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First Amendment Protection of Artistic Entertainment: Toward Reasonable Municipal Regulation of Video Games

John E. Sullivan

NOTE

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Outline

I. INTRODUCTION

A video game is an artistic creation that a craftsman expresses through the medium of computer software as a colorful, graphic, and thematic display of moving images. Participation in the video game experience recently has become an immensely popular source of entertainment, and since Atari, Inc. (Atari) introduced its first generation of video games in 1977,[1] the video game has reigned as king of the American entertainment industry.[2] In 1981 consumers spent an estimated 75,000 hours and five billion dollars playing video games.[3] These 1981 revenues totaled twice the reported intake of all Nevada casinos; almost twice the 2.8 billion dollar gross earnings of the American movie industry; and three times the combined total of television revenues and gate receipts of major league baseball, basketball, and football.[4] The potential for immense profit in the video game production industry has motivated many large and small companies to enter the video game market to com-

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1. Nulty, *Why the Craze Won't Quit*, FORTUNE, Nov. 15, 1982, at 114, 116.

2. The video game industry's success also expanded internationally. Video Games have achieved popularity in Amsterdam, Japan, Mexico, South Africa, Spain, Sweden, and West Germany. *Games That Play People*, TIME, Jan. 18, 1982, at 50, 53. In the Philippines, however, puhlic outcry against video games because of their perceived detrimental effects on the morality of Philippino youth precipated President Ferdinand Marcos' November, 1982, ban on video games in the Islands. *Id.*

3. *Games That Play People*, *supra* note 2, at 51. In 1982 home video games sales totaled $2.1 billion and captured 31% of total toy industry sales, up from 19% in 1981. In addition, video game arcade revenues amounted to approximately $6 billion in 1982. Recent Development, *Substantial Similarity Between Video Games: An Old Copyright Problem in a New Medium*, 36 VAND. L. REV. 1277, 1277 n.1 (1983) (citing Leaf, *Video Makes—and Breaks—Toy Industry*, 56 ELECTRONICS 84, 84-85 (Feb. 24, 1983)). Although sales of home video game equipment have quadrupled since 1980, some analysts and game executives forecast a drop in this growth rate during 1983. Nulty, *supra* note 1, at 115. Analysts, however, disagree as to the speed and steepness of this decline. *Id.* Because only approximately one in seven American homes and one in one hundred European and Japanese homes have video games, industry optimists expect sales to expand at rates as high as 40% to 60% for the next several years. *Id.*

Rapidly expanding technology is helping the industry attack the problem of declining sales by enabling manufacturers to design new games that appeal to different social segments of society. Today, war-type video games, which appeal primarily to young men and boys, dominate the market. *Id.* With this predominant theme, video games now are present in approximately 12 million of the 83 million homes which own television sets. Perry Odak, president of Atari's consumer products division, asserts that this statistic indicates "a tremendous hole in the market." Atari plans to begin filling this market vacuum in early 1983 with the introduction of a line of children's games, some of which will have an educational emphasis. Atari also plans to market a line of games that will appeal to women and other games designed specifically for people over the age of forty-five. *Id. See generally* N.Y. Times, Oct. 4, 1982, at 1, col. 3; Wall St. J., Jan. 19, 1983, at 1, col. 4.

4. *Games That Play People*, *supra* note 2, at 51.

pete fiercely with Atari.[5] This often cutthroat[6] competition necessitated massive advertising campaigns by gamemakers in 1982,[7] and has inspired a large number of patent violation and copyright infringement claim filings in recent years.[8]

The video game designer is the lifeblood of today's video game industry. Although novelty was the principle cause of the industry's explosive growth during the late 1970s and early 1980s,[9] the intense competition and increasingly demanding buyers of today are forcing video game companies to rely heavily on the game designers' "rare blend of creativity and technological prowess" to maintain their market shares.[10] Video game companies are acutely aware of the economic reality that most of the newly introduced games fail.[11] Consequently, game manufacturers are beginning to appreciate the video game designer as the " 'heart and soul' " of the entire industry.[12] These designers, of whom approximately a dozen are acknowledged "superstars,"[13] have ensured the survival of the video game craze by elevating the game experience to increasingly more colorful, challenging, and exciting levels.[14]

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5. Nulty, *supra* note 1, at 114. Some of the companies that presently compete strongly with Atari are: Activision, Inc.; Coleco Industries, Inc.; Emerson Radio, Inc.; Mattel, Inc.; Magnovox, Inc.; Bally Midway Manufacturing, Inc.; and the Milton-Bradley Company. *Id.*

6. Wall St. J., *supra* note 3, at 1.

7. Nulty, *supra* noto 1, at 114-15. Gamemakers spent approximately 200 million dollars on advertising in 1982. Atari and Mattel spent nearly one-half of this amount. *Id.*

8. *See, e.g.*, Atari Inc. v. North. Am. Phillips Consumer Elec. Corp., 672 F.2d 607 (7th Cir. 1982); Stern Elec., Inc. v. Kaufman, 523 F. Supp. 635, 213 U.S.P.Q. 75 (E.D.N.Y. 1981), [1981-1983] Copyright L. Rep. (CCH) ¶ 25,363 (Dec. 4, 1981) *aff'd* 669 F.2d 852 (2d Cir. 1982). *See* Kramsky, *The Video Game: Our Legal System Grapples with a Social Phenomenon*, 64 J. PAT. OFF. SOC'Y 335 (1982); Jones, *Video Game Litigation and the 1976 Copyright Act: The Ideas of Games, The Expression of Aliens and the Underlying Computer Software*, 1 J. COPYRIGHT, ENTERTAINMENT &. SPORTS L. 17 (1982).

9. Wall St. J., *supra* note 3, at 1.

10. *Id.* For example, Bally Midway Manufacturing Company, the creators of Pac-Man, hired three 25-person teams consisting of engineers, artists, computer programmers, and game developers to translate game ideas, drawings, and designs into intricate microchip circuitry. *Games That Play People, supra* noto 2, at 54.

11. Wall St. J., *supra* note 3, at 1. *See The Hottest Games in Town*, 100 NEWSWEEK, Aug. 16, 1982, at 55; Wiegner, *New Stars, New Firmament*, 129 FORBES, May 24, 1982, at 48; *Games That Play People, supra* noto 2, at 54; Shell, *Games People Program*, 83 TECH. REV., Nov.-Dec. 1980, at 10.

12. Wall St. J., *supra* note 3, at 1 (quoting James H. Levy, founder, president, and chief executive of Activision, Inc., which makes home video cartridges for Atari.) Mr. Levy believes that the good designers develop their own styles which consumers recognize. Thus, their names become " 'almost like brand names' " and help sell the games. *Id.*

13. *Games That Play People, supra* note 2, at 54.

14. See Nulty, *supra* note 1, at 114-15, for an excellent photographic history depicting the developments in color, challenge, and graphical sophistication of video games. Advances in computer software technology have made possible more creative programming and more

Video game manufacturers are not the sole economic beneficiaries of the games' tremendous popularity. Game distributors and retail operators also have earned substantial profits from the billions of quarters that players have dropped into video game machines in recent years.[15] Typically, manufacturers sell these machines to distributors who lease them to owners of arcades, restaurants, taverns, and other business establishments for a percentage of the lessee's gross revenues.[16] Some businesses earn greater profits from video game machines than from the other aspects of their operations.[17] Much of the local business profit from video games originates in the pockets of teenagers, who "tend to indulge—or overindulge—against the wishes of their parents."[18] Thus, common parental complaints that video games cause children to skip school and steal quarters, and that arcades are "nothing but hangouts,"[19] have spurred widespread local governmental concern about the social problems accompanying large scale use of video games.[20]

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colorful and detailed video graphics. *Id.* at 120. The first generation of video games that Atari introduced in the mid-1970s are primitive in comparison to today's games. *Id.* The industry's first success, Atari's Pong, was a simple black and white video rendition of ping-pong. *Id.* at 115. Micro Surgeon, however, which Imagic, Inc. introduced in the fall of 1982, presents "the player with a kaleidoscopic view of the human body as [it] battles disease." *Id.*

15. M. Jaffe, Regulating Video Games, American Planning Ass'n, Planning Advisory Service Report No. 370 at 1 (Sept. 1982) (available by request at the following address: American Planning Association, 1776 Massachusetts Ave., N.W., Washington, D.C. 20036).

16. *Id.* Depending on the business establishment's location, video game machines can gross up to $1000 per week. *Id.*

17. *Id.*

18. *Id.* at 2.

19. *Id.*

20. *Id.* Local government regulation of video games is widespread and sometimes arbitrary. *See infra* notes 37-131 and accompanying text. This inconsistent regulation exists despite the many socially beneficial uses of video games. The United States Army, educators, hospitals, and therapists, for example, are using video games productively. At Fort Eustis, Va., the United States Army uses a modified version of Atari's "Battlezone" game as a weapons training device. *Games That Play People, supra* note 2, at 54. *See* N.Y. Times, July 10, 1982, at 9, col. 2; *Video Games Train the Army*, 90 SCI. DIG., Mar. 1982, at 24. The Epilepsy Center at the Johns Hopkins Medical School in Baltimore, Maryland, employs specially wired video games to monitor the effects of anticonvulsant drugs on the learning and physical abilities of their patients. *Games That Play People, supra* note 2, at 54. Dr. Eileen Vining, associate director of the Epilepsy Center, asserts that these games benefit therapeutic training because "children are eager to make their best efforts in eye-hand coordination tests." *Id.* Video Games serve other therapeutic and medically related purposes. *See Electronic Games Help The Handicapped*, 90 SCI. DIG., July 1982, at 89. The Capital Children's Museum in Washington, D.C., uses video games to provide computer instruction to preschool children. *Games That Play People, supra* note 2, at 54. *See* Levin, *They Zap, Crackle and Pop, But Video Games Can Be Powerful Tools for Learning*, 17 PEOPLE WKLY., May 31, 1982, at 74; Comfort, *The Joy of Video Games*, 90 SCI. DIG., April, 1982, at 44

Land-use planning regulation is one attempted solution that local governments have applied to the complaints and problems attributable to commercial video games. Although parental complaints about out-of-home video game use may be quite justifiable,[21] these and other moral issues generally are not legitimate land-use planning concerns.[22] Rather, city planners must distinguish between legitimate planning goals, which derive generally from police powers that states delegate to municipalities,[23] and the

(video games are valuable tools in teaching children physics).

21. Video games critics cite evidence suggesting that excessive playing may be addictive, psychologically harmful, and conducive to gang activity, and may encourage other aggressive and antisocial behavior. M. Jaffe, *supra* note 15, at 2. *See also* N.Y. Times, Sept. 2, 1982, at 26, col. 2 (editorial concerning parents' displeasure with video games); N.Y. Times, May 23, 1982, § 11, at 1, col. 1 (residents of Cliffside, New Jersey, organized movement to ban video game parlors because of fear of teenage misconduct). *But see* N.Y. Times, January 20, 1982, at 26, col. 4 (suggesting that there is no scientific evidence that video games are psychologically harmful). *See generally Video Games - Fun or Serious Threat*, 92 U.S. NEWS & WORLD REP., Feb. 22, 1982, at 7 (debating social problems and benefits associated with commercial video game playing).

22. M. Jaffe, *supra* note 15, at 2. For example, in State v. Bloss, 62 Hawaii 147, 613 P.2d 354 (1980), the Hawaii Supreme Court invalidated on equal protection grounds a municipal ordinance that prohibited pinball game purveyors from allowing persons under the age of eighteen to loiter near or play a pinball machine unless accompanied by a parent, guardian, or authorized adult. The ordinance's legislative history stated that one of the main reasons the municipality passed the ordinance was to prevent children from spending their lunch money on pinball. *Id.* The court held that this motive was not a valid purpose for classifying pinball games differently than other games of skill. In addition, the court reasoned that it could visualize many other legal ways in which children foolishly could spend their lunch money. *Id.*

23. Because the United States Constitution grants all sovereign states inherent police authority to control land use within their boundaries, state legislatures possess complete authority to create municipal corporations and to control these municipalities subject to constitutional limitation. Barnes v. District of Columbia, 91 U.S. 540 (1876); O. REYNOLDS, LOCAL GOVERNMENT LAW 75 (1982); 56 AM. JUR. 2D *Municipal Corporations* § 125 (1976). *But see* Northwestern School Dist. v. Pittenger, 397 F. Supp. 975 (W.D. Pa. 1975) (holding that a municipal corporation has no rights under the Constitution which it may use against the authority of its creator state). State legislatures nsually delegate powers of self-governance to municipalities through statutory grant or constitutional provision. 56 AM. JUR. 2D, *supra* at § 125. Today, most states also have adopted special constitutional provisions that allow municipalities to adopt their own charters and submit them for legislative approval. *Id.* at § 126. Once the legislatures approve these charters, the legislatures may not alter them until the municipality adopts another one in the same manner. *Id.* Municipal charters, together with other relevant state statutes and constitutional provisions that delegate power to municipalities, constitute their home rule charter. O. REYNOLDS, *supra*, at 136. When state and local law conflict, state law governs statewide interests and local law prevails on local issues. Difficulty often arises, however, in distinguishing between purely state and purely local issues. O. REYNOLDS, *supra*, at 136. *See generally* 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 3.10, 3.17 (1983); *see, e.g.*, City of Thorton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978) (holding that municipality's operation of a water works was purely a local matter that municipal home law controlled). If a municipality does not adopt a home rule, state statutes and constitutional provisions dictate its local

quagmire of important but nonplanning public concerns.[24] Land-use regulation of video games involves both traditional planning goals such as "minimizing their adverse effects" on adjacent communities,[25] and special concerns such as congested traffic, crime, inadequate parking, late night hours of operation, litter, loitering, and vandalism.[26] The process of regulating video game entertainment establishments often compels local governments to weigh the positions of competing interest groups. Concerned citizens and disgruntled parents demand harsh regulation of video game machines to preserve neighborhood peace and the moral character of their youth,[27] but local businessmen, who legitimately offer profitable video game entertainment to "millions of consumers who just happen to be teenagers,"[28] seek reasonable regulation of their businesses.[29] Municipalities have attacked these problems primarily by enacting new licensing and zoning ordinances and by strictly enforcing extant ordinances that are broad enough to encompass

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powers. O. REYNOLDS, *supra*, at 137 (citing Morehead v. Dyer, 518 P.2d 1105 (Okla. 1973)). Regardless of whether a municipality possesses home rule or derives its powers solely from state statutes or constitutional provisions, the majority of states follow the Dillon Rule in determining the complete scope of powers of a local government. *Id.* (*citing* J. DILLON, MUNICIPAL CORPORATIONS § 55 (1st ed. 1872)). For a list of states that use the Dillon Rule, see 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 10.09 nn. 58, 59 (rev. 3d ed. 1976). The Dillon Rule states that local governments have "(1) those powers *expressly* conferred by State constitution, state statutes, and (where applicable) home-rule charter, (2) those powers necessarily or fairly *implied* in, or incident to, the powers expressly granted, and (3) those powers *essential* to the declared objects and purposes of the municipality or quasi-corporation." O. REYNOLDS, *supra*, at 137 (emphasis in original).

24. M. Jaffe, *supra* note 15, at 2.

25. *Id.*

26. *Id.*

27. M. Jaffe, *supra* note 15, at 1-2. The video game industry acknowledges that an estimated 50% to 75% of video game customers are under the age of 19. Zeigler, *Regulating Video Games: Mixed Results in the Courts*, 34 LAND USE L. & ZONING DIG., Apr. 1982, at 4. *See* N.Y. Times, Sept. 12, 1982, § 23, at 22, col. 3 (suggesting that the video game controversy illustrates adult insecurity about whether contemporary youth have adopted traditional morals and values).

