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A First Amendment for *Second Life*: What Virtual Worlds Mean for the Law of Video Games

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ABSTRACT

In the first decade of the twenty-first century, video games have finally taken their place alongside movies, comic books, and drawings as a form of protected First Amendment speech. Since the Seventh Circuit's 2001 decision in American Amusement Machine Association v. Kendrick, court after court has struck down ordinances and statutes aimed at restricting violent video games – on the grounds that such violate game designers' and players' First Amendment speech rights. This series of rulings marks a stark change from courts' previous stance on video games, which consigned them to the same realm of unprotected non-speech conduct as games like tennis, chess, or checkers. Video games were able to escape from this unprotected realm—and become First Amendment expression—largely because advances in computer graphics and design made them more and more like interactive movies and television shows, and less and less like digitized board games and pinball machines.

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But instead of simply forging ahead in this jurisprudential evolution, as video games evolve from personal forms of recreation to virtual worlds, this Article suggests that virtual worlds should make us rethink the First Amendment theory that got us to this point. This is because, while video games may have become First Amendment speech by becoming intricate movie-like stories, many virtual worlds are decidedly not scripted stories. They are rather stages for a multitude of expressive activity, some of which is an electronic analogue of the chess-playing, tennis-playing, car racing, or aimless lounging and wandering, that the courts excluded from the realm of First Amendment speech in an earlier era. This Article argues that this exclusion was a mistake. Virtual worlds are realms of First Amendment expression not because of the stories and role play they make possible, but rather because they provide a setting for giving form to imagination in sounds and imagery, a setting that can be walled off from the business of civil government and thus reserved for more unconstrained exercises of individual freedom. Stories and messages are an optional part of this setting and are not a necessary ingredient of First Amendment speech. This is not to say that government has no role to play in regulating virtual worlds: where individuals bring harm-threatening activity into virtual worlds involving acts that abuse others' money or reputation, for example, government might have to regulate such worlds. But such regulation must take place alongside of, and not simply displace, the First Amendment's application to virtual worlds.

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“[D]on’t call asking what the object of the game is. Figuring that out *is* the object of the game.”

- The Game¹

“You don’t have to have a point to have a point.”

- The Point²

In the science fiction novel *Ender’s Game*,³ the protagonist, a child named Ender, plays a video game with some rather unusual characteristics. The game Ender plays is not entirely different from the video games that garner media attention today and that have given rise to litigation and proposed legislation to restrict their use by minors. Like many games that are popular with young Americans, this one has violent encounters; for example, Ender gouges out the eyes of his monstrous opponent.⁴ However, it differs from regular video games in two important respects. First, typical video games end when the player overcomes the last hurdle and achieves victory; Ender’s game, however, does not reach an apex, but rather persists in a seemingly taskless environment. Even with no more missions left to achieve or points to collect, the game world lives on in an electronic realm that exists to be explored and understood.⁵ The second way in

1. THE GAME (Polygram Filmed Entertainment 1997).

2. THE POINT (Murakami-Wolf Productions 1971).

3. ORSON SCOTT CARD, *ENDER’S GAME* (Tor 1991) (1977).

4. *Id.* at 47.

5. *Id.* at 54 (describing Ender’s arrival at a stage of the video game called the “End of the World” and his musing that “[p]erhaps it’s called the end of the world because it’s the end of the games, because I can go to one of the villages and become one of the little boys working and playing there, with nothing to kill and nothing to kill me, just living there”).

which Ender's game differs from real-world video games is that the electronic interface on which Ender "plays" spills over into the physical world inhabited by Ender, his family, his colleagues, and many others.⁶ Far from simply providing entertainment for the player, the computer actually spies on (and enables others to spy on) him, gathering information from far-away databases to incorporate into the game.⁷

These two idiosyncratic qualities of Ender's video game nicely highlight a challenge that emerging virtual worlds like *Second Life* pose to First Amendment jurisprudence. Courts have only recently begun to gather their bearings in video game cases, such as those dealing with restrictions on violent games. Beginning with *American Amusement Machine Association v. Kendrick*,⁸ a case from the U.S. Court of Appeals for the Seventh Circuit in 2001, federal courts began to abandon their previous refusals to treat video games as First Amendment speech. At issue in the case was the constitutionality of an Indianapolis ordinance that aimed to limit minors' access to video games containing "graphic violence."⁹ The ordinance required video game arcade operators to place these games (as well as any with "strong sexual content") in a separate partitioned area of the arcade, and to make them off-limits to any "minor unaccompanied by a parent, guardian, or other custodian."¹⁰ Previous cases had generally found that arcade games were no more deserving of being called First Amendment "speech" than the playing of tennis or baseball.¹¹ But the Seventh Circuit's decision in *Kendrick* broke with that consensus, and set the stage for a new one. Since *Kendrick*, numerous other courts have found that many, if not all, video games constitute protected expression under the First Amendment's free speech clause¹² and have

Ender eventually finds that there are some additional challenges that arise, although they are challenges with a very different purpose and nature than those in a typical video game.

6. *Id.* at 296-97.

7. *Id.*

8. 244 F.3d 572 (7th Cir. 2001).

9. *Id.* at 573.

10. *Id.*

11. *See, e.g.,* America's Best Family Showplace Corp. v. City of New York, Dep't of Bldgs., 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (finding that video games, like baseball and chess, are outside the scope of the First Amendment).

12. *See, e.g.,* Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954 (8th Cir. 2003); James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002); Video Software Dealers Ass'n v. Schwarzenegger, No. C-05-04188, 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007); Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006); Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065 (D. Minn. 2006); Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006); Entm't Software Ass'n v. Blagojevich,

required state legislators to overcome a much higher hurdle in restricting these games' production, sale, or availability—a hurdle which they have generally failed to overcome.¹³

It is likely that if video games played on Playstation 3, Wii, and Xbox consoles—to name just a few—are protected by the First Amendment (at least when played in the United States), then so too will be massively multiplayer online role-playing games (MMORPGs) like *Second Life* and *World of Warcraft*, where millions of gamers come together in online worlds to interact, compete, and jointly build settings to live out virtual fantasy lives. Thus, if legislators and other officials in the United States extend their concerns about online sex and violence to cover MMORPGs,¹⁴ they will likely encounter First Amendment barriers.

But virtual worlds may complicate the analysis that courts have provided for typical video games. The most prominent legal justification for granting video games First Amendment status is that, unlike unprotected *non-speech* sporting or gaming activities in the physical world—such as tennis, bowling, or backgammon—video games are not merely games but also *stories*, essentially interactive forms of the graphic novel. Thus, Judge Posner once noted that “[m]ost of the video games in the record of this case, games that the City believes violate its ordinances, are stories.”¹⁵ He added that the themes of games like *House of the Dead*— “[s]elf-defense, protection of others, dread of the ‘undead,’ fighting against overwhelming odds . . . are all age-old themes of literature . . .”¹⁶ He hinted that video games lacking such a story may, by contrast, be unprotected by the First

404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

13. See, e.g., *Granholm*, 426 F. Supp. 2d at 649-50 (“The issue of regulating violent video games to minors has been decided in the Seventh and Eighth Circuit, both of which have found that the attempted regulation in those districts violates the First Amendment. Several other District Courts have similarly held such acts to be unconstitutional.”) (internal citations omitted).

14. Such concerns have recently been expressed by a committee of the European Parliament, which— instead of recommending bans on any specific kind of MMORPG content—insisted that technology could increase parental control over what minors see. See *Video Games: A Red Button for Parents*, http://www.europarl.europa.eu/news/expert/infopress_page/063-48809-040-02-07-911-20090209IPR48788-09-02-2009-2009-false/default_sv.htm (last visited Apr. 2, 2009) (“Members of the committee are particularly worried about on-line games, which are easy to download onto a PC or a mobile phone, making parental control harder. Until [Pan-European Game Information] online is up and running, the report proposes fitting consoles, computers, or other game devices with a ‘red button’ to give parents the chance to disable a game or control access at certain times.”).

15. *Kendrick*, 244 F.3d at 577.

16. *Id.* at 577-78.

Amendment.¹⁷ And certain courts and scholars have built upon this hint, suggesting that there is an important distinction to be drawn between video games that are essentially interactive movies or graphic novels (which receive First Amendment protection) and those that are merely traditional games, like pinball or baseball, recast in electronic form (where they receive no more First Amendment protection than they do in their original form).¹⁸

But some virtual worlds—and other computer-generated visual media—do not necessarily provide a setting for role playing or drama; instead they provide an outlet for users to simply wander around and experiment in an unstructured, goal-free environment. In *Second Life*, for example, your virtual self (or “avatar”) can spend the day floating over a city, lying on a beach staring at computer-generated waves, or tinkering with a newly purchased car or spaceship.¹⁹ And, in what presents the most likely target for legislation—when avatars engage in simulations of sexual activity, violence, or some combination thereof—they need not do so as part of a script or story. On the contrary, *Second Life*’s creators provide no narrative or mission. Any such narrative must be supplied by *Second Life*’s users, who can also opt to enjoy its simulation capacities without weaving them into a script of any kind.

It is not only virtual worlds like *Second Life* that raise such questions, but also numerous other types of electronic media: people

17. *Id.* at 579-80; *See infra* text accompanying notes 65-76.

18. *See e.g.*, Michael T. Morley, “*Exceedingly Vexed and Difficult*”: *Games and the First Amendment*, 112 YALE L.J. 361, 366 (2002) (“The courts’ treatment of video games offers an interesting insight into the constitutional status of traditional games. Those video games that are essentially ‘digitized’ versions of traditional games have been ruled to lack sufficient communicative features to warrant constitutional protection, precisely because the underlying traditional games they represent are not forms of expression. On the other hand, video games with story lines that convey information or ideas are closely akin to constitutionally protected books and movies—media that are inherently communicative—and so fall under the First Amendment. Simply being a game is not sufficient to bring either traditional games, or video games, under the Constitution’s protection.”).

19. *See* MICHAEL RYMASZESWIKI ET AL., *SECOND LIFE: THE OFFICIAL GUIDE* 5-6, 11 (2d ed. 2008). *Second Life* is by no means the only such virtual space allowing for unstructured play, exploration, or experimentation. Similar open virtual expanses, where the object is to live one’s life rather than achieve a given mission can be found in worlds like The Sims Online. *See* F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 4 (2004) (describing The Sims Online Community, Blazing Falls, where individuals perform chores like “taking out the garbage, washing the dishes, and paying for parties and furniture” and “in their leisure time, they chat with neighbors, attend shows, dance at nightclubs, work out, and visit local attractions.” As Lastowka and Hunter note, this “a new concept in games, if it is even properly characterized as a game at all.” *See also* EDWARD CASTRONOVA, *SYNTHETIC WORLDS* 10-11 (2005) (noting that virtual worlds allow for much more than role playing and “allow such a huge number of players, and such an unscripted plot, that the line between acting and mere living vanishes.”).

play chess and checkers and bowl on computers and cell phones.²⁰ They also play games that involve manipulating colored tiles²¹ or building new types of species.²² Moreover, they make use not only of the graphical creations of professional programmers, but also of the user-generated content now found in innumerable games, computer icons, ringtones, animations, and computer sound clips. They create their own soundscapes on the musical video-game *Electroplankton*,²³ and on virtual keyboards on iPhones and laptops and in virtual worlds. They rack up points and set off light and sound shows as they play *Pinbrawl* on the web²⁴ or *iPinball* on their iPhones.²⁵ What is the First Amendment status of this non-narrative virtual activity? If, as one court has suggested, story-based video games are protected, but not those that “are merely digitized pinball machines,”²⁶ then what about *Pinbrawl*, *iPinball*, and other story and communication-free forms of electronic imagery, including those found within virtual worlds?

