Kendrick* court: it was definitely getting into the fantasy of fiction when it equated tourists rummaging around neighborhoods in Dublin with young children competing with each other as to how many heads and arms and legs they can blow off with their arsenal of virtual weaponry.

Up until *Kendrick*, no court had explicitly held that video games constituted speech within the meaning of the First Amendment. Nor has the Supreme Court ever dealt squarely with this issue.<sup>64</sup> But in addition to *Interactive Digital*, several other courts have subsequently adopted the *Kendrick* view on video games. In *James v. Meow Media, Inc.*, parents of children killed during a school shooting in Kentucky sued the makers and distributors of violent video games that the shooter had frequently played.<sup>65</sup> But the court, following the lead of *Kendrick*, ruled that video games were constitutionally protected speech. Just as the *Kendrick* court had done, the *James* court refused to extend the obscenity exception beyond material of a sexual nature.<sup>66</sup> It did not even consider carving out any other exceptions to protected speech. Even though video games are a relatively new medium, and even though they contain violence of a uniquely graphic nature, the court declined to examine whether such violence should be treated as obscenity—e.g., as speech outside the scope of the First Amendment.

In the current media environment, with the explosion of graphics fantasy and imagery and simulated reality, it may make sense to take a fresh look at what kinds of ‘entertainment’ should receive constitutional protection and which should be given a lesser degree of constitutional status. It may be time to consider whether the narrow pigeonhole exception of

61. This comparison is repeated in *Sanders v. Acclaim Entertainment, Inc.*, a wrongful death action brought against video game makers by the survivors of a teacher killed by two students. 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002).

62. *Am. Amusement Mach. Ass’n v. Kendrick* 244 F.3d 572, 577 (7th Cir. 2001).

63. *Id.*

64. The Court has only remotely faced a video game ordinance once, and on that occasion, the issue was of due process and not the arcade owners' First Amendment right. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 286 (1982).

65. 300 F. Supp. 3d 683 (6th Cir. 2002).

66. *Id.* at 697.

obscenity should be modified to include other things like video game violence aimed at children.

Courts have asserted that “there is no ‘precise test for determining how the First Amendment protects a given form of expression.’”<sup>67</sup> Moreover, “[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”<sup>68</sup> These statements seem to reflect precisely what the First Amendment requires: for courts to closely scrutinize the nature of new media before granting constitutional protection. Instead, the courts are following *Kendrick*, holding that video games are protected speech and stating that any medium that either “convey[s] information or evoke[s] emotions by imagery are protected under the First Amendment.”<sup>69</sup>

The Supreme Court has granted First Amendment protection to entertainment, as well as political speech.<sup>70</sup> This includes motion pictures,<sup>71</sup> live entertainment,<sup>72</sup> music,<sup>73</sup> and even non-verbal entertainment such as live nude dancing.<sup>74</sup> Yet despite this abundance of case law, the Court has not articulated constitutional standards that courts can use to ascertain when certain acts or imagery fall within the protected category of entertainment.<sup>75</sup> Consequently, there is “no type of blanket protection afforded to all of the different entertainment genres.”<sup>76</sup> Each form of entertainment must be judged on its own particular form and content.<sup>77</sup> Following this rule, courts prior to *Kendrick* and *Interactive Digital* regarded video games as falling into a “gray area” of speech that may have some First Amendment protection but is nevertheless an “outer ambit” of speech, allowing the government greater freedom to regulate.<sup>78</sup>

67. See *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 179 (D. Conn. 2002) (involving a personal injury claim against the video game industry and quoting *Am. Amusement Mach. Ass’n v. Kendrick*, 115 F. Supp. 2d 943, 952 (S.D. Ind. 2000)).

68. *Id.*

69. *Id.* at 181. Yet despite the assertion that any medium that conveys information or evokes emotions by imagery qualifies for full First Amendment protections, not all forms of media do receive such protections. The broadcast media, for instance, occupies a lower constitutional status than does the print medium; and the content of broadcast speech can be more easily regulated than can the content of newspapers. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748-51 (1978); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

70. *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981).

71. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

72. *Schad*, 452 U.S. at 61.

73. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

74. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

75. See *Kaye v. Planning & Zoning Comm’n*, 472 A.2d 809, 810 (Conn. Super. Ct. 1983) (stating that the Supreme Court has not articulated any precise test for determining the level of protection afforded to entertainment, and, in particular, video games).

