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NOTES

VIDEO GAMES AND THE FIRST AMENDMENT: ARE RESTRICTIVE REGULATIONS CONSTITUTIONAL?

In recent years, video games have become one of the most popular new phenomena in this country. In fact, the pinball and video game industry has been reported to be one of the most profitable forms of entertainment in America.¹ However, as these games have increased in popularity, they have brought with them a challenge far beyond what was ever imagined. The challenge of these games is no longer whether one can obtain the highest score; now the challenge is whether the games may be played at all.

Throughout the country, cities have enacted laws restricting access to both video games and the arcades in which they are found. These laws vary, ranging from a complete ban on video games² to time, place and manner restrictions.³ Many of these restrictions focus specifically

1. Comment, *Video Games Wars: Arcades v. City Licensing Laws*, 1983 DET. C.L. REV. 103, 103 n.1. See also G. LOFTUS & E. LOFTUS, *MIND AT PLAY* 3 (1983), claiming that over five billion dollars a year are spent in video arcades.

2. See, e.g., *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 389 Mass. 436, 450 N.E.2d 605, *appeal dismissed*, 104 S. Ct. 475 (1983) which quotes Town of Marshfield General By-Law No. 48. This law provides:

(1) No person shall keep, or cause to be kept, operate or suffer to be operated, on premises owned or leased by him, or subject to his control, any mechanical or electronic automatic amusement device, whether coin-operated or not . . . except private in-home use, coin-operated juke boxes, pool, billiard, bowling and athletic training devices.

Id. at — n.3, 450 N.E.2d at 607 n.3.

3. See, e.g., *1001 Plays v. Mayor of Boston*, 387 Mass. 879, 444 N.E.2d 931 (1983) which quotes MASS. GEN. LAWS ANN. ch. 140, § 181 (West 1974). In pertinent part this law provides:

The mayor or selectmen shall grant such license or deny such license upon a finding that issuance of such license would lead to the creation of a nuisance or would endanger the public health, safety or order by: (a) unreasonably increasing pedestrian traffic in the area in which the premises are located or (b) increasing the incidence of disruptive conduct in the area . . . or (c) unreasonably increasing the level of noise in the area . . . (d) otherwise significantly harming the legitimate protectable interests of the affected citizens of the city.

387 Mass. at 879 n.1, 444 N.E.2d at 931 n.1.

on regulating minors' access to video games. The restrictions include banning minors completely,⁴ restricting their hours of use,⁵ and admitting them only when accompanied by an adult.⁶

The justifications given for restricting minors' access to video games or arcades are somewhat different from those given for restricting access without respect to age. The latter restrictions are usually upheld as zoning regulations enacted for the health, safety, and welfare of the general public.⁷ On the other hand, laws that restrict minors' access are often justified on the basis that children need special protection from the evils that lurk in arcades and the dangers of the games themselves.⁸

Regardless of the justification given, the United States Supreme Court has recently given strong support to local governments that wish to regulate, if not ban, video games by dismissing an appeal in the case of *Marshfield Family Skateland, Inc. v. Town of Marshfield*.⁹ The Court stated that a total ban on video games raised no "substantial federal question." The case had raised the issues of freedom of expression and freedom of association. The effect of the dismissal, therefore, was to declare that video games are not entitled to the protection of the first amendment under the United States Constitution.¹⁰ However, state

4. See, e.g., *Aladdin's Castle, Inc. v. Village of N. Riverside*, 66 Ill. App. 3d 542, 383 N.E.2d 1316 (1978) which quotes Municipal Code No. 75-0-16, providing in pertinent part: "No proprietor shall permit or allow any minor to operate or play any multiple play machine or device as defined herein and shall not permit any person under the age of eighteen years to play any single play machine or device as defined herein." 66 Ill. App. 3d at 544, 383 N.E.2d at 1317.

5. See, e.g., *State Regulation of Electronic Game Machines*, 11 J.L. & EDUC. 385, 386 (1982).

6. *Id.*

7. See, e.g., *Aladdin's Castle, Inc. v. Village of N. Riverside*, 66 Ill. App. 3d 542, 547, 383 N.E.2d 1316, 1319 (1978).

8. For examples of feared consequences, see Comment, *supra* note 1, at 132; Strom, *Video Games: Regulation and Control*, 5 ZONING & PLAN. L. REP. 73, 74 (Nov. 1982).

9. 104 S. Ct. 475, *dismissing appeal from* 389 Mass. 436, 450 N.E.2d 605 (1983) (Justices Brennan and White noted probable jurisdiction and would have been willing to hear oral argument).

10. In *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), the Supreme Court stated: "As Mr. Justice Brennan once observed, '[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case' " See also C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS ch. 12, § 108 (3d ed. 1976). This procedure has been challenged by at least one law review commentator. The problem with calling a dismissal for lack of substantial federal question a disposition on the merits is that the appeal has been decided without the benefit of oral arguments or briefs on the merits, therefore it should not be accorded precedential weight. See Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda*, 76 COLUM. L. REV. 508, 519 (1976). However, lower federal courts are still bound by the dismissal when hearing similar challenges. *Id.* at 511.

courts may find differently under their own constitutions since nothing in the United States Constitution prohibits an individual state from granting a greater degree of first amendment protection to communication than that provided by the federal government.¹¹

The Supreme Court erred in *Marshfield* by dismissing the novel constitutional claim in such a "discretionary"¹² manner. Restricting access to this new form of entertainment and technology will have harmful effects on those wishing to play. Since video games provide an introduction to computers, upon which our society is becoming increasingly dependent, it is critical that people, especially children, receive exposure to the new technology and skills that are becoming necessary to survive in today's complex society.¹³

To insure access to video games, it is necessary to provide the games with constitutional protection. On first glance it appears that the Supreme Court's dismissal in *Marshfield* may have been correct and that video games are no more deserving of first amendment protection than such activities as pinball games or bowling. However, as this Note will demonstrate, video games are more entitled to protection than these other activities because, unlike the others, video games are a new form of communication.

This Note will explore the important role video games play in modern society and examine the reasons for granting video games constitutional protection greater than that provided by the "rational relationship" test.¹⁴ The strongest argument supporting constitutional

11. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court held that although there was no right of access to private property for purposes of distributing handbills under the U.S. Constitution, there was also nothing preventing a state from granting more expansive individual liberties under its own constitution. *Id.* at 81. Therefore, a state may grant a greater degree of first amendment protection for video games as well.

12. Comment, *supra* note 10, at 518-19 explains the problems of dealing with novel constitutional claims, such as one involving video games, in this manner. The author states that "when the Court disposes of questions of first impression without the benefit of oral argument and briefs on the merits, the disposition arguably results from discretionary considerations."

13. See *infra*, part I. Of course, restricting access to the games and arcades creates an economic harm by reducing the number of people who are allowed to play or forbidding a person to engage in the video game business altogether. This aspect of the regulations, though, is beyond the scope of this Note.

14. "Rational relationship" is a test used by the courts in determining if a law is constitutional. Generally, as long as a court holds that the means used constitute a rational way to reach a legitimate government goal, the law is upheld. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-15 (1976); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1972). The problem with the rational relationship test, as Justice Marshall has pointed out in his dissent in *Murgia*, is that a law is almost always upheld under this test. When constitutional rights are involved, however, a heightened form of scrutiny

protection for video games is first amendment protection of free speech. A second argument is the first amendment right to freedom of association. The Supreme Court refused to hear either of these arguments in *Marshfield*. This Note explains why that refusal was improper. These arguments are important not only in terms of federal law, but also to states that may wish to grant greater protection to video games under their own constitutions.¹⁵ While other arguments can be made against video game regulation, they are beyond the scope of this Note which is concerned only with the relationship of the regulations to the first amendment.¹⁶ Three types of regulations blatantly restrict access and are especially adverse to first amendment principles. These are: total bans on video games and arcades; regulations barring minors from video arcades; and regulations requiring minors in video arcades to be accompanied by an adult.

The Note is divided into three parts. The first will establish the importance of video games in today's society; the second will establish why video games should be considered a form of expression entitled to first amendment protection; and the third will explore the possibility of a right of association under the first amendment.¹⁷

I. VIDEO GAMES: THEIR ROLE IN MODERN SOCIETY

In order to understand the full impact of regulations that restrict access to video games, it is necessary to depart from the law and look at the social aspect of the games and arcades in general. Modern society is entering a new era in which information and technology are the dominant components.¹⁸ In essence, what is occurring can be thought of as an "information"¹⁹ or "computer"²⁰ revolution. Computer literacy,

is employed which requires that the law be necessary to promote a compelling governmental interest. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

15. See *supra* note 11 and accompanying text.

16. Regulations may also be challenged on grounds that they place too much discretion in the licensing authority, that they are vague, or that they deny equal protection to arcade owners. If it is determined that video games are a form of communication, then an equal protection argument will essentially add nothing to the argument. A challenge of a regulation will more likely be successful if the regulation is tested using a standard of heightened scrutiny. Once first amendment principles are involved, this level of review is already triggered, so there is no need to make an equal protection argument.

17. "First amendment" will be used as a shorthand way of referring to the freedom of expression argument even though rights to both freedom of speech and freedom of association emanate from the first amendment.

18. F. WILLIAMS, *THE COMMUNICATION REVOLUTION* 236-37 (1982). See also D. BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY* (1973).

19. Friedrich, *The Computer Moves In*, *TIME*, Jan. 3, 1983, at 14.

20. Goleman, *The Electronic Rorschach*, *PSYCHOLOGY TODAY*, Feb. 1983, at 36, 40.

which is now "as essential a tool as reading, writing and arithmetic,"²¹ has caused dramatic changes in the way in which people live and work.²² Already, more than half of the American workforce earns its living as "knowledge workers," exchanging various kinds of information.²³ Computers are invading the workplace, the school, and the home. They are being used for such things as computer networking and information retrieval,²⁴ as well as for entertainment purposes, such as video games. More and more, communication is taking place with this new form of technology.

Video games serve an important function as one of the primary ways in which people are introduced to this new technology.²⁵ They tend to ease the apprehension people have of dealing with computers,²⁶ which is extremely important since many people tend to fear new technology and resistance is often their first reaction to computers.²⁷ Since technological advancements will continue, it is necessary for people to become familiar and competent with the technology as quickly as possible to avoid becoming functionally illiterate. Learning the new technology of computers is especially essential for today's youth since they more than anyone else will need to know and use these skills. Early exposure to computers can provide advantages later in life.²⁸ Some fear that children who do not receive exposure to the games will become second-class citizens or functional illiterates.²⁹

21. *Id.* at 43.