This Article argues that these should be staunchly protected. Narrative or no narrative, message or no message—the qualities that entitle video games to First Amendment protection have been there all along, and predate the current age of movie-like, adventure-based video games. These qualities can be found even in older arcade games like *Pong* or *Pacman*, where players respectively play electronic tennis with lines and dots or chase a smiley face through a maze. These games, like virtual worlds today, generate imagery, animation, music,

20. See e.g., Karpov Chess for Cell Phones, <http://www.gamespot.com/mobile/puzzle/karpovchess/index.html> (last visited Apr. 2, 2009); Play Checkers on AOL Games, <http://games.aol.com/game/checkers/> (last visited Apr. 2, 2009); Pro Bowling for Cell Phones, <http://www.gamespot.com/mobile/sports/probowling/index.html> (last visited Apr. 2, 2009); Touch Chess with iChess, <http://www.touchtip.com/iphone-and-ipod-touch/touch-chess-with-ichess/> (last visited Apr. 2, 2009).

21. See e.g., Swain Valasek, *Quadrum: Colors Review*, IPHONE APPS REVIEWS, Feb. 7, 2009, <http://www.iphoneappreviews.net/2009/02/07/quadrumcolors/>; Bejeweled Review, <http://pc.gamezone.com/gzreviews/r17327.htm> (last visited Apr. 2, 2009).

22. See Tracy Erickson, *Spore Origins iPhone*, POCKET GAMER.CO.UK, Sept. 10, 2008, [http://www.pocketgamer.co.uk/r/iPhone/Spore+Origins+\(iPhone\)/review.asp?c=8844](http://www.pocketgamer.co.uk/r/iPhone/Spore+Origins+(iPhone)/review.asp?c=8844). However, one might plausibly argue that *Spore* does contain a narrative, albeit one a little different from that of many other video games, in that it allows one to progress from one stage of evolution to another. See *id.*

23. See *infra* text accompanying notes 90-91.

24. See *Pinbrawl*, <http://www.thepinballzone.net/playGame.php?id=52> (last visited Apr. 2, 2009).

25. See *iPinball: Fantastic Physics Addon for Your Apple iPhone*, <http://iphonegap.com/2008/01/19/ipinball-fantastic-iphysics-addon-for-your-apple-iphone/> (last visited Apr. 2, 2009); see also Youtube – Demonstration of *iPinball*, <http://www.youtube.com/watch?v=9yd2h3GE9LQ> (last visited Apr. 2, 2009).

26. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002).

or other aural landscapes, and that should be enough to make them presumptively a kind of artistic endeavor. Thus, an act in a video game or virtual world should be presumptively protected speech even absent the elements of a traditional story or drama: not just moving a human-looking avatar or guiding a spaceship, but also simply moving a white square across a slightly darker white background. No one would question that Kasimir Malevich's famous painting *White on White*²⁷ would be just as much a protected form of expression under the First Amendment as Francisco de Goya's realistic depictions of bullfights,²⁸ and the same should be true where the abstract visions occur in computer animation rather than a painting, or when they are created by casual users dabbling in the realm of expression rather than dedicated and trained professionals and craftsmen.

First Amendment protection should apply to creative acts in virtual worlds not because they carry messages, stories, or dramatic enactments, but for two more basic reasons: first, because, with or without stories, acts in virtual worlds embody and give form to imagined perceptions or experiences; and, second, because the electronic and visual medium that gives form to users' internal visions is by its nature generally separated from the realm that John Locke called the "business of civil government."²⁹ The images and sounds on a computer monitor or cell phone screen can be seen and heard, and they can generate emotional and other internal responses from us, but they cannot typically reach into our lives and reshape our physical environment, subject us to physical injury, or cause gains or losses in resources. These environments should thus remain presumptively free from control or limitation by government. And the game designers who create and revise such environments should not be seen as performing the business of government (as some commentators appear to advocate when arguing that these environments are like

27. See Ricki Sapolich, *When Less Isn't More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art*, 47 IDEA 453, 459 (2007) (noting Malevich is "infamous for *White on White*, which consists of a white square on a white canvas"); see also Kazimir Malevich, *White on White*, http://www.bc.edu/bc_org/avp/cas/fnart/art/20th/painting/malevich1.jpg [hereinafter Kazimir Malevich, *White on White*].

28. See Kazimir Malevich, *Suprematist Composition: White on White*, *supra* note 27. See also Spanish Painting from El Greco to Picasso: Time, Truth, and History, Blood and Sand, Guggenheim Arts Curriculum, at http://artscurriculum.guggenheim.org/lessons/spanish_L3.php (last visited Apr. 27, 2009) (noting that Goya "drew and painted bullfighting throughout his life" and "captured both the brutality and the energy of this real-life event.").

29. JOHN LOCKE, A LETTER CONCERNING TOLERATION 19 (Prometheus 1990) (1689).

company towns run by quasi-government entities).³⁰ Indeed, it is not only digitized versions of arcade games like electronic pinball, or board games like chess and checkers, that should be the First Amendment beneficiaries of the new light cast by virtual worlds and user-generated content on the realm of video games, but also the more old-fashioned versions of these games that one finds in mechanical devices or cardboard and plastic—for there is little basis for distinguishing them from their electronic equivalents. One of the most interesting First Amendment lessons of gaming’s future then is what it says about the constitutional status of gaming’s past. This is the major First Amendment lesson that can be drawn out of the law’s encounters with virtual worlds.

But this argument would seem drastically incomplete if it did not acknowledge a key complication in extending such broad First Amendment protection to virtual world environments and experiences: emerging virtual worlds not only resemble the strange computer activity in *Ender’s Game* by being storyless, but also by being borderless. *Second Life* and other virtual worlds are often unmoored to any specific plot. They are free of the limitations that would ordinarily wall off a digital fantasy world from the physical realm where people socialize, work, learn, and buy things. For example, virtual worlds allow employees of a business to begin a conference call in the real world, but then continue it in a virtual world where their avatars can not only exchange suggestions, but also explore business-related 3D models.³¹ Moreover, someone in the real world might trade a real item of value for virtual-world currency (like “Linden dollars” in *Second Life*) that can only be used in virtual worlds.³²

One might thus anticipate that virtual worlds like *Second Life* will link to activities that people engage in on sites for commercial exchange, like eBay, PayPal, or Craigslist,³³ or for recreation and

30. See *infra* text accompanying notes 145-49.

31. Cf. Kermit Pattison, *Why You Should Have Your Next Business Meeting in Second Life*, FASTCOMPANY.COM, Aug. 5, 2008, <http://www.fastcompany.com/articles/2008/08/interview-philip-rosedale.html> (“*Second Life*, the virtual reality site, is reaching out to a new audience: businesses. [*Second Life*] is seeing an uptick in traffic for business meetings, conference calls and classes . . .”).

32. See RYMASZEWSKI, *supra* note 19, at 9 (“*Second Life* has its own currency: the Linden dollar. Linden dollars are exchangeable for real-life dollars.”).

33. Craigslist, <http://www.craigslist.com> (last visited Apr. 2, 2009); eBay, <http://www.ebay.com> (last visited Apr. 2, 2009); PayPal, <http://www.paypal.com> (last visited Apr. 2, 2009).

social exchange, like Facebook or Digg.³⁴ As Jack Balkin writes, “virtual worlds platforms will be adopted for commerce, for education, for professional, military, and vocational training, for medical consultation and psychotherapy, and even for social and economic experimentation to test how social norms develop.”³⁵ As Dan Hunter and Gregory Lastowka write, “economic boundaries between the real and the virtual world are not as distinct as they might appear,” as “[y]our nonvirtual credit card will be charged” for purchases of virtual items.³⁶ And as Joshua Fairfield likewise writes in this issue of the *Vanderbilt Journal of Entertainment and Technology Law*, there is no “magic circle” that preserves virtual worlds for pure play and expression and protects them “from outside influences—law, real-world economics, real-world money, and the like.”³⁷ These things are obviously part of the “business of civil government,” so how can one maintain—as this article will—that the virtual imagery and experiences should be placed beyond the government’s reach by First Amendment limits? The answer suggested in this analysis is that the sound and imagery of virtual worlds must mix with something else—generally, something that can cause a certain kind of harm to person or property—before it can become subject to legal restriction or regulation. Such mixing may well become a pervasive part of life in MMORPGs and other virtual worlds. But we should be slow to presume it has taken place absent evidence of harm (or threats of harm) to people or property, and should not suspend First Amendment protections for graphical art and imagery simply on the grounds that particular electronic images or soundscapes lack a narrative, a message, or other indicia of more familiar forms of First Amendment speech.

Part I sets out the argument for why First Amendment protection should apply to virtual worlds and free-form video games, and probably to much structured or unstructured creative activity that happens in physical space as well. Although courts sometimes suggest that it is the stories or messages within video games that make them First Amendment speech, this suggestion is an erroneous one. This Part considers some possible counterarguments that courts

34. Digg, <http://www.digg.com> (last visited Apr. 2, 2009); Facebook, <http://www.facebook.com> (last visited Apr. 2, 2009).

35. Jack Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2044 (2004).

36. F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 10 (2004).

37. Joshua Fairfield, *The Magic Circle*, 11 VAND. J. ENT. & TECH. L. 823, 825 (2009).

or scholars might invoke to justify drawing a constitutional line between video games with a message or narrative, and those that lack one. Part II then looks at a possible complications in extending broad First Amendment shielding to emerging video game play in virtual worlds: the possibility that in doing so, courts will be stopping government authorities not only from restricting artistic expression, but regulating financial and social transactions where people need protection from harm. It focuses specifically on the example of privacy protection and briefly considers the question of how First Amendment protection for virtual world activity might affect privacy protection *from* virtual world surveillance and spying.

I. FIRST AMENDMENT PROTECTION FOR VIRTUAL WORLDS AND VIDEO GAMES

There was a red-haired man who had no eyes or ears.

Neither did he have any hair, so he was called red-haired theoretically.

He couldn't speak, since he didn't have a mouth. Neither did he have a nose.

He didn't even have any arms or legs. He had no stomach and he had no back and he had no spine and he had no innards whatsoever. He had nothing at all!

Therefore there's no knowing whom we are even talking about.

In fact it's better that we don't say any more about him.

— Daniil Ivanovich Kharms, “The Red-Haired Man” (1937)³⁸

The art of the past which stood, at least ostensibly, in the service of religion and the state, will take on new life in . . . pure (unapplied) art

No more “likenesses of reality,” no idealistic images nothing but a desert!

But this desert is filled with the spirit of nonobjective sensation which pervades everything.

— Kasimir Malevich, *Suprematism* (1927)³⁹

In the television show *Seinfeld*, the character George Costanza famously tries to convince a confused network executive to produce “a

38. Daniil Ivanovich Kharms, *The Red-Haired Man*, OLD POETRY, <http://oldpoetry.com/opoem/28748-Daniil-Ivanovich-Kharms-The-Red-Haired-Man>.