76. Pyle, *supra* note 19, at 461.

77. See *Joseph Burstyn*, 343 U.S. at 501.

78. See, e.g., *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1098-99 (7th Cir. 1990) (Posner, J., concurring). In his opinion in *Miller*, Judge Posner stated:

There are some clearly expressive activities and some clearly nonexpressive ones but there is also a vast gray area populated by . . . creators of video games, . . . and so on without end. The government has a greater scope for regulation in the gray area. Maybe, indeed, that area could be regarded as outside the boundaries of the First Amendment.

## A. THE EARLY STAGE OF VIDEO GAME CASES

The first video game cases were fairly uniform in their denial of First Amendment protections. In *America's Best Family Showplace v. City of New York*, the court likened video games to mechanical entertainment devices, such as pinball machines, and recreational pastimes, such as chess and baseball, consisting of rules and implements:

In no sense can it be said that video games are meant to inform. . . . That some of these games 'talk' to the participant, play music, or have written instructions does not provide the missing element of 'information' . . . . [T]hey 'contain so little in the way of particularized form of expression' that video games cannot be fairly characterized as a form of speech protected by the First Amendment.<sup>79</sup>

For speech to fall within the protected entertainment category, the court required that it contain a communicative or informative element.<sup>80</sup>

Subsequent to the *America's Best* decision, other courts followed suit and held that video games could not receive constitutional protection because they were not designed to communicate or express information.<sup>81</sup> In *Caswell*, for instance, the Massachusetts Supreme Court held that any communication of information disseminated while playing a video game is inconsequential.<sup>82</sup> But near the turn of the millennium, and in direct contrast with the *America's Best* line of cases, courts began to concede First Amendment protection to video games.

## B. A CRITICISM OF THE RECENT TREND IN VIDEO GAME CASES

The trial court in *Kendrick* upheld the Indianapolis ordinance restricting children's access to violent video games, asserting that there was no principled constitutional difference between sexually explicit material (which may be regulated) and graphic violence (at issue with video games), at least as they pertained to children.<sup>83</sup> On appeal, however, the Seventh Circuit reversed the trial court and held that obscenity occupied a unique niche within First Amendment jurisprudence and that violence did not fit into this niche.<sup>84</sup> What the court did not consider was whether a particular form of violence (video game violence) should be given its

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*Id.*

79. 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (citing *Stern Elec., Inc. v. Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982)).

80. *Id.* at 173.

81. See *Malden Amusement Co., Inc. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983); *Kaye v. Planning & Zoning Comm'n*, 472 A.2d 809, 812 (Conn. Super. Ct. 1983); *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922, 926-27 (Mass. 1983); *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 609 (Mass. 1983); *People v. Walker*, 354 N.W.2d 312, 316 (Mich. Ct. App. 1984); *City of St. Louis v. Kiely*, 652 S.W.2d 694, 697 (Mo. Ct. App. 1983); *Tommy & Tina, Inc. v. Dep't of Consumer Affairs*, 459 N.Y.S.2d 220, 227 (N.Y. Sup. Ct. 1983).

82. *Caswell*, 444 N.E.2d at 927.

83. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 971 (S.D. Ind. 2000), *rev'd and remanded*, 244 F.3d 572 (7th Cir. 2001).

84. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574-75 (7th Cir. 2001).

own category of First Amendment exclusion, whether obscenity should be given a more expansive reading beyond mere offensiveness, or whether in a media society of ever increasing technological imagery more care should be given as to what imagery receives constitutional protection. After all, under the First Amendment the issue of whether something qualifies as protected speech is a more open question than whether particular restrictions on protected speech are allowed to stand. Consequently, judges should take a more objective stance toward examining the constitutional worthiness of new forms of media.<sup>85</sup>

If courts are asked to treat violent speech similarly to obscene speech, they should look at all the reasons underlying the obscenity exception to the First Amendment. Contrary to the court's reasoning in *Kendrick*, the rationale for obscenity laws goes beyond simply the offensive nature of the material. In *Paris Adult Theatre v. Slaton*, for instance, the Supreme Court suggested that a connection between antisocial behavior and obscene material could also justify legislative regulation of obscenity.<sup>86</sup>

It has been thirty years since the Court last created an exception to protected speech under the First Amendment. The obscenity exception basically began with *Miller v. California*, where the Court defined obscenity as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."<sup>87</sup> With the media and technological developments of the past three decades, however, perhaps a violence exception is now warranted.

The *Kendrick* approach also erodes the integrity of the constitutional model governing the broadcast medium.<sup>88</sup> If broadcast content can be regulated based on the fact that the broadcast medium has the capacity to be intrusive and harmful to children in ways that the print media is not, then other new media should be similarly treated if found to have that harmful or manipulative characteristic. However, when the courts automatically elevate violent video games in a First Amendment sense, above broadcast medium, the entire rationale underlying broadcast regulation is cast into doubt.

