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Video Games as a Protected Form of Expression

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VIDEO GAMES AS A PROTECTED FORM OF EXPRESSION

*Paul E. Salamanca**

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I. INTRODUCTION

Over the past few years, courts have properly begun to hold that video games fall within the protective scope of the First Amendment. These decisions incorporate two distinct findings: First, video games are a form of expression presumptively entitled to constitutional protection. Second, they do not fall into a category of unprotected speech such as obscenity¹ or incitement.² As a matter of precedent and theory, these holdings are correct. Although the Supreme Court has never isolated a single, unifying justification for the protection of speech,³ drawing video games within the First Amendment's protection is consistent with longstanding precedent and promotes many of the values most commonly associated with that provision of the Constitution. If courts are to remain faithful to precedent, they cannot easily ignore the literary and artistic aspects of many video games. Neither can courts avoid acknowledging the rapidly disappearing technological and conceptual distinction between video games and motion pictures, which the First Amendment has protected for over fifty years.⁴ As a matter of policy, protecting video games will promote an important avenue of expression, release, and self-fulfillment from the perspective of both creators and players.⁵ Indeed, because of the

¹ See *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth basic test for obscenity).

² See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (setting forth basic test for incitement); see also *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam) (elaborating on *Brandenburg*). The government also has the general power to regulate speech on the basis of its content if it adopts means necessary and narrowly tailored to serve a compelling public interest. *Sable Comm'ns v. FCC*, 492 U.S. 115, 126 (1989).

³ See Martin H. Redish, *The Value of Free Speech*, 130 U. PENN. L. REV. 591, 591 (1982) ("There seems to be general agreement that the Supreme Court has failed in its attempt to devise a coherent theory of free expression.").

⁴ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding that expression by means of motion pictures is protected by free speech and free press guarantees of First Amendment).

⁵ See David C. Kiernan, Note, *Shall the Sins of the Son Be Visited upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 219-20 (2000) (recognizing video games as form of expression). Although Kiernan assumes that video games are a form of expression, he goes on to suggest that they be treated as a form of incitement outside the protective ambit of the First Amendment. See *id.* at 236 ("*Brandenburg* was not intended to apply to the tort context and thus the lower courts have erroneously applied this highly protective test to protect negligent media defendants."). My position differs from Kiernan's on this latter point. See *infra* notes 263-75 and accompanying

interactive nature of video games, the distinction between “creator” and “player” in this medium may have little enduring meaning.⁶

Notwithstanding the apparent unanimity of the courts with regard to the protected status of video games, several commentators have taken the contrary position. Starting from a variety of premises—ranging from an asserted lack of meaningful content to claimed deleterious effects on children—these commentators suggest that courts should adopt a more lenient, government-friendly standard with respect to video games than that adopted for traditional media such as books and newspapers.⁷ This Article responds to these commentators; describes, defends, and to some extent criticizes recent decisions extending constitutional protection to video games; and identifies points courts should consider in future decisions involving the extension of protection to new media.

The judicial project of extending constitutional protection to video games formally began in early 2001, when the United States Court

text.

⁶ See DAVID KUSHNER, *MASTERS OF DOOM: HOW TWO GUYS CREATED AN EMPIRE AND TRANSFORMED POP CULTURE* 165-68 (2003) (describing how “players” substantially rewrote video game released in cyberspace); cf. Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1623-24 (1995) (discussing interactive communication and noting that “the architecture of the network makes no distinction between users who are information providers and those who are information users. In fact, most users play both roles from time to time.”).

⁷ See, e.g., Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 160-61 (2004) (raising objections to full constitutional protection for video games); Kiernan, *supra* note 5, at 250 (proposing broader definition of “incitement” for video games containing violent imagery); cf. Anthony Ventry III, Note & Comment, *Application of the First Amendment to Violent and Nonviolent Video Games*, 20 GA. ST. U. L. REV. 1129, 1131 (2004) (arguing that courts should decide whether the First Amendment protects video games on “case-by-case” basis). Other commentators have made similar proposals for a broad category of media that includes, but is not limited to, video games. See, e.g., KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* 2-3 (2003) (arguing for inclusion of books, films, and video games); David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 1007 (2002) (arguing for inclusion of commercial speech, video games, and pornography); David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 45-59 (1994) (finding incitement speech hidden in music); Juliet Dee, *Basketball Diaries, Natural Born Killers and School Shootings: Should There Be Limits on Speech Which Triggers Copycat Violence?*, 77 DENV. U. L. REV. 713, 737 (2000) (noting violent content in a variety of media); John Charles Kunich, *Natural Born Copycat Killers and the Law of Shock Torts*, 78 WASH. U. L.Q. 1157, 1158 (2000) (discussing violent forms of mass entertainment).

of Appeals for the Seventh Circuit decided *American Amusement Machine Ass'n v. Kendrick*.⁸ This case involved a challenge to an Indianapolis municipal ordinance that restricted minors' access to video games.⁹ In reversing the district court, the Seventh Circuit (per Judge Posner) concluded that the First Amendment applies to most, if not all, video games¹⁰ and instructed the district court to preliminarily enjoin enforcement of the ordinance.¹¹

An unbroken series of similar holdings followed the Seventh Circuit's decision in *American Amusement*, including decisions in 2002 by the United States District Court for the District of Colorado,¹² the United States District Court for the District of Connecticut,¹³ and the United States Court of Appeals for the Sixth Circuit (per Judge Boggs);¹⁴ a decision in mid-2003 by the United States Court of Appeals for the Eighth Circuit (per Judge Morris Sheppard Arnold);¹⁵ and a decision in mid-2004 by the United States District Court for the Western District of Washington.¹⁶ Thus, this new medium currently—and perhaps ironically—enjoys constitutional protection in much of the bread basket of the United States and receives only scattered protection on the coasts.¹⁷

⁸ 244 F.3d 572 (7th Cir. 2001).

⁹ *Id.* at 573.

¹⁰ *Id.* at 579-80.

¹¹ *Id.* at 580.

¹² See *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1282 (D. Colo. 2002) (holding that video games are protected under First Amendment).

¹³ See *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2002) (finding video games to be expression protected by First Amendment).

¹⁴ See *James v. Meow Media, Inc.*, 300 F.3d 683, 699 (6th Cir. 2002) (refusing to attach tort liability to ideas and images conveyed by video games for fear of raising constitutional concerns).

¹⁵ See *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 960 (8th Cir. 2003) (holding that video games are protected form of speech under First Amendment).

¹⁶ See *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1188-90 (W.D. Wash. 2004) (holding that law penalizing distribution of specific video games to minors violated First Amendment under strict scrutiny).

¹⁷ This development is partially attributable to local values and partially attributable to fate. The cases that arose in the Seventh and Eighth Circuits involved municipal ordinances that limited minors' access to video games. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001); *IDSAs*, 329 F.3d at 956. These ordinances reflected culturally conservative impulses. The cases that arose in the District of Colorado and the Sixth Circuit involved tort actions over school shootings. See *James*, 300 F.3d at 687 (discussing school shooting in Paducah, Kentucky, in December 1997); *Sanders*, 188 F. Supp. 2d at 1268 (involving school shooting in Littleton, Colorado, in April 1999). The District of Connecticut's

It would be difficult to underestimate the importance of this protection. Due to the controlling nature of federal law within its scope of operation, full constitutional protection for creators of video games may well preclude civil liability for tort actions arising from any mishap concerning such a game.¹⁸ At the very least, First Amendment protection would require a court to construe the law of its jurisdiction in such a way as to avoid imposing liability.¹⁹ Thus, a maker sued in tort would likely prevail on a motion to dismiss for failure to state a claim upon which relief may be granted. Needless to say, defendants cannot ask for better protection, inasmuch as they would avoid liability and discovery. Similarly, a creator of video games challenging an ordinance or statute restricting access to such games would readily subject the ordinance or statute to

case also involved a tort action, *see Wilson*, 198 F. Supp. 2d at 169 (stabbing of one child by another), whereas the Western District of Washington's case involved a state-wide regulation of access. *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1183.

As this Article moves toward publication, at least two suits are pending that involve video games and the First Amendment. One arises from a series of shootings that took place on Interstate 40 in Tennessee in June 2003. *See Hamel v. Sony Computer Entm't Am. Inc.*, No. 28-613 (Cocke County Tenn. Cir. Ct. filed Oct. 20, 2003); *see also J.J. Staumbaugh, Maker of Violent Game Sued; Fatal Cocke County Spree Draws Suit Asking Millions from Firms, Teens' Parents*, KNOXVILLE NEWS-SENTINEL, Oct. 21, 2003, at B1 (discussing lawsuit brought against video game manufacturers and retailers alleging that certain games inspired copycat violence in young consumers). The other case involves a challenge to a recently enacted Illinois statute that would restrict minors' access to certain video games. *See David L. Hudson, Jr., First Amendment Center, What's on the Horizon*, http://www.firstamendmentcenter.org/speech/arts/horizon.aspx?topic=arts_horizon (last visited Sept. 4, 2005) (citing *Entertainment Software Ass'n v. Blagojevich*, No. 05C-4265 (N.D. Ill. filed July 25, 2005)). *See generally John Patterson & Eric Krol, Video Game Legal Fight Begins[:] Industry, Retailers Quickly File Lawsuit on the Constitutionality of Newly Signed Law*, CHI. DAILY HERALD, July 26, 2005, at 1 (discussing constitutional and legal issues arising over statute designed to prevent sale of certain video games to minors).

Additionally, at least one Senator has called for national restrictions on sales of certain video games to minors. *See Shihoko Goto, Clinton Joins Video Game Censoring Rally*, UPI, July 15, 2005 ("[Senator Clinton] called for enforcement of the existing video-game ratings system by punishing retailers who sell the games to minors. She would impose a \$5,000 penalty on those caught providing minors with sexually explicit and violent games.").

¹⁸ *See U.S. CONST.* art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also Anderson, supra* note 7, at 1004-05 ("When a First Amendment defense is invoked in a tort case, it properly raises only one issue: Would judgment for the plaintiff . . . abridge the freedom of speech or press? All other questions . . . are ancillary to that.").

¹⁹ *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (refusing to extend jurisdiction of National Labor Relations Board without clear expression of legislative intent).

strict judicial scrutiny. In most, if not all, instances, such scrutiny would result in the invalidation of the ordinance or statute.

This Article proceeds in three parts. In Part II, I describe the process by which the Supreme Court assigned a broad protective scope to the First Amendment.²⁰ In Part III, I detail three prominent decisions in which courts addressed the specific question of video games within this First Amendment framework.²¹ In Part IV, I evaluate these decisions and respond to commentators who have proposed that courts afford less than full constitutional protection to video games.²²

II. BACKGROUND

Video games and motion pictures went through almost exactly the same metamorphosis from formal exclusion from the protective ambit of the First Amendment to formal inclusion. As I hope to demonstrate in this Article, this shared experience was not a coincidence. Instead, in both cases, courts failed at first to perceive the expressive and artistic potential of the new medium before them, only to recognize that potential long after it had come into fruition.²³

A. MOTION PICTURES

In 1915, the Supreme Court held in *Mutual Film Corp. v. Industrial Commission of Ohio* that motion pictures were not a form of expression eligible for constitutional protection.²⁴ This decision involved a review of an Ohio statute that required distributors to submit their films to a "board of censors" before they could be presented in the state.²⁵ *Mutual Film* challenged the statute as an improper prior restraint on speech in violation of Ohio's version of

²⁰ See *infra* notes 23-73 and accompanying text.

²¹ See *infra* notes 74-193 and accompanying text.

²² See *infra* notes 194-275 and accompanying text.

²³ With respect to motion pictures, see *infra* notes 24-46 and accompanying text. With respect to video games, see *infra* notes 74-193 and accompanying text.

²⁴ 236 U.S. 230, 243-45 (1915).

²⁵ *Id.* at 240.

the First Amendment.²⁶ As a preliminary matter, the Court had to decide whether film was sufficiently analogous to books and newspapers, which almost certainly would have received protection,²⁷ to merit protection as a form of expression.²⁸ The analogy may seem apt to modern eyes, but the Court was working from a distinctly unmodern script, under which even plays, which it referred to as “spectacles,”²⁹ were considered fully subject to the state’s power to regulate for the health, morals, welfare, and safety of the population.³⁰ In fact, although the *Mutual Film* Court acknowledged many of the attributes of motion pictures that would cause modern thinkers to conclude that films were expressive works, it nevertheless rejected any such conclusion:

²⁶ *Id.* at 231. The provision at issue was article I, section 11, of the state’s constitution. When *Mutual Film* brought its action, the Supreme Court had not yet made the First Amendment applicable to the states. (This did not occur until 1925. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding rights of free speech and free press protected under Due Process Clause of Fourteenth Amendment).) *Mutual Film* was therefore obliged to rest its federal case on the Commerce Clause, arguing that Ohio’s statute imposed an excessive burden on the interstate flow of motion pictures. *Mutual Film*, 236 U.S. at 239. The Court rejected this claim. *Id.* at 240.

²⁷ See *id.* at 243 (“We need not pause to dilate upon the freedom of opinion and its expression, and whether by speech, writing or printing. They are too certain to need discussion—of such conceded value as to need no supporting praise.”). This language, however, was dictum; the Court did not actually invalidate a prior restraint on a newspaper until 1931, six years after it first applied the First Amendment to the states. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 722-23 (1931) (finding statute requiring prior restraint to constitute infringement of freedom of press as guaranteed by Fourteenth Amendment).

²⁸ *Mutual Film*, 236 U.S. at 242-43.

²⁹ See *id.* at 243 (finding theater similar to other shows and spectacles). The Supreme Court did not expressly hold that the First Amendment protects plays as a form of expression until 1975. See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (finding theater includes mixing speech with live action and is subject to First Amendment protection).

³⁰ See *Mutual Film*, 236 U.S. at 244 (“[T]he police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation.”). Under the prevailing constitutional doctrine of this period, due process protected almost any activity with an economic or contractual foundation, unless the activity was properly subject to regulation under the police power. See *Lochner v. New York*, 198 U.S. 45, 56 (1905) (striking down statute interfering with economic liberties). As the Court noted in *Lochner*:

In every case that comes before this Court . . . the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?