28. M. Jaffe, *supra* note 15, at 1.

29. Amusement & Music Operators Ass'n., Guidelines for AMOA Members Regarding Local Regulations of Amusement Games § 1 (1982) (hereinafter cited as Amusement Ass'n.)(available by request at the following address: Amusement & Music Operators Association, 2000 Spring Road, Oak Brook, Illinois 60521). The Amusement & Music Operators Association (AMOA), a nonprofit trade association of manufacturers, distributors, and operators representing the coin-operated amusement game and jukebox industries, contends that if operators and location owners of amusement games can regulate themselves, local regulation generally is neither necessary nor desirable. *Id.* If local regulation becomes necessary, however, they argue that "an ordinance which is positive and narrowly drawn—and not punative or confiscatory in nature—best serves the interests of the municipality, the consumer and the operator." *Id.*

video games.[30] Also, municipalities less frequently attempt to regulate video games and curb the social problems attendant to large scale video game use through taxation[31] and antigambling laws.[32]

Some of the regulations arguably are severe and unreasonable, and commercial video game purveyors have challenged their constitutionality, primarily with fourteenth amendment due process and equal protection claims,[33] with varying degrees of success.[34] Video game proponents, however, recently have introduced a more powerful constitutional tool into this controversial arena—the fundamental right of freedom of speech.[35] Although these claims also

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30. *See* Amusement Ass'n, *supra* note 29; *see generally* M. Jaffe, *supra* note 15, at 4-24; Zeigler, *supra* note 27, at 4, 7.

31. Although some municipalities and states levy taxes on the operation of amusement devices such as video games, this Note will not discuss taxation issues. For an excellent treatise on state and local taxation, see P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION (1981).

32. Courts will probably invalidate regulation of coin-operated amusement devices such as video games when the asserted rationale for regulation is to prohibit or control gambling. Zeigler, *supra* note 27, at 7-8. In recent years, courts uniformly have ruled that when a player obtains a high score and a game replay through skill rather than chance, "the coin-operated game is not a 'gambling device' or 'game of chance.'" *Id.* at 8. For example, in WNEK Vending and Amusements Co. v. City of Buffalo, 107 Misc. 2d 353, 434 N.Y.S.2d 608 (1980), the New York state court applied this rationale and held that video games are not gambling devices because a successful performance depends upon the player's "skill, aptitude, co-ordination and concentration." *Id.* at 358, 434 N.Y.S.2d at 613. Thus, the court held that the city license director's ruling that video games fell within the purview of the Buffalo gambling ordinance was arbitrary and his application of this ordinance to WNEK Vending was an abuse of administrative discretion. *Id.* at 361, 434 N.Y.S.2d at 614.

33. *See* Zeigler, *supra* note 27, at 4-6. The fourteenth amendment to the Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

State constitutional issues also arise in these cases. *See, e.g.*, Aladdin's Castle v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980), *rev'd in part and remanded*, 455 U.S. 283 (1982), *opinion extended*, 713 F.2d 137 (5th Cir. 1983).

34. *See* Zeigler, *supra* note 27, at 4-6.

35. *See, e.g.*, America's Best Family Showplace v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982). The first amendment to the Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Supreme Court made the first amendment applicable to the states through the fourteenth amendment due process clause in Gitlow v. New York, 268 U.S. 652, 666 (1925). In *Gitlow*, Justice Sanford stated:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Id. See Edwards v. South Carolina, 372 U.S. 229 (1963).

have produced judicial disagreement, the freedom of speech challenge promises to provide commercial video game purveyors with their most potent and direct constitutional weapon in the quest for reasonable municipal regulation of this immensely popular form of entertainment.

This Note proposes that video game software, the driving force of all video game entertainment, is an artistic creation of a video game designer. Because the United States Supreme Court repeatedly has recognized that artistic expression and entertainment are forms of expression that the first amendment protects, video game software deserves first amendment protection. Video game software is the "heart and soul"[36] of the video game, and first amendment protection, therefore, also should blanket the game itself. Accordingly, free "speech" liberties give video game manufacturers, distributors, and operators a fundamental right to purvey the protected expression; and the public a fundamental right of access to video games. In establishing the foundation for this argument, part II of this Note surveys the various methods of regulating video games through licensing and zoning. Part III discusses limitations on municipal police power regulation and the challenges that parties have brought against municipal video game ordinances. Freedom of speech constraints on municipal regulation and the recent freedom of speech challenges to New York City video game ordinances receive particular emphasis. Part IV argues that video games are artistic entertainment deserving first amendment protection. This argument presents empirical evidence which demonstrates that video game software is an artistic expression. Part IV also discusses the fundamental values that the first amendment serves and free speech cases in the entertainment, offensive speech, and obscenity areas which justify first amendment protection of artistic expression. Finally, part IV analyzes first amendment precedent in the area of artistic entertainment and the antiquated requirement that entertainment must communicate ideas or information to receive first amendment protection. It concludes that protection of video games is a logical and warranted step in first amendment doctrine. Part V summarizes this Note's conclusions and briefly discusses the implications of first amendment analysis on municipal licensing and zoning regulation of commercial video game entertainment.

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36. Wall St. J., *supra* note 3, at 1.

II. Local Government Regulation of Video Games

Local governments have designed a variety of regulatory schemes in response to the problems that accompany large scale public video game use in commercial establishments. These regulations primarily consist of zoning and licensing ordinances, and many municipalities subject video game arcades to more pervasive regulation than other commercial businesses that install video game machines as accessories to their primary businesses.[37] Municipalities adopt this approach because they often believe that concentrating machines in an arcade causes more extensive use, congregation of more game users, and exacerbation of perceived problems.[38]

A. Zoning Regulation

Zoning regulations are the most effective method of land-use control that local governments employ.[39] Because they are part of a municipality's state-granted police power,[40] zoning regulations must further the health, morality, safety, or general welfare of the municipality's residents.[41] A municipality zones by dividing the land within its boundaries into districts that reflect the nature and extent of allowable land-use and the architectural and structural requirements of buildings within each district.[42] Zoning regulations preserve the character of neighborhoods by banning the land uses that municipalities perceive will cause these neighborhoods to deteriorate.[43] In recent years, municipalities increasingly have used zoning controls to further preservation of historic landmarks and to accomplish environmental and aesthetic objectives.[44]

1. Video Game Arcades Permitted by Right

Many municipalities pass zoning ordinances that permit video game arcades by right.[45] Such an ordinance encompasses video

37. M. Jaffe, *supra* note 15, at 3.
38. *Id.*
39. 1A C. Antieau, *supra* note 23, at § 7.00.
40. *Id. See supra* note 23.
41. 1A C. Antieau, *supra* note 23, at § 7.00.
42. *Id.*
43. *Id.*
44. *Id. See generally* Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 Vand. L. Rev. 603 (1981).
45. M. Jaffe, *supra* note 15, at 4.

game arcades by defining commercial and recreational facilities in extremely broad terms.[46] The ordinance then designates the areas within the municipality in which such facilities may locate.[47] Santa Cruz, California, for example, defines a "Commercial Recreational Facility" as a "recreation facility operated as a business and open to the general public."[48] The Santa Cruz ordinance then permits "Commercial Recreational Facilities" to locate in all business districts within the community.[49]

Zoning ordinances that permit certain uses by right frequently include compulsory aesthetic standards that mitigate the harsh effects of a commercial land use on surrounding residential neighborhoods. For example, Joliet, Illinois, prohibits a nonresidential use of land on "a lot that adjoins or faces any residential district" until the potential user submits an acceptable "screening plan" to the local building inspector.[50] Joliet further defines "screening" generally as a barrier of fencing or shrubbery that partially or completely obstructs "the view of unattractive structures or activities," absorbs or deflects sound, and contains litter and debris.[51]

2. Video Game Arcades as Conditional or Special Uses

Local communities may impose stricter regulations upon video game arcades by defining them as conditional or special uses that must comply with stringent locational standards.[52] Two variations of the conditional use exist. First, municipalities may define video game arcades as a conditional land use and review an establishment's application for an operation permit under the criteria appli-

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 5.
51. *Id.*
52. *Id. See generally* 1A C. ANTIEAU, *supra* note 23, at § 7.107 (quoting State *ex rel* Skelly Oil Co. v. Delafield, 58 Wis. 2d 695, 700-01, 207 N.W.2d 585, 587 (1973)). In *Delafield*, the Wisconsin court explained municipal use of conditional use zoning as follows:

> Conditional uses or as they are sometimes referred to, special exception uses, enjoy acceptance as a valid and successful tool of municipal planning on virtually a universal scale. Conditional uses have been used in zoning ordinances as flexibility devices, which are designed to cope with situations where a particular use, although not inherently inconsistent with the use classification of a particular zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone.

Id. See also 8 E. MCQUILLIN, *supra* note 23, at § 25.159; O. REYNOLDS, *supra* note 23 at 413-14.

cable to all conditional uses.[53] The village of Huntington, New York, for example, treats video game arcades as a general conditional use, and requires them to apply to the village's Board of Appeals for a special use permit. Before issuing a special use permit, the Board must find that the proposed use:

> 1. Will be properly located in regard to transportation, water supply, waste disposal, fire protection, and other facilities;
> 2. Will not create undue traffic congestion or traffic hazard;
> 3. Will not adversely affect the value of property, character of the neighborhood, or the pattern of development;
> 4. Will encourage an appropriate use of land consistent with the needs of the town;
> 5. Will not impair the public health or safety, and will be reasonably necessary for the public health or general welfare and interest.[54]

The Board also considers other factors, such as the location and height of buildings, the necessity for landscaping, and the potential for noise, to determine whether to impose additional land-use requirements on the special permit applicant.[55]

Under the second variation of the conditional use, municipalities may review an arcade's permit application pursuant to standards responsive to the specific local problems that commercial video game use creates.[56] San Gabriel, California, for example, enacted a combined zoning and licensing scheme that requires video game arcades to fulfill a set of strict application procedures to obtain a two-year use permit.[57] The San Gabriel reviewing board considers the arcade's location, potential for noise, internal layout, and adequacy of adult supervision and parking to determine whether to grant a special use permit.[58]

3. Video Games as Accessory Uses

An accessory land use is incidental or secondary to a primary use but is so necessary or common that courts will not construe a zoning ordinance to prevent it.[59] Before a municipality issues a permit for an accessory use, the applicant generally must demonstrate that the proposed accessory use is subordinate to a primary

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53. M. Jaffe, *supra* note 15, at 5.
54. *Id.* at 6.
55. *Id.*
56. *Id.*
57. *Id.* at 7.
58. *Id.*
59. 1A C. Antieau, *supra* note 23, at § 7.85.

use.[60] Accessory use zoning laws, which municipalities often use to regulate video games as accessory uses in retail establishments, typically limit the number of video game machines permissible in any one business to between two and six.[61] Municipalities often employ accessory use zoning laws in conjunction with licensing regulations and other zoning laws that permit video games by right in designated locations,[62] and with zoning provisions that regulate video games as a special or conditional use.[63] In addition, localities that completely ban video game arcades as separate businesses sometimes permit video games as an accessory use in other establishments such as restaurants, shopping centers, and taverns.[64] In Islip, New York, for example, zoning laws restrict video games to accessory uses within the business districts. The Islip zoning laws define "Game Centers" as establishments containing a maximum of three electronic video games or other similar games in which the player inserts money into the machines directly or pays an operator.[65] The town's zoning laws allow Game Centers if such uses are "clearly incidental to the principal use and do not include any activity commonly conducted as a [primary] business."[66] Many municipalities favor accessory use laws such as those in Islip, New York, because they prohibit concentration of large numbers of machines, discourage congregation of large groups of players, and facilitate supervision of the establishments.[67]

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60. *Id.* For cases discussing the meaning of accessory use, see Davis v. Pine Lumber Co., 273 Cal. App. 2d 218, 223, 77 Cal. Rptr. 825, 828 (1969); Lawrence v. Zoning Bd. of Appeals, 158 Conn. 509, 512-13, 264 A.2d 552, 554 (1969); Amarillo Lodge v. City of Amarillo, 473 S.W.2d 264, 273 (Tex. Civ. App. 1971).

61. M. Jaffe, *supra* note 15, at 8. *See, e.g.*, America's Best Family Showplace v. City of New York, 536 F. Supp. 170, 172 (E.D.N.Y. 1982) (in which New York City licensing and zoning ordinances allowed a maximum of four video games per commercial establishment in certain municipal zones, but a greater number in other parts of the city contingent upon acquisition of a special arcade license). Bloomfield, New Jersey, recently passed an ordinance that allows only two amusement devices per establishment, unless the business can justify adding more machines up to a total of four. Recent Development, *State Regulation of Electronic Game Machines*, 11 J. L. & EDUC. 387 (1982) [hereinafter cited as *State Regulation*].

62. *See supra* notes 45-50 and accompanying text.

63. *See supra* notes 52-58 and accompanying text.

64. M. Jaffe, *supra* note 15, at 8.

65. *Id.* at 9.

66. *Id.*

67. *Id.* at 8.

4. Special Standards for Establishments Offering Video Game Entertainment

While many municipalities use zoning laws to regulate commercial video games and video game arcades as permitted,[68] conditional,[69] or accessory uses,[70] many cities also impose a variety of additional standards on video game establishments.[71] Municipalities often enforce these standards in conjunction with licensing requirements to attack the unique community problems that commercial video game use raises, including the young age of players and late arcade hours, arcade structure and space, litter control, location, noise, parking, and inadequate supervision.[72]

(a) Age of Players and Hours of Operation Standards

Many communities enforce age and time regulations on video game use by minors to curb the problems of juvenile delinquency and truancy.[73] In Mesquite, Texas, for example, the city passed an ordinance that prohibited children under the age of seventeen from playing video game machines in commercial establishments unless an adult accompanied them. The Fifth Circuit, however, in *Aladdin's Castle, Inc. v. City of Mesquite*,[74] invalidated this age restriction as violative of both the Texas and United States constitutional guarantees of due process and equal protection, and the United States constitutional guarantee of freedom of association.[75] The more specific age and time restrictions on video game play that San Gabriel, California, enacted however, remain unchallenged. The city limits operating hours of video game arcades on Sunday through Thursday from 10:00 A.M. to 10:00 P.M., while expanding them to between 10:00 A.M. and midnight on weekend days.[76] Additionally, the city prohibits all people under the age of eighteen from entering or remaining on the premises of game ar-

68. *See supra* notes 45-50 and accompanying text.
69. *See supra* notes 52-58 and accompanying text.
70. *See supra* notes 59-67 and accompanying text.
71. M. Jaffe, *supra* note 15, at 9.
72. *Id.* at 9-14.
73. *Id.* at 14.
74. 630 F.2d 1029 (5th Cir. 1980), *rev'd in part and remanded*, 455 U.S. 283 (1982), *opinion extended*, 713 F.2d 137 (5th Cir. 1983).
75. Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d at 1038-44. The United States Supreme Court remanded this case for the determination of whether the Texas Constitution provides independent support for the Fifth Circuit's decision and thus allows the Court to avoid the federal constitutional questions. 455 U.S. at 291-95.
76. M. Jaffe, *supra* note 15, at 14.

cades during public school hours of operation.[77]

(b) Arcade Space and Structural Standards

Many municipal zoning ordinances impose structural requirements on game arcades, including the minimum floor space and number of restrooms that each establishment must have.[78] Municipalities typically base these standards upon the number of video game machines present in a business.[79] For example, Paramus, New Jersey, requires that arcades comply with the city's fire safety code and maintain a minimum aisle width of thirteen feet between rows of games.[80] In addition, the city enforces specific space requirements for each machine that vary with the number of players who simultaneously can use the machine. Such regulations limit the number of persons who can use an arcade at one time, and consequently, reduce attendant problems such as noise, litter, and inadequate parking.[81]

(c) Arcade Location Standards

Locational zoning ordinances typically regulate video game establishments in two ways. First, zoning ordinances may restrict the location of arcades to certain districts within a city, and second, they may require such establishments to separate spacially from more sensitive land uses such as churches, libraries, playgrounds, and schools.[82] For example, an Akron, Ohio, zoning ordinance prohibits operation of amusement devices, including video games, within 500 feet of the real estate boundary of a school, public playground, or library.[83] Huntington Beach, California, however,

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77. *Id.*

78. *Id.* at 11.