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85. What I propose has been termed a "defining in" approach, which "would identify a category of covered speech based upon 'the underlying theory of the First Amendment and would exclude everything else.'" Cynthia L. Estland, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 41 (1990). But as one commentator has put it, modern First Amendment doctrine "follows the 'defining-out' approach: 'speech' is presumptively within the realm of the First Amendment unless it is shown to be excluded." *Id.*

86. 413 U.S. 49, 60 (1973). Thus, the policy behind the obscenity exception is not just limited to the offensive nature of obscene speech.

87. 413 U.S. 15, 24 (1973).

88. *See supra* note 69. This model gives broadcast a lower First Amendment status than is given to the print media. Consequently, on a content basis, broadcast speech can be regulated in ways that print speech cannot. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978). One of the rationales given for this lower constitutional status is that the broadcast medium can be more intrusive and hence, more harmful to children.

Another criticism of the *Kendrick* opinion involves its view of video games as a type of speech vital to human development. The Seventh Circuit, in comparing the restrictions on video games with Nazi Germany's denial of free speech to children, states that violence has always been a part of society and that children should not be shielded from it, lest they be left "unequipped to cope with the world as we know it."<sup>89</sup> The court also compared the violence in video games with the violence portrayed in some of the great works of literature,<sup>90</sup> but to say that the descriptions of violence in *The Odyssey*, *The Divine Comedy*, and *War and Peace* are similar to the violent imagery in video games is to stretch reality to the breaking point. Despite the court's characterization of literature as an interactive medium, a book is nowhere near as interactive as a video game. No book seeks to make violence as addictive and all-consuming as video games do. Furthermore, modern video games are capable of portraying violence in a graphic, thrilling, and even appealing way that books cannot come close to replicating.<sup>91</sup> The modern games are "alarmingly true to life and include splattering blood whenever someone is shot or chain sawed."<sup>92</sup>

If the *Kendrick* court is correct in its view that children need to be exposed to violence through some media form if they are to grow into healthy adults, then would it not be wiser to steer this exposure toward the medium of books and newspapers? Is not the print medium a place where individuals get a more informed, broad-based, and less sensationalized education on a subject such as social violence? Is not the print medium a preferred medium for that kind of educational and developmental purpose? Shouldn't courts, in a media society such as America has become, look to the totality of the speech available to the public? For instance, the occurrence and concept of violence is pervasively expressed through every medium in society. Thus, is it really an unconstitutional abridgement of an idea or image to limit its expression or conveyance in just one of the media outlets operating in a media-abundant society?

Prior to the explosion of communications technologies, the censorship of a particular medium (or of a particular way of conveying an idea or information) amounted more or less to a complete censorship of that idea or information. But now, courts should expand their vision when addressing the restrictions placed on one kind of output or imagery of one kind of media. Courts should look at the whole of the media society to see if a restriction on one form of media is really an unconstitutional infringement on speech. In a media society bulging with unlimited media content, courts should approach censorship issues as they do issues of statutory construction or interpretation—they should look at the whole

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89. 244 F.3d at 577.

90. *Id.*

91. William Li, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467, 476 (2003).

92. Campbell, *supra* note 27, at 816.

scheme. They should examine whether the particular restriction amounts to an effective censorship of an idea or piece of information in the society at large.<sup>93</sup>

The video game industry argues that unless it receives full constitutional protection, it may have to "sanitize" its games.<sup>94</sup> But even if such "sanitization" occurs, will an idea or opinion be smothered? Is somehow the spirit of the First Amendment violated if video games have a little less blood and gore and mayhem? Is graphic, sensationalized violence that essential to any useful idea? Are sophisticated, intelligent games not possible without blood-curdling violence? If video games cannot survive without the use of such manipulative violence, what does that say about video games or about the direction of our society?

#### IV. THE JUDICIAL DUTY TO DEFINE PROTECTED SPEECH

As technology advances, more communication media will be developed; and as America, the world leader in media, increasingly specializes its economy toward its strengths, there will be many different kinds of technological imagery, graphics, and entertainment available. Therefore, it will become necessary for the courts to determine, amidst this flood of technology, precisely what forms of entertainment qualify as protected speech under the First Amendment.