22. Friedrich, *supra* note 19, at 14.

23. *Id.* at 16.

24. LEXIS and WESTLAW, for example, are information retrieval systems which index legal information. Mainly, these two systems are used for research by plugging key words or phrases into the keyboard which is attached to a video display terminal. The computer then searches the programmed data base(s) and retrieves cases that contain the search terms. The systems provide other functions as well, but these are not important for the purposes of this Note. The main point is that the systems convey information to the user.

25. Kesler, Sproull, & Eccles, *Second-Class Citizens?*, PSYCHOLOGY TODAY, Mar. 1983, at 40, 43 [hereinafter cited as Kesler]. See also Friedrich, *supra* note 19, at 16.

26. See Friedrich, *supra* note 19, at 16. See also Kesler, *supra* note 25, at 42.

27. Goleman, *supra* note 20, at 39.

28. G. LOFTUS & E. LOFTUS, *supra* note 1, at 106. See also Kesler, *supra* note 25. "Children who are exposed to computers early on are most likely to develop 'computer efficacy,' learn procedural thinking and programming, and develop the sense of mastery that will encourage them to tackle more complex computer tasks." *Id.* at 42.

29. Kesler, *supra* note 25. The researchers were particularly worried that girls will wind up becoming second-class citizens or "functional illiterates" since the arcades are primarily male dominated and girls are not obtaining exposure.

Small advantages in skills at an early age can develop into great differences in competence later in life. Boys' earlier familiarity and ease with computer games, we fear, may put girls at a disadvantage when they enter the computer world. . . . Cultural factors and expectations seem to keep girls out of arcades and away from computers.

In addition to opening the door to the world of computers, video games provide other benefits. For example, since the essence of computer literacy is procedural thinking,³⁰ video games provide insight into computer programming as they take educational aspects of the games—the articulation of knowledge and learning of strategy—and carry it to a higher level.³¹ Thus “the line between game playing and programming is very thin.”³²

Besides programming skills, video games also teach other skills that are necessary in using a computer in the workplace. To begin with, the efficiency of computer systems hinges in part upon the quality of the worker’s attention. Thoughtful mental involvement must be sustained, as opposed to the casual or passive attention that was once satisfactory.³³ Exposure to video games instills this ability to sustain attention, as well as teaches essential eye-hand coordination and the skill of making quick judgments of spatial relationships.³⁴ Video games may therefore be thought of as analogous to a primer introducing people to the basic skills of computers.

Another important feature of video games is their ability to provide a sense of mastery, a chance to be in control. This is one of the major reasons that video games are so popular among today’s youth.³⁵ This feeling of mastery, which is very important for a positive feeling of self-esteem and which is a crucial achievement for children,³⁶ is often unavailable in modern society.³⁷ With video games, the possibility of mastery arises from the sophisticated technology used in the games; the games “think” and fight back, responding to each of the player’s moves with one of their own.³⁸

Another reason for the popularity of video games is the fact that they provide visually compelling entertainment.³⁹ “Each video game of-

Id. at 48 (emphasis added).

30. Kesler, *supra* note 25, at 47.

31. Golden, *Here Come the Microkids*, TIME, May 3, 1982, at 56.

32. *Id.*

33. Goleman, *supra* note 20, at 41.

34. Kesler, *supra* note 25, at 46. The fact that these skills can be learned is apparent from the fact that after practice girls did as well as their male counterparts.

35. Golden, *supra* note 31, at 52. “[T]he overwhelming attraction of the machines is the line of control, the pleasure of being able to make something happen, a satisfaction all too often denied children.” See also Surrey, *It’s, Like, Good Training for Life*, NAT. HIST., Nov. 1982, at 70, 83. “The critical factor [of the games’ popularity] seems to be not the destruction of aliens but the challenge of first meeting and then conquering technology.”

36. Needham, *Thirty Billion Quarters Can’t Be Wrong—Or Can They?*, 71 TODAY’S EDUC. 54 (1982/1983).

37. *Id.*

38. *Id.*

39. G. LOFTUS & E. LOFTUS, *supra* note 1, at 37.

fers a virtual cosmic light-and-sound show unto itself. The colors are bright and varied; the visual effects equal the latest screen spectaculars"⁴⁰ In essence, video games are a new form of artistic expression. As well as providing visual entertainment, video games also provide the player with a story. Regardless of what the specific storyline is, "the stories and themes are as old as humanity. The themes are of adventure and conquest. Timeless themes which are channeled by the state of the art technology."⁴¹ Video games thus allow a player to enter the world of his favorite fantasy.⁴²

The use of video games is not just limited to entertainment; they have been used for educational purposes as well since they provide motivation, a key element in learning. There are two primary ways in which video games can be used in computer learning. First, a game may be used as a form of reward in and of itself. Children are motivated to learn because they know that correct answers will be rewarded with a game. Second, the games themselves can be learning devices,⁴³ helping children to grasp concepts at early ages.⁴⁴

Other positive effects of the video games involve the socialization process. The easy accessibility of video games causes them to act as a social equalizer, allowing anyone to gain exposure to the new technology and skills for a small price. This means that children from lower income families will have a better chance to stand on equal footing when exposed to computers in school or the work place. Also, computer games have the ability to teach pro-social values to children through the situations presented in the games. An example of this is the game RIPOFF, which promotes cooperative play by allowing two people to play simultaneously, teamed against the computer.⁴⁵ Furthermore, children are developing their own rules to ensure orderly play. One custom that has developed is for the person "on deck" to place a quarter next to the coin slot to reserve his turn, thereby avoiding argu-

40. Surrey, *supra* note 35, at 74.

41. *Id.* at 83.

42. Needham, *supra* note 36, at 54.

43. One such game is called "Geography Search" which launches competing teams on Columbus-like voyages.

They must make their way across the Atlantic, taking into account currents and winds, finding their longitude and latitude by means of star patterns and the length of a shadow thrown by a stick at high noon . . . and coping with such unforeseen perils as an outbreak of scurvy, an attack by pirates and a tropical storm. Only shrewd planning, wise choices and cooperative action insure survival.

Golden, *supra* note 31, at 55.

44. Through the use of a computer language called LOGO, third grade students are able to tackle basic geometry, a concept that is normally not taught until junior high school. *Id.* at 56.

45. G. LOFTUS & E. LOFTUS, *supra* note 1, at 102.

ment over who plays next.⁴⁶

Of course, fears have also been expressed about the possibility of harmful effects of video games and arcades on children. These fears have in large part led to the regulation of arcades. Among the fears are those of truancy, crime, drugs and violence. Some of the problems, such as truancy, are easily solved by means of reasonable regulations such as requiring arcades to deny admission to school age children during school hours.⁴⁷

One of the greatest fears is that video games will make children more violent than they would otherwise be; yet there is simply no proof to indicate that video games will increase violent tendencies⁴⁸ and there are several reasons to doubt that this will happen. To begin with, the games are actually less violent than other things which vie for children's attention, such as television, movies and comic books.⁴⁹ In addition, the games have actually reduced violence in some areas by giving gangs "something to do besides fight each other."⁵⁰ The idea that video games may actually serve as an outlet for violent tendencies has been echoed by others as well.⁵¹ Still another factor is that the games display abstract symbols and not lifelike images,⁵² which, like the other factors,

46. Surrey, *supra* note 35, at 76.

47. Most arcade owners are not opposed to reasonable regulations. Ranii, *Pac Man Meets Lawman*, NAT'L. L.J., May 23, 1983, at 8, col. 2. In fact, many arcades already engage in self-regulation. See, e.g., Caswell v. Licensing Comm'n for Brockton, 387 Mass. 864, —, 444 N.E.2d 922, 924 (1983) (as part of the plan Caswell intended to post and enforce the following rules: "no smoking, eating, drinking or loitering, and no school age children admitted during school hours"); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980) (arcade rules included the prohibition of "loitering, gambling, smoking, and the consumption of . . . alcoholic beverages" as well as barring school children during school hours).

48. G. LOFTUS & E. LOFTUS, *supra* note 1, at 103.

49. Wolkomir, *Arcades & Our Kids—Much Ado About Nothing?*, 83 COMPUTERS no. 5, at 55. Anyone who has ever seen a Road Runner or Popeye cartoon knows that even Saturday morning television, whose audience is primarily young children, contains a great deal of violence.

50. Freeman, *Restricting Pac-Man and Friends*, CALIF. LAW., July 1983, at 17.

51. Wolkomir, *supra* note 49, at 54. Similarly, Dr. Bruce David Brooks, a Ph.D. in human behavior and educational leadership who is a consultant on juvenile violence, claims that game rooms actually decrease, not increase illegal activities. Oltmann v. City of Palos Hills, No. 82 CH 3568, slip op. at 3-4 (Ill. Cir. Ct. Aug. 20, 1982).

52. Wolkomir, *supra* note 49, at 55. In the newer games that operate by laser-disc, such as Space-Ace or Dragon's Lair, the video display is an actual cartoon, therefore more lifelike, and thus this argument may not apply to these games. It should be pointed out, though, that the more sophisticated the video display is, the more sophisticated the story is. Therefore although cartoon images of people may be displayed, these games are even more deserving of first amendment protection as communicative expression. Of course, there currently is no way to know what the effect of this display will be on violent tendencies; it should be remembered however that these are still cartoon images.

tends to mitigate the notion that video games will lead to increased violence.

Another major fear is that the arcades will expose children to crime and drugs. These fears stem from the days when pinball was associated with gambling.⁵³ In today's arcades, these fears seem unsubstantiated; there is no evidence linking crime and racketeering to video game arcades. Drugs also do not seem to be a problem since video games require complete alertness.⁵⁴ Again, reasonable regulations, such as requiring supervision, can alleviate possible problems.

A final reason that has led to the regulation of arcades, although one that is not always admitted,⁵⁵ is the desire to stop adolescents from having a place to "hang out." This is an inadequate justification for several reasons. To begin with "kids [will] always find a place to hang-out."⁵⁶ Closing down an arcade, where it is possible to supervise and enforce certain regulations, will only lead youths to find a new place to congregate, one in which supervision and regulation may not be possible. Furthermore, this may violate a first amendment right to freedom of association.⁵⁷

Since video games serve an important social function by introducing people to computers, as well as being useful for purposes of socialization, education, and entertainment, and since there has been no evidence indicating that the fears about games and arcades are justified,⁵⁸ laws restricting access to video games may actually wind up hurting the very children that they were intended to protect. Now that it is apparent that more is at stake than the regulation of a simple activity such as pinball or bowling, it is possible to turn to a traditional legal analysis of the regulation of video games and arcades.