79. *Id.* The city of San Gabriel, California, requires all video game arcades to meet the following space and structural standards as a prerequisite to operation:

> Game machines shall be located no closer than 12 inches from any wall assembly separating the arcade from any adjacent building or portion of a building. Where machines are located along one side of an aisle, said aisle shall be a minimum of 66 inches in width and shall be unobstructed. When machines are located on both sides of any aisle, the aisle shall be not less than 90 inches in width and shall be unobstructed, and such open areas shall be unobstructed. The maximum number of machines in any arcade shall not exceed one machine for every 40 square feet of gross floor allotted to the arcade operation.

Id.

80. *Id.*

81. *Id.*

82. *Id.* at 9.

83. AKRON, OHIO, CODIFIED ORDINANCES § 870.01.5(a) (1975) (amended 1981).

adopted a much stricter zoning ordinance that prohibits the location of a game arcade within one-half mile of any elementary, junior, or senior high school.[84]

(d) Noise, Litter, and Parking Standards

Municipal regulations frequently impose noise restriction, litter control, and parking standards on commercial video game purveyors.[85] A San Gabriel zoning ordinance imposes very comprehensive noise restriction regulations that require separation of arcades from "adjacent occupiable areas" by walls that allow transmission of only specified low levels of sound.[86] The city of Mesquite, Texas, passed a litter control regulation after it determined that young video game players often caused this nuisance.[87] The ordinance requires arcade owners to arrange with the city for daily waste disposal that will keep the arcade's property in safe and sanitary condition.[88] Additionally, zoning laws in Paramus, New Jersey, and

84. M. Jaffee, *supra* note 15, at 9.
85. *Id.* at 9-10, 12.
86. *Id.* at 9-10. San Gabriel devised the following noise standards table:

	Noise standard that shall not be exceeded	
Nature or character of intrusive noise	Commercial areas	Residential areas
Cumulative period of 30 minutes in any hour	45 db	40 db
Cumulative period of 15 minutes in any hour	50	50
Cumulative period of 5 minutes in any hour	55	50
Cumulative period of 1 minute in any hour	60	55
Anytime	65	60

Id. at 10.

San Gabriel uses the following noise measurement procedure in enforcing its noise standards:

> Measurement Period and Sound Level Meter. For the purposes of enforcement of these conditions, a sound level meter which satisfies the requirements of the American National Standards Institute (ANSI), S1.4-1971 (or the most recent revision thereof) [or] Type S2A meter shall be used. The measurement period shall be any one-hour period during the hours of operation of the arcade.

Id.

87. *Id.* at 10-11.
88. *Id.*

Mesquite, Texas, require arcades to provide a minimum number of automobile parking spaces in accordance with the number of game machines that the arcade operates. Some cities also require arcades to provide bicycle parking for their youthful customers.[89]

(e) Adult Supervision Standards

Many local ordinances require commercial video game purveyors to supervise juveniles who patronize their establishments and to post signs specifying the restrictions to which minors must adhere when playing the games.[90] Huntington Beach, California, for example, requires at least one supervisory employee over the age of eighteen to be on duty during all operating hours.[91] San Gabriel, California, also requires owners to post easily observable signs in the arcade that state in two inch letters the city's law against smoking and consuming alcoholic beverages in arcades.[92] These ordinances usually reflect the local community's concern for protecting its youth.[93]

B. Licensing Regulation

1. Licensing and Zoning Distingnished

In addition to zoning regulations, local governments also regulate video games by requiring commercial game operators to obtain a license or permit.[94] Municipal administration of licensing and zoning regulations follow similar procedures. Both require that prospective land users apply to the local government for permission to operate, and that they comply with certain local standards.[95] A licensing ordinance, however, may also require public officials to investigate an applicant's moral character, prior police record, education, skill, and competence as a precondition to li-

89. *Id.* at 12.
90. *Id.* at 13.
91. *Id.* (citing Huntington Beach, Cal., Ordinance 2539 (Jan. 1982)).
92. M. Jaffe, *supra* note 15, at 14.
93. *Id.*
94. *Id.* at 15. As with other forms of municipal regulation, a municipality may regulate through licensing only if state constitutional provisions, state statutory provisions, or its local charter expressly or implicitly authorizes it to do so. *See supra* note 23; *see also* 3 C. ANTIEAU., *supra* note 23, at § 24.00 (citing Nugent v. City of East Providence, 103 R.I. 518, 523, 238 A.2d 758, 761 (1968), and City of Chicago v. Drogasawacz, 256 Ill. 34, 35-36, 99 N.E. 869, 870 (1912)).
95. M. Jaffe, *supra* note 15, at 15.

cense issuance. Such investigation is permissible only if these matters reasonably relate to acceptable performance of the regulated activity.[96] Unlike zoning approval of an applicant's land use, however, which generally extends over the duration of the activity, a license is effective for only a specified period, after which the licensee must apply for renewal.[97] Periodic renewal affords local communities the intermittent opportunity to reevaluate the licensee's effect on surrounding neighborhoods.[98] Additionally, the licensee generally must pay a reasonable license fee for its land use privilege.[99] These fees defray the municipalities' costs of regulating licensed activities.[100]

Due process of law mandates that municipal ordinances "re-

96. 3 C. ANTIEAU, *supra* note 23, at §§ 24.17-19.

97. M. Jaffe, *supra* note 15, at 15; 3 C. ANTIEAU, *supra* note 23, at § 24.28. A municipality may require license renewal on a daily basis. *Id.* (citing Commonwealth *ex rel.* Hines v. Winfree, 408 Pa. 128, 182 A.2d 698 (1962)).

98. M. Jaffe, *supra* note 15, at 15.

99. *Id.* at 23. The Department of Planning, Environment, and Development, in Brookhaven, New York, analyzed the licensing fees that Long Island communities charge per video game machine in commercial establishments within their cities. The study showed the following:

Annual Fees Per Machine

Town	Fees
Long Beach	$ 11
Port Jefferson	$ 25
Village of Babylon	$ 50
Patchogue	$ 50
Irvington	$100

Id. Courts generally presume licensing fees are reasonable if the fees are not significantly greater than the related regulatory expenses that the city incurs. 3 C. ANTIEAU, *supra* note 23, at § 24.24. In 1962 the Supreme Court of Pennsylvania stated:

> In determining the reasonableness of the amount of a license fee two principles must be borne in mind: (a) the party who claims that the amount of a license fee is unreasonable has the burden of so proving and (b) in matters of this character municipalities must be given reasonable latitude in fixing charges to cover anticipated expenses to be incurred in the enforcement of the ordinance and all doubt should be resolved in favor of reasonableness of the fee.

Id. (quoting Commonwealth *ex rel.* Hines v. Winfree, 408 Pa. at 136-37, 182 A.2d at 703). Local governments generally may include in the amount of a licensing fee "the costs of investigating the applicant, the expenses in counection with issuing the authorization, the costs of all supervision connected with insuring that the license conforms to the applicable rules and regulations, plus all other police charges reasonably related to the activity controlled." 3 C. ANTIEAU, *supra* note 23, at § 24.24.

100. 3 C. ANTIEAU, *supra* note 23, at § 24.24.

quiring licenses, permits and certificates be clear and certain as to whom they apply and what obligations" they impose.[101] Also, "licensing ordinances can not leave to the whim or discretion of a local official or board the matter of determining what" the ordinances prohibit,[102] "nor can they by the absence of all or reasonable standards permit official action denying such permits, licenses, or certificates at the arbitrary will of the public servant."[103] Licensing and zoning ordinances, therefore, essentially must be reasonable expressions of the municipality's police power and relate reasonably to furtherance of "the public health, safety, morals, or general welfare" of its citizens.[104]

2. Video Game Licensing Standards

Although the application procedure to acquire a license for operating video games resembles the procedural requirements for zoning law approval of commercial video game operation, some unique characteristics that arise from municipalities' desires to scrutinize moral background accompany license applications. Two major reasons for the sensitive and exhaustive inquiries which municipalities make are that the principal users of video game devices often are adolescents[105] and that municipalities often suspect organized crime of having ties to the video game business.[106] Thus, ordinances usually require the applicant to list all previous criminal convictions on the video game license application, and the ordinances sometimes require applicants to submit fingerprints to a

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101. *Id.* at § 24.04 (citing Barker Bros., Inc. v. City of Los Angeles, 10 Cal. 2d 603, 76 P.2d 97 (1938)).

102. *Id.* (citing Junglen v. Board of Review, 184 Colo. 59, 518 P.2d 826 (1974)).

103. *Id.* (citing Hague v. C.I.O., 307 U.S. 496 (1939)).

104. *Id.* at § 24.02; M. Jaffe, *supra* note 15, at 16-17.

105. M. Jaffe, *supra* note 15, at 17. *See* 3 C. ANTIEAU, *supra* note 23, at §§ 24.17-.19 (municipality's inquiry into the applicant's moral character, reputation, criminal record, education, skill, competence, and experience).

106. M. Jaffe, *supra* note 15, at 18. Mesquite, Texas, for example, will deny a video game liconse application if a person who holds a substantial interest in the applicant's business has a "connection with criminal elements." Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d at 1034 n.6, 1035 n.10. The Mesquite ordinance further provides:

> A determination by the United States Department of Justice that a party is a member of the "mafia" or "Cosa Nostro" family or that such party is engaged in or affiliated with a nation-wide crime organization, whether formally or informally, sball be prima facie [sic] evidence, so far as the issuance of a license hereunder, that such person has "connections with criminal elements" and constitute, within the meaning of this ordinance, "criminal elements."

Mesquite, Tex., Ordinance 1353 (Feb. 7, 1977).

municipal law enforcement officer.[107] Some applications also require the applicant to compile a record of the prior criminal convictions of the machine distributors, business partners, and corporate officers, directors, and shareholders who participate in the arcade's operations.[108]

Local video game licensing regulations, like zoning ordinances, impose age and time, locational, structural and space, and number of machines restrictions upon establishments offering video game entertainment.[109] In addition, some communities employ licensing techniques to regulate the "type and nature" of video game devices.[110] For example, Des Plaines, Illinois, passed a licensing ordinance that restricted the number of replays video game machines could award and prohibited the wagering of money on video game plays because of concern over gambling and loitering in video game establishments.[111]

3. Administration of Video Game Licensing

The administrative procedures concerning application for and issuance of licenses are relatively simple.[112] The license applicant usually submits an application form to a municipal clerk or the municipality's mayor, who then sends it to a city law enforcement officer for review.[113] The law enforcement officer, typically the chief of police, evaluates the information, including any criminal records, and makes a recommendation to the mayor or clerk.[114] The mayor or clerk then reviews the application, the police officer's recommendation, and the municipality's other licensing requirements to decide whether to grant or deny the applicant's request.[115] Legal problems sometimes arise from the denial, violation, revocation, or suspension of a license.[116]

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107. M. Jaffe, *supra* note 15, at 17.

108. *Id.* at 17-18. *See, e.g.*, Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d at 1035 n.10.

109. M. Jaffe, *supra* note 15, at 18-21. *See supra* note 73-84 and accompanying text.

110. M. Jaffe, *supra* note 15, at 19.

111. *Id.*

112. 3 C. ANTIEAU, *supra* note 23, at § 24.25.

113. M. Jaffe, *supra* note 15, at 21.

114. *Id.*

115. *Id.*

116. 3 C. ANTIEAU, *supra* note 23, at §§ 24.30-.40.

(a) Denial of a License

Local governments, even under a valid ordinance, may not deny "arbitrarily, capriciously, or unreasonably" an application for a governmental license.[117] A West Virginia court, for example, invalidated as arbitrary and unlawful a municipality's denial of a poolroom license because the municipality based its decision on parental complaints that "boys were spending too much time and money in poolrooms."[118] The court determined that the municipality's reaction to the complaints was unreasonable.[119]

Municipalities also must justify denial of a license as necessary to protect the health, morals, safety, and general welfare of their citizens. Courts usually will find unreasonable a municipality's denial of a license if the denial infringes upon fundamental rights such as freedom of speech or religion.[120]

(b) Revocation of a License

The authority to revoke a license typically coincides with the power to grant it.[121] Because licenses generally contain no property or contractual rights that prevent revocation, a local government can revoke them when necessary to protect the welfare of its citi-

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117. *Id.* at § 24.15.

118. *Id.* (citing Hardman v. Town of Glenville, 102 W. Va. 94, 134 S.E. 467 (1926), *overruled on other grounds*, 109 W. Va. 653 (1930)).

119. *Id.* (citing V.S.H. Realty, Inc. v. Gendron, 338 A.2d 143 (Me. 1975)).

120. *Id.* (citing Schneider v. New Jersey, 308 U.S. 147, 162 (1939); Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948)). *See generally* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 539-43 (1970). For example, in Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the Birmingham City Commission refused to grant the petitioner, a black minister, a parade permit to lead an orderly civil rights march. The Birmingham ordinance gave the commission discretion to approve or disapprove an applicant's permit request contingent upon its sole determination of whether granting the permit would or would not harm the "public welfare, peace, safety, health, decency, good order, morals or convenience." *Id.* at 149. City police subsequently arrested the petitioner when he conducted the civil rights march without a permit. *Id.* The United States Supreme Court held the ordinance facially invalid because it gave the commission unbridled authority to issue or deny parade permits without reference to the legitimate purposes underlying regulation of public streets and sidewalks. *Id.* at 151, 155-59. The Court emphasized that when a person confronts an unconstitutional licensing ordinance, that person "may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Id.* at 151 (citing Lovell v. Griffen, 303 U.S. 444, 452-53 (1938); Schneider v. State, 308 U.S. 147, 159, 165 (1939); Largent v. Texas, 318 U.S. 418, 419, 422 (1943); Jones v. City of Opelika, 316 U.S. 584, 602 (1942) (Stone, C.J., dissenting), adopted *per curiam* on rehearing, 319 U.S. 103, 104 (1943); Staub v. City of Baxley, 355 U.S. 313, 319 (1958); Freedman v. Maryland, 380 U.S. 51, 56-57 (1965)).