Id. at 56.

It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.³¹

As this language demonstrates, the Court based its decision on four aspects of films: (1) they are not necessarily dependent upon the printed or spoken word; (2) they are derivative of existing media and therefore in some sense superfluous; (3) they do not so much explain events as depict them; and (4) they are capable of tremendous emotional impact. As I hope to show later in this Article, many of these same arguments, the last of which Donald Lively has described as "fear-based,"³² have been invoked to oppose full constitutional protection for video games.³³

To give the *Mutual Film* Court its due, one can concede that a First Amendment limited to protecting the conventional press is far easier to administer than one that protects parades,³⁴ nude dancing,³⁵ and flag burning.³⁶ Further, such a limited interpretation has arguable value in terms of judicial restraint and majoritarian theory.³⁷ One can also concede that words are often far more precise

³¹ *Mutual Film*, 236 U.S. at 244.

³² Donald E. Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071, 1080 (1985).

³³ See *infra* notes 194-97 and accompanying text.

³⁴ See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 581 (1995) (holding parade organizer has First Amendment right to deny gay group's participation).

³⁵ See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (invalidating ordinance prohibiting nude dancing).

³⁶ See *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (recognizing flag burning as protected expression).

³⁷ See JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* 100 (1996) ("[O]ne of the virtues of the argument from democratic theory is the very strong

and powerful analytical tools than depictions. Indeed, one can even concede that motion pictures work more at an emotive level than books and newspapers, whose effects tend more toward the cognitive. For the *Mutual Film* Court, this was obviously enough. The modern analyst, however, might note the doctrinal conservatism the Court exhibited. Although the Court recognized the importance of protecting opinion, this recognition was limited to expressions of opinion of a highly cognitive nature.³⁸ By imposing this limitation, the Court implicitly discounted the fact that one important aspect of "expression" is its ability to move an audience. Had the Court taken this aspect into account, perhaps it would have concluded that its own analysis required the classification of motion pictures as a form of expression.³⁹

The *Mutual Film* era, which lasted thirty-seven years, was laid to rest in the 1952 case of *Joseph Burstyn, Inc. v. Wilson*.⁴⁰ Between *Mutual Film* and *Joseph Burstyn*, of course, lay one of Hollywood's high plateaus, including films such as *Casablanca*,⁴¹ *Citizen Kane*,⁴² and *The Wizard of Oz*.⁴³ These films would have likely met the approval of Ohio's Board of Censors, but by 1952 it was apparent to the Court that motion pictures were indeed a form of expression, and that the distinctions between motion pictures and traditional media noted in *Mutual Film* did not preclude such a classification:

protection it gives to political speech. If we define that term too broadly we will weaken the First Amendment protection by spreading it too thin."); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 478-80 (1985) (arguing that, by overextending constitutional protections during periods of low national tension, courts undermine strength of such protections in periods of high tension); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (arguing First Amendment should be limited to political speech).

³⁸ See *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 243 (1915) (comparing film to circus).

³⁹ The Court expressly recognized the emotive value of speech in the much later case of *Cohen v. California*, 403 U.S. 15, 26 (1971) ("We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for [the] emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.").

⁴⁰ 343 U.S. 495 (1952).

⁴¹ CASABLANCA (Warner Bros. 1942).

⁴² CITIZEN KANE (RKO 1941).

⁴³ THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.⁴⁴

The *Joseph Burstyn* Court's expanded notion of the predicate for constitutional protection is hard to mistake. Although the Court began its analysis with a bow to the purely cognitive—noting that the First Amendment protects “direct espousal of . . . political or social doctrine”—it went on to indicate that the Constitution also protects “the subtle shaping of thought which characterizes all artistic expression.”⁴⁵ This was a major leap. Not all art is demonstrably political, and that which is political is often only obliquely or remotely so. Nevertheless, the Court suggested that the First Amendment embraced the whole of film as a medium.⁴⁶

⁴⁴ *Joseph Burstyn*, 343 U.S. at 501 (footnote omitted). The Court's decision in *Joseph Burstyn* may have been prefigured to some extent by its earlier decision in *Winters v. New York*, 333 U.S. 507 (1948). The issue in *Winters* was whether the state could criminalize magazines devoted principally to “criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime,” notwithstanding the First Amendment. *Id.* at 508. Although the Court saw “nothing of any possible value to society in [the] magazines,” *id.* at 510, it nevertheless invalidated *Winters*' conviction, reasoning that the line between entertainment and information is so elusive as practically not to exist:

We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.

Id.

⁴⁵ *Joseph Burstyn*, 343 U.S. at 501.

⁴⁶ *See id.* at 502 (“[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”). The *Joseph Burstyn* Court recognized some continuing power in the government to regulate the exhibition of films, but did not indicate any ground for distinguishing among genres within the medium. *See id.* at 502-03 (noting that Constitution does not require “absolute freedom to exhibit every motion picture of every kind at all times and all places”). Justice Reed concurred on the ground that the particular film at issue in the case—*The Miracle*, which had

B. PROGRESS, ALBEIT INCOMPLETE

The evolution of doctrine from *Mutual Film* to *Joseph Burstyn* arguably reflected a significant development in the intellectual and cultural history of the United States. Whereas the *Mutual Film* Court expressed concern for the exposition of opinion only insofar as it found manifestation in highly cognitive forms, the *Joseph Burstyn* Court saw comparable value in less cognitive forms of expression, principally art and drama, that can have an indirect yet powerful effect on political and social values. In fact, the *Mutual Film* Court essentially conceded the potential emotive impact of motion pictures, but assigned it a negative valence.⁴⁷ The *Joseph Burstyn* Court simply altered the valence and consequently promoted the medium to constitutionally protected status.⁴⁸

Notwithstanding the significant liberalizing trend reflected in *Joseph Burstyn*, the question still arises whether the Court was not in some respects continuing to adhere to a relatively conservative doctrinal approach. Although the Court's rationale was subtle, it nevertheless justified its decision in terms of the ultimate political or social impact of motion pictures.⁴⁹ Thus, perhaps the *Joseph Burstyn* Court was simply throwing in the towel on any attempt to distinguish between subtle and overt messages⁵⁰ rather than announcing any intention to protect art for art's sake.

On the other hand, the Court may have been signaling precisely such an intention. According to this view, the grounding of the Court's analysis in the protection of *messages*, subtle or direct, may

been claimed to be sacrilegious—was “of a character” protected by the First Amendment. *Id.* at 506-07 (Reed, J., concurring).

⁴⁷ See *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244 (1915) (noting that motion pictures are “capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition”); see also Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125, 1145 (1996) (noting that “[o]ne of the most offensive applications of governmental authority under *Mutual Film* was censorship designed to preserve the racial status quo”).

⁴⁸ See *supra* notes 40-46 and accompanying text.

⁴⁹ See *Joseph Burstyn*, 343 U.S. at 501 (noting variety of ways film affects public attitudes and behavior).

⁵⁰ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: 1888-1986*, at 514 (1990) (“Even artistic expression has been protected not so much for its own sake as because of the difficulty of determining when it was a vehicle for commentary on public issues.”).

have been nothing more than a fig leaf. One can reasonably assume that the *Joseph Burstyn* Court intended the natural consequences of its decision, and although the "subtle reshaping of thought" has a communicative impact, it may have other impacts as well. There are thus two distinct ways to read *Joseph Burstyn*, with significant ramifications for media that do not seek to affect political discourse in a discernible way.

By the late twentieth century, the Court appeared to resolve this uncertainty largely in favor of protecting even pure art.⁵¹ In the short term, however, the *Joseph Burstyn* Court seemed to perpetuate this ambiguity, as demonstrated in subsequent decisions regarding symbolic conduct.

C. SYMBOLIC CONDUCT

Subsequent to *Joseph Burstyn*, some of the cases that most challenged the Court to define the protective contours of the First Amendment involved so-called "symbolic conduct," in which individuals seek to convey a message through some form of action. Such conduct provokes many of the same issues as pure art because it seeks to convey a message without text. As I hope to demonstrate, however, the Court's work in this area failed to resolve the question of whether the First Amendment protects pure art. Instead, the Court avoided the issue by working out a sophisticated understanding of what constituted a "message."

One of the Court's most comprehensive treatments of the constitutional status of symbolic conduct was its opinion in *Spence v. Washington*.⁵² In this case, a student had displayed outside his window an upside-down United States flag with peace symbols superimposed on either side with removable black tape.⁵³ Given more recent decisions upholding the burning of flags as a form of expression,⁵⁴ we may be astonished to think that the First Amend-

⁵¹ For a discussion of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), see *infra* notes 67-72 and accompanying text.

⁵² 418 U.S. 405 (1974).

⁵³ *Id.* at 406.

⁵⁴ See, e.g., *United States v. Eichman*, 496 U.S. 310, 312 (1990) (invalidating Flag Protection Act of 1989 as applied to flag burners protesting government policy); *Texas v.*

ment would *not* protect such defacement, but the *Spence* Court took pains to decide whether the Constitution can protect a “message” that lacks words.⁵⁵ At trial, Spence testified that he had displayed the flag in protest of the recent invasion of Cambodia and shootings at Kent State University.⁵⁶ He was sentenced to ten days in jail, suspended, and fined \$75; on appeal, the Supreme Court of Washington upheld his conviction.⁵⁷ Reversing, the Court concluded that Spence’s display satisfied a two-part test for protected communication—he had an “intent to convey a particularized message,” and “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”⁵⁸

Spence, and other cases in the same vein,⁵⁹ seemed to establish that for expression to qualify for First Amendment protection, it must convey a message that: (1) can be articulated in words; and (2) can be understood by those who perceive it.⁶⁰ Although this formulation was helpful for Spence and others who engaged in symbolic conduct, it did little to resolve the ambiguity underlying *Joseph Burstyn*. The *Spence* formulation may encompass most speech and symbolic conduct, as well as much art, but it certainly does not include everything that one might regard as “expressive.” Indeed, this test arguably excludes many films, such as *Fantasia*,⁶¹ that lack significant dialogue. It also invites litigation over much *avant-garde* film, not to mention much classical music.⁶² As a

Johnson, 491 U.S. 397, 420 (1989) (invalidating state statute prohibiting desecration of venerated objects as applied to flag burner making political statement).

⁵⁵ See *Spence*, 418 U.S. at 409 (questioning whether student’s act was “sufficiently imbued with the elements of communication”).

⁵⁶ *Id.* at 408.

⁵⁷ *Id.*

⁵⁸ *Id.* at 410-11.

⁵⁹ See, e.g., *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding First Amendment protected students’ right to wear black armbands in protest of war in Vietnam); cf. *United States v. O’Brien*, 391 U.S. 367, 382 (1968) (holding government could punish O’Brien for intentionally burning draft card because of legitimate governmental interest in preserving card as record of holder’s status as potential draftee).

⁶⁰ *Spence*, 418 U.S. at 410-11.

⁶¹ *FANTASIA* (Disney 1940).

⁶² See David B. Goroff, Note, *The First Amendment Side Effects of Curing Pac-Man Fever*, 84 COLUM. L. REV. 744, 757-58 (1984) (“While communication often is ideational, it need not always be. Music is often played solely to create a mood. Much modern art simply tries to

consequence, one might say that *Spence* not only failed to resolve the ambiguity of *Joseph Burstyn*, but also appeared to undermine some of *Joseph Burstyn's* holding.⁶³

Given the apparent inconsistency between *Spence* and *Joseph Burstyn*, one wonders whether the *Spence* Court intended its test to apply only to symbolic conduct and not to what might be described as "pure expressive media." This distinction is enticing, but it begs the question of what "pure expressive media" are and how they are defined. It also encourages protracted litigation over any new medium that lacks a discernible message.⁶⁴ Suffice it to say that, under the doctrinal constraints of *Spence*, one could not know for certain whether the Court intended to draw abstract art within the protective ambit of the First Amendment.

D. THE ROAD TO *HURLEY*

In time, of course, the Court did draw abstract art within the scope of constitutional protection, eliminating the "discernible message" requirement without even a backward glance at the doctrinal limitations seemingly imposed by *Spence*.⁶⁵ Indeed, by the last two decades of the twentieth century, the First Amendment had grown exponentially in its scope, with courts extending constitutional protection to a wide variety of media—many of which

combine attractive colors and patterns without standing for any proposition." (citation omitted)).

⁶³ For a relatively recent attempt to reconstruct the First Amendment along the lines of *Spence*, see Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 304 (1992) (arguing that courts should interpret First Amendment to protect only "political speech" and defining political speech as speech that is "both intended and received as a contribution to public deliberation about some issue" (emphasis omitted)).

⁶⁴ See *infra* notes 74-89 for a discussion of the early cases excluding video games from the protective ambit of the First Amendment.

⁶⁵ The doctrinal conservatism of *Spence* may be attributable to the Court's need to differentiate physical activity that lacks an expressive component, and is therefore fully subject to regulation, from similar activity that includes such a component. Ironically, *Spence* was not the best vehicle for drawing such a distinction. Displaying a flag (except perhaps on a battlefield) has no discernible mechanical purpose; it is purely a means of expression, such that modifying a flag is simply modifying a message. A better vehicle for the distinction was presented in *United States v. O'Brien*, in which O'Brien was prosecuted for burning a draft card. 391 U.S. 367, 369 (1968). Unlike flag burning, there are mechanical reasons why a person would ignite a piece of paper, such as wanting to start a fire.

tend more toward the inchoate than the choate, the artistic than the political.⁶⁶

The Supreme Court succinctly captured these trends in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, which involved the expressive rights of the organizers of a parade.⁶⁷ In this case, certain gays and lesbians of Irish descent (“GLIB”) sought to march as a group in Boston’s St. Patrick’s Day parade.⁶⁸ The organizers of the parade objected, and GLIB brought suit under a statute of the Commonwealth of Massachusetts that forbade sexual orientation discrimination by places of “public accommodation,” which the courts of the state interpreted to include the parade.⁶⁹ Reversing the Supreme Judicial Court of Massachusetts, the Court held that the First Amendment protected the organizers’ right to exclude GLIB from the parade.⁷⁰ In reaching this conclusion, the Supreme Court wrestled with one of GLIB’s principal arguments: because the organizers exercised little control over the content of the parade, the eclectic and kaleidoscopic parade had no particular expressive purpose.⁷¹ This did not deter the Court from recognizing the parade’s protected status: “[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jaberwocky verse of Lewis Carroll.”⁷²

In concluding that the First Amendment applies even in the absence of a particularized or coherent message, the *Hurley* Court emphasized that protected expression can be purely artistic (or

⁶⁶ See *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (dance); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (film); *Winters v. New York*, 333 U.S. 507, 510-11 (1948) (“lurid” magazines); *Argello v. City of Lincoln*, 143 F.3d 1152, 1152-53 (8th Cir. 1998) (fortune telling); *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 66-67 (2d Cir. 1997) (trading cards depicting “heinous crimes”); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) (visual art).