53. See, *State v. Bloss*, 62 Hawaii 147, 152-153, 613 P.2d 354, 359-60 (1980); Comment, *supra* note 1, at 105.

54. "[D]espite the somewhat sordid reputation of the arcades, crime does not fester in most of them." According to one New York City officer, "It takes the kids off drugs. They have to be alert." Surrey, *supra* note 35, at 77-78. "Fears that drugs and liquor are commonplace were off target . . . One cannot play well when drunk or high . . . and where video games are concerned, playing well is the adolescent's best revenge." *Donkey Kong Goes to Harvard*, TIME, June 6, 1983, at 77.

55. In *Marshfield Family Skateland, Inc. v. Town of Marshfield*, one of the reasons given by the Massachusetts Supreme Court in upholding the regulation was to prevent the congregation of young males. 389 Mass. 436, ___, 450 N.E.2d 605, 611, *appeal dismissed* 104 S. Ct. 475 (1983). In *Caswell v. Licensing Comm'n for Brockton*, the Massachusetts Supreme Court pointed out that at the hearing for the granting of the license, part of the opposition stemmed from the desire of not providing a place for youths to congregate. 387 Mass. 864, ___, 444 N.E.2d 922, 924 (1983).

56. Wolkomir, *supra* note 49, at 54.

57. See *infra*, part III.

58. Wolkomir, *supra* note 49, at 55.

II. FIRST AMENDMENT PROTECTION

The first amendment to the Constitution of the United States provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." ⁵⁹ In the first amendment context, the word "expression" is used as the equivalent of speech. ⁶⁰ The purpose of this section is to establish that video games are a form of expression and, as such, they should be entitled to the protection of the first amendment. In order to do this, it is necessary to examine the lower courts' decisions that have dealt with the issues prior to the Supreme Court's ruling in *Marshfield* ⁶¹ as well as examine basic first amendment concepts.

A. AN OVERVIEW OF THE LOWER COURTS' DECISIONS

Like the Supreme Court, the majority of the lower courts that have dealt with the issue have refused to extend first amendment protection to video games. Two lower courts, however, have found that the first amendment applies to this new form of entertainment.

In *Oltmann v. City of Palos Hills* ⁶² an Illinois court found that an ordinance which prohibited minors from playing video games without a parent or guardian present violated both the arcade owner's and minors' rights of freedom of expression. ⁶³ The court determined that video games should be entitled to the same first amendment protection granted to movies, and that regulations concerning video games must face a heightened level of scrutiny.

Similarly, in *Gameways, Inc. v. McGuire* ⁶⁴ the New York Superior Court, ruling on a motion for a preliminary injunction, stated:

Considering the fact that other forms of expression no more "informative" than video games—viewing nude dancing through a coin operated mechanism—have been recognized as constitutionally protected and the elusive line between informing and entertaining, this court concludes that video games are a form of speech protected by the First Amendment. ⁶⁵

59. U.S. CONST. amend. I.

60. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 33 (1973).

61. *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 104 S. Ct. 475, *dismissing appeal from* 389 Mass. 436, 450 N.E.2d 605 (1983).

62. No. 82 CH 3568, slip op. (Ill. Cir. Ct. Aug. 20, 1982).

63. *Id.* at 13-14.

64. No. 17300/81, slip op. (N.Y. Sup. Ct. May 3, 1982).

65. *Id.* at 5-6. Although the court's decision is correct, its analysis is flawed. The reference to viewing nude dancing through a coin-operated mechanism most likely refers to *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). Although there was dicta in *Schad* indicating that nonobscene nude dancing is entitled to first amendment protection, *id.* at 76, the ordinance was found unconstitutional on the ground that it was overbroad,

The majority of courts which have refused to extend first amendment protection to video games have based their decision on the concept that the games lack "sufficient communicative, expressive, or informative elements to be protected."⁶⁶ In *America's Best Family Showplace Corp. v. City of New York*⁶⁷ the New York District Court stated that "before entertainment is accorded First Amendment protection, there must be some element of information or some idea being communicated."⁶⁸ Similarly, in *Caswell v. Licensing Commission for Brockton*, the Massachusetts Supreme Court stated that in order to gain protected status, entertainment must be designed to communicate or express some idea or information.⁶⁹ What these courts have failed to realize is that video games do contain and transmit ideas and information. Once this is established there is no further threshold level of expression that must be attained in order to grant the games protection. In order to understand why this is so, it is necessary to examine the history and principles of the first amendment.

At this point it should be noted that when discussing first amendment protection for video games, the rights of many different parties are involved. Expression in the form of video games involves the rights of the creators, manufacturers, distributors, and arcade owners to present this expression as well as the rights of the players to receive this expression. It is a well settled principle that the first amendment necessarily involves as an inherent corollary the "right to receive information and ideas, regardless of their social worth."⁷⁰

It should also be noted that arcade owners have standing to raise the constitutional claims of their patrons. In most cases courts do not allow third party claims, in order to prevent "unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative."⁷¹ However, the Supreme Court has recognized that in certain situations it is necessary to allow parties to litigate third-party claims when there will be a substantial impact on third-

as it prohibited all forms of live entertainment. However, the New York Court's analysis in *Gameways* was correct in pointing out that there is no minimum threshold level of informational value that a form of expression must meet before it can be entitled to first amendment protection.

66. *Marshfield Family Skateland*, 389 Mass. at —, 450 N.E.2d at 609. See also, *America's Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982); *Caswell v. Licensing Comm'n for Brockton*, 387 Mass. 864, —, 444 N.E.2d 922, 926 (1983).

67. 536 F. Supp. 170 (E.D.N.Y. 1982).

68. *Id.* at 173.

69. 387 Mass. 864, —, 444 N.E.2d 922, 925.

70. *Stanley v. Georgia*, 394 U.S. 557, 564 (1968) (holding that a statute which prohibited the possession of obscene material was unconstitutional).

71. *Craig v. Boren*, 429 U.S. 190, 193 (1976).

party interests.⁷² Furthermore, in a footnote in *Eisenstadt v. Baird* the Supreme Court pointed out that the general standing rule has been relaxed in first amendment cases because of the "intolerable, inhibitory effect on freedom of speech" that the general rules would have.⁷³

Because arcade owners meet the guidelines set out by the Supreme Court and because first amendment issues are involved, the arcade owners must also be allowed to act as advocates for the rights of their patrons. This in fact was the reasoning applied by the Fifth Circuit in *Aladdin's Castle, Inc. v. City of Mesquite*.⁷⁴

The importance of such a ruling is that owners can raise not only first amendment issues which pertain to the games and patrons alike, but may also raise those issues which pertain only to the players such as the constitutional claims of freedom of association and the constitutional rights of minors. If courts did not allow the owners to raise these issues, there is a good chance they would never be raised since an individual player is not as likely as an owner to bring suit due to time and money constraints.

B. AN OVERVIEW OF FIRST AMENDMENT CONCEPTS

The first amendment protects the marketplace of ideas. According to Professor Emerson, a free flowing exchange of ideas and expression is important not only for the individual human spirit, but also for the good of society.⁷⁵ This is due to the fact that it is "through the acquisi-

72. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972). In *Carey v. Population Serv. Int'l.*, 431 U.S. 678 (1977), the Supreme Court determined that Population Planning Associates, Inc., a corporation which was engaged in mail-order retail sale of nonmedical contraceptives, had standing to challenge a law that restricted their ability to engage in this business, "not only in its own right but also on behalf of its potential customers." *Id.* at 683. The reasoning behind this decision was that the vendor had suffered injury in fact satisfying article III's case-or-controversy requirement since its choice was to heed the statute and incur "a direct economic injury . . . or to disobey . . . and suffer legal sanctions." *Id.* Therefore, the Court ruled that vendors could resist efforts to restrict their own operations by advocating the rights of third parties whose interests would be adversely affected. *Id.* at 684. See also, *Craig v. Boren*, 429 U.S. at 192, 195-97; *Eisenstadt v. Baird*, 405 U.S. at 443-46.

73. 405 U.S. at 445 n.5.

74. 630 F.2d 1029 (5th Cir. 1980), *modified on other grounds*, 455 U.S. 283 (1982). The Supreme Court remanded to the Fifth Circuit the part that dealt with unconstitutionality as far as regulating minors' access was concerned to determine if their holding was based on Texas or U.S. constitutional law. On the first remand, the Fifth Circuit found the issue had been decided under the Texas Constitution. 701 F.2d 524 (5th Cir. 1983) (opinion withdrawn). The court then issued an extended opinion, vacating their first remand and held that the original opinion was not based on Texas constitutional law. 713 F.2d 137 (5th Cir. 1983).

75. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1st ed. 1963).

tion of new knowledge, the toleration of new ideas, the testing of opinion in open competition, [and] the discipline of rethinking its assumptions, [that] a society will be better able to reach common decisions that will meet the needs and aspirations of its members."⁷⁶ Furthermore, "suppression of information, discussion, or the clash of opinion prevents one from reaching the most rational judgment, blocks the generation of new ideas and tends to perpetuate error."⁷⁷

As the previous comments illustrate, one of the vital functions that the first amendment serves is that of preventing society from stagnation. This is extremely important since "no modern society can survive for long by merely preserving the status quo."⁷⁸ Paradoxically though, people tend to fear change and society "favors the established style and is uncomfortable with any challenge to it."⁷⁹ For this reason, society tends to suppress ideas that lead to changing circumstances or new ideas,⁸⁰ and uses the prosecution of unpopular opinions as a method of opposing necessary social change.⁸¹

This fear and apprehension of change affects society as it enters the new technological age discussed in part I of this Note. People tend to be intimidated by and resistant to the new technological changes,⁸² just as their ancestors resisted the changes brought by the Industrial Revolution of the nineteenth century. Video games are an obvious manifestation of society's progression toward new technology. While it may not be possible, under both Nimmer's and Emerson's analyses, to slow down progress in the work place or in society as a whole, the regulation of video arcades can be viewed as an attempt to try to slow down inevitable change.⁸³

Since video games are one of the primary ways in which people receive an introduction to computers and develop new and necessary skills, severely restricting access to this new form of communication can lead to an ignorant and functionally illiterate public. The ignorance

76. *Id.* at 8.

77. *Id.* at 7.

78. *Id.* at 79.

79. Nimmer, *supra* note 60, at 60.

80. T. EMERSON, *supra* note 75, at 11.

81. *Id.* at 21. In line with this reasoning is Nimmer's interpretation of hair-style regulations being seen as society's way of preventing a change in lifestyle and preserving the status quo. Nimmer, *supra* note 60, at 60.