The Supreme Court has noted that a "medium of expression" should be judged by standards uniquely suited to it, because "each [medium] may present its own problems."<sup>95</sup> Thus, even though the Supreme Court has not yet addressed the applicability of the First Amendment to video games, it has nonetheless directed lower courts to study each medium before making any such application. In the past, the Supreme Court has carved out several exceptions to First Amendment protection: fighting words,<sup>96</sup> obscenity,<sup>97</sup> child pornography,<sup>98</sup> defamation,<sup>99</sup> clear and present dangers,<sup>100</sup> and speech intended to incite imminent unlawful activity.<sup>101</sup> Therefore, there is certainly nothing preventing the courts from

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93. Courts can distinguish between laws that suppress ideas and laws that only suppress particular expressions of those ideas. See *Cohen v. California*, 403 U.S. 15, 19 (1971) (stating that the First Amendment has "never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses"). For instance, many books and movies express violence—so do we really need a video game expression of the same thing (and in a way that has a particularly harmful effect on children)?

94. Li, *supra* note 91, at 494.

95. *Southeastern Prods., Inc. v. Conrad*, 420 U.S. 546, 557 (1975).

96. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

97. *Miller v. California*, 413 U.S. 15, 23 (1973).

98. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

99. *Gertz v. Welch*, 418 U.S. 323 (1974).

100. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

101. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). All the above categories of speech are often referred to as low-value speech. Although the government cannot suppress low-value speech arbitrarily, courts normally uphold restrictions as long as the government can show a rational basis for its actions. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 195 (1983) (noting that "[t]he conclusion

carving out further exceptions as new media or new forms of entertainment may warrant.

Not only are there judicially-created exceptions to speech covered by the First Amendment, but there is also a hierarchy of speech within the First Amendment. Different types of speech receive varying levels of First Amendment protection.<sup>102</sup> Noncommercial speech, for instance, is “consistently accorded . . . a greater degree of protection than commercial speech.”<sup>103</sup> A priority scheme even exists with respect to nonobscene, sexually-explicit speech.<sup>104</sup> “[T]he First Amendment offers such speech protection ‘of a wholly different and lesser magnitude.’”<sup>105</sup> Courts have found “a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance.”<sup>106</sup> For instance, in approving a school district’s sanctioning of a student speech containing sexual innuendo and profane language, the Supreme Court drew a clear distinction between such speech and a more serious message of political protest, which would be protected.<sup>107</sup>

First Amendment jurisprudence has created somewhat of a hierarchy in the constitutional protection of speech: “[c]ore political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; [and] obscenity and fighting words receive the least protection of all.”<sup>108</sup> Speech that forms “no essential part of any exposition of

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that a particular class of speech has only low first amendment value does not mean that the speech is wholly without constitutional protection or that the government may suppress it at will”).

102. See Ausness, *supra* note 17, at 638.

103. Clear Channel Outdoor, Inc. v. City of Los Angeles, 234 F. Supp. 2d 1127, 1132 (C.D. Cal. 2002) (stating that “[w]hile commercial speech is afforded First Amendment protection, noncommercial speech is higher up on the hierarchy of protected speech”), *vacated by* 340 F.3d 810 (9th Cir. 2003); see also Rappa v. New Castle County, 18 F.3d 1043, 1055 (3d Cir. 1994); Arlington County Republican Com. v. Arlington County, 983 F.2d 587, 593 (4th Cir. 1993); Commodity Trend Serv. v. Commodity Futures Trading, 233 F.3d 981, 993 (7th Cir. 2000) (stating that “[c]ommensurate with its subordinate position within the First Amendment hierarchy, advertising receives less protection . . . than fully protected speech”). “Commercial speech occupies a position somewhere between fully-protected speech and ‘low value’ speech in the First Amendment hierarchy.” Ausness, *supra* note 17, at 639.

104. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (stating that “it is manifest that society’s interest in protecting [erotic materials] is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate . . . few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice”).

105. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 439 (6th Cir. 1998) (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976)).

106. *Id.* (quoting *Young*, 427 U.S. at 61); see also *Encore Videos, Inc. v. City of San Antonio*, 310 F.3d 812, 820 (5th Cir. 2002) (sexually-oriented expression falls into “a category of speech subject to less than full First Amendment protection” (quoting *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1276 (5th Cir. 1988))).

107. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986).

108. *Cannabis Action Network v. City of Gainesville*, 231 F.3d 761, 775 (11th Cir. 2000) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring)).



ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality” falls low on the First Amendment ladder.<sup>109</sup> There exists “practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs.”<sup>110</sup>

In addition to this hierarchy within the First Amendment, certain speech can be treated differently when being exposed to children.<sup>111</sup> Given the compelling interest in the upbringing of children, the government can sometimes enact laws that shield children from material that is otherwise protected.<sup>112</sup> The Court has recognized three justifications for treating the constitutional rights of children differently from those of adults: the “vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing.”<sup>113</sup> In *Prince v. Massachusetts*, the Court stated that some types of speech available to adults are “wholly inappropriate for children” of “tender years.”<sup>114</sup> In *Ginsberg v. New York*, the Court upheld a state regulation aimed at suppressing only children’s access to indecent speech, while leaving adult access unfettered.<sup>115</sup> The Court ruled that it was permissible “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.”<sup>116</sup> This legal dichotomy of allowing adult access to materials, while prohibiting access to minors, did not violate a minor’s First Amendment rights.<sup>117</sup>

To assess whether a particular act or imagery is protected by the First Amendment, a court must first determine if the act or imagery amounts to speech. Once that issue is decided, the court must then address whether the expression falls within (or outside) the ambit of protected

109. *United States Healthcare, Inc. v. Blue Cross of Greater Phil.*, 898 F.2d 914, 929 (3d Cir. 1990) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); see also *Zapach v. Dismuke*, 134 F. Supp. 2d 682, 687 (E.D. Pa. 2001) (“Speech on public issues and political matters lies at the heart of protected speech.” (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))).

110. *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (quoting *Mills*, 384 U.S. at 218); see also *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984) (“[E]xpression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values’” (quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982)); *Garrison v. Louisiana*, 379 U.S. 64, 74 (stating that “speech concerning public affairs is more than self-expression; it is the essence of self-government”).

111. See Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 *VAND. L. REV.* 427, 436-46 (2000).

112. *Id.*

113. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

114. 321 U.S. 158, 170 (1944); see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001) (noting that children of tender years are children whose experience in the real-world is limited and their beliefs “are the function of environment as much as of free and voluntary choice,” (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985))).

115. 390 U.S. 629 (1968).

116. *Id.* at 637.

117. *Id.*

speech. For instance, even if video games are to be considered a form of expression, the decision must then be made whether that particular expression is core speech protected by the First Amendment, or whether it is merely low-value speech. One of the ways of determining whether certain speech is low-value is whether it serves the essential purposes of the First Amendment.

## V. DEFINING FIRST AMENDMENT SPEECH

### A. THE JUDICIAL FAILURE TO MAKE THE EFFORT

In *Watters v. TSR, Inc.*, a mother brought a wrongful death action against the maker of the *Dungeons and Dragons* video game, alleging that the game had caused her son to commit suicide.<sup>118</sup> The court held that regardless of whether *Dungeons and Dragons* was characterized as literature or merely a game, it nonetheless fell within the category of protected speech;<sup>119</sup> however, no analysis was provided as to why the game constituted protected speech. This stance was similar to the one later taken in the *Kendrick* and *James* cases, where the courts adopted an “absolutist” position that all video games, even if designed solely to entertain, “are not only a protected form of expression but are entitled to the same level of protection as political speech.”<sup>120</sup>

Such automatic presumption of constitutional status mirrors the way the courts have approached other kinds of free speech cases. For instance, in *Barnes v. Glen Theatre, Inc.*, the Supreme Court recognized that the language of several previous cases had established that nude dancing constituted protected expression.<sup>121</sup> Although stating that public nudity was not protected,<sup>122</sup> the Court provided no real guidelines as to why nude dancing was protected speech, nor did it provide guidance as to the constitutional distinction between nude dancing and public nudity.<sup>123</sup> The Court made no attempt to define what kind of speech the First Amendment was meant to protect; instead, it simply made the same presumption of constitutional coverage that would later be made in the violent video game cases.<sup>124</sup>

With respect to determining what speech is to be protected under the First Amendment, courts have found an “elusive line between entertaining and informing.”<sup>125</sup> Instead of trying to address or determine this elusive line, however, the courts have simply fallen back upon a presumption of protected speech. They have not articulated a coherent theory or any

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118. 715 F. Supp. 819, 820 (W.D. Ky. 1989), *aff'd on other grounds*, 904 F.2d 378 (6th Cir. 1990).

119. *Id.* at 821.

120. See Kiernan, *supra* note 54, at 215.

121. 501 U.S. 560, 565 (1991).

122. *Id.* at 571.

123. But does that mean that essentially anything done up on a stage is protected speech?

124. See *Barnes*, 501 U.S. at 571.

125. See Kiernan, *supra* note 54, at 217.

set of factors that might ever justify not extending constitutional protection.<sup>126</sup> Consequently, we have been left with the rule that practically any form of entertainment will be viewed as protected speech.