39. KASIMIR MALEVICH, *THE NON-OBJECTIVE WORLD: THE MANIFESTO OF SUPREMATISM* (2003).

show about nothing.”⁴⁰ When others try to salvage the idea by offering premises for the show, Costanza vehemently refuses to compromise his “artistic integrity.”⁴¹ The notion of a show without any plot or storyline—without any challenge to be met or obstacles to overcome—was intended as a joke; after all, *Seinfeld* itself is often described as “a show about nothing.” There are some *Seinfeld* episodes dedicated entirely to the characters’ trivial daily frustrations, such as a long wait for a table at a restaurant,⁴² or their search for a car in a parking garage.⁴³ But there are some dramatic works that do not even rely on a minimal plot, but dispense with a story entirely. Indeed, there are influential movies that not only lack plots or stories, but characters: the dancing colors and shapes in the animations of German experimental filmmakers such as Walter Ruttmann, Hans Richter, Viking Eggeling, and Oskar Fischinger,⁴⁴ for example, or of American animator Harry Everett Smith.⁴⁵

There is little doubt that even these plot- and character-free films constitute protected expression under the First Amendment. The Supreme Court said as much when it noted that the First Amendment “unquestionably shield[s the] painting of Jackson Pollock, music of Arnold Schoenberg, [and] Jabberwocky verse of Lewis Carroll.”⁴⁶ In doing so, the Court put aside (or at least, recognized an exception to) the rule it had previously articulated in *Spence v. Washington* (often referred to as “the *Spence* test”⁴⁷): the rule that a

40. See *Seinfeld: The Pitch* (NBC television broadcast Sept. 16, 1992), transcript available at <http://www.seinfeldscripts.com/ThePitch.htm>.

41. See *id.*

42. See *Seinfeld: The Chinese Restaurant* (NBC television broadcast May 23, 1991), transcript available at <http://www.seinfeldscripts.com/TheChineseRestaurant.htm>.

43. See *Seinfeld: The Parking Garage* (NBC television broadcast Oct. 30, 1991), transcript available at <http://www.seinfeldscripts.com/TheParkingGarage.htm>.

44. See Cindy Keefer, “Space Light Art” - *Early Abstract Cinema and Multimedia, 1900-1959*, CENTER FOR VISUAL MUSIC, <http://www.centerforvisualmusic.org/CKSLAexc.htm> (describing developments that “led to the abstract or ‘absolute’ films of Viking Eggeling, Walther Ruttmann, Hans Richter, and Oskar Fischinger”); Esther Leslie, *Where Abstraction and Comics Collide*, TATE ETC. (Summer 2006), available at <http://www.tate.org.uk/tateetc/issue7/fischinger.htm> (“In the 1920s Ruttmann, Richter and others threw away their canvases in favour of pictures that moved: multiple Mondrians a second.”); see also Leslie, *supra* note 44 (describing an Oskar Fischinger film, *Allegretto*, as “animated Kandinsky”).

45. See Harry Smith Archives, http://www.harrysmitharchives.com/1_bio/ (last visited Apr. 2, 2009).

46. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

47. See, e.g., See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1251 (1995) (noting that criteria offered in *Spence* for determining if certain activity counts as speech is “known as the *Spence* test.”).

discernable message must be present for non-verbal conduct to count as First Amendment “speech.”⁴⁸ One cannot find such a verbal message in music, or non-representational art, or in the parade at issue in *Hurley* itself. But the Court nonetheless held that such abstract artistic and cultural expression counts as First Amendment “speech.”⁴⁹

This language from the Court has significant implications for the First Amendment status of many virtual worlds and other new forms of computer-generated visual media that provide raw material for the exercise of creativity. While there is no mission that must be completed or task that must be undertaken in *Second Life*, and while one can spend one’s day lounging at a virtual beach or floating above a landscape of geometric forms, this hardly disqualifies these virtual activities from the scope of the First Amendment. The First Amendment’s free speech protection should likewise extend to the *Second Life* computer “scripts” that users can write (or obtain) for making objects move—regardless of whether that movement consists of a black cube moving against a white background or a simulation of the sexual gyration that Chief Justice Rehnquist recognized (in describing nude dancing that occurs in physical rather than virtual space) as falling within “the outer perimeters of the First Amendment.”⁵⁰

*A. The Scope of Judicial Protection for Video Games:
Courts’ Approaches to First Amendment Protection of Games*

Considering this, much of the effort that courts have made to justify finding video games as First Amendment speech, while correct, was redundant. As noted earlier, federal courts have gone to great lengths since 2001 to point out that modern-day video games are developing a closer and closer resemblance to films and graphic novels: their graphics are impressively realistic and the sequence of adventures is based on increasingly intricate scripts.⁵¹ Paving the way for video game protection, Judge Posner pointed out in *Kendrick* that the games at issue were stories, many of which conveyed themes

48. 418 U.S. 405, 405, 410-11, 415 (1974) (holding that displaying a flag upside down with a peace symbol constituted symbolic expression where “[a]n intent to convey a particularized message was present[] and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it”).

49. See *Hurley*, 515 U.S. at 569.

50. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (Rehnquist, C.J., plurality).

51. See *supra* notes 12-13, 15-18 and accompanying text.

common to literature.⁵² Other courts have repeated this theme. For example, the district court in *Entertainment Software Association v. Blagojevich* emphasized that video games “most resemble films and television shows by telling stories through pictures, text, and sound.”⁵³ Likewise, the district court in *Video Software Dealers Association v. Maleng* stressed that “[the] games at issue in this litigation . . . frequently involve intricate . . . story lines.”⁵⁴ And scholars defending these holdings, such as Paul Salamanca,⁵⁵ Gregory Laughlin,⁵⁶ Clay Calvert,⁵⁷ and Robert Richards,⁵⁸ have pointed out the many examples of video games that contain developed characters, intricate plotlines, educational functions, and/or social and political messages. These arguments have value in that they make it hard for courts to deny First Amendment protection to many modern-day video games.

However, these same arguments also obscure the more important characteristic of video games that makes them count as First Amendment speech: the outlet that they provide for exercises of imagination (by both creators and players) through the creation of pure sound and imagery. As Paul Salamanca observes, in his defense of extending First Amendment protection to video games, they are thus part of the territory where individuals can exercise freedom in the realm of fantasy that they cannot exercise in the highly regulated real world where social needs must be met and social conflict

52. Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 577-78 (7th Cir. 2001).

53. 404 F. Supp. 2d 1051, 1056 (N.D. Ill. 2005).

54. 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004).

55. See Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153, 169 (2005) (“Today, video games bear a close resemblance to motion pictures, and many people would probably be surprised if the First Amendment did not protect them as a form of expression. But to give courts like the Caswell court [which previously denied such protection to video games] their due, video games in the early 1980s were somewhat limited in their technological capabilities.”). As noted below, *infra* text accompanying note 59, Salamanca also offers a broader framework for extending the First Amendment to video games, focusing not simply on narrative but on these games’ aesthetic qualities, and on the medium’s technological potential. See *id.* at 170-71, 189.

56. See generally Gregory K. Laughlin, *Playing Games with the First Amendment: Are Video Games Speech and May Minors’ Access to Graphically Violent Video Games Be Restricted?*, 40 U. RICH. L. REV. 481, 510-518 (2006); describing numerous video games that “have the explicit and primary goal of communicating a particularized message to the gamers who play them,” and providing examples of games with political and religious messages and educational uses. *Id.* at 510 (noting that video game creation often involves “extensive plot and character development.”).

57. See Clay Calvert, *Violence, Video Games and a Voice of Reason: Judge Posner to the Defense of Kids’ Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 9-11 (2002) (quoting Judge Posner’s language in *Kendrick* relating video games to fairy tales and other literature, and citing other scholarly support for treating video games as such a narrative form).

58. See *id.*

adjudicated by government authority.⁵⁹ He observed that while “[p]eople cannot generally slaughter cattle in their backyards[, t]hey can, however, live expansive lives of fantasy constructed almost entirely with ink, oil, or bytes.”⁶⁰ In other words, if, as Jed Rubenfeld argues, it is “First Amendment bedrock” that “[i]magination ought to be free,”⁶¹ then video games—and many new virtual spaces that allow individuals to manipulate, or immerse themselves in, computer imagery—provide one setting where imagination can be free, with or without a narrative or goal to organize it.

At least one of the federal courts extending First Amendment protection to video games has strongly suggested as much: quoting the Supreme Court’s statement in *Hurley* that the First Amendment unquestionably protects abstract, non-representational art, explaining “we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to a similar protection.”⁶² As this language shows, some courts that take note of the narrative qualities of modern video games have also noticed the artistic elements in these video games that justify First Amendment protection even in the absence of a narrative. Another such example is found in the *Maleng* court’s recognition that video games not only contain stories but also “detailed artwork.”⁶³

Statements of this sort cut strongly against earlier court decisions denying First Amendment protection to older “arcade-style” video games like *Pacman*.⁶⁴ Still, courts in more recent cases have been reluctant to expressly disavow the earlier holdings. On the contrary, even as they have extended First Amendment protection to the complex dramas and impressive graphics of modern video games, they have strongly suggested that many of the more primitive “first-person shooter” games might remain *unprotected*.

59. See Salamanca, *supra* note 55 at 198.

60. *Id.*

61. Jed Rubenfeld, *Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 37 (2002).

62. Interactive Digital Software Ass’n v. St. Louis County, Mo., 329 F.3d 954, 957 (8th Cir. 2003).

63. Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004).

64. See, e.g., America’s Best Family Showplace Corp. v. City of New York, Dep’t of Bldgs., 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (“In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element.”); Caswell v. Licensing Comm’n for Brockton, 444 N.E.2d 922, 927 (Mass. 1983) (“From the record before us, it appears that any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential.”).

One of the more recent decisions, *Wilson v. Midway Games, Inc.*,⁶⁵ for example, attempted to reconcile these earlier cases with the newer rulings protecting video games by suggesting that there is an important First Amendment distinction to be drawn between those games that “are merely digitized pinball machines [and] are not protected speech” and “those that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, [and] are protected under the First Amendment.”⁶⁶ This is by no means the only decision suggesting that some games—or game activity—may fall outside the scope of the First Amendment, even if those with elaborate storylines fall within it. As mentioned earlier, the district court in *Maleng* found that unlike modern-day, adventure-based games, “early generations of video games may have lacked the requisite expressive element, being little more than electronic board games or computerized races.”⁶⁷ Similarly, Judge Posner’s decision in *Kendrick* noted in dicta that “if the games [targeted by ordinance] lacked any story line and were merely animated shooting galleries,” government restriction “might survive a constitutional challenge.”⁶⁸ And the U.S. Court of Appeals for the Sixth Circuit, in rejecting an attempt to hold video game makers liable for a school shooting, stressed that “there are features of video games which are not terribly communicative, such as the manner in which the player controls the game,”⁶⁹ and for this reason stated that its decision “should not be interpreted as a broad holding on the protected status of video games”⁷⁰

The interest in such context-based tests is understandable: since many physical games like table tennis, baseball, or chess have not been considered protected First Amendment activity,⁷¹ why should the same activity count as speech when it happens to take an electronic form? To be sure, courts have found some board games—like *Dungeons & Dragons*—to constitute protected First Amendment

65. 198 F. Supp. 2d 167 (D. Conn. 2002).

66. *Id.* at 181.

67. 325 F. Supp. 2d at 1184.

68. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579-80 (7th Cir. 2001).

69. *James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002).

70. *Id.*

71. *See e.g.*, *America’s Best Family Showplace Corp. v. City of New York*, Dep’t of Bldgs., 536 F. Supp. 170, 174 (E.D. N.Y. 1982); Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 MICH. ST. L. REV. 51, 102 (2003) [hereinafter Saunders, *Regulating Youth Access*] (arguing that video games should be no more protected by the First Amendment than “baseball, checkers, or tennis”).

activity,⁷² but that may be because they have the narrative component that many other games lack.⁷³ Thus, it might seem sensible to draw a First Amendment line between those games that convey a message, or that involve narrative or role-playing, and those cruder games, the design and challenges of which do not incorporate any such First Amendment elements. This was precisely what the court in *Wilson* tried to do,⁷⁴ when it sought to extend First Amendment protection to complex, story-based games, but deny it to games that are simply “digitized pinball machines.”⁷⁵

Such a solution would help classify the First Amendment status of games, both virtual and physical, along the lines of the Supreme Court’s rule in “the *Spence* test.” Specifically, such a rule would provide that games that communicate messages (or perhaps, broadening the test a bit, that involve narratives) count as protected First Amendment activity, and those lacking such expressive content do not. But as appealing as use of the *Spence* test may be in this context, it is ultimately a poor guide for which video games—or virtual environments—should or should not receive First Amendment protection. As noted earlier, the Supreme Court has recognized that abstract art and music count as protected First Amendment speech even though they lack the “particularized message” that the *Spence* test treats as an essential and defining element of such speech.⁷⁶ What is true for non-narrative and non-representational painting and music should be true also for non-narrative and non-representational video games.