82. See Goleman, *supra* note 20, and text accompanying note 27.

83. The idea that these fears may actually underlie some arcade regulations is supported by the view that what parents "are afraid of has much to do with their own fears and fantasies about computers." Warner, *The Electronic Boogeyman*, PSYCHOLOGY TODAY, Oct. 1982, at 8. Similarly, school psychologist David Ifkovic feels that what parents fear is not the video games, but the fact that the ideals and values they have hopefully instilled in their children will be tested in the arcades. Wolkomir, *supra* note 49, at 54.

will come not only from the denial of access to the communications contained within the video games, but, more importantly, it will come from reducing access to the technology of the games themselves. In other words, the medium itself may be viewed as the message, one that must be granted first amendment protection.

The fact that video games are a form of entertainment does not lessen the need for first amendment protection and is irrelevant in determining whether protection should be granted. The basic theory behind the first amendment's freedom of expression goes beyond the realm of politics and includes "all discussion which enriches human life and helps it to be more wisely led."⁸⁴ Thus in our first national statement of the subject by the Continental Congress in 1774, this freedom was declared to include the "advancement of truth, science, morality and arts in general."⁸⁵ Emerson echoes this sentiment in declaring that the first amendment "embrace[s] the right to participate in the building of the whole culture, and include[s] freedom of expression in religion, literature, art, science and all areas of human learning and knowledge."⁸⁶

It has long been recognized that entertainment is entitled to the protection of the first amendment. In 1948 the Supreme Court decided *Winters v. New York*,⁸⁷ striking down a law which prohibited the selling of magazines consisting of stories and reports of crime. The Court stated:

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.⁸⁸

Four years later, the Supreme Court confirmed that entertainment is entitled to first amendment protection in *Joseph Burstyn, Inc. v. Wilson*.⁸⁹ In that case, the Court decided an issue which in retrospect seems obvious: that motion pictures are entitled to first amendment protection.⁹⁰

Entertainment was more recently upheld as a form of protected communication in *Schad v. Borough of Mount Ephraim*.⁹¹ In that case

84. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 545 (2d ed. 1969).

85. *Id.* (quoting J. OF THE CONTINENTAL CONGRESS (ed. 1800)) (emphasis Chafee's).

86. T. EMERSON, *supra* note 75, at 8-9. See also Nimmer, *supra* note 60, at 33-34.

87. 333 U.S. 507 (1948).

88. *Id.* at 510.

89. 343 U.S. 495 (1952).

90. *Id.* at 501.

91. 452 U.S. 61 (1981).

the Supreme Court found a ban on all live entertainment to be unconstitutional, stating once again that "entertainment as well as political and ideological speech is protected."⁹² In the opinion, there was dicta suggesting that even nonobscene nude dancing would be protected by the first amendment.⁹³ First amendment protection has also been extended to "skits" performed on public thoroughfares,⁹⁴ and to possession of obscene material.⁹⁵

Nor does the fact that video games are a form of commercial enterprise lessen the need for first amendment protection. In *Joseph Burstyn* it was argued that motion pictures do not deserve protection since they are products of large-scale businesses conducted for private profit. The Supreme Court rejected this argument, comparing movies to books, papers, and magazines which are also created and sold for profit. The Court found that just as profit did not deny those forms of expression first amendment protection, it would not also prevent motion pictures from receiving this protection.⁹⁶ There is no reason why profit should now stand in the way of according first amendment protection to video games.⁹⁷

C. WHY VIDEO GAMES SHOULD BE CONSIDERED EXPRESSION

As an analysis of the above cases makes clear, it is not just verbal speech or printed words that are entitled to first amendment protection. Nor is there a minimum level of information or value that must be contained in an expression for first amendment protection to apply. The Supreme Court made this explicitly clear in *Winters v. New York*⁹⁸ in stating "though we can see *nothing of any possible value* to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."⁹⁹ When these principles are applied to communication in the form of video games, it becomes apparent that this communication too should be entitled to first amendment protection.

Video games utilize a television monitor and computer technology

92. *Id.* at 65.

93. *Id.* at 76. "Here the Borough totally excludes all live entertainment, *including non-obscene nude dancing*, that is otherwise protected by the First Amendment." (Emphasis added.)

94. *Schacht v. United States*, 398 U.S. 58 (1970).

95. *Stanley v. Georgia*, 394 U.S. 557 (1969).

96. 343 U.S. at 501-02.

97. See *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1126 (1st Cir. 1981) where the court found that "peep shows," coin-operated devices that display risqué adult pictures, are entitled to first amendment protection.

98. 333 U.S. 507 (1948).

99. *Id.* at 510 (emphasis added).

to present the viewer/player with continuous visual displays and sound effects. The video display closely resembles expressions which are admittedly entitled to first amendment protection, such as animated motion pictures or cartoons. After depositing a coin or token in the machine the player can use the controls to interact with and manipulate the video display. Unlike the old-fashioned pinball games, video games present the player with a story or plot, depicting the ideas and fantasies of their authors. This is especially true of the newest of the video games which are actual cartoons. By combining the computer and laser videodisc technologies, these newer games offer a random pattern of possible plays¹⁰⁰ thereby varying the story each time. One of the creators of these new animated games has said that what he is trying to do with his games is tell a story while at the same time transforming a passive movie-watching experience into an active event.¹⁰¹ While the stories presented in less sophisticated video games are not as elaborate, those games still contain a basic story and, when thought of as predecessors to the new laser disc games, are equally entitled to protection.

Another factor supporting the argument that video games are a form of expression is the Copyright Act,¹⁰² which protects "original works of authorship fixed in a tangible method of expression."¹⁰³ The purpose of the Copyright Act has been consistently recognized as intending to protect "the literary, musical, graphic or artistic form."¹⁰⁴ In enacting the Copyright Act, Congress intended to maintain flexibility in its coverage since "authors are continually finding new ways of expressing themselves and it is impossible to foresee the forms that these new expressive methods will take."¹⁰⁵ In *Stern Electronics, Inc. v. Kaufman*,¹⁰⁶ the Seventh Circuit described the video game as a movie in which the viewer participates in the action and the popularity of which

100. The newest of the games, *Space Ace*, allows players to "guide the hero through the game as if they are directors in command of a multimillion-dollar film crew. They make *Ace's* decisions for him, choosing from among a handful of possible outcomes for each scene of the game." *Lexton, Animator Leads with a 'Space Ace'*, *L.A. Times*, Feb. 21, 1984, at 1, col. 1.

101. *Id.* at 1, col. 3. Don Bluth, creator of *Dragon's Lair* and *Space Ace*, two of the newer games, claims that "laser games have to do with a plot or a goal, (and) their focal point has to be the relationship of the characters." He feels that these new games are a forerunner of the interactive movie. *Id.*

102. 17 U.S.C. §§ 101-810 (1982).

103. 17 U.S.C. § 102(a) (1982). This does not mean that anything that receives a copyright is automatically protected by the first amendment; it means only that copyrightability should be a factor in determining if something is expression or not.

104. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 56 (1976).

105. *Id.* at 51. See also *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 627-28 (7th Cir. 1982).

106. 523 F. Supp. 635 (E.D.N.Y. 1981), *aff'd*, 669 F.2d 852 (2d Cir. 1982).

depends on the creativity of the audio-visual display.¹⁰⁷ It is unclear why most courts have found this to be an irrelevant factor in determining whether video games are entitled to first amendment protection.¹⁰⁸ Most likely the finding is based on a mistaken belief that a threshold level of expression is required before a communication is protected by the first amendment. This belief, and the resulting denial of protection for video games, is erroneous for several reasons.

In *Sunset Amusement Co. v. Board of Police Commissioners*¹⁰⁹ the California Supreme Court reiterated the principle that "all forms of communication, not merely the expression of concrete and definite ideas, *potentially* receive First Amendment protection The key element is, of course, *communication*."¹¹⁰ Under this standard, roller skating in a rink was not found to be protected speech since it was done primarily for physical exercise and personal pleasure, but nonobscene dancing was protected since it involves communication between the artist or performer and an audience.¹¹¹ This standard favors a finding that video games are constitutionally protected, since video games more closely resemble dancing than they do roller skating—while video games do require some degree of physical activity such as eye-hand coordination, they also involve communication. The communication in video games is two-fold: first, interaction between the player and the computer, each responding to the other's moves; second, expression of a story to the player, similar to a dancer's communication with the audience.

The Massachusetts Supreme Court in *Caswell v. Licensing Commission for Brockton*¹¹² seemed to reject *Sunset Amusement's* position that concrete and definite ideas were not required for communication to be constitutionally protected by saying that entertainment must be designed to express some idea or information before protection ap-

107. *Id.* at 639. *Accord*, *Midway Mfg. Co. v. Artic Int'l., Inc.*, 704 F.2d 1009 (7th Cir.), *cert. denied*, 104 S. Ct. 90 (1983); *Williams Elecs., Inc. v. Artic Int'l., Inc.*, 685 F.2d 870 (3d Cir. 1982); *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982).

108. In *Caswell v. Licensing Comm'n for Brockton*, 387 Mass. 864, —, 444 N.E.2d 922, 926 (1983), the court stated that *Caswell* had not demonstrated "that video games are or contain protected expression." Similarly, in *America's Best Family Showplace v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) the court stated that "copyrighting doesn't give expression."

109. 7 Cal. 3d 64, 496 P.2d 840, 101 Cal. Rptr. 768 (1972), *appeal dismissed*, 409 U.S. 1121 (1973).

110. *Id.* at 74, 496 P.2d at 846, 101 Cal. Rptr. at 774 (emphasis in original).

111. *Id.* The court was discussing its previous holding of *In re Giannini*, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968), in which non-obscene dancing was granted first amendment protection.