This approach, however, poses problems when viewed within the larger context of the media society that America has become. Contrary to the situation even twenty or thirty years ago, the advances in communication technologies have brought on an explosion of different kinds and forms of entertainment. If the courts cannot somehow carve out of this dense forest of entertainment a clearing of First Amendment speech, then the First Amendment itself will increasingly lose meaning, not amidst censorship, but amidst a suffocating blanket of media chatter.

The line of recent video game cases reveals a direction in free speech jurisprudence that may very well be at odds with the purposes of the First Amendment. The decisions seem to rest constitutional protection on the artistic creativity embodied in the software, rather than upon any communication of ideas. But if artistic creativity is the essential component of protected speech, then should not the color schemes and furniture arrangements of interior designers qualify for First Amendment protections?

The video game cases also seem to rely on the realism that the games are able to convey. Sophisticated games today use “full-motion video, detailed animation, and stereo surround sound” to bring their action to life.<sup>127</sup> They are able “to simulate real-world environments” in games like *Postal*, *Doom*, and *Mortal Kombat*.<sup>128</sup> However, if simulating reality is a component of First Amendment coverage, then shouldn't the sets and targets in a realistic shooting range qualify for constitutional protection?

## B. THE MEIKLEJOHN APPROACH TO DEFINING PROTECTED SPEECH

Most First Amendment textbooks contain a section discussing the purposes and values of free speech. There is the truth value, the self-fulfillment value, the safety-valve value, and the democratic self-governance value.<sup>129</sup> This latter value is often associated with, or illustrated by, the writings of Alexander Meiklejohn.<sup>130</sup> To Meiklejohn, the First Amendment does not forbid the *abridging* of speech, but only the *abridgement of freedom of speech*<sup>131</sup>—a freedom that applies only to the political speech necessary for the conduct of self-government. Meiklejohn also sees a dis-

126. *Id.*

127. *Id.* at 218.

128. *Id.*

129. *See, e.g.*, GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 998-1005 (4th ed. 2001).

130. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); MEIKLEJOHN, *supra* note 8. “In modern times, the prominent place of ‘democratic self-governance’ as a rationale for protecting freedom of speech is due in no small measure to the prodigious scholarly efforts of Alexander Meiklejohn who, in a series of important works, articulated the view that freedom of speech is necessary to intelligent self-governance in a democracy.” 1 RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 27 (2003).

131. MEIKLEJOHN, *supra* note 130, at 19 (emphasis added).

inction between public speech and private speech.<sup>132</sup> The First Amendment covers only speech that is related to self-governance because only that kind of speech is truly part of the public arena.<sup>133</sup> By contrast, speech that is pursued merely for private purposes or gain amounts to a mere individual good.

Meiklejohn argues that since “self-governance is the *whole point*” of the American constitutional scheme, then “*freedom of speech* must be defined in ‘relation to self-governance.’”<sup>134</sup> Essentially, for Meiklejohn, freedom of speech *is* self-governance. Consequently, the First Amendment must be viewed within the context of the democratic system in which it functions, “which is not a marketplace free-for-all, but a self-governing society with a *community of purpose*.”<sup>135</sup>

Meiklejohn’s views regarding the First Amendment’s focus on political speech have been adopted by other free speech scholars.<sup>136</sup> Although “the Supreme Court has repeatedly emphasized the importance of political speech,” it has never ruled that to qualify for high levels of constitutional protection the speech at issue must relate to self-government.<sup>137</sup> However, in *Garrison v. Louisiana*, the Court did state, for example, that

132. *Id.* at 94.

133. 1 SMOLLA, *supra* note 130, at 30.

134. *Id.*

135. *Id.* at 32. Meiklejohn declared that the First Amendment applies only to speech that bears, “directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest.” MEIKLEJOHN, *supra* note 8, at 79. According to Meiklejohn, the First Amendment “is not the guardian of unregulated talkativeness . . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.” *Id.* at 26.

136. See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 62 (1975) (declaring that “the First Amendment should protect and indeed encourage speech so long as it serves to make the political process work”); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 358 (1978) (contending that “the sole legitimate First Amendment principle protects only speech that participates in the process of representative democracy”); Harry Kalven, Jr., *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 208 (arguing that the First Amendment “has a central meaning—a core of protection of speech without which democracy cannot function”).