B. *The First Amendment and Free-Form Video Games*

Consider the following examples. Apart from *Second Life*, which is often devoid of a narrative until its users wish to endow it with one, there are numerous other video games that lack traditional stories. This is arguably the case with the genre of “Zen gaming” developed by thatgamecompany⁷⁷ and others through games like

72. See *Watters v. TSR, Inc.*, 715 F. Supp. 819, 821 (W.D. Ky. 1989).

73. See Morley, *supra* note 18, at 365 (“Of course, when a game expressly conveys a particular idea, the First Amendment applies.”)

74. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002).

75. *Id.*

76. See *supra* text accompanying note 53.

77. See About thatgamecompany, <http://thatgamecompany.com/about/> (last visited Apr. 2, 2009) (noting that the company’s “goal is to make commercial video games that communicate different emotional experiences [that] the current video game market is not offering”).

Flower and *fLOw* for the PlayStation 3.⁷⁸ *Flower* does have a plot and task of sorts: the player “collect[s] petals by steering a gust of wind through idyllic pastures” as she floats through the dreamscapes of various flowers that can only be explored in the flowers’ dreams since they are, in actuality, confined to an apartment window sill. This is a highly unusual game, since, as one review notes, “[Y]ou’re encouraged to lose yourself in this digitally created nirvana” and not simply to focus on the goals of the game.⁷⁹ According to the same review, the greatest reward of playing the game is not to win or achieve anything, but to enjoy the remarkable visual and auditory qualities of the environment: dreamscapes that range from “natural to psychedelic to industrial” and the auditory experiences one can generate while wandering.⁸⁰ “Each petal,” the review adds, “has a distinct audio cue, be it a string instrument or chorus song, and creating beautiful waves of sound is probably the greatest incentive for perfecting your path through each level.”⁸¹

Similar observations have been made about thatgamecompany’s previous release, *fLOw*, where gamers devour small sea creatures (and avoid being devoured by larger ones) to create new, longer animals that look like a cross between strange microscopic organisms and elements of a Paul Klee painting. As one reviewer notes:

fLOw has more in common with something like a lava lamp than an actual game. It’s something to be watched. You’ll find yourself infinitely more intrigued by the shapes and colors that evolve throughout its experience than its relatively scarce gameplay mechanics. It’s basically a piece of computer art that happens to be controllable via the Sixaxis controller.⁸²

Although there are small traces of narrative in these games, it seems odd to make any protected First Amendment status that they might receive depend upon these narratives—especially given that the experience that players may well find attractive has more to do with

78. See Posting of Stephen Totilo (*Sony Introduces New Genre to Video Games . . .*) to MTV Multiplayer Blog, <http://multiplayerblog.mtv.com/2008/12/10/sony-introduces-new-genre-to-video-games/> (Dec. 10, 2008, 14:30 EST) (noting that included in Sony’s announcement for the game *Flower* is the statement that “Zen gaming” is “the official genre for the game”); see also Ian Bogost, *Persuasive Games: Video Game Zen*, GAMASUTRA.COM, Nov. 29, 2007, http://www.gamasutra.com/view/feature/2585/persuasive_games_video_game_zen.php (“Casual games inch closer to Zen because they are abstract. These games ask the player to move cards or blocks or stones into patterns.”).

79. Guy Cocker, *Flower Review*, GAMESPOT.COM, Feb. 11, 2009, <http://www.gamespot.com/ps3/action/flower/review.html>.

80. *Id.*

81. *Id.*

82. Alex Navarro, *fLOw Review*, GAMESPOT.COM, Feb. 22, 2007, <http://www.gamespot.com/ps3/puzzle/flow/review.html>.

simply enjoying colorful abstract forms and melodious sounds than with any unfolding story or plot. The same is true of the game *Endless Ocean* for Nintendo's Wii game console, a virtual seascape where the player interacts with—and learns about—numerous virtual sea creatures. As one reviewer states, “Although there are actually plenty of tasks awaiting you in *Endless Ocean*, that’s not really the point. It feels as if the developer’s goal was solely to create options and then leave the choice of what you do and when you do it totally up to you.”⁸³

Indeed, the game of *Electroplankton* dispenses with even the thin veneer of a narrative: “players” generate sequences of musical tones by manipulating a visual environment that resembles a “bizarre petri dish—or perhaps a very musical aquarium—filled with different species of plankton that can produce sound and light when you interact with them.”⁸⁴ Game reviewers have expressed the same doubts about calling this a “game” as they have about applying this term to *fLOw* or *Endless Ocean*:

To call *Electroplankton* a game would be a bit of a misnomer—there is no competition, no objectives to be met, and no points to be scored. Rather, this new project from self-proclaimed media artist Toshio Iwai is better described as a collection of interactive multimedia art installations that you can take with you.⁸⁵

To be sure, the artistic training, thought, and energy that has gone into the design of these interactive art experiences goes far beyond⁸⁶ that which is evident in games like *Pong* or other typical arcade-style games. But the Supreme Court has shown great reluctance to make protection for artistic work depend on evidence of artistic skill or depth.⁸⁷

C. Possible Bases for Excluding Video Games

83. Aaron Thomas, *Endless Ocean Review*, GAMESPOT.COM, Jan. 29, 2008, <http://www.gamespot.com/wii/adventure/foreverblue/review.html>.

84. Ryan Davis, *Electroplankton Review*, GAMESPOT.COM, Jan. 6, 2006, <http://www.gamespot.com/ds/puzzle/electroplankton/review.html>.

85. *Id.*

86. See e.g., Cocker, *supra* note 79 (describing the game *Flower* as “gorgeously crafted” and noting that the “overall artistic quality . . . really impresses”).

87. See *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (stating that the “line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all”); see also Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1375 (1990) (noting that “[e]ven before the Post-Modern revolt in the arts, courts have long recognized that they are not proper arbiters of artistic worth”); Saunders, *Regulating Youth Access*, *supra* note 71, at 100 (“[B]eing great literature is not a requirement for first amendment protection. The written work of the worst hack novelist is just as protected as that of Nobel Prize winners.”).

*from the First Amendment's Scope:
Human Communication vs. Commands to Machines*

1. Why Commands to Machines Are Presumptively Non-Expressive

Thus, there seems to be little basis for excluding “digitized pinball” or any other interactive graphics environment from the scope of the First Amendment, regardless of crudity. Still, before discarding the *Spence* test—or alternative tests that might deny First Amendment protection to some virtual environments or video game activities while allowing it for others—it is useful to consider a number of alternatives. One such alternative is proposed by legal scholar Kevin Saunders, who says that one must distinguish between the game designers (whose game design *does* involve substantial protected First Amendment activity) and the game players (whose control of the game does not).⁸⁸ He argues against classifying game-playing as protected First Amendment speech because pressing buttons or joysticks is not “person-to-person communication,” which is an essential element of protected First Amendment activity:

With an ordinary arcade video game, there is no one with whom the player can communicate. It is only a machine, and while the programmer may communicate to the player through the software, the player's actions do not communicate back to the programmer but only to the program The multi-player video game . . . should be no more protected by the First Amendment than the . . . paint ball example[] or a game of baseball, checkers, or tennis. The only personal interactions are simply moves of the game intended to win, rather than to convey any message.⁸⁹

Saunders's analysis is quite similar to those that rely on the *Spence* test, since it emphasizes the question of whether the interactions in question “convey any message.”⁹⁰ But it can rather easily be restated in a way that takes account of the exception that the Court made to the *Spence* test in protecting non-representational art.⁹¹ In short, Saunders's central argument against protecting video games is not simply that they lack a message, but that they do not convey *anything*

88. See Kevin W. Saunders, *Virtual Worlds--Real Courts*, 52 VILL. L. REV. 187, 196 (2007) [hereinafter Saunders, *Real Courts*] (“It should be recognized that even for video games, the program's game developer's rights are protected, as are the images the program displays on the screen. Playing the video game, however, may be seen as another matter. The player is not engaged in communication protected by the First Amendment but in activity akin to playing a pinball machine.”).

89. Saunders, *Regulating Youth Access*, *supra* note 71, at 102.

90. *Id.*

91. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

to another person—even the sometimes indescribable feelings evoked by music and abstract art.

Thus, the distinction that Saunders relies on is not between actions that convey messages and actions that do not, but rather between acts that communicate with human beings and acts that “communicate” instructions to machines. This distinction certainly has importance for First Amendment law, and is illustrated by the following: when I would like my children to do something, such as put away their toys or get ready for school, I ask them to do so. But when I want an inanimate object, like a car, to do something, I must instead set in motion a series of physical events, like turning on the ignition and pressing the gas pedal. Unlike children, cars cannot understand the meanings of words. Nor can they form emotional or intellectual responses to non-verbal forms of expression, such as music or a painting. As such, the orders or signals I give to a car will not be protected First Amendment speech. Nor should such instructions to machines automatically become “speech” when they are conveyed by computers that make the communication more speech-like. For example, if I can turn on a futuristic car by saying “start” to a voice-recognition-equipped computer instead of turning an ignition lock, the act would still not be a person-to-person communication protected by the First Amendment. I am still providing orders to a machine that can form no understanding of what I am saying, nor form any mental impressions upon receiving the communication.

Saunders’s key point, therefore, seems to be that the commands that game players give to video-game consoles are simply instructions to machines, not communications to other people. And the fact that such machine-directed acts are encased within a story or other work of art does not make them protected First Amendment acts, just as the act of starting my car while dressed as James Bond would not turn that action into protected speech.⁹² Moreover, physical acts do not become protected communication because of the addition of rules or players. Saunders says that, in baseball,

hitting the ball to the shortstop is not communicating to that player a message that he or she should catch the ball and throw it to first. It is simply an event in the game. The same is true for video games: the player does something that causes the

92. Saunders offers another example, noting that a house of prostitution would not create First Amendment protection for itself merely by using “fantasy rooms,” as “[t]he existence of costumes, scenery, and scripts do[es] not change the fundamental nature of the transaction, and the First Amendment should not serve to protect this otherwise regulable activity.” Saunders, *Regulating Youth Access*, *supra* note 71, at 101.

program to respond in a certain way, but the player is not communicating with anyone.⁹³

This characterization remains true in a multiplayer game, where, for example, a player's virtual batter hits an electronic ball to the other team's electronic shortstop.⁹⁴

Saunders takes a different position on virtual world activity. In contrast to game players' non-communicative instructions to machines, "there is a great deal of communication in virtual worlds, [which] may be of great value."⁹⁵ Indeed, "there may be individuals who find [that] they can communicate some ideas or issues better through their virtual selves than in the real world," and "[i]t is interactivity with others that gives virtual worlds value worthy of First Amendment protection."⁹⁶

2. Why Commands to Machines May Sometimes Be Expressive

But Saunders's distinction between the speech acts he finds in virtual worlds like *Second Life* and the non-speech acts he finds in video games—particularly the first-person shooter games that one can play by oneself at home—is too simple. First, much of what people do in virtual worlds is as non-communicative as what they do in a video game. When I enter *Second Life* and press buttons, causing my avatar to fly from one island to another, steer a submarine through the sea, or hone my missile-firing skills by shooting spaceship lasers at nearby targets, I am not communicating any more than I am in first-person shooter games. Nor is it clear that players do so when they control their avatars in virtual street fights or simulated sexual encounters. Saunders does not clarify whether such non-communicative acts receive First Amendment protection because they occur within a certain medium—the virtual world—that allows for communication. Making such a concession would raise the question of whether one might similarly bequeath First Amendment protection to video games by building in opportunities for textual, multiplayer interaction. And if adding protected First Amendment elements to a virtual world or video game can cast an aura that covers even non-communicative acts in that environment, then why do the stories or other artistic elements woven into video games not already cast such an aura?