121. 3 C. ANTIEAU, *supra* note 23, § 24.36.

zens.[122] Thus, municipalities may revoke licenses if an applicant procures them "through misrepresentations of material facts, fraud and deceit, or bad faith."[123] Municipalities also may revoke licenses when licensees do not conduct their activities in accordance with their original statement of purpose to the city, or when the municipality issues the license illegally, without proper authority, or under mistake of fact.[124] In such cases, the municipality may revoke the license even though the applicant has expended funds or acted in reliance upon it. Courts often justify this policy on the grounds that improperly granted licenses are void from their inception.[125]

To comply with constitutional due process standards and avoid litigation, municipalities often adopt elaborate license revocation procedures.[126] For example, an Irvington, New York, ordinance requires the village clerk, within five days after a decision to revoke a license, to notify the licensee in writing of the reasons for this determination and the date that the revocation becomes effective.[127] Upon receipt of this notice, the licensee has five days to submit a written request for a hearing before the village hearing panel to determine the appropriateness of the revocation. The village must hold a hearing within five days after the request, preserve a tape recorded record, and decide the issue by a majority vote. Cities find such procedures a desirable way to ensure procedural fairness, especially in controversial regulatory areas such as

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122. *Id.* (citing Restaurants of Wichita, Inc. v. City of Wichita, 215 Kan. 636, 527 P.2d 969 (1974)). In *Restaurants of Wichita* the Kansas Supreme Court stated:

> It is the general rule that there is no contract or vested right of property in a license or permit as against the power of the state or a municipality to revoke it for cause or in the exercise of the police power to protect the public health, safety, morals, or welfare.

Restaurants of Wichita, Inc. v. City of Wichita, 215 Kan. at 639-40, 527 P.2d at 972.

123. 3 C. ANTIEAU, *supra* note 23, § 24.36 (citing Bentrovato v. Crinnion, 206 Misc. 648, 133 N.Y.S.2d 120 (1954)).

124. 3 C. ANTIEAU, *supra* note 23, § 24.36.

125. *Id.* (quoting Maurice Callahan & Sons, Inc. v. Cooley, 126 Vt. 9, 220 A.2d 467, (1966)). In *Cooley* the Vermont court stated:

> A permit for a use prohibited by a valid zoning ordinance, regulation or restriction is void, of no effect and subject to revocation. This is true although the permit has been issued under a mistake of fact. Such permit, void in its inception, may be revoked notwithstanding that permittee may have acted upon it, and any expenditures made in reliance upon such permit are made at his peril. The public has an interest in zoning which cannot be set at naught by the unauthorized acts of its officers.

Maurice Callahan & Sons, Inc. v. Cooley, 126 Vt. at 11, 220 A.2d at 468-69 (citations omitted).

126. M. Jaffee, *supra* note 15, at 21.

127. *Id.* at 21-22.

video game licensing.[128]

(c) *Penalties for Abuse of a License*

Violation of the regulations underlying licenses often results in suspension or revocation of the licensee's privileges.[129] Video game ordinances, however, frequently make a license violation a misdemeanor, which subjects the licensee to fines and sometimes imprisonment.[130] For example, the Department of Planning, Environment, and Development in Brookhaven, New York, recently conducted a survey of penalty provisions in video game licensing ordinances that Long Island communities had enacted. The survey revealed that the maximum penalties for violation of the surveyed ordinances ranged from $250 to $500 and, in one community, up to six months imprisonment.[131]

III. Recent Challenges to Ordinances That Regulate Video Games

Commercial purveyors of video game entertainment judicially have attacked increasing municipal video game regulation with a variety of constitutional weapons. These challenges have characterized video game ordinances as arbitrary and capricious exercises of local police power,[132] and as violations of state or federal due pro-

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128. *Id.*

129. *See* 3 C. Antieau, *supra* note 23, §§ 24.35-.36.

130. M. Jaffe, *supra* note 15, at 23.

131. *Id.*

132. State and federal courts generally presume local goverument regulation of economic interests such as commercial video game entertainment, undertaken pursuant to reasonable exercises of state-granted police power, to be valid under the fourteenth amendment. *See supra* note 23. The " 'police power' encompasses the inherent right of state and local governments to enact legislation protecting the health, safety, morals or general welfare of the people within their jurisdiction." J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 389 (1978). When municipalities enact legislation pursuant to a reasonable exercise of their broad police power, courts refuse to substitute their opinion regarding the wisdom of the legislation for that of the enacting local government. *See, e.g.*, Olsen v. Nebraska *ex rel.* Western Reference & Bond Ass'n, Inc., 313 U.S. 236, 246 (1941) ("We are not concerned . . . with the wisdom, need, or appropriateness of the legislation."). Consequently, courts give state and local governments virtually unlimited discretion in promulgating economic legislation for the purposes and ends they deem desirable. Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963). Courts adhere to this policy even though the regulation incidentally causes other arguably improper effects. 372 U.S. at 731. See Ziegler, *Trouble in Outer Galactica: The Police Power, Zoning, and Coin-Operated Video Games*, 34 Syracuse L. Rev. 453 (1983), for a comprehensive discussion of local video game regulation instituted pursuant to the police power and zoning authority of municipalities.

Some commercial purveyors of video game entertainment have challenged municipal

cess,[133] equal protection,[134] freedom of association,[135] and freedom

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video game legislation on grounds that it was an arbitrary and capricious exercise of municipal police power. *See, e.g.*, Aladdin's Castle, Inc. v. Village of North Riverside, 66 Ill. App. 3d 542, 383 N.E. 2d 1316 (1978); Supercade Cherry Hill, Inc. v. Borough of Eatontown, 178 N.J. Super. 152, 428 A.2d 530 (1981); America on Wheels, Eatontown, Inc. v. Board of Adjustment, 178 N.J. Super. 155, 428 A.2d 532 (1981). Although courts generally presume municipal ordinances enacted pursuant to validly granted state police powers to be valid, *see supra* note 23, these cases indicate that state courts do not treat this presumption equally. *See, e.g.*, Aladdin's Castle, Inc. v. Village of North Riverside, 66 Ill. App. 3d 542, 383 N.E. 2d 1316 (1978) (court rejected challenge to ordinances that prohibited amusement device operators from allowing games to award replays and that prohibited persons under eighteen years of age from playing the games); Supercade Cherry Hill, Inc. v. Borough of Eatontown, 178 N.J. Super. 152, 428 A.2d 530 (1981) (court sustained challenge to ordinance barring amusement machines); America on Wheels, Eatontown, Inc. v. Board of Adjustment, 178 N.J. Super. 155, 428 A.2d 532 (1981) (court invalidated zoning ordinances barring amusement arcades from certain zoning districts and limiting the number of machines installed as incidental uses). *See also* Ziegler, *supra*, at 470, 485-90.

133. Even if a local government enacts an ordinance pursuant to its police powers, persons may challenge it under the due process clause of the federal constitution if there is no reasonable relationship between the municipality's regulatory method and the ordinance's purpose.

Today, federal courts provide very deferential review to substantive due process challenges to federal, state, and local economic legislation. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 132, at 404-10; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 450-55 (1978). State and federal courts, however, have reached different results depending in part upon whether they apply very deferential federal standards of due process scrutiny, *see, e.g.*, America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982) (court applied federal rational basis test and upheld video game licensing and zoning laws), or more liberty protective state standards; *see, e.g.*, Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980), *rev'd in part and remanded in part*, 455 U.S. 283 (1982), *opinion extended*, 713 F.2d 137 (5th Cir. 1983) (on remand the court held that the ordinance violated the due process clause of the Texas Constitution, which gives substantive economic rights broader protection than the federal constitution does).

134. Under federal standards, courts rarely sustain equal protection challenges to economic regulations unless the regulation unpinges upon a fundamental right, Kelley v. Johnson, 425 U.S. 238, 247-48 (1976), or draws an irrational or inherently "suspect" classification. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 132, at 525. For an excellent discussion of judicial disfavor of classificatious based on "suspect" criteria, see Brest, *Foreward: In Defense of the Antidiscrimination Principle*, 98 HARV. L. REV. 1 (1976). Again, however, some state courts have shown heightened sensitivity toward these claims by applying more protective state constitutional standards. *See infra* notes 137-39 and accompanying text. In America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982), the plaintiff argued that a municipality's video game regulatory scheme created two unpermissible classifications: (1) commercial video game purveyors offering fewer than five video games and those offering five or more video games, and (2) the prohibited amusement arcade use in the plaintiff's zoning district and those commercial entertainment uses permitted within its district, such as "incidental musical entertainment by mechanical device" or three-piece live band. *Id.* at 175. The court accepted that the four video game device limit represented the city council's reasonable judgment as to the maximum level of congestion, noise, and traffic allowable to maintain stable commercial neighborhoods. The court emphasized that although the effects of such line drawing must be somewhat arbitrary, they are not, therefore, unreasonable. *Id.* at 175. The court also upheld as reasonable the city's judgment that limited live entertainment would not attract as large a number of people for a

of speech.[136] Judicial decisions have varied, largely because the involved ordinances differ significantly and because state constitutions offer different amounts of protection to individual liberties.[137]

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short period of time as would a video game arcade. The court felt that slower turnover of audiences listening to live entertainment justified the city's conclusion that live entertainment does not cause the seem degree of noise and congestion as do video game arcades. *Id.*

See Zeigler, *supra* note 132, at 493-96, for a discussion of equal protection analysis in video game ordinance cases.

135. Freedom of association is a fundamental right that arises from the penumhras of the first amendment and the due process clauses of the first and fourteenth amendments. The right of free association protects associational activities that deal with economic, *see, e.g.*, United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 221-25 (1967), familial, *see, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977), intimate, *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965), and political objectives. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 22-23 (1976). The Supreme Court also has suggested in dicta that freedom of association protects individuals from invidious discriminatory regulation of social association, such as formation of and membership in social clubs. Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974). Consequently, when laws restrict free association rights, courts apply strict scrutiny to determine whether the laws are constitutional. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

In Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, (5th Cir. 1980), the Fifth Circuit drew on the Supreme Court's social association dicta and other Fifth Circuit precedent which held that the right to associate protects social interaction on street corners, *see* Sawyer v. Sandstrom, 615 F.2d 311, 317 (5th Cir. 1980), to extend this protection to the association of minor children in a video game arcade. The Fifth Circuit then invalidated on free association, due process, and equal protection grounds the Mesquite video game ordinance that prohibited persons under the age of seventeen from playing coin-operated amusement games unless accompanied by an adult or legal guardian. *Aladdin's Castle*, 630 F.2d at 1041-42.

On appeal to the Supreme Court, Jnstice Stevens remanded the freedom of association, substantive due process, and equal protection aspects of the Fifth Circuit's opinion for clarification. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 291-95. Justice Stevens took this action because the Fifth Circuit's opinion seemed to base the court's actions on both Texas and federal constitutional law. Justice Stevens noted that, if this observation were true, the Court would have no jurisdiction to review these issues. *Id.* Justice Stevens, however, commented that the Fifth Circuit relied upon Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), in its substantive due process and equal protection analysis, and that this standard of judicial review was not necessarily the standard the Court would currently apply. *Aladdin's Castle*, 455 U.S. at 294.

On remand from the Supreme Court, the Fifth Circuit invalidated the Mesquite age ordinance on state constitutional grounds, but it did not utilize its freedom of association analysis. Aladdin's Castle, Inc. v. City of Mesquite, 701 F.2d 524, 529-31. Thus, the novelty and importance of the court's free association analysis seems diminished.

136. *See infra* notes 173-213 and accompanying text.

137. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). When state courts base their decisions on state constitutional law, the Supreme Court is completely without jurisdiction to review these decisions. Brennan, *supra*, at 501. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). For other discussions of this issue, see Falk, *The Supreme Court of California 1971-1972, Foreward, The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger*

All states must provide the minimum level of protection that the federal constitutional law establishes, but some states are more protective of individual liberties.[138] This constitutional law phenomenon is partially responsible for the differing responses that state and federal courts have given due process and equal protection challenges to video game ordinances.[139] If, however, the federal courts grant first amendment protection to video games, the disparate treatment will diminish and state courts will have to accord video games a substantially higher minimum standard of constitutional protection than they do currently.

A. The First Amendment

Commercial video game purveyors fighting to obtain and maintain reasonable municipal regulation of video game entertainment recently raised an extremely controversial, direct, and potentially potent constitutional shield against municipal regulation. This protection is the first amendment's fundamental right of freedom of speech.[140] Controversy surrounds the novel question that this first amendment approach poses: whether a video game is an artistic expression and a form of entertainment that the first amendment protects. The free speech challenge is the most direct one because it should require judicial consideration of the unique artistic characteristics of video games and would protect the games directly. Additionally, it would force courts to adjudge an ordinance's constitutionality pursuant to an individual's right to create, play, and purvey the games.[141] Thus, this challenge would ap-

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Court, 62 VA. L. REV. 873 (1976); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

138. Brennan, *supra* note 137, at 498-503.

139. *Compare* Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980), *rev'd in part and remanded in part*, 455 U.S. 283 (1982), *opinion extended*, 713 F.2d 139 (5th Cir. 1983) *and* State v. Bloss, 62 Hawaii 147, 613 P.2d 354 (1980) *with* Malden Amusement Co., Inc. v. City of Malden, No. 82-8140-S (D. Mass. Jan. 25, 1983)(available Mar. 1, 1983, on LEXIS, Genfed library, Dist file) *and* America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982)(examples of courts applying different levels of due process scrutiny).

140. *See infra* notes 141-73 and accompanying text.

141. Once a court holds that certain expressions deserve first amendment protection, and that a speaker has a right to communicate or express them, the constitution protects the right of the public to know, and thus, to receive these expressions of information and ideas. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 464 (1980); *see also* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1. In First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978), for example, Justice Powell, writing for the majority, stated that the Court's recent commercial speech decisious "illustrate tbat the First Amendment goes beyond protection of the press and the self-ex-

ply to all video game cases, regardless of an ordinance's provisions.[142] Due process, equal protection, and freedom of association challenges, however, are less direct because they do not force courts to examine the unique characteristics of video games, nor do they attach constitutional protection directly to the games or the games' creators. Rather, they protect only the rights of individuals to play and purvey video games and, therefore, necessarily do not apply to all cases. If successful, the freedom of speech challenge also would be the most potent of constitutional protections because free speech is a fundamental right under the Bill of Rights, and courts consequently would apply strict judicial scrutiny to laws that trammel upon it.[143]

1. Freedom of Speech and the Balancing Test

The presumption of validity that local government regulation enjoys when it seeks to maintain satisfactory quality of life in urban and rural communities quickly fades when these laws infringe the first amendment rights of free expression.[144] A court's initial inquiry in a first amendment analysis of local government regulation is whether the regulated expression deserves first amendment protection. If a court grants first amendment protection to a form of expression, then the first amendment also grants individuals a fundamental right to purvey and to know or have access to the expression. Once a court determines that a municipal regulation affects first amendment rights, the court weighs the following factors to determine the validity of the law: (1) the societal value of

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pression of individuals to prohibit government from limiting the stock of information from which members [of society] may draw." Justice Powell reasoned that protecting the public's right of access to first amendment commercial speech furthers the " 'free flow of commercial information.' " *Id.* (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976)). For further discussion by the Court of the right to receive information and ideas principle, see Stanley v. Georgia, 394 U.S. 542, 564 (1969); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Lamont v. Postmaster Gen., 381 U.S. 301, 305-07 (1965).

Similarly, the first amendment protects the right of individuals to purvey or communicate protected speech even though the purveyor is not the original speaker or creator of the expression. For example, in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the Court held that a drive-in motion picture theater operator had a first amendment right to purvey motion pictures containing nudity. *See id.* at 211 n.7 (in which Justice Powell said, "At issue here, however, is not the viewing rights of unwilling viewers but rather the rights of those who operate drive-in theaters and the public that attends these establishments.").

142. *See infra* notes 217-31 and accompanying text.