⁶⁷ 515 U.S. 557, 559 (1995).

⁶⁸ *Id.* at 561.

⁶⁹ *Id.* at 561-62.

⁷⁰ *Id.* at 572-73.

⁷¹ See *id.* at 562 (recounting state court’s basis for denying protection).

⁷² *Id.* at 569 (internal quotation marks and citation omitted).

almost purely so) and perhaps also incomprehensible (or quite nearly so). This finding has enormous and unmistakable value for the development of non-cognitive forms of expression, both as a means of affecting audiences and as a means of promoting self-development. Unfortunately, it also presents (or resurrects) the quandary of how to discern the protective scope of the First Amendment. Indeed, given the abstract principle set forth in *Hurley*, the question, "What does the First Amendment protect, other than the traditional press?" becomes roughly synonymous with the profoundly challenging question, "What is art?"⁷³ Perhaps anticipating the abyss presented by the principle set forth in *Hurley*, lower courts first hearing claims that the First Amendment protects video games retreated to the conventional question of whether such games conveyed a discernible message. Finding none, they ruled accordingly.

III. COURTS AND VIDEO GAMES

A. DECISIONS DENYING PROTECTION

Notwithstanding the copious sentiments expressed in *Hurley*, judges may be instinctively inclined to underestimate the expressive potential of new media, particularly where they cannot readily distinguish a new medium from mere "spectacle" of the carnival variety.⁷⁴ Thus, in a series of cases arising in the early 1980s, a number of judges held that video games were not a form of expression falling within the protective ambit of the First Amendment because they failed to convey a discernible message, political or otherwise.⁷⁵ Thus, municipalities could regulate access

⁷³ See Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 252-60 (1998) (describing three major approaches to defining "art"—"formalism," "intentionalism," and "institutionalism").

⁷⁴ See *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 243-44 (1915) (refusing to classify "motion pictures and other spectacles" with "free press and liberty of opinion").

⁷⁵ See *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass 1983) (agreeing with court's analysis in *Showplace* that video games are not protected); *America's Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (holding that video game is pure entertainment with no informational element); *Kaye v. Planning & Zoning Comm'n*, 472 A.2d 809, 810-11 (Conn. Super. Ct. 1983) (finding video

to video games in the same manner in which they regulated access to bowling alleys⁷⁶ and pinball machines.⁷⁷ Perhaps the most evocative of these cases was *Caswell v. Licensing Commission for Brockton*, in which the Supreme Judicial Court of Massachusetts noted that:

[A]ny communication or expression of ideas that occurs during the playing of a video game is purely inconsequential. *Caswell* has succeeded in establishing only that video games are more technologically advanced games than pinball or chess. That technological advancement alone, however, does not impart First Amendment status to what is an otherwise unprotected game.⁷⁸

Although the *Caswell* court did not cite *Spence*, its analysis reflected the approach of that opinion. By looking for a discernible message or an expressed idea in a video game, the court came upon a ground for excluding video games from the First Amendment's protective scope.

Today, video games bear a close resemblance to motion pictures,⁷⁹ and many people would probably be surprised if the First Amendment did not protect them as a form of expression. But to give courts like the *Caswell* court their due, video games in the early 1980s were somewhat limited in their technological capabilities. Although they may have represented a significant technological development beyond pinball, they were still quite short of the works we are familiar with today.⁸⁰ In the early and wildly popular video

games lack element of information or some communicated idea); *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 609-10 (Mass. 1983) (holding that video games do not contain sufficient communicative elements to be entitled to protection); *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922, 927 (Mass. 1983) (stating that any communication that occurs when playing video game is "purely inconsequential").

⁷⁶ *Marshfield*, 450 N.E. at 612.

⁷⁷ *Showplace*, 536 F. Supp. at 174.

⁷⁸ *Caswell*, 444 N.E.2d at 927.

⁷⁹ See William Li, Note, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467, 476-77 (2003) (discussing technological development of video games).

⁸⁰ See KUSHNER, *supra* note 6, at 45-46 (noting that "scrolling" was most salient

game “Pac-Man,” for example, the hero simply moved around an electronic maze, ate dots and packets of energy, and ran away from bad guys.⁸¹ If a judge had the choice of analogizing such a game to *Casablanca* or to pinball, we should not be surprised that he or she made the latter analogy. Indeed, in his later-reversed opinion upholding an ordinance restricting minors’ access to video games, Judge Stephen N. Limbaugh of the United States District Court for the Eastern District of Missouri rejected the video game-motion picture analogy and attempted to reconcile *Spence* and *Joseph Burstyn* as follows:

It appears to the Court if an entirely new “medium” is being given First Amendment protection, there does need to be at least some type of communication of ideas in that medium. It has to be designed to express or inform, and there has to be a likelihood that others will understand that there has been some type of expression.⁸²

In truth, what most distinguished video games from pinball in the early 1980s was not so much their current content as their potential.⁸³ Because pinball is essentially mechanical, it is limited by real spatial constraints. A game of pinball literally takes place in the roughly five cubic feet encompassed by the machine’s glass, with a real ball rolling down real ramps and bouncing off real bumpers and flippers. A video game, by contrast, is essentially representational, like a book, and therefore can be whatever technology can make it. Thus, a screen the size of a computer

technological achievement of video games in 1980s); Kiernan, *supra* note 5, at 218 (noting greater sophistication of video games).

⁸¹ See Wikipedia: The Free Encyclopedia, Pac-Man, <http://en.wikipedia.org/wiki/Pac-Man> (last visited Aug. 21, 2005) (describing Pac-Man game).

⁸² Interactive Digital Software Ass’n v. St. Louis County, Mo., 200 F. Supp. 2d 1126, 1132-33 (E.D. Mo. 2002), *rev’d*, 329 F.3d 954 (8th Cir. 2003).

⁸³ Cf. Goroff, *supra* note 62, at 760-61 (arguing that, in deciding whether Constitution protects new medium, courts should look to medium’s expressive potential). As David Goroff notes, “[t]hat a medium is not currently being used to its fullest potential should not, by itself, place it outside the purview of the first amendment.” *Id.* at 760.

monitor with sufficient technological enhancement can recreate many of the incidents of the invasion of Normandy in 1944.⁸⁴

Indeed, some jurists noted the expressive potential of video games as early as the 1980s. In *Marshfield Family Skateland, Inc. v. Town of Marshfield*, for example, the Supreme Judicial Court of Massachusetts “recognize[d] that in the future video games which contain sufficient communicative and expressive elements may be created.”⁸⁵ Despite this acknowledgment, the court would not allow this recognition to affect its disposition of the matter at hand, noting that it was “not prepared . . . to hold that these video games, which are, in essence, only technologically advanced pinball machines, are entitled to constitutional protection.”⁸⁶ Several years later, the United States Court of Appeals for the Seventh Circuit approached this same general issue with great trepidation in *Rothner v. City of Chicago*, a case involving a challenge to a municipal ordinance regulating minors’ access to video games.⁸⁷ After referring to cases from the early eighties, the *Rothner* court noted that, on the basis of the complaint presented, it could not tell whether the video games at issue were “simply modern day pinball machines” or “more sophisticated presentations involving storyline and plot that convey to the user a significant artistic message protected by the first amendment.”⁸⁸ The court continued:

To hold on this record that *all* video games—no matter what their content—are *completely* devoid of artistic value would require us to make an assumption entirely unsupported by the record and *perhaps* totally at odds with reality.⁸⁹

⁸⁴ See Dan Morris, *Call of Duty II: PC Gamer Makes a United Offensive on Infinity Ward's Offices and Brings Back the Exclusive on the Most Ambitious Wartime Shooter Yet . . .*, PC GAMER, Apr. 2005, at 38, 44 (“In the Normandy campaign, at the village of Bocage, you’ll be treated to grim face-to-face fights as you make your way through the hedgerows.”).

⁸⁵ 450 N.E.2d 605, 609-10 (Mass. 1983).

⁸⁶ *Id.* at 610.

⁸⁷ 929 F.2d 297, 298 (7th Cir. 1991).

⁸⁸ *Id.* at 303.

⁸⁹ *Id.*

Later, this same court was the first to extend constitutional protection to video games.⁹⁰

B. DECISIONS EXTENDING PROTECTION

As noted earlier, the early decisions in which courts denied constitutional protection to video games all arose from municipal ordinances restricting access to arcades.⁹¹ In six recent decisions considering the issue, the courts extended such protection; three of these cases involved similar restrictions on access,⁹² but the other three were tort actions brought against video game developers and distributors, in which the plaintiffs alleged that such games had been the legal cause of injury to themselves or their decedents.⁹³ In the following analysis, I will concentrate on three of these six decisions: the Seventh Circuit's decision in *American Amusement Machine Ass'n v. Kendrick*,⁹⁴ the Sixth Circuit's decision in *James v. Meow Media, Inc.*,⁹⁵ and the Eighth Circuit's decision in *Interactive Digital Software Ass'n v. St. Louis County, Mo. (IDSA)*.⁹⁶ To conclude that the First Amendment protected the video games at issue in these cases, each court had to reach two distinct holdings: First, the games constituted a form of expression presumptively

⁹⁰ See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001) (enjoining enforcement of ordinance restricting minors' access to "harmful" video games).

⁹¹ See *supra* note 75 and accompanying text.

⁹² See *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 956 (8th Cir. 2003) (ordinance enacted by St. Louis County, Missouri); *American Amusement*, 244 F.3d at 573 (ordinance enacted by Indianapolis, Indiana); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1183 (W.D. Wash. 2004) (statute enacted by State of Washington).

⁹³ See *James v. Meow Media, Inc.*, 300 F.3d 683, 687 (6th Cir. 2002) (recounting allegations that video games, along with other media, desensitized youth and caused shooting rampage at school in Paducah, Kentucky); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 169 (D. Conn. 2002) (stating plaintiff's argument that video game design and marketing led to stabbing); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1269 (D. Colo. 2002) (noting plaintiffs' allegations that video games led to school shooting in Littleton, Colorado, by making violence pleasurable and attractive and detaching violence from its natural consequences).

⁹⁴ 244 F.3d 572 (7th Cir. 2001).

⁹⁵ 300 F.3d 683 (6th Cir. 2002).

⁹⁶ 329 F.3d 954 (8th Cir. 2003).

entitled to constitutional protection.⁹⁷ Second, they did not fall into any category of unprotected speech.⁹⁸

With regard to the first holding, the courts' decisions were based on two basic rationales: (1) the video games at issue must communicate a message, because the basis for regulation or imposition of liability proceeds from such an assumption; and (2) video games are expressive because they bear many of the characteristics of previously recognized forms of expression.⁹⁹ The Sixth Circuit's decision in *James* provides a good example of the first argument in action;¹⁰⁰ the Eighth Circuit's decision in *IDSA* illustrates the second.¹⁰¹

With respect to the latter holding, all three courts refused to categorize the video games before them as obscene.¹⁰² In addition, the *James* and *IDSA* courts refused to uphold the actions in question as constitutionally permitted means of protecting children.¹⁰³ Finally, the *James* court concluded that the games (and other works) before it did not constitute incitement.¹⁰⁴

1. American Amusement. This case involved a City of Indianapolis ordinance that sought to prevent minors without an accompanying adult from accessing "amusement machine[s]" that the city deemed harmful to them.¹⁰⁵ Under the ordinance, an

⁹⁷ *IDSA*, 329 F.3d at 957-58; *James*, 300 F.3d at 695-96; *American Amusement*, 244 F.3d at 574.

⁹⁸ *IDSA*, 329 F.3d at 958; *James*, 300 F.3d at 697-98; *American Amusement*, 244 F.3d at 574-79.

⁹⁹ *IDSA*, 329 F.3d at 957-58; *James*, 300 F.3d at 695-98; *American Amusement*, 244 F.3d at 574-79.

¹⁰⁰ See *James*, 300 F.3d at 696 (noting court does not rule on protected status of video games broadly but only "as a recognition of the manner in which James seeks to regulate them through tort liability").

¹⁰¹ See *IDSA*, 329 F.3d at 957-58 (comparing video games to literature). The Seventh Circuit did not have to devote much time to this issue because the court below had already concluded that video games are a form of expression. *American Amusement*, 244 F.3d at 574. Judge Posner did go on, however, to note that "[m]ost of the video games in the record of this case, games that the City believes violate its ordinances, are stories." *Id.* at 577.

¹⁰² *IDSA*, 329 F.3d at 958; *James*, 300 F.3d at 697-98; *American Amusement*, 244 F.3d at 575.

¹⁰³ See *IDSA*, 329 F.3d at 958-59 (refusing to uphold ordinance in part because of lack of evidence linking violent behavior to games); *James*, 300 F.3d at 696-97 (noting difficulty in deciding whether protective measures advocated by plaintiffs would be narrowly tailored).

¹⁰⁴ *James*, 300 F.3d at 698-99.