112. 387 Mass. 864, 444 N.E.2d 922 (1983).

plies.¹¹³ The *Caswell* decision seems wrong when viewed in light of the Supreme Court's statement in *Winters v. New York*¹¹⁴ that although the Court could see no value in the magazines in question, the magazines were still entitled to first amendment protection.¹¹⁵

Even if one accepts the *Caswell* standard as valid, video games should still be considered a form of expression entitled to first amendment protection. As discussed in part I of this Note, video games do more than entertain; they serve social functions that meet the more traditional definitions of information communication and thereby qualify for first amendment protection. But even if they did not serve these functions, video games, like many types of communication intended purely to entertain, should still be accorded first amendment protection. Video games are simply a new form of expression, and new forms of expression must be protected to the same extent as the older, more traditional forms. As mentioned above, there was at one time a hesitancy to grant first amendment protection to movies. Discussing this, Professor Chafee writes:

In an age when "commerce" in the Constitution has been construed to include airplanes and electromagnetic waves, "freedom of speech" in the First Amendment and "liberty" in the Fourteenth should be similarly applied to new media for the communication of ideas and facts. Freedom of speech should not be limited to the airborne voice, the pen, and the printing press, any more than interstate commerce is limited to stagecoaches and sailing vessels.¹¹⁶

This same logic should now be followed in extending first amendment protection to video games. As the Supreme Court stated in *Joseph Burstyn, Inc. v. Wilson*, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."¹¹⁷

D. ANALOGIES BETWEEN VIDEO GAMES AND OTHER PROTECTED FORMS OF EXPRESSION

It may be helpful at this point to draw some analogies to further reinforce the concept that video games are a form of expression entitled to first amendment protection. It could hardly be argued that communication by means of a computer network should be denied first amendment protection;¹¹⁸ computer networking is still an exchange of information between people, despite the fact that a computer is the me-

113. *Id.* at ___, 444 N.E.2d at 925.

114. 333 U.S. 507 (1948).

115. *Id.* at 510.

116. Z. CHAFEE, *supra* note 84, at 545.

117. 343 U.S. 495, 503 (1951).

118. This assumes that the communication does not involve obscenity or other possible categories of speech that the courts have allowed to be regulated.

dium of exchange. Similarly, intuition tells one that information drawn from computer based information retrieval systems would also be protected communications. Denying protection to this form of information retrieval would be identical to denying protection to the information and knowledge contained within a library. The medium of expression is different, but the information communicated is the same.

Like these other technologies, video games also involve interaction with a computer. The question is whether video games are more like these other forms of computer activities which one intuitively assumes are entitled to first amendment protection, or whether they are more like pinball machines and roller skating, activities that would not receive protection.

The fact that video games do not contain as much "hard" information as other computer uses is irrelevant since, as established above, expression which does nothing more than entertain is also entitled to protection. Comic books and cartoons do not contain as much informational value as novels and movies, yet they receive first amendment protection. The fact that the first two do not tell their stories in as sophisticated a fashion as the others is not relevant. Similarly, one would not argue that the early silent movies are any less deserving of protection than one of today's full-length motion pictures.

The new laser-disc video games present their stories in such a sophisticated manner that it would be difficult to argue that these games are not entitled to first amendment protection.¹¹⁹ Just as early silent movies should not receive less protection for being less sophisticated storytellers, neither should the less sophisticated video games receive less protection.¹²⁰

Like the other computer activities, video games use a new medium to perform the protected function of storytelling. Just as the use of

119. None of the cases that denied first amendment protection involved the new laser-disc video games. These games are more likely to receive protection since they are a more sophisticated storyteller, presenting a cartoon instead of abstract symbols. It is easier to identify with the characters in these new games and the stories are more complex. In fact, in *Marshfield Family Skateland, Inc. v. Town of Marshfield*, the Massachusetts Supreme Court specifically recognized that "in the future video games which contain sufficient communicative and expressive elements may be created." 389 Mass. 436, —, 450 N.E.2d 605, 610, *appeal dismissed*, 104 S. Ct. 475 (1983). These new laser disc games definitely seem to contain a sufficient degree of expression to qualify.

120. It is possible though that this could be a dividing line in determining what forms of computer communication should or should not be considered expression. However, this author would hold that all video games should be entitled to protection providing it contains a basic story line or instills programming concepts into the player. Very few games would not fall into either of these two categories and therefore would not be entitled to protection. One such game may be video pinball, which is actually a hybrid of the older pinball games and new technology.

computers does not reduce the protection given to exchanges or retrieval of information, it should not now cause a reduction of protection given to storytelling. It should make no difference that the creative ideas are being displayed on a video display terminal instead of on paper or movie screen.

Video games are also analogous to reading primers. A beginning reading primer that contains the phrase, "See Dick. See Jane. See Spot." certainly has no informational value, yet no one would argue that it would not be protected by the first amendment. Video games can also be thought of as primers; just as reading primers teach a child to read by beginning with very basic concepts, video games teach people to use computers in the same way. Since computer literacy is becoming increasingly important in modern society, teaching these new skills is just as important as learning to read. For this reason, the games should be accorded protection.

Video games can also be distinguished from non-protected forms of entertainment activities such as pinball and roller skating. "The feature that sets [video games] apart from all other games is the extremely flexible nature of the digital computer that controls them."¹²¹ The player and computer interact with each other,¹²² responding to the other's moves. Furthermore, video games contain an expression of their creator, while in pinball, roller skating or bowling, no expression is communicated. These latter activities are purely physical. By contrast, when one plays a video game, one in effect enters into a fantasy world.

"Before the electronic revolution of the early 1900s, people entertained themselves with plays, chamber music, conversation, [and] books"¹²³ All of these forms of entertainment receive protection under long recognized principles of the first amendment. Since video games are simply a new form of entertainment and fantasy, there seems to be no reason not to apply these same first amendment principles to them.

The fact that a person is actively involved in a video game should not lessen the need for protection. If a video game were to play itself out upon the insertion of a quarter, it would most likely receive first amendment protection since, in essence, it would be a cartoon. Allowing the viewer to become an active participant should enhance, not decrease, the need for protection.¹²⁴

A final analogy is that between video games and artistic expression. Many of today's artists make use of computers in their work. Absent a

121. G. LOFTUS & E. LOFTUS, *supra* note 1, at 21.

122. *Id.* at 32.

123. *Id.* at 96.

124. *Oltmann v. City of Palos Hills*, No. 82 CH 3568, slip op. at 14 (Ill. Cir. Ct. Aug. 20, 1982).

reason such as obscenity, these creative, artistic expressions would be entitled to first amendment protection.¹²⁵ Similarly, movies and pictures are merely images that communicate ideas. Since video games provide visually compelling entertainment,¹²⁶ they may be thought of as a new form of art. Instead of displaying works on canvas, today's artist can express himself by programming his ideas into a computer which will display it to a larger public for a mere quarter or two.

E. JUDICIAL SCRUTINY—THE TEST TO BE APPLIED

Having established that video games are a form of expression entitled to first amendment protection, it is now necessary to determine the standards by which restrictions upon that expression will be tested for constitutionality. When the object regulated by a statute is constitutionally protected, courts must apply a stricter test in determining the validity of a statute than they would if no protected interest were involved. In *Schad v. Borough of Mount Ephraim*¹²⁷ the Supreme Court stated, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed."¹²⁸ Since first amendment principles are involved in restricting access to video games, a stricter test than rational relationship must be applied.

There are two ways to think about laws that restrict access to video games. They may be thought of either as time, place, and manner restrictions or as a regulation of speech and conduct. Either conception leads to the application of essentially the same test. The laws that this Note is concerned with are clearly time, place and manner restrictions. Since conquest and adventure themes are not regulated in other media, such as comic books or cartoons, it is clear that the ideas are being regulated on the basis of the manner in which they are conveyed—that is, the *medium* of video games is what is being regulated. At the same time the laws may also be thought of as a regulation of conduct involving both speech and non-speech elements.

In determining what constitutes a reasonable time, place and manner restriction, courts will look at number of factors, a list of which was recently set forth by the Supreme Court in *Heffron v. International So-*

125. See *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (pictures, films, paintings, drawings, and engravings, like oral utterances and the printed word, are entitled to first amendment protection).

126. G. LOFTUS & E. LOFTUS, *supra* note 1, at 37. Arcade games are still more popular than home versions because the graphics are superior at the arcades. Needham, *supra* note 36, at 55.

127. 452 U.S. 61 (1981).

128. *Id.* at 68.

ciety for Krishna Consciousness.¹²⁹ Such a restriction on first amendment rights is valid when: (1) the restriction makes no reference to the content or subject matter of the speech;¹³⁰ (2) the restriction gives no arbitrary discretion to a governmental authority;¹³¹ (3) the restriction serves a significant governmental interest;¹³² (4) there is no less restrictive alternative available;¹³³ and (5) there are alternative forums available for the expression of the protected speech.¹³⁴

Similarly, when a regulation proposes to regulate conduct rather than speech, the test applied is substantially the same as above. In *United States v. O'Brien*¹³⁵ the constitutionality of a regulation forbidding draft-card burning came before the Supreme Court. Appellants challenged the statute on the basis that it violated their first amendment rights. In determining whether the statute was constitutional, the Court stated:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹³⁶

These then will be the relevant factors in determining if the laws that restrict access to video games and arcades are constitutional under the first amendment.¹³⁷

1. *Significant Governmental Interest*

To begin with, it must be determined if there is a significant governmental interest involved and if the statute bears the required relationship to that interest. There can be little doubt that local governments have the power to protect the health, safety, and welfare of their residents through various regulations. Local governments also have the power to act as *parens patriae* in order to protect children. However, the government must be protecting the public from legitimate harms; they may not restrict access to video games simply because they

129. 452 U.S. 640, 647 (1981). See also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68-70 (1981) (applies these factors to a zoning ordinance.).

130. *Heffron*, 452 U.S. at 648.

131. *Id.* at 649.

132. *Id.*

133. *Id.* at 654.

134. *Id.*

135. 391 U.S. 367 (1968).

136. *Id.* at 377.

137. The factor concerning arbitrary discretion is not a relevant factor under the scope of this Note as it does not involve the constitutional issues being discussed. This factor really comes into play when a specific law is being examined.

feel that the games are bad. It is not up to the government to make moral judgments for its citizens or control what ideas the public is exposed to, even in the case of children.¹³⁸ Since courts will not look for an illicit motive where a legitimate one is proposed,¹³⁹ it is generally assumed that there is a significant interest involved. The question then becomes whether the restriction has a sufficient relationship to the required governmental interest.

The relationship is sufficient when the regulation bears a "rational relationship" to a compelling governmental interest.¹⁴⁰ As discussed at the outset of this Note, there are two general reasons for video arcade regulations; either they are enacted to promote the health, safety and welfare of the general public, or for the protection of minors.

a. *Health, safety and welfare regulations:* In *Schad v. Borough of Mount Ephraim* the Supreme Court made it clear that a local government's ability to zone and control land use, while broad in its power, is not infinite and unchallengeable.¹⁴¹ The power of a local government "must be exercised within constitutional limits."¹⁴² In other words, the governmental interest must be balanced against the first amendment.