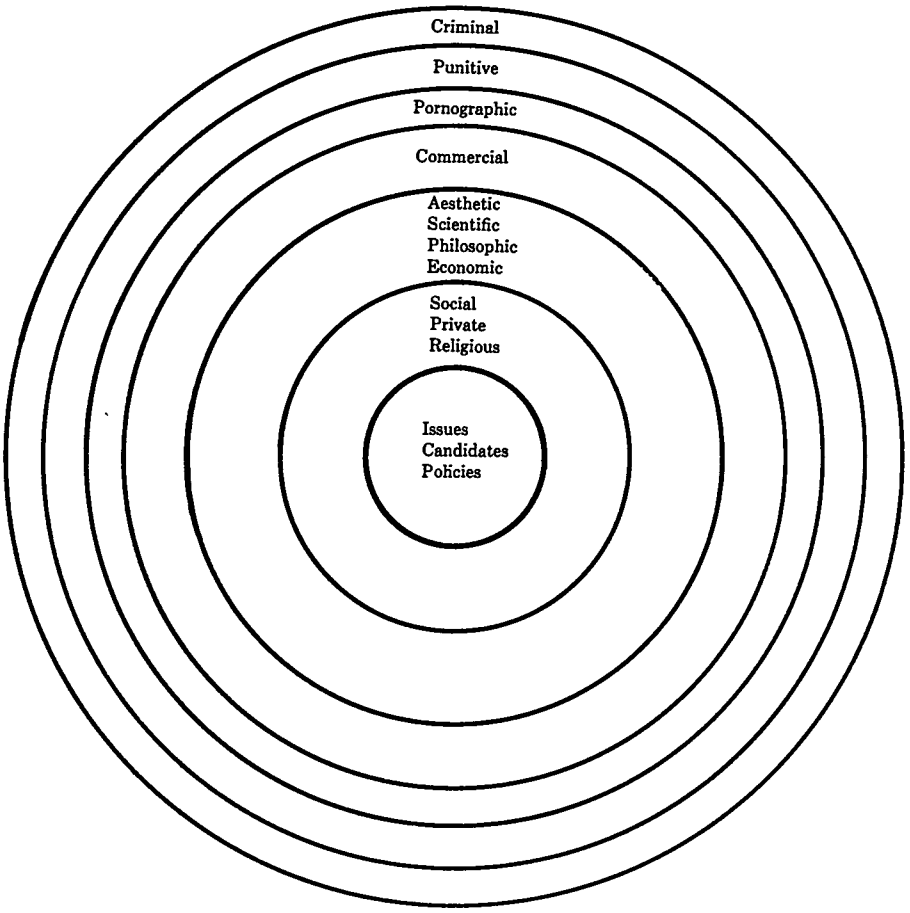
143. *See infra* text accompanying notes 152-54.

144. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 77 (1981) (Blackmun, J., concurring).

the restricted expression,[145] (2) the degree of the law's infringe-

145. Emerson, *supra* note 141, 68 CALIF. L. REV. at 451-54. The proposition that the Burger Court weighs the social value of the regulated expression in its first amendment scrutiny of challenged legislation is highly controversial. Professor William Van Alstyne, for example, proposed the following graphic depiction of the different types of first amendment expression and the various degrees of protection each receives:

Protection of the First Amendment By Subject



Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 140 (1982). At the center of Professor Van Alstyne's graphic illustration is political speech, such as public criticism of governmental officials. Courts deem political speech critically important to the proper functioning of the first amendment and, thus, accord it full first amendment protection. *Id.* at 139. On outer perimeters of Professor Van Alstyne's graph lie pornographic and commercial speech, which the Court has stated deserve less than full protection. *See* Young v. American Mini Theaters, Inc., 427 U.S. 50, 61 (1976) (in which Justice Stevens upheld a Detroit "Anti-Skid Row" ordinance that regulated adult movie theaters and stated that "[T]here is surely a less vital interest in the uninhibited exhibition of [sexually explicit nonobscene adult movies] that [are] on the borderline between pornography and artistic

ment upon the protected expression,[146] (3) the existence and suffi-

expression than in the free dissemination of ideas of social and political significance . . . ."). In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), Justice Powell stated:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 456. Other forms of obscene expression, such as obscene movies and literature, do not receive first amendment protection. *See* Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

In the realm between pure political speech, which enjoys full first amendment protection, and pornographic expression which receives no protection, lies aesthetic, scientific, philosophic, and economic expression. Van Alstyne, *supra*, at 140. As Professor Van Alstyne suggests, whether these types of expression receive a lesser degree of first amendment protection is speculative at best; and the Court has provided no clear answer in recent years. *Id.* at 141-42. Professor Thomas Emerson, however, argues that longstanding first amendment theory forbids governments from making these types of value judgments. Emerson, *supra* note 141, 68 CALIF. L. REV. at 453-54. Arguably, therefore, this uncertain realm of expression on Professor Van Alstyne's graphic illustration should receive full first amendment protection. For more comprehensive discussions of Court valuation of first amendment expression, see A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521.

146. Emerson, *supra* note 141, 68 CALIF. L. REV. at 453-54. In weighing this second element in its balancing test, the Court generally will deny first amendment protection when "[t]he impact of the government regulation, although substantial, is not deemed sufficient." *Id.* at 453. In Young v. American Mini Theaters, Inc., for example, the Court upheld the Detroit ordinance because it posed nothing more than a limitation on the place where the respondent theater owner could exhibit adult films. 427 U.S. 50, 71-72 (1976). Moreover, the Court relied on district court findings to reason that the burden on first amendment rights was slight because many locations existed in Detroit that were over 1000 feet from another regulated land use, and thus, permissible locations for adult theaters under the ordinance. *Id.* at 71-72 n.35. Justice Powell, concurring, emphasized that even though the ordinance created economic loss for the theater owner, the loss was not greater than that which other commercial enterprises suffer at the hands of constitutionally valid zoning ordinances. *Id.* at 78 (citing Zahn v. Board of Public Works, 274 U.S. 325 (1927)). Justice Powell also argued that first amendment inquiry does not concern itself "with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *Id.*

An individual will enjoy full first amendment protection if a local ordinance causes a substantial abridgement of first amendment rights. In *Schad v. Borough of Mount Ephraim*, the Court invalidated a Mount Ephraim ordinance that prohibited all live entertainment, including live nude dancing, within its boundries, as a substantial and unjustified restriction on free speech. 452 U.S. 61, 72 (1981). Unlike the Detroit ordinance in *American Mini Theaters*, the Mount Ephraim ordinance did not regulate the location of adult theaters. Instead, it made criminal the act of offering all live entertainment anywhere within the borough. *Id.* at 65, 71. The Court also rejected the borough's argument that live nude entertainment was amply available in nearby areas outside its limits and stated that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Id.* at 76-77 (quoting Schneider v. State, 308 U.S. 147, 163 (1939)).

Whether a local ordinance imposes a slight or substantial burden on free speech often is

ciency of alternative channels of expression that the law leaves open,[147] and (4) the substantiality of the governmental interest

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not clearly discernible on the face of the statute. Rather, the party who challenges the statute bears the burden at trial to prove by factual evidence the substantiality of an ordinance's impingement upon free speech. For example, in Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982), the Fifth Circuit considered the validity of a Galveston ordinance that, like the ordinance upheld in *American Mini Theaters*, restricted the operation of adult theaters to certain designated areas within the city. *Id.* at 1209. Basiardanes, however, introduced into evidence maps of Galveston depicting the "oppressive options" that the city's ordinance left for aspiring purveyors of adult films. *Id.* at 1214. The Court summarized Basiardanes' evidence as follows:

> In the ten percent to fifteen percent of the city not categorically banned, adult theaters may operate only in the industrial zones at a great distance from other consumer-oriented establishments. Few access roads lead to the permitted locations, which are found among warehouses, shipyards, undeveloped areas, and swamps. These locations are poorly lit, barren of structures suitable for showing films, and perhaps unsafe. In theory they are available to adult movie proprietors and patrons, but in fact they are completely unsuited to this use.

Id. The district court held that the attractiveness of the permissible locations was irrelevant and merely a "[R]easonable economic burden that befalls some activity in every land use program." Basiardanes v. City of Galveston, 514 F. Supp. 975, 982 (S.D. Tex. 1981). The district court also relied on Justice Powell's concurring opinion in *American Mini Theaters* to emphasize that an exclusive focus on economic impact is improper under first amendment inquiry. *Id.* at 982 n.15 (citing Young v. American Mini Theaters, Inc., 427 U.S. at 78 (Powell J., concurring)). The Fifth Circuit, however, struck down the Galveston ordinance as a drastic impairment on protected speech because it rendered virtually impossible efforts by a proprietor to open a theater and exhibit adult films or by patrons to attend. 682 F.2d at 1214. Thus, although the Galveston ordinance facially appeared to be a reasonable time, place, or manner restriction that was permissible under the *American Mini Theaters* analysis, the ordinance effectively imposed a substantial restriction on free speech that was unconstitutional under the *Schad* standard of review. *Id.* at 1214-15.

147. Emerson, *supra* note 141, at 454. Even if an ordinance's purpose is legitimate and furthers a substantial governmental interest, municipalities may not pursue that purpose by means which broadly restrict first amendment rights when more narrowly restrictive means can attain the same end. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 132, at 727. Courts consider the existence of "less drastic means for achieving the same basic purpose" when analyzing the breadth of legislative restrictions. *Id.* (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)). For example, in *Shelton*, the petitioner and other school teachers challenged the constitutionality of an Arkansas statute that required all teachers, as a condition of employment in a state school or college, "to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years." 364 U.S. at 480. Justice Stewart, writing for the majority, stated that the statute required the petitioner and other teachers "to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious." *Id.* at 488. Although the Court agreed that the state had a valid interest in investigating the competence and fitness of the people it hired as teachers, *id.* at 485, the Court felt that many of the relationships the state required teachers to reveal had "no possible bearing upon the teacher's occupational competence or fitness." *Id.* at 488. The Court reasoned that the unlimited and indiscriminate sweep of the statute "went far beyond what was necessary to achieve [the state's] legitimate governmental purpose" and invalidated the statute as a breach of the petitioner's fundamental right to freedom of association. *Id.* at 489. For other examples of the Court's application of the least restrictive means test, see Village of

which the law purports to further.[148]

Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); NAACP v. Alabama, 377 U.S. 288, 307-08 (1964); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Talley v. California, 362 U.S. 60 (1960); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Schneider v. State, 308 U.S. 147, 161, 165 (1939).

148. Schad v. Borough of Mount Ephraim, 452 U.S. at 68-70, (citing Schneider v. State, 308 U.S. at 161). For example, in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), the city of Detroit, Michigan, passed an amendment to an "Anti-Skid Row Ordinance" that survived first amendment review by the Court. At trial the city introduced substantial evidence tending to justify its amendment. The Detroit ordinance regulated adult theaters, a classification predicated upon the theater's exhibition of motion pictures "characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' . . ." *Id.* at 53 n.4. The city pursued its "anti-skid row" purpose by requiring disbursement of adult theaters from each other and other regulated uses. *Id.* at 52. Specifically, the ordinance prohibited adult theaters from locating "within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area." *Id.* The respondent operated two adult theaters that the Detroit ordinance encompassed. *Id.* at 55. Consequently, the respondent brought two separate actions seeking declaratory judgment that the ordinance was unconstitutional and an injunction against its enforcement. *Id.* Although respondents nonobscene adult movies enjoyed first amendment protection, the Court held in the city's favor.

The city achieved this favorable decision by the introduction at trial of Detroit Common Council findings showing that clusters of adult theaters in small geographic areas were injurious to surrounding neighborhoods and the city's urban renewal projects. *Id.* at 54 n.6. The city also produced testimony by urban planners and real estate experts asserting that the location of several regulated uses, including adult theaters, "in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and business to move elsewhere." *Id.* at 55. The Court upheld the Detroit ordinance as constitutional because the ordinance's dispersement requirement only minimally burdened the respondent's free speech liberties and because Detroit articulated a sufficient basis for its law-making decision. *Id.* 71-73.

Conversely, the city of Jacksonville, Florida, in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), failed to justify sufficiently its ordinance that invaded the petitioner's first amendment right to exhibit nonobscene movies containing nudity at his drive-in theater. The challenged Jacksonville ordinance made criminal the showing of " 'any motion picture . . . in which the human . . . bare buttocks, human female bare breasts, or human bare pubic areas are shown, if [the exhibition] is visible from any public street or public place.' " *Id.* at 207 (quoting JACKSONVILLE, FLA., MUNICIPAL CODE § 330.313 (1972)). The petitioner violated this ordinance by showing the film "Class of '74," *id.* at 206 n.1, which contained some nudity and was visible from public streets. *Id.* at 206. The city argued primarily that it designed the ordinance to protect its citizens, particularly children, against unwilling exposure to offensive materials. *Id.* at 208, 212. At oral arguments before the Court, the city first argued that nudity on a drive-in movie screen distracts passing motorists, slows traffic, and increases the likelihood of automobile accidents. *Id.* at 214. Justice Powell, however, writing for the majority, emphasized that a legislative classification which singled out and prohibited movies containing the "most fleeting and innocent glimpses of nudity" was "strikingly underinclusive." *Id.* at 214. Justice Powell hypothesized that a wide variety of other typical movie scenes, "ranging from soap opera to violence," would equally distract passing motorists. *Id.* at 215. The majority invalidated the Jacksonville ordinance because it facially infringed first amendment rights. *Id.* at 208-17. *See infra* notes 157-67 and accompanying text. Justice Powell stressed that the city failed to heed repeated Court warnings that attempts

Commentators have criticized sharply the unpredictability of the Supreme Court's application of this four part balancing test. Professor Emerson argues that in most Burger Court applications of this test, the scales could have tipped in favor of either party, as the frequent and sharp division among Justices' opinions evidences.[149] Professor Emerson capsulizes the common objections to this balancing test as follows:

> In essence, the balancing doctrine is no doctrine at all but merely a skeleton structure on which to throw any facts, reasons, or speculations that may be considered relevant. Not only are there no comparable units to weigh against each other, but the test is so vague as to yield virtually any result in any case.[150]

Regardless of the balancing test's vagueness and unpredictability, the Court, in practice, subjects a challenged law to a high degree of scrutiny analagous to due process and equal protection tests concerning violations of a fundamental right or a "suspect" classification.[151] When the Court subjects a law to strict scrutiny under the first amendment analysis, it carefully examines the societal importance of the objectives the government designed the law to achieve, and determines whether the law actually furthers these objectives through the least restrictive means possible.[152] Although burdensome to governmental entities, this standard is not insurmountable. A municipality can pass the test by articulating and empirically supporting a well-reasoned and significant basis for its decision to enact the challenged legislation. Governments also must prove that the law leaves reasonable alternative avenues for continued communication of the restricted speech.[153]

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to regulate first amendment freedoms require precise legislative drafting and clearly articulated and supported governmental purposes. *Id.* at 217-18.

149. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 451 (1980).

150. *Id.* at 440.

151. *See supra* notes 133-34 and accompanying text.

152. Schad v. Borough of Mount Ephraim, 452 U.S. at 68-74.

153. *See, e.g., id.* at 72-73; Young v. American Mini Theaters, Inc., 427 U.S. 54-55, 71 n.34.