¹⁰⁵ *American Amusement*, 244 F.3d at 573.

amusement machine "harmful to minors" was one that: (1) "predominantly appeal[ed] to minors' morbid interest in violence or minors' prurient interest in sex"; (2) was "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen"; (3) lacked "serious literary, artistic, political or scientific value as a whole" for persons under the age of eighteen; and (4) contained either "graphic violence" or "strong sexual content."¹⁰⁶ The ordinance went on to describe "graphic violence" as a "visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration [disfigurement]."¹⁰⁷ In support of its ordinance, the city argued that video games encourage violence by those who play them, at least where minors are involved.¹⁰⁸

Certain manufacturers of video games and one of their trade associations brought suit in federal court to enjoin enforcement of the ordinance, arguing that it constituted an impermissible restraint on speech.¹⁰⁹ The United States District Court for the Southern District of Indiana denied plaintiffs' request for a preliminary injunction, and the case proceeded to the Seventh Circuit from that denial.¹¹⁰

Reversing the district court, the Seventh Circuit began its analysis by noting the extent to which the city had attempted to categorize violent video games as obscene and thereby take advantage of obscenity's status as an unprotected form of expression, particularly where minors are involved.¹¹¹ Indeed, the city's ordinance closely tracked the Supreme Court's three-part test for obscenity set forth in *Miller v. California*¹¹² and the statute upheld in *Ginsberg v. New York*,¹¹³ which restricted minors' access

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (alteration in original).

¹⁰⁸ *Id.* at 573-74.

¹⁰⁹ *Id.* at 573.

¹¹⁰ *Id.* at 574.

¹¹¹ *Id.*

¹¹² 413 U.S. 15, 24 (1973).

¹¹³ 390 U.S. 629, 633 (1968).

to material deemed obscene *as to them*.¹¹⁴ Under *Miller*, the First Amendment does not protect material if: (1) “the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest”; (2) “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and (3) “the work, taken as a whole, lacks serious literary, artistic, political or scientific value.”¹¹⁵ In *Ginsberg*, the Court upheld a statute forbidding the sale to minors of any “representation” of “nudity” that: (1) “predominantly appeals to the prurient, shameful or morbid interest of minors”; (2) “is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors”; and (3) “is utterly without redeeming social importance for minors.”¹¹⁶

Although the city had faithfully tracked *Miller* and the statute upheld in *Ginsberg*, it still needed to surmount the preliminary obstacle of convincing the court that the First Amendment would allow violence to be categorized with obscenity—at least with respect to minors.¹¹⁷ Precedent suggested that the city would not succeed. In *Miller*, the Supreme Court expressly confined regulation of obscenity to “works which depict or describe *sexual conduct*.”¹¹⁸ Similarly, in 1992 the United States Court of Appeals for the Eighth Circuit struck down a statute of the State of Missouri that sought to regulate, in a manner of speaking, obscene violence as to minors.¹¹⁹ The Eighth Circuit rested its conclusion in large part on the observation that “[m]aterial that contains violence but not depictions or descriptions of sexual conduct cannot be obscene. Thus, videos depicting only violence do not fall within the legal definition of obscenity for either minors or adults.”¹²⁰

¹¹⁴ *Id.* at 631-33.

¹¹⁵ *Miller*, 413 U.S. at 24 (citation omitted).

¹¹⁶ *Ginsberg*, 390 U.S. at 633.

¹¹⁷ *American Amusement*, 244 F.3d at 574.

¹¹⁸ *Miller*, 413 U.S. at 24 (emphasis added); *see also* *Cohen v. California*, 403 U.S. 15, 20 (1971) (“Whatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression must be, in some significant way, erotic.”).

¹¹⁹ *See* *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) (finding Missouri statute designed to limit minors’ access to violent videos unconstitutional).

¹²⁰ *Id.* (citation omitted).

The courts' refusal to equate violence with obscenity—even with respect to children—did not seal the fate of Indianapolis's ordinance, but it certainly did not help. Indeed, notwithstanding *Miller*, the *American Amusement* court was willing to countenance the argument that *some* depictions of violence could be obscene in the sense of being offensive or of turning the stomach, but it failed to find any such depictions in the video games under consideration.¹²¹

Turning to the question of whether Indianapolis could justify its ordinance in terms of the instrumental impact of video games—that is, their effect on children's behavior—the court expressed profound skepticism on several grounds. First, the court was highly solicitous of children's right to learn and receive information.¹²² The crux of the court's argument was that children bear heavy responsibilities as soon as they become adults.¹²³ In order to discharge these responsibilities, the court reasoned, they need exposure to the realities of life. As the court noted, “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”¹²⁴

Second, the court expressed a fairly strong conviction that the city's argument proved too much: if the government could regulate children's access to violent imagery, it could preclude unaccompanied reading of *The Odyssey*, *The Divine Comedy*, *War and Peace*, the short stories of Edgar Allen Poe, *Frankenstein*, and *Dracula*.¹²⁵

Third, the court was openly skeptical of arguments regarding the allegedly harmful effects of video games predicated upon psychological research, challenging the asserted causal connection

¹²¹ *American Amusement*, 244 F.3d at 575.

¹²² *See id.* at 576-77 (explaining importance of children's First Amendment rights). The court noted that

[c]hildren have First Amendment rights. This is not merely a matter of pressing the First Amendment to a dryly logical extreme. 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.

Id. (citations omitted).

¹²³ *Id.* at 577 (noting connection of First Amendment to right to vote and effective participation in society).

¹²⁴ *Id.*

¹²⁵ *Id.*

between video games and violent behavior.¹²⁶ According to the court, the studies simply demonstrated a correlation between video games and aggressive feelings.¹²⁷ The court then went on to note that the studies revealed nothing unique about video games even in relation to the provocation of aggressive feelings; therefore, the studies were no more conclusive as to the effects of video games than to the effects of violent imagery in general.¹²⁸

Given this skepticism, the court had little difficulty deciding that the First Amendment protected at least the bulk of the video games at issue.¹²⁹ Accordingly, it remanded the case to the district court with instructions to enter a preliminary injunction.¹³⁰

2. James. In *James v. Meow Media, Inc.*, the plaintiffs brought a tort action against a multitude of media defendants after the December 1997 school shooting in Paducah, Kentucky.¹³¹ The plaintiffs argued that various video games and the film *Basketball Diaries* had caused Michael Carneal, then a junior high school

¹²⁶ See *id.* at 579 (“The studies thus are not evidence that that violent video games are any more harmful . . . than violent movies . . .”).

¹²⁷ See *id.* at 578-79 (“The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere.”).

¹²⁸ See *id.* at 579 (“The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments.”).

¹²⁹ See *id.* at 577 (“Most of the video games in the record of this case, games the City believes violate its ordinances, are stories.”). As the court noted,

[i]t is conceivable though unlikely that in a plenary trial the City can establish the legality of the ordinance. . . . We have emphasized the “literary” character of the games in the record and the unrealistic appearance of their “graphic” violence. If the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be), a more narrowly drawn ordinance might survive a constitutional challenge.

Id. at 579-80. Given Judge Posner’s analysis earlier in the case, see *id.* at 575, his reference to the “use[] [of] actors and [the] simulat[ion] [of] real death and mutilation convincingly,” *id.* at 579, is most likely a reference to the possibility, in the court’s view, that some violent imagery might qualify as obscenity.

¹³⁰ *Id.* at 580. Judge Posner also reasoned that the interactivity of video games does not cut against their status as expression. In fact, he opined that interactivity enhances the expressive impact of a medium. See *id.* at 577 (“All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive.”).

¹³¹ 300 F.3d 683, 687 (6th Cir. 2002).

student, to murder three of his classmates.¹³² With respect to the games, the plaintiffs theorized that the games encouraged Carneal to act violently without subjecting him to normative constraints.¹³³ The defendants moved to dismiss the complaint, relying on conventional tort defenses as well as a First Amendment defense.¹³⁴ The United States District Court for the Western District of Kentucky granted the motion solely on the basis of non-constitutional considerations, primarily Kentucky's tort law,¹³⁵ with little more than an oblique reference to the First Amendment.¹³⁶

The United States Court of Appeals for the Sixth Circuit affirmed, per Judge Boggs, without reaching the constitutional issues, at least as a formal matter.¹³⁷ Instead, the court resolved the case principally on the ground that the defendants had no legal duty to foresee Carneal's violent behavior, describing any reaction he had to the games and movies at issue as "idiosyncratic."¹³⁸ The court bolstered this conclusion by reasoning that the defendants had no duty to prevent a third party from committing a crime where they had no special relationship with him¹³⁹ and had not vested him with ultra-hazardous materials in a manner conventional doctrine would recognize as tortious.¹⁴⁰ With regard to this last point, the court

¹³² *Id.* at 687-88.

¹³³ *Id.* at 688. The plaintiffs in *James* alleged, among other things, that "[t]he Video Game Defendants manufactured and/or supplied to Michael Carneal violent video games which made the violence pleasurable and attractive, and disconnected the violence from the natural consequences thereof, thereby causing Michael Carneal to act out the violence." Complaint ¶ 20 at 16-17, *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000) (No. CIV.A. 5:99CV-96-J).

¹³⁴ See *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 802-03 (W.D. Ky. 2000) (discussing and ruling on defendants' motion to dismiss).

¹³⁵ See *id.* at 803-04. The district court continued:

[T]he Court concludes as a matter of law that it was clearly unreasonable to expect Defendants to have foreseen Plaintiffs' injuries from Michael Carneal's actions. Because the injuries were unforeseeable, Defendants did not owe a duty of care upon which liability can be imposed.

Id. at 803.

¹³⁶ See *id.* at 818 ("[S]ince Kentucky law adequately resolves the issues presented in this matter, the Court will not address the constitutional issues looming in the background.").

¹³⁷ See *James*, 300 F.3d at 695 ("We agree with the district court that attaching tort liability to the effect that . . . ideas have on a criminal actor would raise significant constitutional problems under the First Amendment that ought to be avoided.").

¹³⁸ *Id.* at 693.

¹³⁹ *Id.* at 694.

¹⁴⁰ *Id.* at 694-95.

emphasized the difference between the types of “implements” that ordinarily qualify as “ultra-hazardous” materials and the “ideas and images” at issue in the case, noting that “[b]eyond their intangibility, such ideas and images are at least one step removed from the implements that can be used in the criminal act itself.”¹⁴¹

Although the court did not formally reach the constitutional issues implicated in the case, it strongly implied that it was rendering its decision in the shadow of the First Amendment.¹⁴² The court began its constitutional analysis by addressing the issue of whether video games constitute a form of expression presumptively entitled to the protection of the Constitution, resolving the question in a surprisingly straightforward way by taking its cue from the manner in which the plaintiffs had asserted their claim.¹⁴³ As the court noted, the essence of the plaintiffs’ argument was that the games had somehow communicated a message to Carneal to engage in violent behavior without the benefit of moral training.¹⁴⁴ Given this argument, the games had to qualify as protected expression; otherwise, the plaintiffs’ case-in-chief would have made no sense.¹⁴⁵

In reaching this decision, the Sixth Circuit echoed the Seventh Circuit’s speculation that, in some instances, the First Amendment

¹⁴¹ *Id.* at 695. The *James* court went on to hold that, even if the defendants had a duty to prevent harm to the plaintiffs, that duty was most likely cut off by Carneal’s superseding criminal act. *Id.* at 700. The court also held that the defendants’ various creations were not “products,” at least not in the context of the plaintiffs’ theory, for purposes of imposing any form of product liability. *Id.* at 700-01.

¹⁴² *See id.* at 699 (“Attaching . . . tort liability to the ideas and images conveyed by the video games . . . raises grave constitutional concerns that provide yet an additional policy reason not to impose a duty of care between the defendants and the victims in this case.”). The court devoted four pages of the opinion to the First Amendment issues it did not formally decide. *See id.* at 695-99 (discussing “First Amendment Problems”).

¹⁴³ *See id.* at 695 (noting plaintiffs did not seek to place liability on defendants for manufacturing cartridges but because of ideas and images communicated).

¹⁴⁴ *See id.* at 695 (“Although the defendants’ products may be a mixture of expressive and inert content, the plaintiffs’ theory of liability isolates the expressive content of the defendants’ products.”).

¹⁴⁵ *See id.* at 696 (“Because the plaintiffs seek to attach tort liability to the communicative aspect of the video games produced by the defendants, we have little difficulty in holding that the First Amendment protects video games in the sense uniquely relevant to this lawsuit.”); *see also* *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (“Taking [the plaintiffs] allegations as true, the Court concludes that [the interactive video game] *Mortal Kombat*, as [the plaintiff] describes it, is protected First Amendment speech.”).

might not protect video games.¹⁴⁶ For example, the court noted the physical aspects of these games, intimating that such non-expressive features could be outside the protective ambit of the Constitution: "Extending First Amendment protection to video games certainly presents some thorny issues. After all, there are features of video games which are not terribly communicative, such as the manner in which the player controls the game."¹⁴⁷ Because the plaintiffs had predicated their argument on the supposed messages of the games, however, the court concluded that any physical aspects of the games were irrelevant.¹⁴⁸

The *James* court then addressed a series of constitutional issues that are not unique to video games: (1) whether the government could constitutionally impose liability on the defendants simply as a means of protecting children; (2) whether the various works at issue constituted obscenity; and (3) whether the works constituted incitement.¹⁴⁹

With respect to the first issue, the court noted that laws designed to regulate speech simply for the benefit of children are nevertheless subject to strict scrutiny.¹⁵⁰ Concluding that imposing liability for negligence in the case before them would fail such scrutiny, the court emphasized the amorphous nature of the duty that the plaintiffs sought to attach to the defendants:

At trial, the plaintiff would undoubtedly argue about the efficient measures that the defendants should have taken to protect the children. But at the end of this process, it would be impossible for reviewing courts to evaluate whether the proposed protective measures would be narrowly tailored regulations. Who would know what omission the jury relied upon to find the

¹⁴⁶ See *James*, 300 F.3d at 696 (noting "thorny issues" with extension of First Amendment protection to video games); *Am. Amusements Mach. Ass'n v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001) (supposing violent depictions could rise to obscenity).