Under a test of heightened scrutiny, the burden lies with the government to provide an evidentiary showing that the required relationship exists.¹⁴³ None of the cases that have dealt with this issue have required the government to make such a showing since it was erroneously determined that first amendment principles were not involved and a heightened form of scrutiny was not employed. However, even under the more relaxed rational relationship test, one court struck down a law which prohibited the operation of amusement establishments containing video games.¹⁴⁴ In so doing the court stated:

There is nothing inherent in the nature of this commercial use or in common experience, there is nothing in the ordinance itself, and there

138. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1974), where the Supreme Court stated that except for a legitimate proscription such as obscenity, ideas and images could not be suppressed solely to protect children from what a legislative body may think unsuitable.

139. This policy was stated by the Supreme Court in *O'Brien*: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." 391 U.S. at 383. This means that the Court will not determine if the real reason for the ordinance is an innate dislike of video games and new technology.

140. See *supra* note 14.

141. 452 U.S. 61, 68 (1981).

142. *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring).

143. In *Schad* the Court found that no evidence has been introduced by the Borough to support its asserted justifications. 452 U.S. at 72-75.

144. *Supercade Cherry Hill, Inc. v. Borough of Eatontown*, 178 N.J. Super. 152, 428 A.2d 530 (1981).

is nothing in the proofs submitted below from which it is evident or from which it might fairly be inferred that the use and operation in a commercial zone of a place of amusement containing games, coin-operated amusement or entertainment machines is detrimental to or affects adversely the legitimate interests of the municipality or its inhabitants. In short, the exclusion bears no reasonable or substantial relationship to the protection or promotion of the public health, safety, morals or general welfare.¹⁴⁵

The evidence which a local government must present in support of a health, safety and welfare regulation will depend upon the specific purpose of the law. The reasoning of the above court should be kept in mind, however, especially when dealing with the regulation of games and arcades in commercial zones.

b. *Regulations protecting minors*: If the purpose of the regulation is to protect minors, the issue is whether the local government has a significant interest in protecting its minor citizens from video games through enactment of stricter regulations. The justifications for protecting children include preventing truancy,¹⁴⁶ protecting children from wasting their money,¹⁴⁷ and protecting children from evils such as gambling and drugs.¹⁴⁸ Often, though, the real (although unstated) reason behind the regulation is a fear of providing teenagers with a "hangout."¹⁴⁹

Generally, a local government does have greater power to regulate the conduct of children than it does the conduct of adults. When constitutional rights are involved, however, children and adults are often considered to have coextensive rights unless special circumstances create a unique danger to children.¹⁵⁰ In *Bellotti v. Baird*,¹⁵¹ Justice Powell set out three reasons which would allow a state to restrain a minor in a way that would be unconstitutional if applied to adults. These reasons are "the peculiar vulnerability of children; their inability to make critical decisions in an informed and mature manner; and the importance of the parental role in childrearing."¹⁵² These same factors have been used, for example, to determine the constitutionality of curfew laws restricting minors' constitutional rights.¹⁵³

145. 178 N.J. Super. at 153, 428 A.2d at 531.

146. See, e.g., Strom, *supra* note 8, at 74.

147. *Id.*

148. See *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 389 Mass. 436, —, 450 N.E.2d 605, 608, *appeal dismissed*, 104 S. Ct. 475 (1983).

149. See *id.*; Wolkomir, *supra* note 49.

150. *Bellotti v. Baird*, 443 U.S. 622, 634-35 (1979).

151. *Id.*

152. *Id.* at 634.

153. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. 1981).

In *Aladdin's Castle, Inc. v. City of Mesquite*¹⁵⁴ the Fifth Circuit was faced with determining the constitutionality of a video arcade regulation which restricted minors' access. In applying these factors the court determined that there was no issue of special vulnerability, that the critical decision criterion was irrelevant, and that the legislature exceeded its role when enacting the ordinance and trespassed on the role of parents.¹⁵⁵ The law therefore violated the constitutional rights of minors. However, the analysis applied by the Fifth Circuit has been criticized as being too cursory.¹⁵⁶ It is therefore necessary to take a more in-depth look at the issues since many of the laws are in fact aimed at protecting children from the evils associated with the arcades as well as from those associated with the games themselves.

i. Vulnerability of children: In determining that there was no justification for invoking the peculiar vulnerability of children, the Fifth Circuit found that "it is impossible to conclude that a coin-operated amusement device presents a physical, mental or moral threat"¹⁵⁷ and that a legislature could not suppress children's rights just because it feels that video games are unsuitable.¹⁵⁸ In *McColleston v. City of Keene*,¹⁵⁹ a curfew case, the court found that the "safety and general welfare of vulnerable, impressionable minors was an unstated purpose."¹⁶⁰ The same may be said for video regulations, and an examination of the purported fears shows that the Fifth Circuit reached the correct decision in holding that there was no special vulnerability.

As discussed in part I of this Note, one of the main fears of the legislators is that children will be exposed to a criminal element in the arcade. This fear seems groundless, since arcades can be required to impose anti-loitering and supervisory regulations.¹⁶¹ Furthermore, the arcades and the games have changed since the days of pinball machines which were flipperless and viewed largely as games of chance associated with gambling and racketeering.¹⁶² In *State v. Bloss*,¹⁶³ the Hawaii

154. 630 F.2d 1029 (5th Cir. 1980).

155. *Id.* at 1043.

156. Comment, *Constitutional Law: Pac-Man Rides Into Texas Town, City Fathers Try to Protect Children From Being Devoured*, 12 STETSON L. REV. 207, 231 (1982). This Comment took issue with the Fifth Circuit's conclusion that there was no vulnerability by determining that the video games themselves presented no physical, mental or moral threat instead of looking at the "evil inherent in the possibility of vulnerable children associating with male factors."

157. 630 F.2d at 1043.

158. *Id.*

159. 514 F. Supp. 1046 (D.N.H. 1981), *rev'd*, 668 F.2d 617 (1st Cir. 1982).

160. *Id.* at 1050.

161. See *supra* note 47 and accompanying text.

162. Comment, *supra* note 1, at 105.

Supreme Court compared modern pinball machines to their predecessors and found that they were no longer games of chance, but games of skill.¹⁶⁴ The court, using a rational relationship test, invalidated a law which prohibited children under eighteen from playing the games without the presence of an adult.¹⁶⁵ Today's video games require even more skill, as they involve extensive eye-hand coordination and concentration. The corrupting elements once associated with the earlier games are no longer present in today's arcades. Still, some worry that corrupting influences will gravitate towards the arcade, preying on children and involving them in illicit activities. However, it is likely that corrupting influences will always gravitate towards minors, regardless of where they choose to congregate. At least an arcade provides the possibility of supervision and regulation.

Other fears of legislators are that the games will lead to truancy and to children "wasting" their money. The truancy problem could easily be solved by prohibiting school-age children from playing the machines during school hours or perhaps requiring arcades to be located a specified distance from schools. A total prohibition, however, is over-inclusive and irrational.¹⁶⁶ It is probably true that children may be tempted to save part of their lunch money, allowances, etc., in order to play video games. However, this is not a sufficient reason to deny minors their constitutional rights. In the words of the *Bloss* court, "It does not require much imagination to conjure up other areas where a youngster may foolishly, yet legally, spend his lunch money."¹⁶⁷ There will always be sources of temptation for children (and adults). It is not the legislature's job to determine that a child may spend his money on comic books, but not on video games.

Finally, when examining children's vulnerability to harmful influences of video games, legislatures should also take into account the positive effects of the games, discussed in part I above.

ii. Inability of children to make critical decisions: The next factor to be examined is the inability of children to make critical decisions. The Fifth Circuit determined that this factor did not even deserve serious consideration since the decision to drop a quarter into a slot could in no way be deemed critical.¹⁶⁸ This reasoning is somewhat shallow: the real decisions that the legislators are worried about are probably more serious ones such as the decision to associate with certain people

163. 62 Hawaii 147, 613 P.2d 354 (1980).

164. *Id.* at 152, 613 P.2d at 359-60. See also Comment, *supra* note 1, at 105-06.

165. 62 Hawaii at 154, 613 P.2d at 361.

166. *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1039-40 (5th Cir. 1980).

167. 62 Hawaii at 153, 613 P.2d at 360.

168. *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1029 (5th Cir. 1980).

and engage in certain forms of activity over others. However, these decisions cannot be deemed critical either. When Justice Powell spoke of "critical" decisions in *Bellotti v. Baird*¹⁶⁹ he was dealing with a minor's decision to obtain an abortion. Courts have kept this in mind when deciding cases concerning curfew laws, and have determined that the decisions in those cases are not important enough to be labeled "critical."¹⁷⁰ Similarly, it should be determined that there are no critical decisions involved in cases dealing with video arcade regulations. These underlying worries are simply not "critical" in the sense meant by the Supreme Court. It is illogical to say that a child may obtain an abortion without parental consent¹⁷¹ or may express his or her own views on decisive public issues¹⁷² but may not make decisions regarding whom to associate with or what activity to engage in, in his or her spare time.¹⁷³

iii. Importance of the parental role: The Fifth Circuit correctly determined that a regulation which required a child to be accompanied to an arcade by a parent or guardian infringed upon the parents' role. The Supreme Court has stated, that "the custody, care and nurturing of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder."¹⁷⁴ In *Bellotti* the Court again reiterated this principle, claiming that it was primarily the function of the parents to instill the principles of morality, ethical conduct, religion, and citizenship into their children, and that these responsibilities were beyond the competence of government.¹⁷⁵ Cases dealing with curfew laws have determined that curfew ordinances do not "fit within the circumstances where the state may usurp the parental role."¹⁷⁶ The Fifth Circuit was

169. 428 U.S. 132 (1976).

170. *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. 1981); *McColleston v. City of Keene*, 514 F. Supp. 1046, 1051 (D.N.H. 1981), *rev'd on other grounds*, 668 F.2d 617 (1st Cir. 1982), (the court found that there had been no actual "case or controversy" and thus the District Court lacked jurisdiction. The court "intimated no view as to the correctness of the holding." 668 F.2d at 662).

171. *Bellotti v. Baird*, 428 U.S. 132 (1976).

172. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (children could not be banned from school for wearing armbands to express their opposition to the Vietnam war which violated their first amendment rights).

173. Some areas in which it has been determined that minors and adults have distinguishable rights are the areas of criminal proceedings for juveniles, *see, e.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), and the control of obscene materials, *see, e.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968).

174. *Prince v. Massachusetts* 321 U.S. 158, 166 (1944) (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

175. 433 U.S. at 632-38.