One might conceivably respond to this inconsistency by denying First Amendment protection to non-communicative acts in

93. See Saunders, *Real Courts*, *supra* note 88, at 199.

94. *Id.*

95. *Id.*

96. *Id.* at 201.

virtual worlds as well as in video games. But it is not so simple to classify all human-machine interactions as “non-expressive.” First, some of the acts we take to trigger routines by inanimate objects can have a dual purpose: while they may function in one capacity as an act directed at a machine, the same acts might simultaneously have a human audience. We might, for example, send instructions to a car or other machine not merely to make that device do something, but also to show an audience how to operate it, in a training session for example, or at a convention demonstrating automotive or other technology.

This has been one of the major complexities faced by courts deciding whether computer code for encrypting messages counts as protected First Amendment speech.

Such code, say some judges and analysts, cannot count as speech because it performs its primary function not when it is read or understood by people, but when it triggers certain operations in a computer.⁹⁷ But while computer code is designed to trigger actions in machines, it can also be read, understood, and admired by programmers and others who understand the language in which the code is written. Indeed, when the U.S. government ordered mathematics professor Daniel Bernstein to refrain from publishing encryption code, he argued, in response to the claim that his code was unprotected speech, that when publishing it he would not be giving instructions to any machine but rather sharing his work with others capable of reading and appreciating it.⁹⁸ The U.S. Court of Appeals for the Ninth Circuit agreed, observing that “cryptographers use source code to express their scientific ideas in much the same way that mathematicians use equations or economists use graphs.”⁹⁹ This, it might seem, is of little consequence to understanding the directions that game players provide to machines through video game consoles or attached joysticks, wheels, or guns. These gaming acts, after all, are not expressed in language, but in movement. Still, as explained below, gamers sometimes do record the display of these movements

97. See e.g., *Junger v. Daley*, 8 F. Supp. 2d 708, 717-18 (N.D. Ohio 1998), *rev'd*, 209 F.3d 481 (6th Cir. 2000) (“Because the expressive elements of encryption source code are neither ‘unmistakable’ nor ‘overwhelmingly apparent,’ its export is not protected conduct under the First Amendment.”); Katherine A. Moerke, Note, *Free Speech to a Machine? Encryption Software Source Code is Not Constitutionally Protected “Speech” Under the First Amendment*, 84 MINN. L. REV. 1007, 1048 (2000) (“Although people write source code in languages and source code’s use may implicate free speech values, it is not the protected expression of an idea, but the unprotected implementation thereof.”).

98. See *Bernstein v. United States Dep’t of Justice*, 176 F.3d 1132, 1136, 1140 (9th Cir. 1999), *reh’g granted, opinion withdrawn by* 192 F.3d 1308 (9th Cir. 1999).

99. *Id.* at 1141.

and post them for other gamers to see on websites such as YouTube or WeGame.¹⁰⁰

There is also a second reason that we should not be too quick to exclude instructions or triggering acts aimed at inanimate objects from the ambit of First Amendment speech: some have to be protected because they are essential components of, or support for, the method by which we create expression aimed at human audiences. Thus, when I press a button on my laptop keyboard or hit the send button on an e-mail interface, I am giving instructions to a computer; I make the computer to do what I want in the same way that I make my car or my office light do what I want it to do. But the First Amendment-protected communication I engage in when I send that e-mail would not otherwise be possible. The same is true, of course, when I hit a key on a piano in order to make it produce a particular sound, or when I flip a switch on a movie projector to make it screen a film.

Artists and other individuals likewise create expression with numerous other machines. Thus, even when a programmer does *not* display her computer code for others to read—indeed, even when she shrouds it in secrecy—the creation and running of that code might nonetheless be part of an act of expression, creating computer graphics or animations that are themselves protected First Amendment speech. The code necessary for such expression would likely include not only the programming language (such as C++ or Java, which are intelligible to many computer experts) but also the “machine code” (consisting of a combination of ones and zeros) that can be acted upon by the computer itself.

None of this contradicts Saunders, who, as noted above, seems willing to extend First Amendment protection to the programmed instructions that video game designers create to make games unfold.¹⁰¹ However, we should consider the possibility that it is not only video game designers’ instructions for machines that are necessary for the expression that occurs in video games, but also those provided by the players themselves. In this sense, a video game is like many other examples of interactive art, depending upon interactions not just between artists and audiences but also between the art-producing machines and the participants. Consider, for example, Myron Krueger’s interactive art exhibit, *Psychic Space*, in which the setting produced “automated human-machine experiences” where people interacted with “a responsive environment.”¹⁰² As Krueger

100. See *infra* text accompanying note 111.

101. See *supra* text accompanying note 91.

102. MYRON K. KRUEGER, *ARTIFICIAL REALITY II* 24 (1991).

explains, “pressure sensors . . . detected participants’ footsteps as they moved around the room” and enabled a computer to respond to each person’s efforts “to walk through a maze,” for example, by altering the maze’s path in response to particular moves.¹⁰³ The sensors also acted as “the keyboard of a musical instrument that participants could play by moving around the room.”¹⁰⁴ In short, a person’s interaction with Krueger’s art exhibit—like a player’s interaction with a video game—consisted of moves where contact with the machine would produce changes in sound or imagery. Indeed, Krueger even draws the analogy to video games and pinball himself: among other purposes, he says, his “artificial realities” allow for creating “a game between the computer and the participant . . . , an extension of the pinball machine or the video game, the most commercially successful interactive environments.”¹⁰⁵

The example of interactive art installations underscores the fact that human-machine interactions are not all the same for First Amendment purposes. Some human-machine interactions, like starting a car, are clearly non-speech acts (except perhaps when starting the car is an integral part of a narrative such as a film sequence, or another expressive activity, such as a parade). But others, such as the instructions one gives by using a remote control to select a DVD option or simply to change a television channel, or instructions to a computer that musically modify a piece played back by GarageBand, are difficult (if not impossible) to separate from an audience’s freedom to engage in artistic experience. Indeed, such audience participation in art has become more and more common as artistic work is increasingly viewed online or with the aid of computer software that allows the viewer to digitally modify it. As Julie Cohen writes, “Electronic text is dynamic; rather than following a single, linear progression, the reader is free to choose his or her own path through a network of linked material. Through this process, the reader participates in the construction of the author’s message.”¹⁰⁶ More and more, then, the First Amendment right to receive a writer’s or artist’s information and ideas has a component that allows recipients to transform that expression even as they are receiving it. This is precisely what happens when a player uses an input device to make the visual sequence in a video game unfold one way rather than another.

103. *Id.* at 25-26, 27.

104. *Id.* at 30.

105. *Id.* at 87.

106. Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 1005 (1996).

This facet of video games is underscored by the fact that video games and virtual worlds often allow individuals not merely to participate in a visual (and often auditory) experience, but also to very easily create an animated film of that experience.¹⁰⁷ *Second Life*, for example, allows virtual-world explorers to record every event on their screens with one click of the mouse. Similarly, widely available software allows them to record video game sequences, many of which, as noted above, are routinely posted on websites like YouTube or WeGame.¹⁰⁸ It would be a very strange First Amendment jurisprudence that protected the right to create animated sequences from scratch or with pre-loaded images on computer animation software (like Adobe AfterEffects), but not similar animations created by recording an adventure in *Second Life* or on a video game.¹⁰⁹ This does not mean, of course, that every human activity—from driving to playing a baseball game—is transformed into First Amendment speech when it is recorded by a video camera. But when the experience being recorded consists of the same imagery and sound as the film recording it produces, then it is harder to resist the conclusion that the underlying experience is as deserving of being called First Amendment expression as the film created from it.

*D. Possible Bases for Excluding Video Games
from the First Amendment's Scope II:
Social Convention and First Amendment Goals*

Another possible way to make sense of video-game protection in a world that protects non-representational art is to rely on the kind of First Amendment framework that Robert Post offers for distinguishing speech from non-speech.¹¹⁰ According to Post's argument, one cannot draw such a line by identifying essential qualities that make certain actions "speech" or "non-speech" in the

107. These films created of, and from within, virtual worlds are often called machinima. See RYMASZEWSKI ET AL., *supra* note 19, at 206-07; see also Balkin, *supra* note 35, at 2056 n.23 (noting that "there is already a nascent movie industry within virtual worlds called machinima, in which people 'film' or make digital copies of what happens in virtual worlds").

108. See Mark Hendrickson, *WeGame Launches as YouTube for Gamers*, TECHCRUNCH.COM, Jan. 9, 2008, <http://www.techcrunch.com/2008/01/09/wegame-launches-as-youtube-for-gamers/> (describing how WeGame "provides both the place and the tools for gamers to share screencasts of their favorite in-game moments").

109. See Balkin, *supra* note 35, at 2055 ("The work of producing a new game is increasingly similar to the work of putting together an animated motion picture—and the same technologies are useful for both.")

110. See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250-60 (1995).

abstract: some non-verbal acts, like holding a parade, count as speech, while some verbal acts, like creating a binding contract with a signature or filing a form required by the SEC, do not.¹¹¹ Rather, Post suggests that what matters in determining whether a certain form of human activity should count as “speech” is whether it is part of a social practice that, first, allows an audience to autonomously query a communication or expression¹¹² and, second, furthers one or more of the purposes that the Court attributes to the First Amendment.¹¹³ This is a contextual inquiry and thus allows courts to provide case-by-case determinations.

Video games certainly allow for autonomous reflection because an individual can form her own reflections on the game designer’s work as she steers herself through it. Whether such games do or do not contribute to First Amendment purposes is more debatable. But one interesting consequence of Post’s analysis is that once the medium is recognized as deserving First Amendment protection, then all instances of that medium should probably (at least presumptively) receive First Amendment protection even if they do not, considered in isolation, clearly serve the functions that originally justified counting that medium as First Amendment speech.

Thus, he says, even an experimental movie that lacks a storyline—that simply shows someone sleeping “for six continuous hours”—should count as First Amendment speech simply by virtue of the fact that it is a film. Any “sane court,” he says, “would recognize [it] as part of the genre of the cinema and entitled to First Amendment status for that reason alone.”¹¹⁴ This is because it is not merely the watching of a particular movie, but the viewing of cinema as a social practice more generally, that advances First Amendment purposes and thus merits constitutional protection.

This theory provides at least one account for why non-representational art that some audiences struggle to understand—for example, Hans Richter’s images of white squares and rectangles floating against black backgrounds¹¹⁵—might nonetheless count as “speech.” While such abstract art may well serve First Amendment

111. See *id.* at 1255.

112. See *id.* at 1254.

113. See *id.* at 1255.

114. *Id.* at 1253.

115. See Malcolm Turvey, *Dada Between Heaven and Hell: Abstraction and Universal Language in the Rhythm Films of Hans Richter*, 105 OCTOBER, at 13, 31 (Summer 2003) (discussing Richter’s film *Rhythm 21* and noting that “the film’s basic elements” were “white figures (squares and rectangles) on a black background always positioned perpendicular to the frame.”).

purposes in itself,¹¹⁶ even if it did *not*, it would be a part of and embody a social medium—the medium of cinema that allows individuals to view and understand stories, as well as a cryptic series of abstract images.