¹⁴⁷ *James*, 300 F.3d at 696.

¹⁴⁸ *Id.* at 696; see *infra* notes 213-15 and accompanying text for a discussion of this general point.

¹⁴⁹ See *James*, 300 F.3d at 696-99 (discussing constitutional issues surrounding regulation of movies, websites, and video games).

¹⁵⁰ *Id.* at 696.

defendants negligent? Moreover, under the concept of negligence, there is no room for evaluating the value of the speech itself.¹⁵¹

In essence, the court reasoned that the process by which a jury reaches a verdict is insufficiently controlled and insufficiently sensitive to the value of the expression at issue to pass constitutional muster.¹⁵²

The *James* court then rejected the proposition that the defendants' works were legally obscene and therefore outside First Amendment protection.¹⁵³ In doing so, the court divided these works into two groups—those containing explicit sexual content and those containing no such content.¹⁵⁴ With respect to the first category, the court refused to raise the constitutional bar because the plaintiffs had not asserted any kind of sexual assault.¹⁵⁵ The court implicitly reasoned that there must be a logical connection between the ground for excluding expression from constitutional protection and the ground for imposing liability for that same expression.¹⁵⁶ With respect to the category of works lacking sexual content, the court followed the Seventh Circuit in *American Amusement* in noting that obscenity falls outside the protective ambit of the First Amendment because of its offensiveness, not because of any potential harm.¹⁵⁷ Because the plaintiffs' case proceeded on the theory that the defendants' works had *caused* Carneal's criminal acts, the Sixth Circuit reasoned that the plaintiffs' own argument was inconsistent with a claim that these works were obscene.¹⁵⁸

¹⁵¹ *Id.* at 697.

¹⁵² *See id.* at 696-97 (discussing difficulty arising when tort liability is allowed to regulate access to expression).

¹⁵³ *Id.* at 698.

¹⁵⁴ *See id.* at 697-98 (comparing sex-oriented website with games and movies containing violent imagery).

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* (noting plaintiffs did not seek to hold defendants liable for sexual crime but for murder).

¹⁵⁷ *Id.* at 698 (citing *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001)). The Sixth Circuit also declined to include "violent, instead of sexually explicit, material" in its definition of obscenity. *Id.*

¹⁵⁸ *See id.* (reasoning that concept of obscenity is not designed to protect against behavior speech is believed to create).

The court's treatment of the incitement issue was more extensive. Indeed, this issue played a central role in *James* because of the nature of the case. After all, the plaintiffs' basic theory was that the defendants' expressive works caused Carneal to commit violent acts.¹⁵⁹ Because the plaintiffs' theory sounded in tort, the most plausible exception to First Amendment protection was that of incitement.¹⁶⁰ But precedent, in the form of *Brandenburg v. Ohio*¹⁶¹ and *Hess v. Indiana*,¹⁶² lay somewhat squarely in their way. Thus, the issue in *James* was whether the Sixth Circuit would somehow distinguish those cases.¹⁶³ Given the almost universal success of "media defendants" in similar cases,¹⁶⁴ the plaintiffs faced a decidedly uphill battle and, in fact, did not succeed.

In *Brandenburg*, the State of Ohio obtained a conviction against Brandenburg for incendiary remarks he made at a Ku Klux Klan

¹⁵⁹ *Id.*

¹⁶⁰ See *id.* (noting that protecting public from violence speech might incite is not "completely impermissible purpose for regulating speech").

¹⁶¹ 395 U.S. 444 (1969) (per curiam).

¹⁶² 414 U.S. 105 (1973) (per curiam).

¹⁶³ See *James*, 300 F.3d at 698 (discussing *Brandenburg* and *Hess*).

¹⁶⁴ Prior to *James*, courts had rejected numerous lawsuits in which plaintiffs argued that various media had been the legal cause of compensable injury. See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (*The Encyclopedia of Mushrooms*); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987) (article about "autoerotic asphyxiation"); *Davidson v. Time Warner, Inc.*, No. 94-006, 1997 WL 405907, at *12 (S.D. Tex. Mar. 31, 1997) (song "2Pacalypse Now"); *Waller v. Osbourne*, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991) (song "Suicide Solution"); *Zamora v. CBS, Inc.*, 480 F. Supp. 199, 206 (S.D. Fla. 1979) (TV violence in general); *McCollum v. CBS, Inc.*, 249 Cal. Rpt. 187, 193-94 (Cal. Ct. App. 1988) (song "Suicide Solution"); *Bill v. Superior Court*, 187 Cal. Rptr. 625, 630-31 (Cal. Ct. App. 1982) (film *Boulevard Nights*); *Olivia N. v. NBC, Inc.*, 178 Cal. Rptr. 888, 892-93 (Cal. Ct. App. 1981) (film *Born Innocent*); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (film *The Warriors*); *DeFilippo v. NBC, Inc.*, 446 A.2d 1036, 1039 (R.I. 1982) (episode of *The Tonight Show*). These decisions generally held that the defendants' work did not constitute incitement under *Brandenburg* and *Hess*.

Courts have allowed liability in situations that tend to be readily distinguishable from the cases noted in the previous paragraph. In *Rice v. Paladin Enterprises, Inc.*, for example, the publisher of an assassination manual stipulated that it intended the book to be used by would-be killers and had knowledge that it would be used in this way. 128 F.3d 233 (4th Cir. 1997). Given this, one can reasonably infer that the manual at issue in *Rice* either constituted incitement within the meaning of *Brandenburg* and *Hess*, see *Rice*, 128 F.3d at 263 (finding book *Hit Man* "directly and unmistakably urges concrete violation of the laws against murder" and provides instructions to that end), or satisfied a close analytical substitute for *Brandenburg*, such as a requirement that the publisher aid and abet a crime

rally, portions of which were recorded on film and broadcast.¹⁶⁵ Notwithstanding the inflammatory nature of Brandenburg's language—including his oblique references to acts of violence, the presence of firearms at the rally, and the presence of the electronic media—the Court reversed the conviction and held that Ohio could not punish him for his speech.¹⁶⁶ In doing so, the Court set forth a highly protective test for abstract advocacy of lawless behavior, stating that the Constitution protects such advocacy unless it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁶⁷

Hess v. Indiana involved an individual convicted of violating Indiana's disorderly conduct statute.¹⁶⁸ After police had cleared a street during a protest, Hess said, in a loud voice and in the presence of others, “We'll take the [f--king] street later.”¹⁶⁹ Although

both by having a subjective intent to assist in its commission, and by in fact substantially assisting in its commission. *See id.* at 251-55 (holding plaintiff created jury issue by showing that publisher actually intended to aid and abet murder). It is also worth noting that Judge Luttig, who wrote the opinion in *Rice*, described the case as “unique,” stating that “neither the extensive briefing by the parties and the numerous *amici* in this case, nor the exhaustive research which the court itself has undertaken, has revealed even a single case that we regard as factually analogous to this case.” *Id.* at 265.

In *Weirum v. RKO General, Inc.*, the Supreme Court of California affirmed a judgment against a radio station that had exhorted its listeners to drive around town in search of a peripatetic disc jockey. 539 P.2d 36, 39-42 (Cal. 1975). Two listeners racing to find the jockey had driven another person off the road. *Id.* at 39. Although the radio station had not literally “directed” or “intended” its listeners to drive people off the road, it had “directed” or “intended” them to find a moving target in a busy city. *See id.* at 41 (predicating liability on defendant's creation of unreasonable risk of harm). The tortious act was thus fully integrated with the act that the station directed. Moreover, in affirming the verdict against the station, the court barely gave any consideration at all to the First Amendment issue presented, *see id.* at 40 (“The First Amendment does not sanction the infliction of physical injury merely because achieved by word[] rather than act.”), and at least one court has been content to treat this case as involving purely commercial speech. *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987); *see also* Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting “Negligent” Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984, 999-1000 (1994) (arguing courts do not apply *Brandenburg* in context of commercial speech). As Brill noted: “The *Weirum* court did not explicitly reject the First Amendment defense based on the commercial speech rationale, but no other rationale can explain the slight attention devoted to the free speech issue in the case.” *Id.* at 999 (citation omitted) (emphasis added).

¹⁶⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (per curiam).

¹⁶⁶ *Id.* at 445, 448-49.

¹⁶⁷ *Id.* at 447.

¹⁶⁸ 414 U.S. 105, 105 (1973) (per curiam).

¹⁶⁹ *Id.* at 107.

he had been physically proximate to his putative audience, the situation had been volatile, and his words at least sounded like an exhortation to lawlessness, the Court nevertheless reversed Hess's conviction, noting that his remarks had not been "directed to any person or group in particular."¹⁷⁰ In addition, reiterating and perhaps even strengthening the high degree of scienter required by *Brandenburg*, the *Hess* Court added that the Constitution protected Hess's remarks unless he had "*intended* to produce . . . imminent disorder."¹⁷¹

Applying this precedent, the Sixth Circuit understandably refused to classify the works before it as incitement. First, the court noted that the *James* defendants had not "intend[ed] to produce violent actions" by the people who watched or played their works; they thus failed to demonstrate the high degree of scienter required by *Brandenburg* and *Hess*.¹⁷² Second, the court reasoned that the plaintiffs' own theory of liability foreclosed the possibility that Carneal's reaction to the works in question, if any, was "imminent":

Even the theory of causation in this case is that persistent exposure to the defendants' media gradually undermined Carneal's moral discomfort with violence to the point that he solved his social disputes with a gun. This glacial process of personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test.¹⁷³

Third, the court refused to describe Carneal's possible reaction to the works at issue as "likely."¹⁷⁴ This was not surprising given the court's earlier description of Carneal's behavior as "idiosyncratic."¹⁷⁵ Finally, the court rejected the plaintiffs' attempt to distinguish *Brandenburg* by arguing that it applies only to political advocacy.¹⁷⁶

¹⁷⁰ *Id.* at 107-08.

¹⁷¹ *Id.* at 109 (emphasis added).

¹⁷² *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002) (internal quotation marks omitted).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 699.

¹⁷⁵ *Id.* at 693.

¹⁷⁶ *See id.* at 699 (noting federal courts apply *Brandenburg* test to all types of expression).

3. IDSA. Like *American Amusement*, IDSA involved an ordinance that attempted to restrict minors' access to video games.¹⁷⁷ Video game manufacturers and distributors brought suit to enjoin enforcement of the ordinance, arguing that it violated the First Amendment.¹⁷⁸ The United States District Court of the Eastern District of Missouri denied plaintiffs' motion for summary judgment and proceeded *sua sponte* to dismiss the case, reasoning that the basis for denying the motion and the basis for dismissing the case were the same.¹⁷⁹ The Eighth Circuit, per Judge Morris Sheppard Arnold, reversed and remanded with instructions to enjoin operation of the ordinance.¹⁸⁰

In reaching this conclusion, the Eighth Circuit necessarily decided that the First Amendment protects video games as a form of expression.¹⁸¹ Its analysis included some of the reasoning previously espoused by other courts. For example, the Eighth Circuit adopted Judge Posner's observation that the games subject to the ordinance were thematically indistinct from fairy tales, legends, and epics.¹⁸² The court also reasoned, much like the Sixth Circuit in *James*, that the video games at issue must be expressive because the ordinance isolated them for regulatory treatment precisely because of their message.¹⁸³

The IDSA court also analyzed other aspects of video games. In particular, it recognized the characteristics that such games share with other forms of art.¹⁸⁴ Quoting *Hurley*, the court observed that

¹⁷⁷ *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 956 (8th Cir. 2003).

¹⁷⁸ *Id.*

¹⁷⁹ *See id.* (noting that trial court dismissed case after ruling on ordinance's constitutionality).

¹⁸⁰ *Id.* at 960.

¹⁸¹ *See id.* at 957 (comparing video games to painting by Jackson Pollock).

¹⁸² *Id.* (quoting *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001)). The court also joined in Judge Posner's observation that expressiveness and interactivity are positively correlated. *See id.* at 957-58 (quoting Judge Posner's reasoning that successful literature is highly interactive).

¹⁸³ *See id.* at 957 ("Indeed, we find it telling that the County seeks to restrict access to these video games precisely because their content purportedly affects the thought or behavior of those who play them.")

¹⁸⁴ *See id.* (noting "scripts" and "story boards" showing "storyline," "character development," and "dialogue" of video games set forth in record).

if the First Amendment protects abstract painting, *avant-garde* music, and nonsensical poetry, it must also protect video games:

If the first amendment is versatile enough to “shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,” we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to a similar protection.¹⁸⁵

Having concluded that video games constitute a form of protected expression, the court next addressed whether the county could nevertheless regulate access to them, either because they fell into a category of unprotected speech, or because the regulation was justified under strict scrutiny.¹⁸⁶

Relying on well-settled circuit precedent, the *IDSA* court made short work of the county’s suggestion that “graphically violent” video games are a form of obscenity.¹⁸⁷ The court noted, “[W]e have previously observed that ‘material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene.’”¹⁸⁸ Next, the court turned to the county’s defense of the ordinance as necessary to serve the compelling public interest of protecting children.¹⁸⁹ Although the court conceded the importance of this interest in the abstract,¹⁹⁰ it did not find persuasive the county’s various arguments regarding the deleterious effects of video games on children.¹⁹¹ Last, the court addressed the county’s argument that the ordinance simply reinforced parents’ rights to control the upbringing of their children.¹⁹² Although solicitous of this right, the

¹⁸⁵ *Id.* (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995)).

¹⁸⁶ *Id.* at 958.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (quoting *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992)).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *See id.* at 958-59 (“The County’s conclusion that there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health is simply unsupported in the record.”).