For some excellent discussions of the overbreadth doctrine, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1185-95 (10th ed. 1980); L. TRIBE, *supra* note 133, at 710-22; Monaghan, *supra* note 155; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

2. The Overbreadth Doctrine

The overbreadth doctrine is an exception to traditional free speech standing concepts.[154] It allows litigants whose act of expression falls "within the constitutionally valid applications" of certain legislation to assert that legislation's "potentially invalid applications . . . to other persons not before the court and with whom the litigant stands in no special relationship."[155]

Historically, overbreadth attacks on legislation effectively have protected freedom of expression.[156] In these cases, courts do not consider whether a particular litigant's expression deserves protection.[157] Rather, they invalidate legislation entirely because of its potential restriction on the protected speech of third parties not before the court.[158] The Supreme Court justifies this departure from the traditional rules of standing on the ground that over-

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154. The traditional standing doctrine in constitutional adjudication requires that a litigant "has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy . . . ." Sierra Club v. Morton, 405 U.S. 727, 731 (1972). In analyzing standing questions, the Supreme Court considers whether the litigant "alleges that the challenged action has caused him *injury in fact*, economic or otherwise;" and whether the interest the litigant seeks to protect is within the category of interests that a legislature designed the statute or constitutional guarantee in question to protect. L. TRIBE, *supra* note 133, at 79-80 (quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152, 153 (1970) (emphasis added)). The "cases and controversy" limitation of article III mandates that a party show injury in fact and a " 'fairly traceable' causal connection between the claimed injury and the challenged conduct." Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 72 (1978) (citing Warth v. Seldin, 422 U.S. 490, 501 (1975), and Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977)). *See* Jaffe, *The Citizen as a Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?* 78 YALE L.J. 816 (1969); *see also* L. TRIBE, *supra* note 133, at 80-97. The Constitution does not require courts to consider the standing issue of whether the injured interests fall within the category of interests a certain statute or constitutional provision protects. L. TRIBE, *supra* note 133, at 99. Rather, this element of the standing inquiry is a prudential consideration arising from various policies that concern the proper and limited role of the federal courts in a democratic society. Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. at 80. For example, the Court has denied standing when a party asserts a generalized grievance that many citizens share in equal measure as an injury. *Id.* (citing United States v. Richardson, 418 U.S. 166 (1974)). The Court infrequently grants standing when a party attempts to assert the legal rights of third parties. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975); United States v. Raines, 362 U.S. 17 (1960). The *Duke Power* case, however, holds that if "a party champions his own rights," and the alleged injury "is a concrete and particularized one" that the requested relief will prevent or redress, then meeting the constitutional standing requirements generally will satisfy the prudential concerns as well. 438 U.S. at 80-81.

155. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 1-2.

156. G. GUNTHER, *supra* note 153, at 1086.

157. *Id.* at 1187.

158. *Id.*

broad laws will have a "chilling" effect on the speech of third parties who are too timid to bring suit.[159]

Although the overbreadth doctrine enjoyed immense popularity during the Warren Court years, criticism of this technique grew during the early 1970s. In *Younger v. Harris*,[160] Justice Black restricted federal injunctive relief against laws that allegedly were overbroad or vague on their face by stating that the federal judicial power to adjudicate concrete disputes does not authorize courts "to survey the statute books and pass judgment on laws before the courts are called upon to enforce them."[161] Criticism of the traditional overbreadth doctrine intensified in subsequent Burger Court opinions[162] and finally gained majority support in *Broadrick v. Oklahoma*.[163] In *Broadrick*, the Court enunicated the "substantial overbreadth" doctrine, which emphasizes that courts should apply the overbreadth technique hesitantly.[164] The Court limited the "substantial overbreadth" doctrine further by making it inapplicable in commercial speech cases,[165] and currently requires courts to find a substantial number of constitutionally impermissible applications of a law before facially invalidating it on overbreadth grounds.[166]

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159. *Id. See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

160. 401 U.S. 37, 52 (1971).

161. *Id.*

162. G. GUNTHER, *supra* note 153, at 1190. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 617-21 (1971) (White, J., dissenting) (in which Justice White argued against applying the overbreadth doctrine against a Cincinnati ordinance that prohibited people from assembling and "'conduct[ing] themselves in a manner annoying to persons passing by . . . .'") (quoting CINCINNATI, OH., CODE OF ORDINANCE § 901-L6 (1956)); Gooding v. Wilson, 405 U.S. 518, 530-1 (1972) (Burger, C.J., dissenting) (in which Chief Justice Burger emphasized that the Court should reserve application of the first amendment overbreadth doctrine to cases in which challenged statutes demonstrated the potential for broad improper applications that posed a significant likelihood of infringing important first amendment expressions). In *Gooding*, Chief Justice Burger also argued, citing Justice Black's opinion in Younger v. Harris, 401 U.S. 37, 52-53 (1971), that application of the overbreadth technique is improper when a statute poses only insubstantial or imagined potential for occasional and isolated improper applications that impede protected constitutional liberties. Gooding v. Wilson, 405 U.S. at 530-31.

163. 413 U.S. 601 (1973).

164. *Id.* at 613.

165. Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977).

166. New York v. Ferber, 50 U.S.L.W. 5077, 5084 (U.S. July 2, 1982).

3. The Void For Vagueness Doctrine

The void for vagueness doctrine, a due process concept of special importance in free speech context,[167] is a close relative of the overbreadth doctrine. Consequently, courts often confuse the two concepts.[168] This confusion is understandable since both overbroad and vague statutes chill the willinguess of individuals to express themselves freely. Both doctrines also can produce rulings of facial invalidity.[169] The void for vagueness and overbreadth doctrines, however, are distinguishable. To illustrate, a legislature could draft a statute clearly and precisely, but the statute still might be impermissibly overbroad because its method of regulation is too pervasive and invades areas of protected expression.[170]

Because the vagueness doctrine encourages federal, state, and local legislators to draft reasonably clear guidelines into their laws, enforcement officials and triers of fact can avoid arbitrary and discriminatory law enforcement.[171] Parties frequently challenge licensing and other ordinances requiring administrative officials to exercise discretion before issuing a license as void for vagueness.[172]

B. First Amendment Challenges to Ordinances That Regulate Video Games

To date, the courts and parties that have considered whether video games deserve first amendment protection have focused primarily on the rights of individuals to purvey and play these games. Unfortunately, they have ignored completely, or only slightly discussed, the argument that video game software is an artistic expression of a video game designer.[173] Because the first amendment protects artistic expression,[174] this forgotten issue should lie at the core of a first amendment analysis of video game regulation.

Most courts that have addressed this first amendment issue follow the reasoning in *America's Best Family Showplace, Corp. v.*

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167. *See generally* G. GUNTHER, *supra* note 153, at 1188-89 n.9; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 132, at 726-27; Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

168. G. GUNTHER, *supra* note 153, at 1188-89 n.9. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); NAACP v. Button, 371 U.S. 415, 433 (1963).

169. G. GUNTHER, *supra* note 153, at 1188-89 n.9.

170. Zwickler v. Koota, 389 U.S. 241, 250 (1967).

171. Smith v. Goguen, 415 U.S. 566, 572-73 (1974).

172. *See supra* notes 112-20 and accompanying text.

173. *See infra* notes 216-32 and accompanying text.

174. *See infra* notes 249-72 and accompanying text.

City of New York,[175] and hold that the first amendment does not protect video games.[176] The plaintiff in *America's Best* challenged New York City's interrelated video game licensing and zoning laws. The city's statutory scheme authorized it to grant a video game operator's license to an establishment with no more than four video game machines if the facility qualified as a designated type of establishment, such as a restaurant, laundromat, or retail store.[177] If a prospective licensee sought to install more than four video game machines, the city's Administrative Code required the establishment to qualify as an arcade and obtain a special arcade license.[178] Acquiring an arcade license was difficult because New York permitted arcades in few city zoning districts and because the City Planning Commissioner had sole discretionary authority to approve a license request pursuant to his opinion concerning the propriety of the proposed arcade's location.[179]

The cause of action in *America's Best* arose when the plaintiff sought to reopen a financially doomed restaurant and make it profitable again by installing an innovative "new twist"—forty dining tables imbedded with coin-operated video games.[180] The plaintiff, however, realized that the restaurant was not in a district that permitted operation of more than four games per establishment.[181] Rather than risk the civil and criminal penalties that violation of the city's licensing and zoning laws would impose, the plaintiff sought declaratory and injunctive relief in federal district court.[182] The plaintiff claimed that the city's regulatory scheme violated its first amendment freedom of speech and fourteenth amendment substantive due process and equal protection rights.[183]

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175. 536 F. Supp. 170 (E.D.N.Y. 1982).

176. *See* Marshfield Family Skateland, Inc. v. Town of Marshfield, 389 Mass. 436, ___ N.E. 2d ___ (1983). Malden Amusement Co., Inc., v. City of Malden, No. 82-1840-S (D. Mass. Jan. 25, 1983); 1001 Plays, Inc. v. Mayor of Boston, 387 Mass. 879, 444 N.E.2d 931 (1983); Caswell v. Licensing Comm'n for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983); City of New York v. Rambling Ram Realty Corp., No. 81-43556 (N.Y. Sup. Ct. June 10, 1982) (memorandum opinion); Playtime Games, Inc. v. City of New York, No. 82-9629 (N.Y. Sup. Ct. June 1, 1982). *But see* Oltmann v. City of Palos Hills, No. 82-3568, slip op. at 13-14 (Ill. Cir. Ct. Aug. 20, 1982); Gameways, Inc. v. McGuire, No. 81-17300 (N.Y. Sup. Ct. May 3, 1982).

177. America's Best Family Showplace, Corp. v. City of New York, 536 F. Supp. at 172 n.4.

178. *Id.* at 172.

179. *Id.*

180. *Id.* at 171.

181. *Id.*

182. *Id.*

183. *Id.*

The plaintiff described video games as "visual and aural presentations on a screen involving a fantasy experience in which the player participates."[184] In addition, the plaintiff analogized video games to motion pictures and referred to *Stern Electronics, Inc. v. Kaufman*,[185] a copyright case in which District Judge Nickerson described a video game as a "movie in which the viewer participates in the action as [a] fearless pilot controlling the spaceship."[186] The plaintiff also argued in its memorandum of law that a video game is a "designer's original work of authorship which communicates through the aid of a machine,"[187] but the court did not discuss this argument in its opinion. The plaintiff relied principally on the Supreme Court's decision in *Schad v. Borough of Mount Ephraim*,[188] to formulate the legal foundation for its argument.[189] In *Schad*, the appellant installed a coin-operated mechanism in its adult bookstore that allowed customers to view a live nude dancer performing behind a glass panel.[190] The Court held that this entertainment deserved first amendment protection,[191] and invalidated Mount Ephraim's ordinance banning all live entertainment within the town as a substantial and inadequately justified restriction on protected activity.[192]

In *America's Best*, District Judge McLaughlin rejected the plaintiff's arguments and held that video game software was not a form of expression which the first amendment protects.[193] Judge McLaughlin admitted that although the Supreme Court stated in *Schad* that the first amendment protects "entertainment, as well as political and ideological speech,"[194] he felt that, given the decisions in other entertainment cases, the first amendment protects entertainment only when it communicates some idea or element of information.[195] He found that video games completely lacked any

184. 536 F. Supp. at 173.

185. 523 F. Supp. 635 (E.D.N.Y. 1981), *aff'd*, 669 F.2d 852 (2d Cir. 1982).

186. 523 F. Supp. at 639, *quoted in* Plaintiff's Memorandum of Law at 13, America's Best Family Showplace, Corp. v. City of New York, 536 F. Supp. 170 (1982).

187. Plaintiff's Memorandum of Law, at 14, *America's Best*.

188. 452 U.S. 61 (1981).

189. America's Best Family Showplace, Corp. v. City of New York, 536 F. Supp. at 173.

190. Schad v. Borough of Mount Ephraim, 452 U.S. at 62.

191. *Id.* at 65.

192. *Id.* at 65-66.

193. America's Best Family Showplace, Corp. v. City of New York, 536 F. Supp. at 173.

194. Schad v. Borough of Mount Ephraim, 452 U.S. at 65.

195. America's Best Family Showplace, Corp., 536 F. Supp. at 173.

requisite communicative or informational element.[196] Judge McLaughlin reasoned that all video games, even those that talk or play music, are "pure entertainment" like games of pinball, chess, or baseball and have no informational or communicative element.[197] Despite the Supreme Court's observation that the line between informing and entertaining is very elusive, Judge McLaughlin readily distinguished video games because he felt that they completely lacked any communicative elements.[198]

In *City of New York v. Rambling Ram Realty Corp.*,[199] the New York City trial court analyzed the same law and facts similar to those in *America's Best* and supplied additional justifications for denying first amendment protection to video games. The court agreed with the conclusion in *America's Best* that expression will receive first amendment protection only if it communicates information or an idea.[200] In addition, the court stated that communication worthy of first amendment protection could assume either of two forms. First, a creator could communicate to a viewer in a

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Professor Zeigler recently espoused support for the holding in *America's Best* hy opining that courts probably would not grant video games first amendment protection. Zeigler, *Trouble in Outer Galactica: The Police Power, Zoning, and Coin-Operated Video Games*, 34 SYRACUSE L. REV. 453, 499-501 (1983). Professor Zeigler admitted that the Court's entertainment decisions granting first amendment protection to movies and dancing indicate that video games arguably could be a form of entertainment within the scope of the first amendment. *Id.* at 498. Nevertheless, he attempted to distinguish video games from dancing and movies as follows:

> Since movies and dancing are considered to be generic vehicles for the expression of opinions and ideas, they are entitled to first amendment protection despite the fact that they are often designed solely for the purpose of entertainment. Because the line between informing and entertaining expression is considered to be too elusive in the context of these generic vehicles for communication, the Supreme Court appears to have established a general prophylactic rule for protecting these forms of expression. Coin-operated video games may be a form of expression with the potential for affecting public attitudes and behavior. They are not, however, likely to be considered generic vehicles for communication. Consequently, courts are unlikely to grant to such expression the presumption of first amendment protection.

Id. at 499. In concluding that courts probably will not grant video games first amendment protection because video games do not communicate information, Professor Zeigler, like the *America's Best* court, failed to appreciate that the Court, in its live nude dancing decisions, effectively eliminated its communicative element requirement in first amendment entertainment cases. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); California v. LaRue, 409 U.S. 109 (1972); *see infra* notes 272-94 and accompanying text for a discussion of the Court's live nude dancing decisions and their impact upon the communicative element requirement, see *infra* notes 272-94.

196. America's Best Family Showplace, Corp., 536 F. Supp. at 173.

197. *Id.* at 174.

198. *Id.*

199. No. 81-43556 (N.Y. Sup. Ct. June 10, 1982) (memorandum opinion).

200. *Id.* at 13.

packaged form, such as a film, painting, dance, or sculpture, that exists without any participation by the viewer or receiver. The viewer observes the work without creating or changing it.[201] Second, several individuals may communicate by directly exchanging ideas. This form of communication could be either verbal, as in a debate or discussion, or nonverbal as in a dance when the dancer invites the audience to participate.[202]

The *Rambling Ram* court held that video games do not qualify as either form of communication,[203] but are dormant devices that reflect only the ideas of the player who activates the machine. The court analogized video games to coin-operated juke boxes, which similarly do not receive first amendment protection.[204] The court stated that video games, like juke boxes, are purely a form of recreation in which players create their own entertainment by using mechanical and electronic devices.[205]

Contrary to the holdings in *America's Best* and *Rambling Ram*, however, some courts have extended first amendment protection to video games. In *Gameways, Inc. v. McGuires*,[206] another case arising under New York City's video game ordinances, the trial court held that video games are a form of speech which the first amendment protects. The court rejected Judge McLaughlin's conclusion in *America's Best* that video games lacked the communicative or informational element necessary to receive first amendment protection.[207] The *Gameways* court reasoned that other forms of protected entertainment, such as viewing live nude dancing through a coin-operated mechanism in an adult bookstore,[208] are no more communicative or informative than video games, and that the line between informing and entertaining is extremely elusive. Accordingly, the court concluded that video games also deserve first amendment protection.[209] An Illinois state trial court

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 14. *See* Fitchburg v. 707 Main Corp., 369 Mass. 748, 343 N.E.2d 149 (1976); Commonwealth v. Blackgammon's Inc., 1981 Mass. Adv. Sh. 445, 417 N.E.2d 377 (1981) (holding that a statute which governed licensing of establishments offering entertainment on Sundays did not violate the first amendment rights of the defendant who operated a juke box, played other recorded music, and offered dancing on Sundays).