176. *McColleston v. City of Keene*, 514 F. Supp. 1046, 1053 (D.N.H. 1981), *rev'd*, 668 F.2d 617 (1st Cir. 1982). *See also Johnson*, 658 F.2d at 1074.

therefore correct in determining that the restrictive regulation infringed upon the parental domain.¹⁷⁷ The decision to allow a child to play video games in an arcade is one that must be made by the child's parents. It is up to the parent, not the state, to forbid, limit, or allow a child to play. To allow a state to prohibit an activity approved by the parent is unfair to both the parent and the child.

iv. Summary—Effect of the Belloti factors on video game regulation: There seems to be no reason then, under the guidelines laid out by the Supreme Court, to allow a local government to more stringently regulate children's access to video games. If there is no compelling governmental reason that justifies constricting the first amendment rights of adults, then the same should hold true for minors, since minors are also entitled to a significant degree of first amendment protection.¹⁷⁸

Of course, this does not mean that a government could never regulate a minor's access to video games. For example, a local government could almost certainly forbid video games in the schools themselves. Similarly, it could most likely require that reasonable distances be maintained between schools and arcades or require that children be prohibited from arcades during school hours. The *Belloti* guidelines should not be read to allow a local government to impose a total ban on arcades, to forbid minors to enter or to permit their entry only when accompanied by a parent. These types of regulations simply relict access too severely.

2. Content

The next step in determining whether a law is constitutional is to determine whether the restriction involves impermissible content or subject matter regulation. At first glance it may appear that a restrictive ordinance easily satisfies this factor, but a closer analysis shows that this is not necessarily so.

Professor Nimmer argues that an excessively narrow statute may be said to create a conclusive presumption that in fact "the interest being served is an anti-speech rather than a non-speech interest."¹⁷⁹ According to Nimmer, if the non-speech interest was the real purpose in enacting the statute, then other conduct which leads to the same result

177. 630 F.2d at 1043. See also *FCC v. Pacifica Found.*, 438 U.S. 726, 767 (Brennan, J., dissenting) (discussing whether the FCC should regulate indecent language on radio in order to protect children).

178. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969)).

179. Nimmer, *supra* note 60, at 41. "[A] non-speech interest by the state in suppressing or regulating a meaning effect." *Id.* at 38. Restricting access to protect the public welfare would be a non-speech interest.

should also be prohibited. The obvious inference, he says, is that the real purpose is the suppression of free expression.

The other reason Nimmer gives for invalidating an excessively narrow statute "lies in a combination of equal protection and free speech considerations."¹⁸⁰ Usually a statute cannot be invalidated because it is under-inclusive, that is, excessively narrow, since a legislature may proceed one step at a time in solving a problem.¹⁸¹ However, Nimmer points out that where the only evils sought to be eradicated are those which are speech related, a court should find the classification impermissible on equal protection and free speech grounds.¹⁸²

Under Nimmer's analysis then, video arcade regulations that are too narrowly drawn may be interpreted as content dependent. Generally, video arcade regulations do not restrict similar activities in the same commercial zone. The law in Marshfield, Massachusetts is a good example of this. It prohibited all video games while allowing pool, billiard, bowling and athletic training devices,¹⁸³ all of which are activities that could lead to the same problems of noise and congestion that the regulation of video games was supposed to prevent.

Once it is determined that the regulation is directed at content or subject matter, the question then becomes whether, outside of the school situations discussed above, local governments may restrict the content of expression that children are exposed to; in other words, what degree of first amendment protection is available for children? An examination of Supreme Court cases makes it clear that there is no justification for strict content-based regulations on children's access to video games. Since children's constitutional rights are practically coextensive with those of adults, children are entitled to the same freedom of expression.¹⁸⁴

It is well established that children do not "shed their rights to freedom of speech or expression at the schoolhouse gate."¹⁸⁵ For example, the first amendment rights of students include the right to prevent the removal of books from a school library on the basis of their content.¹⁸⁶ The fact that children retain their constitutional rights *in school* is extremely significant in light of the fact that public schools are recognized

180. *Id.* at 41.

181. *See, e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

182. Nimmer, *supra* note 60, at 41-42.

183. *See supra* note 2.

184. *See Bellotti v. Baird*, 443 U.S. 622, 634-35 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969)).

185. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969).

186. *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

to be "committed to the control of state and local authorities"¹⁸⁷ and that schools have been acknowledged to be vitally important "in the preparation of individuals for participation as citizens" and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system."¹⁸⁸ If children retain their constitutional rights even where the State is serving the important function of transmitting community values,¹⁸⁹ then certainly children should be able to retain these rights in an arena that is not charged with these important functions.

Another analogy showing that content may not be specially regulated for children may be drawn from the area of broadcasting. Of all the recognized forms of communication, the broadcast industry has been subjected to the most stringent regulation in terms of content control. Two reasons given for this are the pervasiveness of the medium and its availability to children.¹⁹⁰ Even in this industry, however, time, place, and manner restrictions have been limited to restrictions upon indecent language, defined as that which "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience."¹⁹¹ Therefore, in order for shows to be banished to the late-night hours, they must deal with sexual topics. Video games do not involve sex.¹⁹² Nor can they be said to be unduly violent. The games display nothing more than a cartoon image and contain no more violence than Saturday morning cartoons. There is no proof that video games lead to increased violence in children; instead, they may actually act as a catharsis.¹⁹³

In *Erznoznik v. City of Jacksonville*¹⁹⁴ the Supreme Court dealt with an ordinance which prohibited the showing of films containing nudity in drive-in movie theatres where the screen was visible from a public place or street. One of the justifications offered in the law's defense was that it protected minors. The Supreme Court acknowledged that more stringent controls could be adopted when dealing with mi-

187. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969).

188. *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

189. *Id.* at 2806.

190. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

191. *Id.* at 732 (quoting 56 F.C.C.2d at 98).

192. There are such things as X-rated video games. However, these are not the type of games being referred to in this Note. These games should be subject to the same types of restrictions and regulations as obscenity.

193. *See supra* part I.

194. 422 U.S. 205 (1975).

nors.¹⁹⁵ However, the Court then went on to declare that minors are entitled to a significant degree of first amendment protection and that the government can only infringe on their rights in relatively narrow and well-defined circumstances:

Speech that is neither obscene as to youths nor subject to some other legitimate proscription *cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them*. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.¹⁹⁶

Therefore, it must be recognized that minors enjoy almost the same first amendment protection of speech and expression as do adults.

3. *Less Restrictive Alternatives and Alternate Forums*

Even if the regulations pass the content requirement of the test, there are still other problems with ordinances that provide for a total ban of video games or severely restrict if not prohibit a minor's access. In many cases there are less restrictive alternatives available; what those alternatives are depends on the purported justifications for the law.

In 1983 the Supreme Court dismissed an appeal of a lower court's holding that a law banning video games and arcades was constitutional.¹⁹⁷ The underlying reason for the dismissal was a failure to recognize that video games are a form of expression entitled to first amendment protection. In a somewhat similar situation a New Jersey town banned all live entertainment. The Supreme Court, in *Schad v. Borough of Mount Ephraim*, found this ordinance to be overbroad, holding that a town could limit the number of entertainment places and require their dispersment, but a complete ban on all live entertainment violated the first amendment.¹⁹⁸

One cannot directly conclude from this case that a complete ban on video games, another form of entertainment, would also be unconstitutional since *Schad* invalidated a ban on *all* forms of live entertainment. Whether the Court would have also invalidated an ordinance banning one particular type of live entertainment is unclear. Although *Schad* does not provide an answer, dicta in later opinions indicates that banning a specific type of entertainment may also be unconstitutional.¹⁹⁹

195. *Id.* at 212. See also, *Ginsberg v. New York*, 390 U.S. 620, 624 (1968).

196. 422 U.S. at 212 (emphasis added).

197. *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 104 S. Ct. 475, *dismissing appeal from* 389 Mass. 436, 450 N.E.2d 605 (1983).

198. 452 U.S. 61, 71 (1981).

199. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 515 n.20 (1981). (Opinion of Justice White with Justices Stewart, Marshall and Powell joining).

Therefore, it can be reasoned that a complete ban on video game entertainment would also violate the first amendment once video games are recognized as a form of expression. Since children's rights in this area are practically coextensive with those of adults, prohibiting access to minors would violate their first amendment rights as well.

Similarly, less restrictive alternatives are also often available when the laws restrict, rather than ban, access to video games. For example, if the goal of an ordinance is truancy prevention, it is possible to accomplish this goal by prohibiting access to video games by minors during school hours or by setting a reasonable limitation on the proximity of video games to schools; it is not necessary to completely prohibit minors from playing or to require that they be accompanied by an adult. Requiring that an arcade completely close during school hours would not be necessary and would infringe on the rights of adults who wish to play.

Related to the concern for finding less restrictive alternatives is the necessity that alternative forums exist for the expression of protected speech before the primary forum is restricted. Home video games should not be regarded as an alternative forum since home systems require a significantly greater expenditure of money than that required to play in an arcade.²⁰⁰ Allowing home systems to be considered as an alternative forum would effectively limit the availability of games to the middle and upper classes due to the costs involved. Furthermore, the graphics of an arcade game are far superior to home games and thus provide a different experience.

Excluding home systems, there is no other alternative forum available if, by definition, the restriction applies to all forums that have or desire to have video games.²⁰¹ Restrictions that require minors to be accompanied by an adult may also effectively cut off all access if the parents are not available to accompany their child to an arcade. Because video games serve as primers for computers, other computer experiences cannot be regarded as alternatives. In fact, a person may be

200. In *FCC v. Pacifica Foundation* the Supreme Court did say that the public had an available alternative to listening to the offending radio broadcast: that of buying the record. 438 U.S. 726, 750 n.28 (1978). This reasoning, however, should not be applied to video games for several reasons. First, there is a substantial price difference between records and video games. Second, *Pacifica* was justified on the basis that radio is an extremely pervasive medium and uniquely accessible to children. Video games, on the other hand, neither enter the home unsolicited nor are they overly accessible to children.

201. Not all ordinances pertain to all businesses that have video games on their premises. Depending on the stated purpose of the law, there may be an argument to invalidate on the grounds that the law fails the rational relationship test. For example, it would make no sense to forbid an arcade (a place with more than four video games) to go into business because of the harms that may come to children while allowing children to play the games at a liquor store which has less than four machines.

much less likely to have any other computer experiences without first being exposed to video games.