¹⁹² *Id.* at 959.

court nevertheless refused to uphold the ordinance on this ground, reasoning that children should generally have the same access as adults to speech protected by the First Amendment.¹⁹³

IV. DISCUSSION

Notwithstanding decisions such as *American Amusement, James*, and *IDS*, several commentators have argued that courts should not afford full constitutional protection to video games containing violent imagery, at least where such games are alleged to cause violent behavior in children. These arguments take a number of forms. Several, for example, emphasize the alleged deleterious effects of such games on children and on society in general.¹⁹⁴ One commentator has even characterized the effect of *Brandenburg* in this context as a subsidy to the creators and distributors of video games.¹⁹⁵ Professor Garry has argued that courts should be wary of extending protection to such novel media as video games because valuable speech will be stifled in a cacophony of relatively worthless speech.¹⁹⁶ In fact, in a manner somewhat reminiscent of the Supreme Court's analysis in *Mutual Film*, Garry has further argued that courts should permit extensive regulation of violent imagery in video games precisely *because* such imagery is available in traditional, cognitive media:

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? . . . [T]he

¹⁹³ See *id.* at 959-60 (“[T]he government cannot silence protected speech by wrapping itself in the cloak of parental authority.”).

¹⁹⁴ See SAUNDERS, *supra* note 7, at 46-48 (arguing that violent video games teach and condition people to kill); Dee, *supra* note 7, at 734-37 (arguing that as long as “society glorif[ies] gratuitous violence, mentally disturbed children will kill other children”); Garry, *supra* note 7, at 141-43 (discussing alleged harmful behavioral effect of violent video games); Kunich, *supra* note 7, at 1262-64 (arguing that survivors of media related tragedies should recover for “shock tort”); Kevin E. Barton, Note, *Game Over! Legal Responses to Video Game Violence*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 133, 137-44 (2002) (noting alleged correlation between video game violence and violent behavior tendencies); Kiernan, *supra* note 5, at 244-46 (arguing that games teach and condition kids to kill).

¹⁹⁵ Kiernan, *supra* note 5, at 239.

¹⁹⁶ Garry, *supra* note 7, at 140.

occurrence and concept of violence is pervasively expressed through every medium in society. Thus, is it really an unconstitutional abridgment of an idea or image to limit its expression or conveyance in just one of the media outlets operating in a media-abundant society?¹⁹⁷

These commentators, along with others who have written generally about violence in the media, have proposed a variety of judicial responses to the problems allegedly presented by video games. Some, for example, have argued that the courts should expand the category of obscenity to include violent imagery, at least where children are concerned.¹⁹⁸ Others have advocated a modification or abandonment of *Brandenburg* in this context, arguing that the case is too rigid,¹⁹⁹ that it was never intended to apply to nonpolitical expression,²⁰⁰ that the requirement of "imminence" should be modified or abandoned,²⁰¹ or that the test should not apply where the speech in question allegedly caused actual harm.²⁰² In the following sub-parts of this Article, I respond to these arguments. I begin by evaluating the recent cases holding

¹⁹⁷ *Id.* at 151.

¹⁹⁸ SAUNDERS, *supra* note 7, at 149-50; Garry, *supra* note 7, at 147-48, 149-50; Barton, *supra* note 194, at 158.

¹⁹⁹ See Crump, *supra* note 7, at 45 (proposing that courts replace *Brandenburg* with more lenient multi-factor test); Kunich, *supra* note 7, at 1169 (arguing rigorous test of *Brandenburg* was probably not intended to be applied literally or in contexts outside facts of that case); Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting From Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 279-92 (1992) (proposing multi-factor test to replace *Brandenburg*); Kiernan, *supra* note 5, at 236-39 (arguing that *Brandenburg* is "overprotective" and applying it to physical injury context "warps it").

²⁰⁰ See Kunich, *supra* note 7, at 1169-70 (maintaining that, against Supreme Court's intention, *Brandenburg* has been applied to factually dissimilar cases); cf. Kiernan, *supra* note 5, at 236 ("*Brandenburg* was not intended to apply to the tort context.").

²⁰¹ See Kunich, *supra* note 7, at 1170-71 (arguing that imminence should function as measure of predictability); cf. Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 664 (2000) (defending *Brandenburg* but arguing that courts should treat imminence as only one factor in determining causation).

²⁰² See Kunich, *supra* note 7, at 1222 (pointing out difference between prosecution of mere possibility of harm and civil remedy of one who is actually injured); Kiernan, *supra* note 5, at 237-38 (noting that in video game tort cases actual harm has occurred, whereas in *Brandenburg* harm was only threatened).

that video games are a form of expression presumptively entitled to constitutional protection.

A. VIDEO GAMES AS EXPRESSION

Courts have properly concluded that the First Amendment protects video games as a form of expression. These games possess all the characteristics of an art form. First, like other art, they are representational. They may look like universes full of gothic architecture, labyrinthine tunnels, and grotesque characters, but in fact they are electronic representations of such things, much like paintings, movies, or TV shows. Second, video games often have aesthetic value. The architecture depicted in a video game, for example, can be magnificent, squalid, or both. Indeed, many schools now teach the art and science of creating interactive video games.²⁰³ Third, these games often tie music and narration to the player's movement through the various levels, and these features can be every bit as evocative as the soundtrack of a film or broadcast.²⁰⁴

Finally, video games often build upon powerful, elemental themes, just like fairy tales or epic poems.²⁰⁵ As Judge Posner opined in *American Amusement*, “[s]elf-defense, protection of others, dread of the ‘undead,’ fighting against overwhelming odds—these are all age-old themes of literature, and ones particularly appealing to the young.”²⁰⁶ Indeed, the very aspect of video games most often decried by their detractors—their reliance, in certain genres, on violent imagery—is itself a staple of art and literature. Judge Posner noted as much *American Amusement*,²⁰⁷ and he is far from

²⁰³ See, e.g., Tamra Fitzpatrick, *New School for Video-Game Degree No Child's Play—Redmond Institute First to Offer Degree in Field*, SEATTLE TIMES, Feb. 18, 1998, at B1 (announcing first school with degree in video game technology).

²⁰⁴ See Steven L. Kent, *Composers Score Points on Games; Video Game Music Is Known to Top the Charts Overseas, but Notoriety in the U.S. Is Lacking*, CHI. TRIB., Aug. 12, 2002, Business, at 1 (“In Japan, where video games are readily accepted into mainstream culture as works of art, game music is sold in record stores. The music from Nintendo’s ‘Pikmin,’ for instance, topped the charts for weeks.”).

²⁰⁵ See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 575, 577 (7th Cir. 2001) (comparing video games to art and literature).

²⁰⁶ *Id.* at 577-78.

²⁰⁷ See *id.* at 578 (“These games with their cartoon characters and stylized mayhem are continuous with age-old children’s literature on violent themes.”).

alone in his observations. As Professor Torben Grodal of the University of Copenhagen, Denmark, recently noted:

The themes and actions of most video games are updated versions of fairy tales and Homer's *Odyssey*, enhanced by modern audiovisual salience and interactive capabilities. Central themes are the fights with dragons and evil monsters in combination with quests through dangerous and exotic scenarios. It is furthermore important for many games that the hero rescues damsels in distress. That there are only a few basic narrative patterns in video games is not surprising because there are not many basic narrative patterns in fiction.²⁰⁸

Similarly, Marjorie Heins, Director and Staff Counsel of ACLU Arts Censorship Project, has observed that:

Historically, violence is an eternal theme in literature, art, popular entertainment and even games invented by children at play. From the gory wartime atrocities in Homer's *Iliad* and *Odyssey* to the fantasy action in *Mortal Kombat* and *Teenage Mutant Ninja Turtles*, human culture has displayed, reflected and documented aggression and violence.²⁰⁹

²⁰⁸ Torben Grodal, *Video Games and the Pleasures of Control*, in *MEDIA ENTERTAINMENT: THE PSYCHOLOGY OF ITS APPEAL* 197, 211 (Dolf Zillmann & Peter Vorderer eds., 2000).

²⁰⁹ Marjorie Heins, *Blaming the Media: Would Regulation of Expression Prevent Another Columbine?*, 14 *MEDIA STUD. J.* 14, 15 (2000). Further support for this point is provided by Joan E. Bertin, executive director of the National Coalition Against Censorship, who testified as to the following before the New York State Task Force on Youth Violence and the Entertainment Industry:

[G]raphic depictions of violence can be found in the Bible, *The Odyssey*, *Agamemnon*, Faulkner's *Light in August*, and James Dickey's *Deliverance*; in films such as *Paths of Glory*, *The Seventh Seal*, and *The Godfather*; in Picasso's *Guernica* and almost all religious art depicting the Crucifixion and religious martyrdom; and in theater including much of Shakespeare (*Macbeth*, *Henry V*, *Titus Andronicus*).

Joan E. Bertin, *The Problem of Media Violence Does Not Justify Censorship*, in *VIOLENCE IN THE MEDIA* 37, 40 (James D. Torr ed., 2001); see also Clay Calvert, *Violence, Video Games, and A Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*,

Indeed, one wonders how a visual artist could depict the following under a legal regime that denied constitutional protection to violent imagery:

With that, just as Dolon reached up for his chin
to cling with a frantic hand and beg for life,
Diomedes struck him square across the neck—
a flashing hack of the sword—both tendons snapped
and the shrieking head went tumbling in the dust.²¹⁰

As the foregoing discussion illustrates, excluding violent imagery from the protective ambit of the First Amendment would exclude so much of what we consider classic art and literature that we would be left with only remnants of the western canon. Because we presumably want to avoid any such result, we cannot allow the violent imagery upon which some video games rely to exclude them from constitutional protection.

Furthermore, although video games may be distinctive in some respects, none of their distinguishing characteristics should suffice to deprive them of protected status. For example, their status as games should not deprive them of protection. Courts have recognized that games can be protected expression. In *Hammerhead Enterprises, Inc. v. Brezenoff*, for example, the United States Court of Appeals for the Second Circuit acknowledged that the First Amendment protects a board game called “Public Assistance—Why Bother Working For a Living,” which makes fun of welfare programs and provoked severe criticism.²¹¹ Similarly, in *Watters v. TSR, Inc.*, the United States District Court for the Western District of Kentucky held that “Dungeons & Dragons,” a

39 SAN DIEGO L. REV. 1, 9-11 (2002) (describing history of violent imagery in arts); cf. *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1113 (9th Cir. 1998) (copyright case) (“Duke Nukem’s world is made up of aliens, radioactive slime and freezer weapons—clearly fantasies, even by Los Angeles standards.”).

²¹⁰ HOMER, *THE ILLIAD*, bk. 10, ll. 523-27 (Robert Fagles trans., Viking Penguin 1990) (n.d.); see also 1 *Kings* 18:40 (King James) (“And Elijah said unto them, Take the prophets of Baal; let not one of them escape. And they took them: and Elijah brought them down to the brook Kishon, and slew them there.”).

²¹¹ 707 F.2d 33, 34-35 (2d Cir. 1983).

medieval fantasy board game, qualifies as a protected form of expression, whether it qualifies as literature or as merely a game.²¹²

Moreover, the incidental physical aspects of video games should not deprive them of their protected status.²¹³ First, some forms of protected expression, such as dance,²¹⁴ are purely physical. This aside, one cannot persuasively argue that the First Amendment only protects non-physical, or purely ideational, activity. All expression requires some motor activity. One must move a pen to write; one must press fingers to a keyboard to type. The First Amendment must be interpreted to protect physical activities that are so inextricably bound up with expression that expression would be impossible without them.²¹⁵

Similarly, any focus on the interactive nature of such games would be misplaced. As the Supreme Court has noted, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices."²¹⁶ There are some plays, for example, whose final act depends on the vote of the audience. In fact, all good art and literature is "interactive," in the sense that it engages its reader, listener, or viewer.²¹⁷ As Judge Posner noted in *American Amusement*, the argument that video games merit distinct treatment because they are interactive

is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the

²¹² 715 F. Supp. 819, 821 (W.D. Ky. 1989), *aff'd on other grounds*, 904 F.2d 378 (6th Cir. 1990).

²¹³ *But cf.* James v. Meow Media, Inc., 300 F.3d 683, 696 (6th Cir. 2002) ("[T]here are features of video games which are not terribly communicative, such as the manner in which the player controls the game.").

²¹⁴ *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981) (holding that nude dancing is protected expression).

²¹⁵ *See* Goroff, *supra* note 62, at 750-51 (noting difficulty of clearly distinguishing between speech and conduct).

²¹⁶ Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995).

²¹⁷ *See* JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 4 (1984) ("The reconstitution of culture in a relation shared between speaker and audience is in fact a universal human activity, engaged in by every speaker in every culture, literate or illiterate.").

more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.²¹⁸

In fact, the player's role in the unfolding drama of a video game is arguably only relevant in the sense that the more the player becomes involved in the plot, the stronger the game's claim to constitutional protection.²¹⁹

Finally, attention should be paid to the emerging amalgamation of video games, computer-generated imagery, and motion pictures.²²⁰ Indeed, we have already reached the point, both technologically and artistically, at which video games and films are literally overlapping artistic genres. For example, George Lucas's recent work, *Star*

²¹⁸ Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

²¹⁹ See Goroff, *supra* note 62, at 766-68 (arguing that information presented through video games may have more impact than information conveyed through other media because of interactive element); see also Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 181 (D. Conn. 2002) ("The nature of the interactivity set out in [the] complaint . . . tends to cut in favor of First Amendment protection, inasmuch as it is alleged to enhance everything expressive and artistic about Mortal Kombat: the battles become more realistic, the thrill and exhilaration of fighting is more pronounced."); Nick Wingfield & Merissa Marr, *Videogames Grow Up: Games Players Can't Refuse?*, WALL ST. J., Apr. 19, 2005, at B1 ("Videogame players are used to slipping into the skins of their favorite movie characters, from Harry Potter to Spider-Man. Coming soon: games that plopp players into the seedier worlds of Sonny Corleone, Tony Montana and Dirty Harry.")