205. *Id.*

206. No. 81-17300 (N.Y. Sup. Ct. May 3, 1982) (memorandum opinion).

207. *Id.* at 5-6.

208. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

209. Gamesways, Inc. v. McGuire, No. 81-17300, slip op. at 5-6 (N.Y. Sup. Ct. May 3, 1982) (memorandum opinion).

recently applauded the *Gameways* holding and similarly granted first amendment protection to video games in *Oltmann v. City of Palos Hills.*[210] The *Oltmann* court reasoned that video games are similar to motion pictures, which have enjoyed first amendment protection since the early 1950's,[211] and concluded that video games also deserve first amendment protection.[212]

IV. Video Games: Artistic Expressions and Popular Entertainment That Deserve First Amendment Protection

A. *The Video Game: An Artistic Expression*

The courts that have heard first amendment challenges of municipal ordinances which regulate video game entertainment have focused primarily on the game-playing experience to determine whether free speech protects video games. Coincidentally, the courts virtually have ignored the fact that video games, like motion pictures, theatre, dance, and other forms of entertainment which enjoy first amendment protection, are the product of individual artistic expression.[213] One may understand fully the artistic character of a video game only by analyzing the designer's creative process, the game's characteristics, and the experience it provides. By overlooking the video game designer's creative process, courts have failed to appreciate the dependency of the artistic work on its creator. As William Butler Yeats philosophically suggested in his poem *Among School Children*, one cannot "know the dancer from the dance"[214] because the life of each depends on the existence of the other.[215]

1. The Video Game Artist and the Creative Process

Video game companies introduce hundreds of video games each year. Most are commercial failures.[216] This statistic has compelled video game manufacturers to admit that the creativity of the game designer is the keystone of success in the video game

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210. No. 82-3568 (Ill. Cir. Ct. Aug. 20, 1982).

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

212. Oltmann v. City of Palos Hills, No. 82-3568, slip op. at 13-14 (Ill. Cir. Aug. 20, 1982).

213. *See supra* cases cited at note 176.

214. W. B. Yeats, *Among School Children*, in Norton Anthology of Poetry 928, 930 (rev. ed. 1975).

215. Conversation with Paul L. Bennett, Professor of English at Denison University, Granville, Ohio (fall 1979).

216. *Games That Play People, supra* note 2, at 54.

market.[217] Of the approximately 200 people currently working as video game designers only about a dozen have gained recognition as creative superstars.[218] Alan Miller, a video game designer for Activision, Inc., is a member of this elite group.[219] He and three other video game designers founded and structured Activision to appease the artistic needs of video game designers who felt that the games they designed were self-expressive creations and not mere commodities.[220]

Activision and other video game companies now prominently include the promotion of their designers in advertising campaigns.[221] James H. Levy, president and chief executive of Activision, noted that the best designers develop unique styles and that their names practically have become trademarks which help the companies sell games.[222] Activision promotes its designers on television and includes their photographs and tips on how to play the games in game instruction books. As a result, loyal video game players have flooded Activision daily with thousands of letters addressed to individual designers.[223]

Each video game designer engages in a unique creative process. Alan Miller, for example, begins with an idea and draws rough sketches of the characters and playing field that he envisions.[224] He then writes a description of the game's theme and how the characters will interact. After refining his idea, Miller retires to his nearby home and "spends days alternately staring out the window at trees and painstakingly translating his idea into an initial ten to twenty pages of detailed computer code."[225] Miller then "burn[s]" his final written video game program, typically containing 2000 to 3000 separate instructions, into a computer chip that ultimately governs the game's action and images.[226] Finally, Miller spends several months working on the game's "playability" to ensure that it is "challenging without being impossible."[227] To trans-

217. Wall St. J., *supra* note 3, at 1.
218. *Id.*
219. *Id.*
220. *Id.* at 22. Activision now designs video games for Atari and Intellivision, Inc., maintains "five separate 'design centers' on the East and West Coasts," and controls "about 15% of the [home] game-cartridge markets." *Id.*
221. *Id.* at 1.
222. *Id.*
223. *Id.*
224. *Id.* at 22.
225. *Id.*
226. *Id.*
227. *Id.*

form the game into a polished final product, he fields comments and criticism from other designers about the game's theme, graphics, and color, and plays the game for hundreds of hours to remedy any stubborn problems in the game's software.[228]

2. The Video Game: The Artistic Work

Video games are colorful, graphic, audio-visual displays of images that resemble cartoon movies and perform in accordance with a preconceived theme. Video games originate as creative ideas of designers and achieve their colorful thematic form through the medium of computer science. The designer embodies original ideas in a computer chip, and a cathode ray tube projects the computer chip's contents as a series of images on the video game screen. The fact that the video game display emanates from computer software does not lessen the artistic value or originality of the designer's work.[229]

In the seven years since Atari first introduced its primitive black and white video ping pong game, designers have experimented with a variety of innovative design techniques and have created increasingly more sophisticated, challenging, and colorful video games. For example, the designer of ZAXXON, a video game that Gremlin Industries, Inc. manufactures, created spectacular video graphics by using shadows and motion to create a three-dimensional effect. Activision designer Alan Miller also experimented for approximately two months with red and green lensed glasses in an attempt to design a three-dimensional video game.[230] Mattel, Inc., recently developed and introduced a talking video game that places the player in the cockpit of a B-17 bomber flying a mission over Europe, and which uses antique radio voices to warn the player of impending perils.[231] One designer also foresees future generations of video games that will use videotaped or filmed backgrounds instead of cartoon-like video graphic images to obtain more realistic video game effects.[232]

The brilliance of the video game as an artistic work is the opportunity the game provides each player to participate actively in the entertainment experience. This characteristic distinguishes video games from other forms of artistic entertainment that typi-

228. *Id.*
229. Stern Elec. Inc. v. Kaufman, 523 F. Supp. at 639.
230. Wall St. J., *supra* note 3, at 14.
231. Nulty, *supra* note 1, at 120, 124.
232. *Id.*

cally require their audiences to observe passively and is undoubtedly responsible for the widespread popularity which video games have achieved.

3. The Video Game: Integrating Its Artistic Elements

Simultaneous examination of the creative processes of the video game designer, the video game's audio-visual characteristics, and its playing experience indicates that the video game is an innovative artistic expression. Like a motion picture, a dance, a painting, or a novel, the video game essentially is the original idea or expression of an individual. The expression of an idea through a particular medium, whether it is oil paint on canvas, a musical instrument, or computer software, does not make a work less original because the individual's final work in each of these forms is the manifestation of the individual's artistic idea. Although individuals usually enjoy artistic entertainment through passive viewing or listening, the fact that video games allow players to participate actively in the entertainment experience does not make them less communicative or expressive of the game designer's original idea.[233] Rather, the ability of players to participate actively in the video game's preconceived entertainment experience is the game's artistic brilliance. The player does not alter, change, or create the video game experience by participating in it. Instead, the game's artistic qualities are preset and the game designer predetermines the player's entertainment parameters through the ideas and themes that the designer embodies in the video game software.

B. First Amendment Protection of Artistic Expression

Courts and commentators currently agree that the constitution's framers originally designed the first amendment to protect against governmental censoring of printers and to abolish common law sedition, which made public criticism of government a crime.[234] The first amendment, however, in addition to protecting and promoting open political discourse, now protects a variety of "speech" including artistic expression. Professor Emerson attributes the expansion in scope of first amendment protection of expression to startling technological changes in society, including the growth and power of mass media, computerized data collection systems, and

233. *But see* City of New York v. Rambling Realty Corp., No. 81-43556 at 13-14.

234. *See* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 3-35 (1941); G. GUNTHER, *supra* note 156, at 1107-08.

other devices and systems that threaten personal privacy.[235] He also cites the expansion of American governmental functions and the power of large public and private organizations as contributors to this development.[236] These and other societal changes naturally have introduced many novel first amendment issues to courts and have caused the American constitutional system of free expression to "expand to the limits of [its] logic."[237] Thus, courts expressly or implicitly have broadened the scope of first amendment expression to include symbolic nonverbal protests,[238] political motivated economic boycotts,[239] commercial advertising,[240] motion pictures,[241] pornography,[242] theatrical and musical performances,[243] dance,[244] and other expressions possessing some serious artistic, literary, political, or scientific value.[245]

The legal foundation of first amendment protection of artistic expression arises from Supreme Court precedent in the areas of entertainment, offensive speech, and obscenity, and from the fundamental values that the Court's first amendment doctrine serves. Early in the twentieth century when first amendment cases primarily concerned criminalization of various forms of political speech, the principal objective underlying the Court's protection of free speech was to discover truth by encouraging competition between truth and falsity in the marketplace of ideas.[246] The Court consistently has considered discovery of truth a value that underlies its first amendment decisions.[247] As the scope of first amendment ex-

235. Emerson, *supra* note 141, at 422.

236. *Id.*

237. *Id.*

238. *E.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (holding that two junior high students had a first amendment right to wear black armbands to school in protest of the Vietnam War).

239. NAACP v. Claiborne Hardware Co., 50 U.S. L.W. 5122 (U.S. July 2, 1982) (holding that black citizens have a first amendment right to participate in an economic boycott of white merchants to achieve legitimate civil rights objectives if the individual defendants do not engage in violent or otherwise criminal activity). *But see* Longshoremen v. Allied Int'l, Inc., 456 U.S. 212 (1982) (in which the Court rejected the first amendment claim of the longshoremen's union that refused to unload cargoes shipped from the Soviet Union in protest of the Soviet invasion of Afghanistan).

240. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975).

241. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

242. *See, e.g.*, Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).

243. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

244. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

245. *See* Miller v. California, 413 U.S. 18, 24 (1973).

246. Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 967-74 (1978).

247. Baker, *supra* note 246, at 968. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323,

pression expanded over the years, however, so did the values that the first amendment serves. Professor Emerson asserts that freedom of expression now has become essential to "(1) individual self-fulfillment; (2) the advancement of knowledge and the discovery of truth; (3) participation in decision-making by all members of society; and (4) maintenance of the proper balance between stability and change."[248] Courts, by granting first amendment protection to artistic expression, seem to promote most significantly the value of individual self-fulfillment.

1. Artistic Expression and the Self-Fulfillment Value

Professor Emerson suggests that the growing emphasis on the first amendment's function to protect individual self-fulfillment reflects an emerging concern of courts with modern society's tendency "to inhibit the growth of the individual personality and the individual's autonomy and self respect."[249] The late Justice William O. Douglas championed the Court's new emphasis on individual self-fulfillment as a value underlying the first amendment.[250] Justice Douglas developed this self-fulfillment notion in his due process privacy opinions in the 1950s that emphasized an individual's need for a right of free personal choice.[251] He argued that the right to personal choice allows the individual to realize his potential as a human being by pursuing his own goals and developing his talents and abilities.[252] Moreover, Justice Douglas felt that allowing individuals to choose freely would promote stronger individual "character and integrity"[253] and would benefit society by encouraging attempts to strive toward "new horizons."[254]

In *Griswold v. Connecticut*[255] Justice Douglas recognized as

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340 (1974) (in which Justice Powell stated that we can only correct pernicious opinions by encouraging "the competition of other ideas").

248. Emerson, *supra* note 149, at 423. Professors C. Edwin Baker and Laurence H. Tribe concur in the belief that the value of individual self-fulfillment underlies the first amendment. *See* L. TRIBE, *supra* note 133, at 576; Baker, *supra* note 246, at 990-96. Professor Bork, however, argues that courts explicitly should accord first amendment protection to political speech, and not to literary, obscene, or scientific expression. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

249. Emerson, *supra* note 149, at 425.

250. *Id.* at 424.

251. Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579, 1589 (1978).

252. *Id.* at 1589 & n.57.

253. Public Util. Comm'n v. Pollack, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting).

254. Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

255. 381 U.S. 479 (1965).

the basis of a fundamental right to use contraceptives the right to privacy within one's personal associations that the "penumbra" of the first amendment envelops.[256] Thus, Justice Douglas implicitly invoked the self-fulfillment value as a reason for using the first amendment to protect an individual's right to free choice in sexual and familial matters.[257] Justice Douglas further expounded his position on the foundational values of the first amendment in his dissent in *Gillette v. United States*,[258] a case concerning an individual who objected for religious reasons to being drafted during the Vietnam war. Justice Douglas stated that he "had always assumed that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment."[259] Concurring with the majority in *Roe v. Wade*,[260] Justice Douglas crystalized his views by stating that one purpose of the first amendment was to help individuals secure "autonomous control over the development and expression of [their] intellect, interests, tastes, and personality."[261]

The right to express one's thoughts, ideas, and emotions artistically is central to the first amendment value of individual self-fulfillment because artistic expression essentially is man's act of expressing his thoughts, visions, and ideas, and developing his talents and abilities. Moreover, some psychologists argue that creative expression also is an outlet which enables man to manage emotional instability and avoid neuroses that the pressures of everyday life can cause.[262] Thus, creative expression serves as a balm that therapeutically promotes an individual's emotional and psychological well-being and self-fulfillment.[263] Thus, because video games are the artistic manifestation of an individual's original

256. *Id.* at 482-84.

257. Emerson, *supra* note 149, at 424; Note, *supra* note 251, at 1588-89.

258. 401 U.S. 437, 469 (1971).

259. *Id.* at 469, *quoted in* Emerson, *supra* note 149, at 424.

260. 410 U.S. 113, 211 (1973).

261. *Id.* at 211, *quoted in* Emerson, *supra* note 149, at 424-25.

262. Conversation with Mr. Paul Bennett, Professor of English, Denison University (Fall, 1979).

263. The benefits that creative expression affords individual artists, the artistic works which man's creative process conceives have provided mankind with a tremendous source of beauty and entertainment. Although the video game may be a mundane form of artistic expression, the Court has repeatedly remarked that "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons." Young v. American Mini Theatres, Inc., 427 U.S. 50, 87 (1976) (Stewart, J., dissenting) (quoting Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)). *See* Cohen v. California, 403 U.S. 15, 25 (1971) (in which the Court reversed a peace demonstrator's conviction for disturbing the peace that he received for entering a courthouse wearing the inscription "Fuck the Draft" sewn onto his jacket).

ideas and creative process, first amendment protection of them would further the first amendment value of individual self-fulfillment that the late Justice William O. Douglas and others have envisioned.[264]

2. Artistic Expression and the Court's Entertainment, Offensive Speech, and Obscenity Opinions

In its entertainment, offensive speech, and obscenity opinions, the Supreme Court has suggested that the first amendment protects artistic expression. For example, in *Young v. American Mini Theatres, Inc.*,[265] Justice Stevens observed that the first amendment will not tolerate the total suppression of sexually explicit pornographic motion pictures if they possess "some arguably artistic value."[266] Because of the films' sexually explicit character, however, Justice Stevens demoted pornographic motion pictures to a level of first amendment protection weaker than the protection applicable to political debate or nonpornographic films. The Justice also implied that nonpornographic and nonobscene materials possessing arguably artistic value deserve full first amendment protection.[267]

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264. *See supra* notes 250-54 and accompanying text.