137. 1 SMOLLA, *supra* note 130, at 33; see also *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (“There can be no doubt that the expenditures at issue in this case [expenditures by independent political committees supporting reelection of President Reagan] produce speech at the core of the First Amendment.”); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“The First Amendment affords the broadest protection to such political expression . . . .”); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“To permit the continued building of our politics . . . .”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“[T]he essence of self-government . . . .” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964))); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”). In *Connick v. Myers*, an action brought by an ex-government employee who claimed she was fired in retaliation for criticisms she made about her employer, the Court focused on whether the speech was political in character and whether it addressed “a matter of public concern.” 461 U.S. 138, 146 (1983). The Court examined whether the subject matter of the speech was one upon which “free and open debate is vital to informed decision-making by the electorate.” *Id.* at 145 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968)).

“speech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>138</sup> This opinion was repeated in *FCC v. League of Women Voters*, where the Court stated that “editorial opinion on matters of public importance . . . is entitled to the most exacting degree of First Amendment protection,”<sup>139</sup> and that the “Framers of the Bill of Rights were most anxious to protect—speech that is ‘indispensable to the discovery and spread of political truth.’”<sup>140</sup> However, just when the Court seems about to clarify the First Amendment hierarchy and the place of political speech within that hierarchy, it backs away and refuses to make any such distinctions. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, for instance, the Court even suggested that commercial speech might be *more* important than political speech: a “consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”<sup>141</sup> Then when the Court recognized that some commercial speech lacked any public interest or importance whatsoever, it refused to distinguish between those types of speech and other speech that did possess a degree of public interest.<sup>142</sup>

As difficult a task as it is, the job of clarifying the parameters and characteristics of the kind of speech protected by the First Amendment is a job that needs to be done, especially as the amount of “speech” in our media society increases exponentially. Meiklejohn knew it was not easy to find a definition for political speech, but the mere difficulty of the task is no reason to abandon it.<sup>143</sup>

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The Court stated that if the speech was not of public concern, there was no First Amendment protection against dismissal. *Id.* at 146.

138. 379 U.S. 64, 74-75 (1964).

139. 468 U.S. 364, 375-76 (1984).

140. *Id.* at 383.

141. 425 U.S. 748, 763 (1976) (emphasis added).

142. STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 53 (1990); see also *Va. State Bd. Pharmacy*, 425 U.S. at 764-65 (stating that “no line between publicly ‘interesting’ or ‘important’ commercial advertising and the opposite kind could ever be drawn”). The Supreme Court has also backed away from an approach it used in *Connick v. Myers*, where it held that a public employee could be discharged for speech that did not relate to matters of public concern—or, in other words, that the First Amendment only protected speech that related to “matters of public concern.” 461 U.S. 138 (1983). This public concern test essentially adopts a “defining in” approach to First Amendment doctrine. See *supra* note 85. But the Court has not built upon the “public concerns” approach used in *Connick*. It has not rested constitutional protection upon a definition of public discourse that distinguishes “speech about ‘matters of public concern’ from speech about ‘matters of purely private concern.’” See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 667 (1990). If it had done so, it may well have seen that the “speech” of video games is not the kind of speech that makes up the public discourse. It is not something that becomes part of a wider conversation, but simply an entertainment that begins and ends with the user.

143. As Professor Sunstein notes, “there is no way to operate a system of free expression without drawing lines. Not everything that counts as words or pictures is entitled to full constitutional protection. The question is not whether to draw lines, but how to draw the right ones.” Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 308 (1992).

The American constitutional scheme, within which the First Amendment is a part, is concerned not with individual freedom but with the effective working of a democratic system of government (though respecting the individual's ability to participate in that system).<sup>144</sup> Judge Robert Bork once went so far as to argue that the First Amendment should be limited to protecting only explicitly political speech.<sup>145</sup> He wrote that freedom for literature, for instance, would depend not on constitutional mandates, but upon the "enlightenment of society and its elected representatives."<sup>146</sup> This is not as harsh a view as it might first seem. First of all, for most authors, the abolition of the First Amendment would have no practical effect on the dissemination of their work. Second, even if a book was taken out of a library in one community, it would probably be available in the next community down the road, and certainly available for purchase through mail-order or the Internet. Third, even if a book were banned because it had no First Amendment protection, there would be full constitutional protection for any protest that arose over that decision. In other words, while the book itself might not constitute political speech covered by the First Amendment, any protest over a book-banning law would certainly be protected speech.<sup>147</sup> The advantage of the Bork approach is that it gives communities the flexibility to deal with troublesome media like violent video games.<sup>148</sup>

Due to the flood of media technologies in search of entertainment content, and because of the fact that traditional political speech can be crowded-out by this entertainment and marketing, the courts need to give a stronger voice and identity to the First Amendment. This identity can only come from more clearly defining the types of speech that warrant constitutional protection. Perhaps, in light of how courts are dealing with new media forms like video games, it is time to revisit Alexander Meiklejohn's theories on the First Amendment and the type of speech it protects.