²²⁰ See Goroff, *supra* note 62, at 765 n.136 ("Video games are merging into movies and animated cartoons, a trend recognized in the case law surrounding video games' copyrightability."); Li, *supra* note 79, at 477 ("Hollywood and the video game industry have apparently formed a symbiotic relationship, with the former producing movies based on video games and the latter developing games based on movies."); Don Clark, *Videogames Get Real: Advanced Graphics Chips Make Features More Lifelike; Closing the Gap With Film*, WALL ST. J., Apr. 14, 2004, at B1 ("As graphics chips become more powerful, the hardware movie studios and game makers use eventually could become the same, allowing them to swap scenes and characters."); Robert A. Guth & Merissa Marr, *Videogames Go Hollywood: Coveting Rich Profit Source, Studios Seek Greater Control Over Titles Based on Films*, WALL ST. J., May 10, 2004, at B1 ("As games include increasingly better graphics and more-detailed story lines, they have become great vehicles for extending movie franchises. Studios now let game makers participate in the early stages of movie development so game and movie can be created in tandem."). Further, certain "Hollywood agents" have "either set up videogame divisions or dispatched agents to drum up new business from the tightening connection between movies and games." Guth & Marr, *supra*.

Wars: Episode II—Attack of the Clones,²²¹ consisted almost entirely of computer-generated images.²²² Much of the “acting” in the film (in the conventional sense of the word) took place in front of screens onto which computer-generated images were later added.²²³ Similarly, films starring a character who originated in the world of interactive video games have now been created.²²⁴

B. VIDEO GAMES AS UNPROTECTED SPEECH

Expanding the category of “obscenity” to include violent imagery or the category of “incitement” to include expression outside the *Brandenburg* and *Hess* test would undermine important social and political interests. Speech and the free exchange of ideas and sentiments are critical to our political system, to our development as mature human beings, and even to our survival.²²⁵ Courts must

²²¹ (Lucasfilm 2002).

²²² See Richard Corliss & Jess Cagle, *Dark Victory: An Inside Look at the New “Star Wars” Episode: How the Young Darth Vader Fell in Love and George Lucas Rediscovered the Heart and Soul of His Epic Series*, TIME, Apr. 29, 2002, at 56, 61 (“CLONES is populated with hundreds of computer-generated creatures.”).

²²³ See Stephen Schaefer, *Life As a Jedi; Hayden Christensen is Ready to Take a Walk on the Dark Side in ‘Star Wars’ Prequels*, BOSTON HERALD, May 15, 2002, at 53 (quoting Christensen as saying “[f]or the most part a lot of blue screens are involved,” and noting that “[a]cting in front of the blue screen allows George Lucas to fill the space with as many creatures and [sets] as he can imagine”). In fact, even the extent to which such screens will remain necessary is a matter of debate:

Thanks to digital technology, seeing is no longer believing in movies, even to the tiny degree it once was.

Not-really-there computer-generated characters are popping up more and more. Films this spring [2002] will feature a new crop, including the crime-fighting cartoon dog of *Scooby-Doo*, the swinging stunt double in *Spider-Man*, and the much-hated Jar Jar Binks in *Star Wars: Episode II—Attack of the Clones*.

Filmmakers may soon be faced with their own version of the cloning debate. When computer graphics imaging (CGI) becomes detailed enough, and when voice synthesis software becomes smooth enough, the next crop of such characters could look and sound more realistic, maybe even passably human.

Dave Kehr, *Who Needs Human Actors? As Digital Characters Become More Real, Advances in Technology Threaten to Make Actual People Obsolete in Hollywood*, N.Y. TIMES UPFRONT, Mar. 11, 2002, at 24.

²²⁴ See Alex Pham, *Virtual Video Star Lara Croft Wins a Real-life L.A. Agent: Action Heroine a Moneymaker*, CHI. TRIB., May 27, 2002, Business, at 4 (noting that Lara Croft is “the star of five video games, a comic book series and an eponymous Hollywood film”).

²²⁵ Cf. John Mintz, *Homeland Security Employs Imagination: Outsiders Help Devise*

therefore construe the protective scope of the First Amendment as broadly as possible, subject only to the need to maintain minimum standards of order. In addition, courts must provide clear rules and safe harbors so as to minimize the chill of liability and regulation.

A number of noted scholars, however, have advocated a limited scope for the First Amendment. Some, for example, have argued that a First Amendment not limited to protecting political speech lacks an organizing principle.²²⁶ According to Judge Bork, because the attributes of non-political expression are “indistinguishable from the functions or benefits of all other human activity,”²²⁷ such expression cannot be protected under the Constitution without granting protection for similarly situated non-expressive activity.²²⁸ He elaborates on this point as follows:

An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. . . . [Only] the ‘discovery and spread of political truth’ . . . [distinguishes speech] from any other form of human activity.²²⁹

Professor Sunstein has made a similar argument, articulating both an opposition to judicial aggrandizement and a concern for promoting discourse of the highest quality.²³⁰ Still others have

Possible Terrorism Plots, WASH. POST, June 18, 2004, at A27 (“The Department of Homeland Security, given the difficult task of trying to divine al Qaeda’s future methods of attack on the United States, is seeking advice from some unexpected sources these days: futurists, philosophers, software programmers, a pop musician and a thriller writer.”).

²²⁶ See, e.g., Bork, *supra* note 37, at 28 (arguing that any line between protected and unprotected speech not drawn at explicitly political speech will always be arbitrary).

²²⁷ *Id.* at 25.

²²⁸ See *id.* at 26 (arguing only political speech should be preferred to other “claimed freedoms” because only it is concerned with social welfare rather than personal gratification).

²²⁹ *Id.* at 25-26; see also Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 302 (1978) (arguing that only relationship between political speech and representative democracy allows protecting expression, but recognizing that other “pragmatic” concerns often justify protecting broader forms of speech).

²³⁰ See Sunstein, *supra* note 63, at 304 (“If autonomy in the abstract is the principle, there

argued that a First Amendment that protects too much will ultimately fail to protect unorthodox speech, which the Framers intended the Amendment to protect above all.²³¹

Conversely, a number of commentators have defended an expansive reading of the First Amendment. Professor Baker, for example, has argued famously in favor of a First Amendment that maximizes individual self-expression, eschewing reliance upon the metaphor of the "marketplace of ideas" or the search for objective truth.²³² Given the possibilities of expression in any medium, Baker's approach would necessarily grant the First Amendment a broad scope. Similarly, Professor Redish has argued that the First Amendment should protect "all forms of expression that further the self-realization value," which he justifies as an implicit and comprehensive premise of our political system.²³³ Others, meanwhile, have advocated a broad expanse for the First Amendment, either on the ground that line-drawing is ultimately arbitrary and therefore distorting to the expressive process,²³⁴ or on the ground that broad freedom of expression enables disgruntled individuals to express their displeasure with the status quo.²³⁵

appears to be nothing distinctive about speech to explain why it has been singled out for constitutional protection."). Professor Sunstein argues that "[t]he current state of free speech in America owes a great deal to extremely aggressive interpretations by the Supreme Court These decisions cannot be justified by reference to the original understanding of the First Amendment. Such decisions also involve a highly intrusive judicial role in majoritarian politics." *Id.* at 256. Further, "[i]f we regard the First Amendment as an effort to ensure that people are not prevented from speaking, especially on issues of public importance, then current free speech law seems ill-adapted to current conditions." *Id.* at 271.

²³¹ See Blasi, *supra* note 37, at 479 (arguing for "carefully confined ambit" of protected speech limited to forms traditionally considered essential to maintaining open society); see also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) ("It is [the] mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.").

²³² C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 966 (1978).

²³³ Redish, *supra* note 3, at 594.

²³⁴ See, e.g., John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *HARV. L. REV.* 1482, 1495 (1975) (arguing that, in evaluating expressive conduct, "[a]ttempts to determine which element 'predominates' will therefore inevitably degenerate into question-begging judgments about whether the activity should be protected").

²³⁵ See Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 *UCLA L. REV.* 915, 949 (1978) ("There is cathartic value in having speakers who might otherwise become dangerous release their tensions through verbal violence rather

Needless to say, all the foregoing scholars raise important points, and many of these points pertain to the subject matter of this Article. Nevertheless, the justification for an expansive reading of the First Amendment may be considerably less doctrinally pure than any of them suggest. First, the text of the amendment is not limited to any one form of speech.²³⁶ To say that a person has a right to talk about politics but not to recite poetry under the original understanding of the First Amendment is to derogate from the plain meaning of the provision.²³⁷ Of course, "speech" has a literal meaning that does not include dance, painting, music, or sculpture, particularly when juxtaposed with another constitutional provision that protects "the press,"²³⁸ but this bridge is crossed without any reference to the distinction between political and non-political speech. Moreover, the presence of the Religion Clauses in the First Amendment strongly suggests that the Framers were not thinking solely in terms of politics when they proposed the Amendment.²³⁹

Second, the Court has been expanding the protective scope of the First Amendment for a number of years, with at least the implicit support of the population. Stare decisis may not count for everything, but it certainly counts for something;²⁴⁰ were the people of the United States to wake up tomorrow and learn that the Supreme Court had deprived *Rambo* of constitutional protection, many would be understandably astonished.²⁴¹

than physical violence.").

²³⁶ See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

²³⁷ See Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1234-35 (1984) (citing David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 463-64 (1983)) (noting that founders perceived prior restraints "as an interference with freedom of the press whether or not the restrained publication was political in character").

²³⁸ U.S. CONST. amend. I.

²³⁹ See JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 39-42 (2000) (noting the importance of "freedom of conscience" to Framers of Religion Clauses).

²⁴⁰ See Shiffrin, *supra* note 237, at 1235 (criticizing Robert H. Bork and Lillian BeVier for undervaluing importance of precedent).

²⁴¹ Cf. Nick Wingfield, *Holiday Mayhem, Videogame-Style: Our Guide to the Releases Aimed at Year-End Gift-Givers: Downloading Camouflage*, WALL ST. J., Nov. 24, 2004, at D1 ("According to a game industry trade group, almost one in three Americans plans to give a videogame this season, and nearly half of adults with children in their households plan to give a game.").

Third, and perhaps most important, broad First Amendment protection arguably serves an acute cultural need that did not exist a century ago. As any student of modern history can attest, ours has become a heavily regulated country in which many endeavors constitutive of the self are subject to hurdles and barriers to entry. People cannot generally slaughter cattle in their backyards.²⁴² They can, however, live expansive lives of fantasy constructed almost entirely with ink, oil, or bytes.²⁴³

In the last one hundred years, the United States has witnessed a massive shift in lifestyle, transforming from an economy that was largely agrarian, industrial, and unrestrained—and in which liberty in the economic realm was not only possible but exalted—to an economy that is decidedly urban and closely regulated, where individual economic behavior is subject to very real constraints. This state of affairs puts a premium on identifying realms in which individuals can grow without restraint and without discernible harm to themselves or others. Indeed, some of the Supreme Court's own decisions have arguably accelerated this process.

Although it began as early as 1873,²⁴⁴ by the middle of the twentieth century the Court had completed its project of enabling government to subject economic conduct to pervasive regulation.²⁴⁵ Indeed, the very provenance of “liberty of contract” had been

²⁴² See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (upholding law requiring cattle to be slaughtered at designated slaughter houses).

²⁴³ See Goroff, *supra* note 62, at 765 (“While people cannot save a princess from a dragon in reality, they can rescue her through *Dragon's Lair*.”); Rachel Nielsen, *Their Own World: Online Role-Playing Games Offer Players Interaction in a Fantasy World. Who are These People, Anyway?*, WALL ST. J., Apr. 26, 2004, at R12 (discussing online role-playing games and characters players assume). For example,

Dark Asmodius is a character [Matt] Blevins assumes while playing an online game called Neocron, an example of an increasingly popular kind of interactive entertainment known as massively multiplayer online role-playing games, or MMORPGs. Such games provide fantastical digitally rendered landscapes in which players roam about and interact through animated characters, or avatars.

Nielsen, *supra*. Nielsen notes that “U.S. subscribers to such games have soared to about 2.4 million [in 2003] from 1.4 million in 2002, and are expected to hit 2.8 million [in 2004].” *Id.*

²⁴⁴ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 63 (upholding regulation of butchering against Thirteenth and Fourteenth Amendment challenges).

²⁴⁵ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)) (upholding minimum wage law for women).

questioned.²⁴⁶ The rejection of economic substantive due process materially, if not radically, reduced the scope of human activity categorically protected from regulation. Perhaps as a concomitant of this development, while the Court minimized the bite of economic substantive due process, it also began to show a greater willingness to protect endeavors with a predominantly expressive component, as *Joseph Burstyn* demonstrated.²⁴⁷ At this time, the Court also began to protect various forms of sexual behavior from the regulatory power of government under the rubrics of due process and equal protection.²⁴⁸

In Aristotelian terms,²⁴⁹ perhaps the Court was seeking to identify zones in which people could experiment and develop their personalities in terms of enhanced character and virtue, without causing excessive, immediate, or discernible harm to others. Expression does not have any such effect,²⁵⁰ nor, at least to some extent, do many forms of consensual sexual behavior. If the government was going to control almost every aspect of the factory²⁵¹

²⁴⁶ See *id.* at 391 (“In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract.”).

²⁴⁷ See *supra* notes 40-46 and accompanying text.

²⁴⁸ See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that sterilization for repeat offenders of crimes against moral turpitude violates Equal Protection Clause).

²⁴⁹ See ARISTOTLE, *THE NICHOMACHEAN ETHICS* bk. 1, ch. 13, in *CLASSICS OF WESTERN PHILOSOPHY* 226 (Stephen M. Cahn ed., J.A.K. Thomson trans., Hackett 3d ed. 1977) (“Happiness [is] an activity of the soul in conformity with perfect goodness.”); see also Lawrence B. Solum, *Symposium on Classical Philosophy and the American Constitutional Order: Virtues and Voices*, 66 *CHI.-KENT L. REV.* 111, 116 (1990) (noting that, per Aristotle, development of virtues is, in part, function of their exercise).

²⁵⁰ See Redish, *supra* note 3, at 601 (arguing that speech has greater protection than conduct because expression is less likely to directly harm interests of others); Shiffrin, *supra* note 237, at 1238-39 (quoting R. Kent Greenawalt, *Speech and Crime*, 1980 *AM. B. FOUND. RES. J.* 645, 734 n.344) (arguing that speech promotes development and happiness and combines values in ways nonspeech activities do not).