265. 427 U.S. 50 (1976).

266. *Id.* at 70.

267. *Id.* at 70-71. Professor Zeigler argues that if courts characterize video game expression as first amendment speech, they probably will classify it within the lesser protected category of commercial speech. Zeigler, *supra* note 132, at 502. He reasons that a coin-operated video game arguably embodies the expression of a game designer's idea, and that courts might consider this embodied expression an inducement to engage in the commercial transaction of playing the game. *Id.* at n.288. This argument, however, ignores the similarity between the creation, production, and marketing of books, motion pictures, and video games. All three forms of expression originate as the creative idea of an individual artist, whether it be the novelist Ernest Hemingway, the filmwriter Steven Spielberg, or the video game designer Alan Miller. *See supra* notes 216-28 and accompanying text. Commercial enterprises such as publishers, motion picture production companies, and video game manufacturers then transform the artist's idea into commercially salable products—published novels, motion pictures, and coin-operated video games. These companies then sell the finished products to distributors and retailers who sell or lease these products to interested consumers such as bookstores, motion picture theaters, and video game arcades and purveyors. The process of creating and marketing books, motion pictures, and video games, therefore, is very similar. Additionally, books and motion pictures that are neither obscene nor pornographic receive full first amendment protection even though commercial profit is the purpose of their production and marketing. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 501. Thus, Professor Zeigler's statement that the video game designer's idea, which a commercially marketed video game embodies, falls within the lesser protected commercial speech category is erroneous given the fact that commercially marketed novels and motion pictures enjoy full first amendment protection.

Similarly, the Court addressed in its obscenity opinions its concern with the artistic value of challenged expressions. The Court, while consistently holding that obscene material is completely without first amendment protection, has struggled to formulate a standard which distinguishes obscene and nonobscene materials or expressions. This distinction is crucial because the materials that legislatures characterize as obscene usually consist of movies, literature, magazines, and live performances, but if courts do not judge these materials obscene, they generally will receive first amendment protection from harsh government regulation. In *Miller v. California*,[268] Chief Justice Burger finally enunciated the Court's obscenity standard, which allows states to enforce criminal penalties against works that—taken as a whole—appeal to the prurient interest in sex, that portray sexual conduct in a patently offensive way, and that—taken as a whole—do not have serious literary, artistic, political, or scientific value.[269] This standard implies that materials which possess artistic value enjoy first amendment protection. Thus, the first amendment should embrace video game software, which essentially is an individual's artistic creation expressed through the technology of computer science.[270]

C. The Entertainment/Communication Dichotomy and the Communicative Element Requirement in First Amendment Entertainment Cases

1. The Entertainment/Communication Dichotomy

The principal argument against granting video games first amendment protection is that they are solely entertainment because they communicate no idea or information. The courts that have accepted this argument, however, have failed to analyze carefully the historical development of the communicative element requirement in entertainment cases. This dichotomy between entertainment and communication in first amendment cases developed from the early Puritan beliefs that entertainment was inherently evil[271] and that people should engage in more serious matters.[272] Commentators also cite as a reason for this dichotomy

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268. 413 U.S. 15 (1973).

269. *Id.* at 24.

270. *See supra* notes 213-32 and accompanying text.

271. Note, *Motion Pictures and the First Amendment*, 60 YALE L.J. 696, 704 n.20 (1951) (citing 2 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 75-76 (Reeve ed. 1889)).

272. Note, *supra* note 271, at 704 n.20 (citing Reisman & Denny, *Do the Mass Media "Escape" from Politics?* in READER IN PUBLIC OPINION AND COMMUNICATION 327 (Berelson &

the antiquated belief that fictional expression does not communicate any ideas significant to the formation of public opinion.[273] Consequently, courts in the early 1900s accepted state and local government censorship of entertainment as a proper exercise of the police power.[274] In *Mutual Film Corp. v. Industrial Commission*,[275] for example, the Court upheld the constitutionality of an Ohio motion picture censorship statute. In its opinion, the Court characterized motion pictures as pure entertainment that operates solely for profit and not as an organ of public opinion.[276]

2. The Demise of the Entertainment/Communication Dichotomy

The Supreme Court began to grapple with the entertainment/communication dichotomy in the late 1940s when, in *Winters v. New York*,[277] it recognized a vendor's first amendment right to sell magazines consisting primarily of criminal news, police reports, and accounts of criminal deeds of bloodshed and lust. The Court rejected the city's argument that the first amendment free press right protects only the communication of ideas and not entertainment.[278] Justice Reed reasoned that, although the Court could see nothing of any possible value to society in these magazines, they held the magazines deserved as much free speech protection as the best of literature because the distinction between informing and entertaining was too elusive to function as a threshold requirement for granting entertainment first amendment protection.[279]

3. Emergence of the Communicative Element Requirement

Four years after *Winters v. New York*, the Court decided *Joseph Burstyn, Inc. v. Wilson*,[280] which specifically overruled *Mutual Film Corp. v. Industrial Commission* by extending first amendment protection to motion pictures. The Court ultimately rejected the strict dichotomy which *Mutual Film* created between entertainment and communication by restating that the line be-

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Janowitz eds. 1950)).

273. Note, *supra* note 271, at 705 n.22.
274. *Id.* at 703.
275. 236 U.S. 230 (1915).
276. *Id.* at 244.
277. 333 U.S. 507 (1948).
278. *Id.* at 510.
279. *Id.*
280. 343 U.S. 495 (1952).

tween entertaining and informing is "too elusive" to serve as the threshold test of first amendment protection.[281] The Court, however, emphasized "that motion pictures are a significant medium for the communication of ideas [and could] affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the *subtle shaping of thought which characterizes all artistic expression.*"[282] The Court also stressed that even though companies design movies to entertain and inform, and produce them as part of a large-scale, profit-oriented business, movies still deserve first amendment protection.[283]

Although the Supreme Court rejected the strict entertainment/communication dichotomy in *Joseph Burstyn*, it argnably established the requirement that entertainment still must communicate some type of idea or information to receive first amendment protection. The Court included expressions of social, political, and artistic significance in its definition of communicative element,[284] and felt that the motion pictures in *Joseph Burstyn* possessed artistic expression in addition to the more traditional forms of first amendment speech.[285] The Court, however, did not clarify whether a form of entertainment that contains only artistic expression and little, if any, political or social communication, would also receive first amendment protection. The Court intimated an answer to this question twenty years later in its nude dancing cases.[286]

4. The Communicative Element Requirement After the Court's Nude Dancing Decisions

The Court's decisions in *Doran v. Salem Inn, Inc.*,[287] and *Schad v. Borough of Mount Ephraim*,[288] signaled a significant diminution of the communicative element requirement in first amendment entertainment cases. In *Doran*, the Court stated that the first amendment might protect a bar owner's right to provide topless dancing entertainment to his customers.[289] Justice Rehnquist and

281. *Id.* at 501 (quoting Winters v. New York, 333 U.S. 507, 510 (1948)).

282. *Id.* (citing INGLIS, FREEDOM OF THE MOVIES 20-24 (1947)) (emphasis added). *See* Note, *supra* note 271, at 704-08.

283. Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 501-02.

284. *Id.* at 501.

285. *Id.* at 501-02.

286. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); California v. LaRue, 409 U.S. 109 (1972).

287. 422 U.S. 922 (1975).

288. 452 U.S. 61 (1981).

289. Doran v. Salem Inn, Inc., 422 U.S. at 932.

seven other justices made this statement even though they recognized that this customary type of barroom nude dancing contains only the barest minimum of protected expression.[290] Six years later in *Schad*, the Court held that the first amendment protected an adult bookstore owner's right to install and operate coin-operated devices which allowed customers to watch a live nude dancer perform behind a glass panel.[291] Justice White, writing for the majority, reasoned that entertainment, as well as ideological and political speech, enjoys first amendment protection.[292]

The *Doran* and *Schad* opinions diverge significantly from other first amendment entertainment cases because the Court failed to discuss the communicative element requirement before granting first amendment protection to nude dancing. Moreover, live nude dancing in bars and adult bookstores communicates little, if any, ideological, political, or social information. In light of *American Mini Theatres*,[293] however, *Doran* and *Schad* seem explicable because both nude dancing and pornographic movies arguably convey some element of artistic expression, which the first amendment now protects. Thus, *Doran* and *Schad* suggest that either virtually all entertainment or, at the least, entertainment which possesses an infinitesimal amount of artistic expression and little or no ideological, political, or social information, deserves first amendment protection. Under either interpretation, however, *Doran* and *Schad* implicitly have extended first amendment protection to a wide variety of entertainment that arguably conveys no political, social, or ideological communication including, such as abstract art, music without words, and video games. Thus, the courts that denied first amendment protection to video games because the games lack a communicative element failed to recognize the complete impact of *Doran* and *Schad* upon this component in first amendment analysis.

5. Video Games: Artistic Entertainment That Deserves First Amendment Protection

Video games, like motion pictures and dance, contain and express the original creative ideas of individual artists.[294] Although video games may convey simple-minded themes and only minimal

290. *Id.* at 932.
291. Schad v. Borough of Mount Ephraim, 452 U.S. at 66.
292. *Id.* at 65 (citations omitted).
293. *See supra* note 260 and accompanying text.
294. *See supra* note 213-33 and accompanying text.

amounts of political, social, or idealogical information, they are no less communicative than the live nude dancers in *Doran* and *Schad*.[295] Because of the debilitating impact that *Doran* and *Schad* had on the communicative element requirement in first amendment entertainment cases, video games possess the requisite artistic and expressive elements to justify receipt of first amendment protection. In addition, granting video games first amendment protection as free speech would be consistent with the Court's growing recognition that artistic expressions deserve such protection,[296] and would further the first amendment's underlying value of individual self-fulfillment.[297]

V. CONCLUSION

Although the first amendment historically promoted discovery of truth primarily in the realm of political and social discourse, courts have expanded its scope significantly and currently use it to protect artistic expression and entertainment. Because artistic expression and entertainment are often inseparably interwoven, the recognition of each as a type of protected free speech experienced parallel and often intersecting treatment in first amendment adjudication. Free speech protection of artistic expression arises primarily from judicial acceptance of the principle that the first amendment should promote individual self-fulfillment.[298] The Supreme Court, in cases concerning various forms of entertainment, offensive speech, and potentially obscene expression, has manifested support for the protection of artistic expression by searching for an act's artistic value to serve as a basis for granting first amendment protection.[299]

Judicial recognition of free speech status for artistic expressions and the underlying first amendment value of individual self-fulfillment spurred similar recognition of first amendment protection for entertainment. Entertainment had long suffered from the puritanical belief that it was evil and lacked social value. Consequently, courts in the early twentieth century strictly distinguished entertainment from expression that communicated social and po-

295. See *supra* notes 206-09 and accompanying text for a discussion of *Gameways, Inc.*, which held that the live nude dancing in *Schad* was no more communicative than video games.

296. *See supra* notes 268-72 and accompanying text.

297. *See supra* notes 251-67 and accompanying text.

298. *See supra* notes 249-64 and accompanying text.

299. *See supra* notes 266-70 and accompanying text.

litical ideas, and granted first amendment protection only to communicative expressions.[300] The Supreme Court subsequently rejected this strict dichotomy and, in the landmark case of *Joseph Burstyn, Inc. v. Wilson*,[301] granted first amendment protection to motion pictures. In *Joseph Burstyn*, however, the Court diverged cautiously from the puritanic tradition of suspicion for entertainment by emphasizing that although motion pictures entertain audiences, they also shape public opinion by communicating social, political, and artistic ideas. Thus, the Court arguably established a communicative element requirement in first amendment entertainment cases. The Court, however, failed to specify the quantum and nature of the communication necessary to command first amendment protection.

The Court's live nude dancing decisions in *Doran v. Salem Inn, Inc.*[302] and *Schad v. Borough of Mount Ephraim*,[303] however, significantly weakened the communicative element requirement from *Joseph Burstyn*. Unlike motion pictures, which typically convey social, political, ideological, and artistic expressions, live nude dancing in a tavern or an adult bookstore arguably conveys only an infinitesimal amount of artistic expression. Perhaps more significant is Justice White's explicit statement for the majority in *Schad* that entertainment, as well as political and ideological speech, deserves first amendment protection. Thus, *Doran* and *Schad* suggest that entertainment possessing some small element of artistic expression deserves first amendment protection. Because most forms of entertainment tend to contain at least some artistic expression, however, *Doran* and *Schad* also may suggest more broadly that virtually all entertainment deserves first amendment protection.

Consideration of the Supreme Court's entertainment cases as a whole indicates that *Doran* and *Schad* erect a protective wall against unreasonable state and local regulation of a wide variety of entertainment, including video games. The impact of applying free speech status to video games is difficult to predict. Granting video games first amendment protection, however, certainly will not proscribe reasonable regulation of video games. Rather, the strict judicial scrutiny that the first amendment authorizes will question seriously only the propriety of controversial forms of video game

300. *See supra* notes 271-76 and accompanying text.
301. 343 U.S. 495 (1952).
302. 422 U.S. 922 (1975).
303. 452 U.S. 61 (1981).

regulation, such as total prohibition of commercial video game establishments, harsh restrictions on the number of video games permissible per establishment, burdensome establishment locational standards, and harsh restrictions on the age of video game players.

Courts employing first amendment scrutiny would analyze carefully harsh video game regulation because the land-use planning objectives that video game ordinances seek, such as the prevention of truancy, vandalism, crime, litter, and noise, are achievable through less restrictive regulatory means. For example, local governments could require video game purveyors to meet strict adult supervision requirements,[304] and to prohibit minors from playing video games only during school hours[305] in efforts to curb truancy and juvenile delinquency. Governments also could impose strict but reasonable spacial requirements[306] for each game and prohibit the sale or presence of food or alcoholic beverages[307] in video game arcades to prevent crime, loitering, and overcrowding. Local governments also could require video game purveyors to comply with stringent noise, litter, and other aesthetic standards[308] and reasonable operating hour restrictions[309] to protect the peace and appearance of surrounding neighborhoods. These regulations probably would curb the problems commonly associated with video game playing in a reasonable manner and would pass first amendment scrutiny because they address these problems directly without sweeping too broadly or unduly burdening video game purveyors. In general, the first amendment will force local governments to draft video game legislation with precision and demonstrate that these ordinances substantially further the objectives that the governments designed them to achieve in a manner that is least restrictive of video game entertainment.[310] Thus, granting first amendment protection to video games would be a significant step toward reasonable municipal licensing and zoning regulation of video games.

JOHN E. SULLIVAN

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304. *See supra* notes 90-93 and accompanying text.
305. *See supra* notes 73-77 and accompanying text.
306. *See supra* notes 79-81 and accompanying text.
307. *See* Zeigler, *supra* note 132, at 463. *See also* M. Jaffe, *supra* note 15, at 13.
308. *See supra* notes 85-89 and accompanying text.
309. *See supra* notes 73-77 and accompanying text.
310. *See supra* notes 144-73 and accompanying text for a discussion of the Supreme Court's first amendment analysis.