Similarly, says Post, conventions about what constitutes art can transform functional items that are not normally speech into a component of it: “Thus while legal regulation of a urinal in a men’s bathroom would not bring the First Amendment into play, regulation of exactly the same urinal in an art exhibition would. The difference lies entirely in the existence of social conventions that create constitutionally meaningful relationships.”¹¹⁷ In fact, a urinal did become a protected work of sculpture when Marcel DuChamp placed one in a museum and signed it.¹¹⁸

With such a model for how we define the contours of speech, courts might well find that video games—with adventures scripted by film writers such as the Wachowski brothers¹¹⁹ or novelists like Clive Barker¹²⁰—cannot easily be distinguished from already-protected works like films or comics in regards to the First Amendment value they offer. Other video games, like *Pong*, *Pacman*, and *Electroplankton*, would then receive First Amendment protection from their membership in the same artistic medium as the story-driven video games they resemble, even if they would not clearly qualify as First Amendment “speech” when considered in isolation.

One problem with this model, however, is that it seems to require either significant leeway for judicial judgment calls, or substantial patience (and hope) for the evolution of social conventions that are clear enough to reduce that leeway. The decision as to whether a particular social practice serves First Amendment

116. For example, those purposes could be served by defying cultural orthodoxies and thus prompting individuals to question governmental or other authority or by promoting the self-development or fulfillment of audiences. *See id.* at 28 (describing Richter’s Dadaist films as part of a “critique of modernity.”); *see also* Rodney A. Smolla, *Free Speech in an Open Society*, at 5-17 (1992) (listing purposes attributed to the First Amendment, including the advancing democratic deliberation, discovery of truth, and autonomy or self-fulfillment).

117. *Id.* at 1254.

118. *See id.* at 1253-54.

119. *See Matrix Game Aims to Set New Standard*, BBC NEWS, May 13, 2003, <http://news.bbc.co.uk/1/hi/technology/3021461.stm> (noting that for the *Enter the Matrix* video game, the Wachowski brothers “wrote the script, directed the action, and provided complete access to the entire film production”).

120. *See* Ben Silverman, *Authoring Games: Best Selling Authors Take a Novel Approach to Game Design*, YAHOO! GAMES, Aug. 4, 2008, <http://videogames.yahoo.com/feature/authoring-games/1201954> (noting that for *Clive Barker’s Undying*, Barker “was closely involved in the game’s production, acting as a script consultant”).

purposes, for example, is likely to be a highly debatable one, especially given the wide disagreement among scholars and jurists about what those purposes are.¹²¹ Similarly, the question of whether two works of interactive art, or two visual experiences, are part of the same medium or social practice, rather than similar-looking instances of different practices, might well depend upon the eye of the beholder.

It is possible that social conventions will provide clear answers to these questions, as they have in the past—for example, by making it hard to deny that an abstract film is still a film.¹²² But it is harder to say whether the plethora of video games and virtual worlds are part of one medium or multiple different media. New developments in computer graphics have now given rise to a dizzying variety of computer-generated visual environments, and it is not clear whether they all seem to be part of a single medium simply because of our limited capacity to describe them, relying on single words or phrases like “virtual world,” “game,” “app,” or “application.” Nor is this question answered by the fact that we increasingly use the same machine, namely a computer of some kind, to generate such visual experiences. The computer, after all, is now a device we use to experience many different forms of entertainment—music, film and television, crossword puzzles, video games, virtual worlds, or just collectively creating and enjoying art on social networking and video-posting sites. The small computers and web browsers in smart phones add old-fashioned voice communication to this list.

Thus, before deciding whether an abstract video game can piggyback on the First Amendment protection already extended to story-telling video games, we must overcome a difficult preliminary inquiry: is it really a video game at all or is it something entirely different? What, for example, does one do with *Electroplankton*, or with *Endless Ocean*, or the virtual flights one might take over the computer-simulated cities of Google Earth?

Are these all video games? Or might one, as some courts seem to propose,¹²³ treat the playing of simple arcade games as a fundamentally different social practice from the more movie-like experience of immersing oneself in a graphically rich adventure game?

121. See e.g., DANIEL A. FARBER, *THE FIRST AMENDMENT* 2-6 (2d ed. 2002) (discussing different theories of the First Amendment’s purpose); see also *id.* at 6-7 (noting that arguments attempting to focus on a particular value “never seemed to persuade many other scholars and were almost entirely ignored by the courts”).

122. But see Adler, *supra* note 87, at 1378 (rejecting any attempt to judicially define “art” because “[a]rt, by its nature, will call into question any definition that we ascribe to it[, and a]s soon as we put up a boundary, an artist will violate it, because that is what artists do”) (alteration in original).

123. See *supra* text accompanying notes 65-69.

Might one likewise exclude from the social practice of video game-playing those virtual leisure activities that have a possible functional component—like the exploration of virtual New York and Paris landmarks on Google Earth 3D buildings layer,¹²⁴ or the use of a virtual driving or shooting range that is intended to develop one's skills in performing the real-life equivalent?

E. Another More Expansive Model of First Amendment Protection for Video Games and Virtual Worlds

Faced with such questions, the best approach to understanding the First Amendment status of virtual worlds and video games is to begin with a presumption that applies not to a discrete social practice or narrowly defined artistic medium, but to a broad swath of human experience. In short, as suggested earlier,¹²⁵ where visual imagery on an electronic screen is meant simply for people to perceive, reflect upon, enjoy, or creatively alter, it should, like a drawing or painting on paper, be seen as First Amendment speech. This conclusion results from an overlap of two more general observations central to First Amendment theory. First, as Paul Salamanca has written, a central element of First Amendment tradition and jurisprudence is to mark out those spaces where human action can be free from legal restriction, even in a highly regulated modern society and economy.¹²⁶ Second, apart from looking at the (broadly defined) media that provide raw material for the exercise of human imagination, we should also consider the most important First Amendment criteria for identifying and marking out this space for free imaginative activity, a variant of John Stuart Mill's harm principle.¹²⁷ This principle provides that where a certain kind of activity does not cause direct harm to persons or property, it should be shielded from government regulation or restraint.¹²⁸ As Lee Bollinger notes, this generalization about likely harms is one of the best explanations for why First Amendment speech (however one defines it) is distinguished from other conduct and singled out for special insulation from government: it is because

124. See New 3D Cities Roundup for Google Earth, Google Earth Blog, Dec. 29, 2008, http://www.earthblog.com/blog/archives/2008/12/new_3d_cities_roundup_for_google_ea.html.

125. See *supra* text accompanying notes 64-66.

126. See Salamanca *supra* note 55, at 198.

127. See JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 14 (John Gray ed., 1991) (1869) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

128. See *id.*

this type of activity “generally causes less individual and social injury than does nonspeech behavior.”¹²⁹

This is not to say that this framework can explain all of First Amendment law. Indeed, where verbal communication is at issue, free speech protection will often presumptively apply as a general matter even where direct harm arises from such communication. But for solitary non-verbal expression, First Amendment jurisprudence has largely (and appropriately) moved toward a framework where almost all visual or musical creative activity counts as speech as long as it is in a medium—like a canvas or an electronic screen—that is merely seen or heard, and rarely felt in the form of physical injury or loss of resources.¹³⁰ Such an approach spares courts the task of asking whether a certain set of images, or means of altering them, is “communicative” enough to count as speech, or has enough artistic or intellectual value to deserve First Amendment protection.

How then do we answer the charge made by courts and scholars that some (if not all) video games are indistinguishable from the unprotected non-speech acts of playing pinball, or chess, or another type of board game? We might perhaps present an account of why a game of pinball played on a phantom machine, or a game of chess played on a virtual board, is less likely to disrupt others’ lives than the physical variants of these games. But a more persuasive—and perfectly plausible—response is to abandon the mission of distinguishing them and instead argue that courts were wrong to assume that mechanical arcade games and board games are outside of the First Amendment’s scope. After all, if enjoying the movement of electronically produced images is a protected First Amendment activity, why not the movements and patterns of mechanically triggered light and sound (in a pinball game) or of wooden figures moved over a wooden board (in a chess game) as well? Unlike football, boxing, or race car driving, these are not activities that are likely to threaten physical damage to people or structures. And once we put

129. LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 124 (1986).

130. This, at least, is one conclusion one can plausibly draw from the Court’s decision in *Stanley v. Georgia* that it the “State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.” 394 U.S. 557, 565 (1969). While this staunch protection for in-home activity is limited to exercise of freedom of thought and speech, it is not clear on what basis the Court could convincingly exclude harm-free solitary activity, given it now neither demands the presence of a discernable message in such activity, *see supra* text accompanying notes 46-50, and does not demand that the activity satisfy any criterion of artistic merit. *See supra* note 87 and accompanying text; *see also* Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 *CARDOZO L. REV.* 1141, 1171-1178 (2008).

aside the *Spence* test's untenable requirement of finding communications, messages, or narratives, then it is hard to justify classifying a private game of solitaire as any less expressive than the creation of a house of cards, a collage, or a diorama.

This vision of the First Amendment's application to video games and virtual worlds is similar to that which Daniel Wachtell very recently proposed when he argued that, since there is no coherent or consistent way to distinguish expressive and non-expressive conduct, courts should adopt "an expansive definition of speech coextensive with the limits of (free) human agency."¹³¹ More specifically, says Wachtell, if an individual's actions are free from harm (or the threat of harm) that gives rise to tort liability—"typically intrusions upon bodily integrity and economic interests"—then the First Amendment should shield it from restriction.¹³² This vision of the First Amendment as encompassing all harm-free activity might be difficult to adhere to in the public sphere. In regulating our public interactions, after all, the government does not merely protect us from injury but also takes on the role of coordinating and shaping communal affairs in numerous ways—for example, by establishing and setting ground rules for collective economic and social activity in areas as diverse as stock market transactions, use of transportation routes and technologies, and construction of buildings and communication infrastructure. However, the proposal has more intuitive power with respect to our actions in private dens, living rooms, and electronic spaces. In these private realms, it is hard to see why the First Amendment should protect only creative expression of, or elaboration of, our thoughts when they take the form of a conventional artistic project like a painting and not a set of cryptic pen marks, computer graphics, or rule-based manipulations of cards and chess pieces.¹³³

By pushing us to think more seriously about this expansive First Amendment protection for harm-free creativity and play, virtual environments—and their narrative and message-free experiences—help us not only define the First Amendment's future, but also rethink the theoretical vision that has dominated its past.

They also help us prepare for the legal future of gaming: while cases in the first decade of the twenty-first century have focused on narrative video games that have moved away from and beyond the

131. Daniel F. Wachtell, Note, *No Harm, No Foul: Reconceptualizing Free Speech Via Tort Law*, 83 N.Y.U. L. REV. 949, 950 (2008).

132. *Id.*

133. See Blitz, *supra* note 130, at 1177-1178.

“earl[ier] generation of video games” that were “little more than electronic board games or computerized races,”¹³⁴ “animated shooting galleries,”¹³⁵ or “digitized pinball machines,”¹³⁶ it is a mistake to dismiss such visually abstract and storyless games as part of an era gone by. People continue to play them on devices like iPhones and iPods, as well as on networks like Facebook. They create games for others and enjoy those games themselves when they drive a virtual vehicle, play a fantastic electronic instrument, or float through a strange geometric pattern in *Second Life*. If anything, the emergence of smart phones and easily created (and transferred) web-based applications has made these simple, storyless games more common and interactive, allowing individuals to modify the virtual space they inhabit.¹³⁷

II. VIRTUAL WORLDS WITHOUT BORDERS

Although courts were reluctant to protect the isolated, storyless, and crude graphic experience in “[t]he earl[ier] generation of

134. Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004).

135. Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 579-80 (7th Cir. 2001).

136. Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 181 (D. Conn. 2002).

137. Of course, even where video games constitute speech, one might be able to argue they should nonetheless be regulated because of the potential harm they cause to minors where they encourage, or train them in, violence. Thus, Kevin Saunders and other scholars, as well as some courts, have also dedicated significant attention to the question of whether—if video games are conceded to be speech—they might be low-value speech of a kind that the government might regulate as to minors without satisfying strict scrutiny. See e.g., Saunders *supra* note 88, at 77 (“A properly drawn, narrowly framed statute restricting access by children to violent video games should meet strict scrutiny.”); see also Laughlin *supra* note 56, at 519-45.

Indeed, the most recent federal case to address the constitutionality of video games focused almost entirely on this issue. See Video Software Dealers Ass’n v. Schwarzenegger, No. 07-16620 (9th Cir. Feb. 20, 2009), available at www.ca9.uscourts.gov/datastore/opinions/2009/02/20/0716620.pdf (considering, and rejecting, California’s argument that courts assessing First Amendment status of violent video games “should not apply strict scrutiny and instead should apply a ‘variable obscenity’ standard from *Ginsberg v. New York*”) (internal citation omitted). I do not address these arguments here, except to note that once one recognizes that video games are expression of the kind one finds in movies, books, and comic books, the state must either take on the task of restricting violent imagery in all of these media as to minors or explain why it is that video games should be subject to such regulation while other media, such as movie that may contain more realistic violent imagery, are not. See Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 579 (7th Cir. 2001) (“Violent video games played in public places are a tiny fraction of the media violence to which modern American children are exposed. Tiny—and judging from the record of this case not very violent compared to what is available to children on television and in movie theaters today.”).

video games,”¹³⁸ and sometimes still express reluctance, such protection is, in at least one respect, less troublesome and problematic than First Amendment protection for the modern-day equivalents in virtual worlds: the simulated wanderings in which individuals engage in virtual worlds like *Second Life* and *World of Warcraft* do not occur on a privately owned video game console or an arcade machine that can be used by only one or two gamers at a time. Rather, they occur in electronic territory that is shared with millions of others—almost all strangers—and run from a far-away server by the game designers (or “game gods”). Moreover, the space on the web or elsewhere in virtual space is not inevitably reserved for pure expression, play, or artistry: it can potentially interact with, control, or compromise information about our lives elsewhere online—for example, realms in which we keep confidential personal information, such as credit card information, or engage in commercial or other practical activity. And even where a world like *Second Life* does not interface with other web-based environments, the activity it consists of is more than mere sound and imagery. People bring to virtual world platforms some practical concerns as well: they engage in money-making, advertising and promotion, education, business conferences, and numerous other activities. This makes it hard to view such virtual environments as the pure First Amendment realms described above.

How should First Amendment analyses respond to this borderlessness? Should courts continue to classify as “speech” even those virtual actions that have functional uses? Should they classify as First Amendment activity—strongly insulated from government regulation—even those virtual world acts that cost or earn people real money or spill over into real-world jobs, projects, or data-archives? And if virtual worlds are not merely places where we express ourselves artistically, but spaces—much like real neighborhoods—where we work, live, and receive information about the world, then should they not be treated like public towns subject to the constitutional rules that prevent governments from abusing their power?

A. *Virtual Worlds as Company Towns*

Some commentators have argued that they should, and draw upon the Supreme Court case of *Marsh v. Alabama*.¹³⁹ In this case, Chickasaw, Alabama, a company town operated by the Gulf

138. *Maleng*, 325 F. Supp. 2d at 1184.

139. 326 U.S. 501 (1945).

Shipbuilding Corporation for its employees, tried to exclude from its streets a proselytizer from the Jehovah's Witnesses, who wished to distribute religious literature on a street corner within the town.¹⁴⁰ When she refused to leave, the town authorities arrested her and she was subsequently charged, in Alabama state court, with criminal trespass—on the grounds that she had remained in the town's "private" property after having been asked to leave. The Supreme Court, however, found that the town's actions violated the First Amendment.¹⁴¹ It found an exception to the constitutional principle that only state actors are subject to constitutional limits like the First Amendment: although the corporation that made rules for, and ran, the town of Chickasaw was a private entity, the rules it made to govern use of the town's streets and public spaces were rules of a kind normally made by government. In other words, the corporation was performing "public function[s]."¹⁴² The court thus rejected the argument that the streets were private property where the company could censor or exclude people without regard to the First Amendment.¹⁴³

The same, says Peter S. Jenkins, should apply to the electronic streets and spaces of virtual worlds that will "in the future become inextricably intertwined with the fabric of our daily lives."¹⁴⁴ Dan Hunter and Gregory Lastowka also argue that "[i]f constitutional speech protection extends to company towns . . ., it seems likely that such rights will be asserted by, and eventually granted to those who live in virtual worlds."¹⁴⁵

Treating virtual worlds as company towns solves some of the problems that arise from the blurring of game world and real world domains: government authorities may not arbitrarily take away people's property or liberty without due process of law, and they may not discriminate in favor of some residents and against others without clearing certain constitutional hurdles. Additionally, treating virtual worlds as company towns may at first seem to help deal not only with virtual worlds' role in providing individuals with concrete goods, but also in securing their role as realms for free expression. Indeed, company town status may at first seem essential for promoting First

140. See *id.* at 502-503.

141. See *id.* at 504.

142. See *id.* at 506.

143. *Id.*

144. Peter S. Jenkins, *The Virtual World as a Company Town: Freedom of Speech in Massively Multiple Online Role Playing Games*, 8 J. INTERNET L. 1, 8 (2004).

145. F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 72 (2004).

Amendment freedom in such environments—since censorship of in-world speech has thus far been imposed not by government attempts to restrict that speech, but by Internet companies responding to players' criticisms or protests.¹⁴⁶

However, treating virtual worlds as company towns is problematic for at least two reasons. First, as Hunter and Lastowka point out, doing so undercuts the expressive freedom of game designers.¹⁴⁷ They consider the possibility that imposing democratic rights and liberties on virtual worlds might nonetheless be an acceptable legal measure, since an appropriate legal regime would secure the right of not only the game gods, but also of participants, to design and shape their worlds.¹⁴⁸ The problem is that treating virtual worlds as company towns would limit these participants' rights of speech and association as well: individual players who wished to join with a game designer in establishing a private online theocracy would not be permitted to do so, since such a virtual regime would run afoul of First Amendment rights for would-be dissenters. Second, the expression and role-play possible in company towns may also be limited in other respects by constitutional requirements: the design and experience of virtual worlds might be limited by procedural due process requirements, for example, or by equal protection requirements that might constrain the ways that virtual worlds choose to govern themselves.

This is not to deny that arbitrariness by game gods can be harmful to virtual world participants—but its harmfulness is more comparable to that of an arbitrary employer, home association, private school authority, or other private government than that of public authorities. While the option of exit from the virtual world may be painful (as it is in an employment context), it remains available. It is not the case, as it was in the Alabama town in *Marsh*,¹⁴⁹ that those who run virtual neighborhoods can drive speech from *all* of the public places in which town residents walk or drive, since virtual world residents may also encounter speech in physical streets and parks, and can organize protests against virtual world operators in those locations, in newspapers, and in other sites on the web.

While it is not the case today, it is possible that a mega-virtual world of the future would become a de facto public entity. Jenkins

146. See, e.g., Jenkins, *supra* note 144.

147. Lastowka and Hunter, *supra* note 145, at 61 (Virtual world creators and operators “may have their own free speech arguments to assert against those who accuse them of censorship.”)

148. *Id.*

149. Marsh, *supra* note 139, at 508.

imagines precisely such a world where a “new virtual earth” swallows or displaces the diverse “virtual mini-worlds” in existence today and where someone exiled from it would be in the position of someone barred from using the Internet, the phone lines, or another key communication technology.¹⁵⁰ Obviously, such an electronic monopoly would necessarily be subject to far greater government oversight than one virtual world among many, but it seems premature to govern existing virtual worlds as though they were inchoate versions of such a future monopoly.

B. Government Regulation in Virtual Worlds

Still, even if virtual worlds are not governments, events within them often concern government—and this poses a challenge for First Amendment analyses. As Jack Balkin notes, virtual worlds are not strongly insulated from interaction with the outside world: “the boundaries between the game space and real space are permeable[, and t]hings that happen to people in the game space can have real-world effects both on them and on other people who are not in the game space.”¹⁵¹ For Balkin and for many others, the single most significant example of this breach in the boundary between real and game space consists in the “commodification” of virtual objects—that is, the appearance in virtual worlds of “items of value easily convertible into real-world property.”¹⁵² Where virtual currency is convertible into real currency, it can be used in commercial exchanges, in gambling, or in laundering—all activities that serve precisely the same functions when they occur inside and outside of virtual space.¹⁵³ How can the state follow and regulate such economic activity if it takes the form of non-regulable artistic expression in virtual worlds? Balkin suggests a framework that separates the commercial element of the world from the artistic element of it, and suggests that it is largely up to game designers to determine what kind of virtual environment they want to create: “Treat the players as artists, and the law will look on your world as a collective work of art. Treat the players as consumers, and they will demand consumer protection.”¹⁵⁴ Thus, much will depend on the specific rules that game designers build into the computer code for their virtual games, and the behavior rules they specify in the end-user license agreements (EULAs) into

150. See Jenkins, *supra* note 144, at 8.

151. Balkin, *supra* note 35 at 2059.

152. *Id.* at 2060.

153. See *id.* at 2060-61.

154. *Id.* at 2073.

which players must generally contract in order to be participants in these virtual worlds.

This strategy for distinguishing expressive and functional aspects of virtual worlds tracks a strategy that has been used, or advocated, elsewhere by First Amendment scholars.¹⁵⁵ Without rejecting the utility of making such a distinction between expressive and functional qualities, courts and scholars need to go further. After all, many works of art have functions that go beyond informing or evoking emotions in a particular audience: a lighted sculpture, for example, can simultaneously provide more light in a room or a park; a book of maps and architectural landmarks can serve as a tool for navigating a neighborhood or a highway; and paintings or photographs can serve as thumbnail icons to distinguish particular files or folders—on a computer or in a drawer. The fact that certain acts of expression serve functions that might just as easily be performed by non-speech acts or non-expressive objects does not automatically remove the First Amendment's shielding of these functions. Rather, to the extent that the state is allowed to regulate the functional aspects of expressive activity, it must be because there are particular interests that the state must serve in doing so. Rather than simply asking whether the imagery in virtual worlds has a functional quality, courts and lawmakers should thus ask what harms would arise from leaving it unregulated (and treating it as unregulable) by the state.