²⁵¹ Cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22 (1937) (examining extent of Congress’s power to regulate relations between labor and management at factory pursuant to its power to regulate interstate commerce). At least in theory, the states could have undertaken regulation of business prior to 1937. Before 1937, however, such undertakings would have been subject to effective challenge as interferences with Congress’s power to regulate interstate commerce or as deprivations of liberty or property without due process of law. See generally ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 82-89 (Sanford Levinson ed., 3d ed. 2000) (discussing challenges to state regulation of business based on Commerce and Due Process Clauses).

or the farm,²⁵² and the Court was not going to stand in its way, perhaps the Court felt a need to compensate by giving people more room for personal development in other areas of their lives.²⁵³ In broader terms, if the people were going to deny themselves the liberty to slaughter cattle in their backyard, they were going to insist on comparable immunity in some other department of their lives. Thus, the predicate for First Amendment protection was poised to include not only artistic expression having an outward, although indirect, effect upon political and social thought, but also artistic expression having a predominantly inward effect.²⁵⁴

Existing precedent construes the First Amendment as broadly as possible and provides clear rules and safe harbors. For example, *Miller v. California*²⁵⁵ and the cases decided thereunder exclude only a narrow, fairly well-defined category of expression from constitutional protection on the ground of obscenity. Specifically, *Miller* limits the category of obscenity to works that “depict[] or describe[], in a patently offensive way, *sexual conduct specifically defined by applicable state law*,”²⁵⁶ and, in fact, gives precise examples of what this conduct can be.²⁵⁷ Writers and artists have worked under the *Miller* regime for decades, arguably never

²⁵² Cf. *Wickard v. Filburn*, 317 U.S. 111, 120-25 (1942) (discussing extent of Congress's power under Commerce Clause).

²⁵³ Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”). See generally Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (describing the varying fortunes of economic substantive due process).

²⁵⁴ The reader may wonder at the difference between an Aristotelian justification for the protection of speech and a justification based on more doctrinally straightforward notions of autonomy or liberty. The distinction, to the extent there is one, lies in the ultimate ground for respecting individual development. Those who argue from autonomy see choice as being preeminent, without regard to how choice is exercised. In contrast, Aristotelians think in terms of objective good having real content, *perhaps* best reached in the context of maximum individual discretion. See Michael J. Perry, *Virtues and Relativism*, in VIRTUE: NOMOS XXXIV 117, 119 (John W. Chapman & William A. Galston eds., 1992) (expressing skepticism toward “deontological claims of morality—that is, of the possibility of justifying claims about what one morally ought to do . . . except on the basis, ultimately, of claims about the requirements of authentic human well-being”).

²⁵⁵ 413 U.S. 15 (1973).

²⁵⁶ *Id.* at 24 (emphasis added).

²⁵⁷ See *id.* at 25 (providing examples of obscenity including representations of intercourse, masturbation, and excretory function).

knowing a climate in which obscenity was completely protected. A similar claim cannot be made about art containing violent imagery.

Any attempt to expand the category of obscenity to include violent imagery having a supposed deleterious effect on children would run afoul of the principles underlying the First Amendment. The Supreme Court allows states and municipalities to suppress obscenity solely because of its offensiveness without further instrumental justification.²⁵⁸ Thus, a law adopted under *Miller* and its progeny is not subject to challenge for being under- or overinclusive so long as it proscribes expression within the defined category. A law that is justified in instrumental terms, however, is subject to challenge on these grounds.

As noted earlier, various commentators asking courts to redefine obscenity to include violent imagery have supported their positions with instrumental arguments regarding the supposed effects of such imagery on children.²⁵⁹ These proposals encourage the prohibition of either all or some violent imagery in video games and other works of art to which children have access. Expanding the category of obscenity to include *all* violent imagery accessible to children, however, would radically and impermissibly truncate children's rights under the First Amendment.²⁶⁰ On the other hand, expanding the category of obscenity to include only *some* violent imagery would produce either an unconstitutionally vague statute or one that is fatally underinclusive because it fails to account for all of the asserted sources of the problem at issue.

Consider, for example, the argument that the First Amendment should not protect violent imagery in video games accessible to children because such games do not integrate normative

²⁵⁸ See *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002) (noting that concept of obscenity premised on preventing shock to community sensibilities, not on protecting against behavior speech might engender); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574-75 (7th Cir. 2001) (stating that obscenity is prohibited because offensive, not because it inflicts harm). This is not to say, of course, that states and municipalities may not justify laws regulating obscenity on instrumental grounds.

²⁵⁹ See *supra* note 194 and accompanying text.

²⁶⁰ See *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 960 (8th Cir. 2003) ("In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors." (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975)); *American Amusement*, 244 F.3d at 576-77 ("Children have First Amendment rights.").

constraints.²⁶¹ Whether or not a complete ban on violent imagery in such games would actually serve the underlying purposes, it would at least correspond to this argument, although it would also be unconstitutionally overbroad.²⁶² On the other hand, a statute or ordinance prohibiting merely some violent imagery would need to draw lines. These lines would need to be either specific, such as a ban on depictions of decapitation, or operational, such as a ban on any depiction of violence not accompanied by adequate normative restraints. The former would be both arbitrary and underinclusive for not corresponding to the theory by which the regulation is justified, whereas the latter would be impermissibly vague.

Similar arguments can be made in defense of *Brandenburg* and *Hess*, which provide strong and certain protection and exclude from the scope of the First Amendment only a narrow, well-defined category of speech posing an acute threat to order and safety. Because these cases require a degree of scienter that no writer or artist would unwittingly possess or display, *Brandenburg* and *Hess* give broad license to the creative process and provide artists and writers with a high degree of control over potential liability. Given the nature of our media, a more expansive definition of incitement—particularly one that would conflate “direction” and “intent” with “likelihood” by construing the first and second of these terms to include subjective awareness of the possibility of a particular result—would leave creators of works containing violent imagery with few if any means to avoid an almost permanent threat of liability. In addition, the requirement that the lawless conduct be “imminent”²⁶³ serves an important independent purpose by foreclosing liability where so much time has passed that no reasonable factfinder could isolate the legal cause of the act at issue.

The variable definitions of incitement proposed by various commentators deny protection to works that, in their view, contain too much violent content.²⁶⁴ Like variable definitions of obscenity, the suggested incitement definitions would not provide sufficiently

²⁶¹ See *supra* note 133 and accompanying text.

²⁶² See *supra* note 260 and accompanying text.

²⁶³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

²⁶⁴ See, e.g., Kiernan, *supra* note 5, at 236 (arguing that more lenient standards should be applied in deciding whether video games containing violent imagery constitute incitement).

clear and broad protection for makers of video games, nor for makers of any work containing violent imagery.²⁶⁵ A popular video game will be played, shared, and perhaps modified by millions of people, young and old, whose reactions will vary substantially. In addition, many of these people will play more than one game and will also encounter violent imagery in books, music, movies, and TV shows. Finally, each of these individuals will be subject to a unique menu of strains arising from the ordinary and extraordinary incidents of life. Given these considerations and the impossibility of determining which “effect,” if any, causes a child to commit a violent act, makers of video games and other works containing violent imagery could not possibly prevent violent, idiosyncratic reactions to their works without substantially impairing children’s rights under the First Amendment or adults’ access to such media.²⁶⁶

For similar reasons, a jury asked to decide whether a particular video game was the proximate and actual cause of a plaintiff’s injuries would have no discernible standard for imposing or refusing to impose liability.²⁶⁷ This would inevitably expose the creators of games to subjective assessments of the expressive value of their works or to subjective desires to compensate plaintiffs for tragic injuries without regard to any finding of fault. In other words, because video games are widely available, and in the end unavoidably so, and because many games contain violent imagery, plaintiffs could frequently claim that a video game was the legal cause of an act of teenage violence. In the absence of clear constitutional rules precluding liability, such claims would expose

²⁶⁵ See Amanda Harmon Cooley, *They Fought the Law and the Law (Rightfully) Won: The Unsuccessful Battle to Impose Tort Liability upon Media Defendants for Violent Acts of Mimicry Committed by Teenage Viewers*, 5 TEX. REV. ENT. & SPORTS L. 203, 229-30 (2004) (discussing alternative theories of liability and constitutional protection and arguing that “[t]he central weakness of all these policy arguments is that they run contrary to established First Amendment jurisprudence and blackletter negligence law”).

²⁶⁶ See Li, *supra* note 79, at 495 (“The specter of liability would compel publishers to ‘dumb down’ their games, stripping them of sophisticated plots and characters simply to avoid portraying violence.”); see also *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (recognizing that protecting minors from exposure to harmful speech restricts adults from exercising right to be exposed to such speech).

²⁶⁷ See *James v. Meow Media, Inc.*, 300 F.3d 683, 697 (6th Cir. 2002) (noting difficulty of protecting speech in context of tort action).

creators of video games to the permanent possibility of vexatious discovery and crippling judgments.

Given the foregoing, it is irrelevant that *Brandenburg* and *Hess* arose in the context of unpopular political speech, because these cases serve an important and salutary purpose in this context as well. Moreover, as the Supreme Court itself has observed, drawing the line between speech that is “overtly political” and speech that is not is a hazardous duty.²⁶⁸ As the Court noted in *Winters* and *Joseph Burstyn*, almost any message is ultimately political.²⁶⁹ Indeed, drawing such a line calls for exactly the kind of content-based distinctions that the Supreme Court has described as being intolerable to the First Amendment.²⁷⁰

Nor would *ex ante* restrictions on access predicated on a variable definition of incitement be any less offensive to constitutional norms than similar restrictions predicated on a variable definition of obscenity. Violence is a fact of life.²⁷¹ Consequently, a statute or ordinance restricting the sale or rental to a minor of any video game containing violent imagery would inevitably suffer from one of three fatal deficiencies: it would sweep far too broadly; it would make arbitrary and therefore unupportable distinctions; or it would be impermissibly vague.²⁷² Would the government classify a video game of Warner Brothers’ *Wile E. Coyote and the Road Runner*, complete with misfiring rockets manufactured by the Acme Company of Walla Walla, Washington, as “gratuitously violent”?²⁷³ How about the highly popular video game *Sim City*, in which the city is subject to attacks from monsters,²⁷⁴ or a recent “pro-bono” game designed to teach children about starvation that requires the

²⁶⁸ See *supra* note 44 and accompanying text.

²⁶⁹ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (recognizing film’s ability to affect behavior and attitudes); *Winters v. New York*, 333 U.S. 507, 510 (1948) (noting instances of propaganda through fiction).

²⁷⁰ See *Police Dep’t of Chicago v. Mosely*, 408 U.S. 92, 95 (1972) (“[G]overnment has no power to restrict expression because of its . . . content.”).

²⁷¹ See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (finding violence permeates various forms of entertainment).

²⁷² See *supra* note 260 and accompanying text.

²⁷³ See *Arcade History*, http://www.arcade-history.com/history_database.php?page=detail&id=2237 (last visited Sept. 2, 2005) (describing *Road Runner* game manufactured by Atari).

²⁷⁴ See *Overview of Sim City 4*, <http://simcity.ea.com/about/simcity4/overview.php> (last visited Sept. 2, 2005) (describing newest version).

hero to “buy rice, oil and beans, then dodge blown-up bridges, land mines and armed rebels to deliver the food”?²⁷⁵

V. CONCLUSION: NO HARM NO FOUL?

The early decisions denying constitutional protection to video games uniformly involved questions of access.²⁷⁶ Consequently, the repercussions of these decisions were somewhat limited. People could still play the games, developers could still design and create new ones, and the market could thrive. It is tempting, therefore, to look back on the experience of the early 1980s with the attitude that “all’s well that ends well.” We expose new media to significant and perhaps undesirable risk, however, if we accept such thinking without reflection. For example, after courts held that video games did not qualify for First Amendment protection, municipalities or states could have banned such games, and Congress could have prohibited their shipment across state lines,²⁷⁷ provided the government in question could justify its action as rationally related to a legitimate public purpose.²⁷⁸

Furthermore, by the late 1990s, plaintiffs were bringing tort actions against the developers and distributors of video games, arguing that the games had proximately caused injuries to themselves or their decedents, and asking for crippling amounts of compensatory and punitive damages. The defendants were then obliged to respond not only to conventional arguments sounding in tort, but also to precedent that almost universally denied constitutional protection to their work. They prevailed, but one

²⁷⁵ Michael M. Phillips, *Action, Sports . . . Famine: Videogame Aims to Teach Kids About Fighting Hunger; Project Seeks Industry Help*, WALL ST. J., Apr. 13, 2004, at B1.

²⁷⁶ See *supra* note 75 and accompanying text.

²⁷⁷ See *United States v. Darby*, 312 U.S. 100, 114 (1941) (holding Congress may ban goods it considers injurious to public health, morals, or welfare from interstate commerce).

²⁷⁸ *E.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). The Court noted that:

[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

cannot be sure that the developers of the next new medium would be similarly successful.

Of course, it may be that courts might have handled the constitutional issue differently if faced with an outright ban or a tort action with millions or even billions of dollars at stake, but one should note that Mutual Film complained to no avail that Ohio's scheme rendered the distribution of films in that state commercially impracticable.²⁷⁹ Indeed, in a highly prescient article published in 1984, David B. Goroff argued that courts should extend the protection of the First Amendment to video games if only because of their *potential* for expression in the coming years.²⁸⁰ The Supreme Court itself has emphasized that a basic policy of the First Amendment is to encourage emerging means of expression.²⁸¹ If only for this reason, courts should be significantly more solicitous of the claims of new media to constitutional protection.

²⁷⁹ See *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 234 (1915) ("It is . . . physically impossible for the board to censor the films with such rapidity as to enable complainant to proceed with its business . . .").

²⁸⁰ Goroff, *supra* note 62, at 752 ("Freezing the first amendment in a particular time frame diminishes the vitality of free speech. . . . To protect peep shows because their purveyors call them 'movies' and the bump-and-grind because its performers say they are 'dancing,' while denying video games protection because they are unlike previously recognized expression, is nonsensical.").

²⁸¹ *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). The Court noted that

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

Id.