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144. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

145. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20 (1971).

146. *Id.* at 28.

147. Professor Sunstein makes a similar argument. He argues that "[r]estrictions on political speech have the distinctive feature of impairing the ordinary channels for political change." Sunstein, *supra* note 143, at 306. As long as there is freedom of political speech, controls on other kinds of speech can always be protested. For instance, "[i]f the government bans violent pornography, citizens can continue to argue against the ban. But if the government forecloses political argument, the democratic corrective is unavailable. Controls on nonpolitical speech do not have this uniquely damaging feature." *Id.*

148. The everything-is-protected message of First Amendment jurisprudence has helped to dull society's duty to make judgments about the state of civilized discourse in the public arena. According to Judge Bork, "[o]ne of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality." ROBERT BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 9 (1984). He decries the entry into First Amendment law of what he describes as the "old, and incorrect, view that the only kinds of harm that a community is entitled to suppress are physical and economic injuries. . . . The result of discounting moral harm is the privatization of morality, which requires the law of the community to practice moral relativism." *Id.* at 3.

## VI. CONCLUSION

As the media component of American society grows, more “content” is needed to fill all the digitized television channels, Internet sites, DVD display racks, and video game store shelves. The explosive increase in all this media content poses a new problem for the First Amendment. It poses a crowding-out problem: a situation where media content that has little value for a democratic society crowds out the kind of political and public interest speech that, according to Alexander Meiklejohn, the First Amendment is intended to protect.<sup>149</sup>

For the past century, since *Abrams v. United States*,<sup>150</sup> judges have been concerned, in a First Amendment context, with freeing the marketplace of ideas from any censoring impulses of government. However, as the twenty-first century gets underway, a completely different concern should be occupying the courts’ First Amendment attentions. This concern still involves censorship, but a censorship of a much different type. Now, the real censorship danger to political speech is an indirect censorship—a censorship caused by the flood of entertainment and advertising that threatens to choke out political speech.<sup>151</sup> The courts contribute to this indirect censorship if they fail to closely scrutinize any new forms of media content that make a claim for speech protection under the First Amendment.

The video game cases reveal that courts tend to adopt a presumption of constitutional protection to new forms of media content. Yet there is nothing in First Amendment jurisprudence that commands the judiciary to make this presumption. Strict scrutiny applies only after a particular form of expression is deemed to constitute speech. Before all the First Amendment protections come into play, the courts must ensure that the First Amendment actually covers the particular media or content at issue. Next, even after that particular media or content is determined to warrant First Amendment coverage, the courts should then place it within the First Amendment hierarchy; and in doing so, the courts should also consider whether the content or media at hand is sufficiently “low-value” to receive the kind of treatment given to fighting words and defamation and

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149. Professor Sunstein agrees with Meiklejohn that “the First Amendment is principally about political deliberation.” Sunstein, *supra* note 143, at 301. Moreover, Sunstein claims that “every Justice has expressed some such view within the last generation.” *Id.* He argues that a “conception of free speech that centers on democratic governance appears to be the best way to organize our considered judgments about cases likely to raise hard First Amendment questions.” *Id.* at 307. Sunstein also takes Meiklejohn’s theory one step further, by offering his own definition of political speech: “I will treat speech as political when it is both intended and received as a contribution to public deliberation about some issue.” *Id.* at 304. Using this definition, video games would not qualify as political speech because they are not being received as contributions to public deliberation, regardless of whether they are intended as such.

150. 250 U.S. 616 (1919) (Holmes, J., dissenting).

151. Some observers have noted how many types of media content in contemporary society amount more to a type of commodity or commercial product or action than a form of speech or communication of ideas or information. See PATRICK M. GARRY, *AN AMERICAN PARADOX: CENSORSHIP IN A NATION OF SPEECH* (1993).

obscenity. In their evaluation of new media intent, the courts are not confined to the existing “low-value” categories. There is nothing preventing courts from creating new categories as technological developments warrant. In this sense, the question can be asked, in connection with the degree of positive value associated with each kind of content, whether there is any real difference between obscenity and violent video games? Should they both fail to warrant constitutional protection? Do they not rise to the kind of speech the First Amendment means to cover, even if their failure occurs in different ways? Do either one of them contribute anything of real, lasting value to a democracy dependent on the healthy development of its youth?