1. Addressing Virtual World Privacy

Consider how such an inquiry might guide us as we deal with a thorny problem raised by the real world effects of virtual worlds: effects on the privacy of information. The privacy problem arises because, while virtual worlds are spaces in the public world outside the home, they are also places where people seek privacy. People seek not only to express themselves in virtual worlds, but also to hide

155. See e.g., Janet Elizabeth Haws, Comment, *Architecture as Art? Not in My Neocolonial Neighborhood: A Case for Providing First Amendment Protection to Expressive Residential Architecture*, 2005 BYU L. Rev. 1625, 1646 (arguing that while “buildings might be so clearly functional and devoid of expressive elements . . . that they fall outside the scope of First Amendment protection,” the First Amendment should protect “expressive, artistic architecture”); Thomas Pak, Note, *Free Exercise, Free Expression and Landmarks Preservation*, 91 COLUM. L. REV. 1813, 1833 (1991) (arguing that buildings should not be protected when their builders’ or owners’ “motives are primarily functional,” but should be when they are expressive); cf. Genevieve Blake, Comment, *Expressive Merchandise and the First Amendment in Public Fora*, 34 FORDHAM URB. L.J. 1049, 1053-61 (2007) (noting how courts have made an inquiry in whether street merchandise sold as art is primarily expressive or functional).

themselves there. As Kevin Saunders observes, some of the people who look for interaction in virtual worlds do so because they “find [that] they can communicate some ideas or issues better through their virtual selves than in the real world,” perhaps in part because virtual worlds provide them with the chance to speak from behind the pseudonymous identity of their avatar.¹⁵⁶

Nor is it only private communication that people seek in virtual worlds, but also private activity, perhaps even isolation. As Joshua Fairfield writes, the “anonymity of novel online environments has caused people to move their intimate lives online,” with the odd result being that this drive for increased privacy only moves these private events into an environment that, given its digital nature, can be far more easily and completely surveyed and recorded than private environments in physical space.¹⁵⁷ He also notes that “The denizens of virtual worlds are constantly under surveillance by ‘game gods,’ the private companies that design, maintain, and administer virtual worlds. The game gods then must comply with government requests for call details, wiretaps, stored chat logs, and other business records.”¹⁵⁸ Thus, Fairfield understandably calls for greater privacy protection for virtual activity. However, strong First Amendment safeguards may make at least some kinds of privacy protection more difficult. If the game gods wish to design and run a virtual environment where surveillance is a constant possibility, First Amendment protection does in some ways make it harder to stop them.

2. Virtual World Privacy vs. Freedom of Virtual Design and Exploration

To the extent that the First Amendment includes a freedom to design virtual worlds and video games, it seems to encompass a freedom for worlds to be transparent and easily supervised. Likewise, if the programming of virtual objects in these worlds is a protected activity, then what remedy is there when individuals design objects that not only fly or move a certain way in response to joystick commands, but also gather audio or video footage, or even other data,

156. Saunders, *Real Courts*, *supra* note 88, at 201.

157. Joshua Fairfield, *Escape into the Panopticon: Virtual Worlds and the Surveillance Society*, 118 YALE L.J. POCKET PART 131, 134 (2009), available at <http://thepocketpart.org/2009/01/19/fairfield.html>. For another discussion and analysis of privacy in virtual worlds, see generally Tal Z. Zarsky, *Information Privacy in Virtual Worlds: Identifying Unique Concerns Beyond the Online and Offline Worlds*, 49 N.Y.L. SCH. REV. 231.

158. *Id.* at 132.

from unsuspecting residents of *Second Life*? What remedy, for example, might people have against in-world drones, parabolic microphones, or virtual reproductions of the “extendable ear” or “invisibility cloak” that are used by denizens of Harry Potter’s world to listen in on others’ conversations? Objects of this sort are already on sale at spy shops in *Second Life*.¹⁵⁹ If the state wished to regulate such in-world spying, or at least make it more obvious to those who might be its victims, would the First Amendment act as a barrier?

This depends in part on what the First Amendment protects when it protects the computer coding or scripting that makes virtual worlds behave the way they do. For some scripts—like those that cause observable in-world action—the answer would probably be relatively simple. Such scripts should generally count as First Amendment speech for the same reason that a video game designer’s program counts as speech: because of the artistic creation it makes possible. However, it is less clear that the answer would be the same for scripts that do not merely order the computer to display something, but order it to be invisible and silently take or store digital information, regardless of whether that information is something of value (monetary or otherwise) or private information belonging to other participants. Consider a scenario where a sculpture or diorama purchased by a private collector contains, artfully built into it, a hidden camera that, unbeknownst to the collector, transmits video or audio recordings of his home to another location.¹⁶⁰ A court would likely consider the camera as an example of invasion of privacy. So it arguably makes sense to draw the same conclusion about virtual environments that contain hidden forms of surveillance of in-world activity.

But to the extent that such privacy violations justify any kind of state intervention, it is not because they work invisibly or because they are “functional” rather than “expressive.” First, even if the collection of information does not manifest itself through on-screen movements or sounds, this fact does not necessarily mean that is outside of, or separate from, the artistic and creative expression that

159. See e.g., W. James Au, *Spy Game*, NEW WORLD NOTES, Feb. 13, 2007, http://nwn.blogs.com/nwn/2007/02/spy_game.html (stating that while *Second Life*’s “Community Standards” forbid listening in on others’ conversations without consent, “[s]urveillance devices are not uncommon in *Second Life*, often used by Residents to spy on their virtual world lovers, if they suspect they’re being unfaithful. [These] devices are widely sold, in-world and on the web, through [*Second Life*] e-commerce sites. Buy one, hide . . . it in the right place, and your chat log will include a handy copy of what everyone within listening distance of the bug says”).

160. This is true, for example, of one of the objects that the protagonist unknowingly has placed in his home in the movie *The Game*. See THE GAME, *supra* note 1.

occurs in a virtual world. There are situations in which surveillance might be integral to the artistic experience itself and not a separate function. The interactive installation “Metaplay” of virtual reality designer and artist, Myron Krueger, for example, involved video observation of participants by an invisible artist, who would then sketch them on video displays.¹⁶¹ In “Metaplay,” the participant soon became aware of this surveillance, but in other contexts, the surveillance might be—and perhaps should be—more mysterious. Where a video game or virtual world includes spying and surveillance as a central component of its challenge or narrative, it might be impossible to isolate that invasion of privacy. The use of spying drones or bionic ears might also allow individuals to create movies or pictures of a kind that would be impossible if they could not use such objects.¹⁶² And the activity that such drones or bionic ears engage in—gathering of expressive sound or imagery created, or enabled, by virtual world designers—is arguably activity of a kind long protected in First Amendment jurisprudence: the receipt of information and ideas.¹⁶³

To the extent that such information should nonetheless be subject to any invasion of privacy laws, this is not because of functionality in virtual spying devices, but because of the type and degree of the harms they threaten—especially when they happen contrary to the expectations of game players (relying on the game designers’ assurances) about the kind of privacy they can find in a virtual world.

The state has for over a century now played a role in assuring that individuals are not subject to observation or intrusion in environments where they are led to believe they can engage in sheltered reading or intimate activity, or can engage in solitary review of sensitive personal or business information. It is for this reason that the state probably should be able to require that virtual world operators clearly inform would-be players about the privacy regimes in their worlds, and perhaps require privacy-protective regimes as a

161. KRUEGER, *supra* note 102, at 18-24.

162. This may have been true of the experience in which the protagonist immerses himself in the movie *The Game*, where very sophisticated surveillance is arguably a part of the drama he seeks to enter into at the beginning of the film. See *THE GAME*, *supra* note 1.

163. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“the Constitution protects the right to receive information and ideas”). One might argue that since freedom of speech – and “the right to receive information that it entails” – “presupposes a willing speaker,” *Va. State Bd. of Pharmacy v. Va Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 756 (1976), individuals exploring *Second Life* or other virtual worlds should not have a right to create records of communications, or artistic expression, that has been created for other audiences – but *not* willingly provided *to them*.

default. To the extent that the expressive action of game designers or players in virtual worlds is subject to legal restriction or regulation, it is not because we (or state officials) can discover non-expressive components within virtual world experiences, but because those experiences raise possible harms that the state is responsible for guarding against.¹⁶⁴

III. CONCLUSION

Video games have quickly—in the past eight years—found a secure place in the realm of protected First Amendment expression. They have done so largely by becoming less and less like pinball machines and board games, and more and more like movies: they are often woven around stories created by scriptwriters and feature appearances by actors. But while video games' impressive evolution

164. As a practical matter, this will probably make it so that, if the government wishes to regulate virtual world expressions with real-world implications, it will often have to satisfy the *O'Brien* test to do so. See *United States v. O'Brien*, 391 U.S. 367, 377 (setting out a four-part test for regulating symbolic conduct on the basis of its non-expressive qualities, allowing government regulation of this kind when it is “[1] within the constitutional power of the Government. . . [2] furthers an important or substantial governmental interest [3] [that is] unrelated to the suppression of free expression, and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”). The *O'Brien* test is the test that the Supreme Court has used for symbolic conduct, but courts have also used it in other circumstances where, as the U.S. Court of Appeals for the Second Circuit recently said, the government restricts speech under a “content-neutral regulation with an incidental effect on a speech component.” *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 454 (2d Cir. 2001). Thus, in *Corley*, the Second Circuit followed the District Court case it was reviewing in using the *O'Brien* test to analyze an injunction, under the Digital Millennium Copyright Act (DMCA), banning dissemination of computer code that could be used to circumvent copyright protection software on DVD movies. See *id.* at 442 (noting that the District Court had found that because the DMCA regulates the “functional” aspect of the code, it is not strict scrutiny, but rather “the intermediate scrutiny of *United States v. O'Brien* [that] applies). See also *id.* at 450, 454 (reiterating the *O'Brien* test’s four prongs and using them to assess the constitutionality of the DMCA injunction) (citation omitted). Ultimately, after applying the *O'Brien* test, it found, the DMCA-based injunction was a permissible content-neutral regulation under the First Amendment.

Some scholars have recently criticized the court for weakening the *O'Brien* test (as well as the time, place, and manner test with which the Court has equated it). See e.g., *Post supra* note 110. But the language of the *O'Brien* test seems designed to, and could, require the government to regulate activity mixing speech and non-speech only where it can show that doing so is necessary to address a harm of the kind that it is government’s responsibility to address (if courts require such a showing in requiring that government be pursuing “substantial government interest”). See *O'Brien*, 391 U.S. at 377 (requiring, *inter alia*, that government show it has pursuing a “substantial government interest . . . unrelated to the suppression of free expression” even when its speech regulation is content-neutral). Using the *O'Brien* test in this way over a series of cases may help define what kind of harms possibly arising out of virtual worlds should be considered harms that the government may regulate, despite such regulation’s impact on some virtual world speech.

has made it easier for courts to give them First Amendment protection, it has come at the cost of leaving courts and scholars more confused about the electronic media that they evolved away from—media that consists not of action-packed adventures marked by stunning special effects, but of simpler games that involve “digitized pinball machines” or “animated shooting galleries.” Courts had previously refused to give these simpler arcade-style games First Amendment status, perhaps because doing so seemed to open the door to extending First Amendment protection not just to computer games, but also to games more generally—and perhaps even further.

Fortunately, certain aspects of emerging virtual worlds give us reason to revisit this legally abandoned cultural landscape: some virtual worlds (and other electronic territories) leave individuals to write their own stories and scripts, or to forego this option and simply play digitized pinball or poker, build and float over abstract forms, or engage in simulated sex and violence. People are left free to sculpt their own lives in *Second Life*, for example. They spend substantial amounts of time on computers and iPhones enjoying games—or very ungamelike “video games” that fail to give them a plot or a challenge but rather provide intriguing imagery or soundscapes. All of this should be staunchly protected by the First Amendment when it is conducted in private environments, walled off from the social worlds. Furthermore, it should continue to receive some (albeit lesser) First Amendment protection even as these walls are lowered and individuals take advantage of the open-endedness and plasticity of modern virtual environments and bring real-life business into artistic settings that might previously have been reserved for creativity or recreation. Such settings offer a refuge of sorts from the regulated world where physical and economic harm is present, and where the state is charged with vigilantly protecting us from it. These are places where people have freedom to give visual, aural, and other vivid form to their imaginations—or at least enter, interact with, and transform the environments that others have sculpted—and where such freedom should be preserved to the greatest extent possible with the aid of First Amendment armor. Providing such protection to creative environments requires that courts stop reserving it only for exchanges where they can find a message to be understood, a lesson to be learned, or a story to be heard. It requires them to more broadly cordon off from state control electronic and other spaces that can provide hospitable terrain for the exercise of imagination.