4. *Summary*

While it is impossible to evaluate the constitutionality of all restrictive regulations, it is possible to set up some general guidelines that should be considered in determining whether a regulation violates the first amendment. First, if local governments are going to enact this type of regulation, the regulations should be carefully and narrowly drawn. If the goal of an ordinance is to protect the public against specific harms caused by video games, the ordinance should reach beyond video games and arcades and regulate other activities which do not contain a speech component but which also cause the same harm. Otherwise, the regulation is open to attack as being unconstitutionally content based. The law must also choose the least restrictive alternative and make sure that there are alternate forums available. This requires that there be some form of access to video games; total prohibitions for both minors and adults would not be constitutional. In determining if a significant governmental interest is involved, a court should first determine what the actual interest is, making sure that it is legitimate and sufficiently important. Then, the court must determine whether a substantial relationship exists between the means and the ends by requiring the local government to make the proper evidentiary showing. Since this is essentially a balancing of factors to determine which interest is the most important, courts should take into account the benefits of video games as well as the harms. Under these guidelines, complete bans on video games and on minors' access to the games appear to be unconstitutional.

III. ASSOCIATIONAL RIGHTS

The last issue to be examined is that of freedom of association. This issue was also raised before the Supreme Court in *Family Skateland, Inc. v. Town of Marshfield*;²⁰² the Court's dismissal for lack of a substantial federal question²⁰³ constituted an adjudication on the merits.²⁰⁴ Prior to the *Marshfield* dismissal, the various jurisdictions were split on the issue. The Fifth Circuit, in *Aladdin's Castle, Inc. v. City of Mesquite*,²⁰⁵ found that there was a right to association in social contexts and that a statute which prohibited children under seventeen

202. *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 104 S. Ct. 475, *dismissing appeal from* 389 Mass. 436, 450 N.E.2d 605 (1983).

203. 104 S. Ct. 475 (1983).

204. *See supra* note 10 and accompanying text.

205. 630 F.2d 1029 (5th Cir. 1980).

from playing video games unless accompanied by an adult was a violation of the minors' rights. However, in *Caswell v. Licensing Commission for Brockton*,²⁰⁶ the Massachusetts court found that there was no such freedom of association.

A. THE RIGHT TO ASSOCIATE IN A SOCIAL CONTEXT

Freedom of association is not a right that is explicitly guaranteed by the first amendment.²⁰⁷ However, like the right to receive information, the right of association has been recognized by the Supreme Court as derivative of the first amendment's guarantees and therefore an implicit right.²⁰⁸

Traditionally, the issue of freedom of association arises in cases of political associations, but it has been applied in other situations as well.²⁰⁹ Although the Supreme Court has never directly dealt with the issue of associational freedoms in a social context, there has been dicta in various Supreme Court opinions indicating that such a protection should be extended to these situations as well.²¹⁰ For example, in *Coates v. City of Cincinnati*,²¹¹ the Supreme Court struck down a law which made it a criminal offense for more than three persons to assemble on sidewalks and annoy persons passing by. In discussing the right of association the Supreme Court stated:

The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of people to gather in public places for *social* or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct.²¹²

The right of association in social contexts has also been found in the lower court decisions dealing with curfew laws. In *McCollister v. City of Keene*,²¹³ a minor and her parent argued that the statute violated the first amendment, infringing upon the rights of free speech, as

206. 387 Mass. 864, 444 N.E.2d 922 (1983).

207. The first amendment reads: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

208. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-13 at 700 (1978).

209. See, e.g., *Griswold*, 381 U.S. at 483. See also citations listed in *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d at 1041-42.

210. *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972)).

211. 402 U.S. 611 (1971).

212. *Id.* at 615 (emphasis added).

213. 514 F. Supp. 1046 (D.N.H. 1981), *rev'd*, 668 F.2d 617 (1st Cir. 1982).

sociation, and assembly.²¹⁴ The court determined that the law was unconstitutional since it violated invaluable rights. Specifically, the court cited examples in which a child's conduct may be innocent yet restricted under the law, including the ability to play basketball at a neighbor's home past curfew since walking home would be a violation of the law.²¹⁵ Clearly, playing basketball is a social activity.

Similarly, in *Johnson v. City of Opelousas*²¹⁶ the Fifth Circuit also dealt with a constitutional attack upon a curfew law, invalidating the statute on grounds of overbreadth since the law effectively prohibited minors "from attending associational activities such as . . . organized dances and theatre and sporting events."²¹⁷ The right of association was found to include associations for "social, legal, or economic purposes."²¹⁸

Earlier in this Note it was argued that first amendment protection could not be withheld from video games simply because they are a new form of communication.²¹⁹ These same arguments should be applied here. There is no reason to withhold constitutional protection simply because they are now being applied to a new situation; the principles remain the same. "Since the right of free expression has been extended to protect the other various forms of entertainment, the right to associate should, therefore, be expanded to include social associations."²²⁰ This is essentially the same argument Professor Chafee made in applying the first amendment to motion pictures.²²¹ The thrust of both arguments is that the law must continue to expand and apply to new situations in order to keep up with a changing society.

However, in *Caswell v. Licensing Commission for Brockton*²²² the court refused to find a right of association on the grounds that there was no identifiable group. "Furthermore, even if there were such an identifiable group . . . [it] would not advance the social, legal, and economic benefits . . . in the way that the freedom of association contemplates."²²³ This view is erroneous. Part of the error stems from the fact that the *Caswell* court mistakenly believed that video games are not

214. *Id.* at 1048.

215. *Id.* at 1052.

216. 658 F.2d 1065 (5th Cir. 1981).

217. *Id.* at 1072.

218. *Id.* The Fifth Circuit also upheld a right of association in a social context in *Sawyer v. Sandstrom*, 615 F.2d 311 (5th Cir. 1980). The problem in analogizing from curfew laws is similar to the problem of analogizing from a total ban like that in *Schad*. Curfew laws create a much greater infringement on activity than video arcade regulations which infringe only on that one specific activity.

219. See Z. CHAFEE, *supra* note 84, and text accompanying note 116.

220. Comment, *supra* note 1, at 138.

221. See Z. CHAFEE, *supra* note 84 and text accompanying note 116.

222. 387 Mass. 864, 444 N.E.2d 922 (1983).

223. 387 Mass. 864, —, 444 N.E.2d 922, 927.

a protected form of expression.²²⁴ Despite the ruling in *Caswell*, an identifiable group has never been held to be a requirement for applying freedom of association. In fact, cases involving the right of association in political contexts have held that an organization cannot be required to disclose its membership list.²²⁵ Thus, when video games are recognized as a forum of communication deserving of protection, there seems to be no reason to require an identifiable group in order to accord the games the first amendment protection of the right of association.

B. DETERMINING WHETHER THE RIGHT SURVIVES JUDICIAL SCRUTINY

Once it is established that there is a right to freedom of association in a social context, it must be determined whether the restrictive regulations violate that right. Tribe states that this freedom is violated whenever "any insufficiently justified governmental rule, practice, or policy . . . interferes with or discourages a group's pursuit of ends having special first amendment significance—such as literary expression, or political change or religious worship."²²⁶ Like freedom of expression, freedom of association is not an absolute right; the test to be applied is one of heightened scrutiny.

The Supreme Court has stated that when pursuing a substantial State interest which affects constitutional rights, it must be shown that the law is precisely drawn, that it is tailored to serve legitimate objectives and that there are no less restrictive alternatives available.²²⁷

It is beyond the scope of this Note to determine which laws violate this test and which do not. The same considerations that apply in freedom of speech cases will come into play in freedom of association cases, in terms of both the legitimacy and importance of the governmental interest as well as the strength of the relationship between the goals and the ends.

The same laws that seemed unduly restrictive of freedom of expression are troublesome here as well since they impinge on the right to associate. In *Marshfield*,²²⁸ for example, the Massachusetts Supreme Court contemplated that one of the possible purposes of the ban was to prevent the congregation of young males;²²⁹ likewise, one of the con-

224. *Id.* at —, 444 N.E.2d at 926. Had the court found first amendment rights to be involved, then the implicit and dependent right of association would probably have been recognized.

225. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958).

226. L. TRIBE, *supra* note 208, at 703.

227. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

228. *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 389 Mass. 436, 450 N.E.2d 605, *appeal dismissed*, 104 S. Ct. 475 (1983).

229. *See supra* note 55.

cerns of the community in *Caswell*²³⁰ was providing a place for youths to congregate.²³¹ In *Coates v. City of Cincinnati*²³² a law directly prohibiting association on the streets was declared an unconstitutional violation of the right of association. Similarly, the law upheld in *Marshfield*²³³ also violates the right of association. Although a court usually will not look at a possible illegitimate purpose where a legitimate one is proposed, in this case the court itself listed this illegitimate and unconstitutional purpose. Therefore, even though the town only *indirectly* regulated association by regulating the activity itself, the law should have been declared unconstitutional. Other laws such as prohibiting access to minors or requiring a guardian also seem to be unduly restrictive of the right to associate.

Generally though, a right of association argument, in a social context, does little to strengthen an attack on restrictive regulations since freedom of association is generally regarded only as a means of protecting traditional first amendment rights to freedom of speech, petition, and assembly,²³⁴ and not as an independent right.²³⁵ Thus an associational argument adds little once first amendment values are involved, since the statute will already be subject to a heightened form of judicial scrutiny.²³⁶ The right of association simply becomes another factor to be balanced in determining the constitutionality of a statute. If the right were considered to be independent, however, it would be possible to subject the law to a test of heightened scrutiny even without finding protected expression.

V. CONCLUSION

This Note has outlined the constitutional protections that should be accorded to video games. Video games are a new form of expression and they serve an important role in modern society. Not only do they entertain with a story but they also provide an introduction to the new computer technology. As a new form of expression, video games should

230. *Caswell v. Licensing Comm. for Brockton*, 387 Mass. 864, 444 N.E.2d 922 (1983). See *supra* note 55.

231. See *supra* note 55.

232. 402 U.S. 611 (1971).

233. 398 Mass. 436, 450 N.E.2d 605 (1983).

234. Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977). See also L. TRIBE, *supra* note 208, at 702. In *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), the Supreme Court stated, "the freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." *Id.* at 575.

235. Raggi, *supra* note 234, at 1.

236. For the same reason, an equal protection analysis adds little to the argument. See *supra* note 16.

be protected under the first amendment. The laws that are especially troublesome under the guidelines set out in this Note are those that totally ban the use of video games by all people, as well as those that completely restrict access to minors. While certain, less restrictive alternatives may be constitutional, total bans for children and/or adults are simply too intrusive upon the right of free expression. Furthermore, these laws very possibly infringe upon the right of association in a social context. The basic principles of the first amendment should not be denied to this new medium of communication.

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