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VIDEO GAMES AND THE FIRST AMENDMENT

Eli Pales

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**VIDEO GAMES AND THE FIRST
AMENDMENT**

Eli Pales



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VIDEO GAMES AND THE FIRST AMENDMENT

*Eli Pales**

ABSTRACT— The video game industry is massive, with an annual revenue of \$180 billion worldwide; \$60 billion of that in America alone. For context, the industry’s size is greater than that of the movie, book, and music industries combined. Yet, despite this market dominance, the video game industry is relatively new. Only in the 2011 decision of *Brown v. Entertainment Merchants Association* did the Supreme Court extend First Amendment protection to games. Still, the Court failed to define the scope of the game medium. As understood by an average person, a video game could be something as simple as Pac-Man or as complicated as a sophisticated \$200 million recreation of the American West. If treated literally, the Supreme Court’s rule in *Brown* would require lower courts to treat all video games—regardless of their individual characteristics, sophistication, and visuals—as equally protected under the law. Yet lower courts have not been following this Supreme Court decision by its word. Instead, judges have scrutinized how complicated a video game is, whether it has a narrative, if its characters are unique, and other characteristics that should be irrelevant. This Article confronts the ways that lower courts discriminate against video games compared to established mediums and argues that this violates the Supreme Court mandate in *Brown*. It also provides a context and legal basis for constitutionally protecting video games that the Supreme Court failed to provide in its relatively simplistic decision. Ultimately, I argue that lower courts should take the *Brown* decision seriously and treat video games like any other protected medium, even if the results at first seem counterintuitive.

INTRODUCTION	394
I. THE <i>BROWN</i> DECISION AND THE MEDIUM-BASED FRAMEWORK	395
A. <i>Mediums and First Amendment Coverage</i>	396
B. <i>Aesthetic Discrimination</i>	397
C. <i>The Implications of Brown</i>	400

* Eli Pales graduated from Yale Law School last May and currently clerks at the Colorado Supreme Court. Before law school, Eli worked as a video game journalist for six years, traveling to events to write articles seen by millions of readers. During law school, Eli conducted research on the game industry and worked as a consultant in the field. Next term, Eli will clerk at the Sixth Circuit and hopes to continue working in entertainment law afterward.

II.	SQUARING BROWN’S MANDATE AND LOWER-COURT CONFUSION	401
A.	<i>Categorical distinctions: Narrative, simulation, and basic video games</i>	401
B.	<i>Uniqueness of Characters</i>	405
C.	<i>What is wrong with these differentiations?</i>	407
III.	DEFINING VIDEO GAMES & JUSTIFYING FIRST AMENDMENT PROTECTION	418
A.	<i>First Amendment Theories</i>	419
B.	<i>Defining Video Games</i>	428
	CONCLUSION.....	431

INTRODUCTION

The video game industry is massive, with an annual worldwide revenue of \$180 billion; \$60 billion of that in America alone.¹ For context, gaming is greater than the movie, book, and music industries *combined*.² Yet, despite this market dominance, the video game industry is relatively new. Only in the 2011 decision of *Brown v. Entertainment Merchants Association* did the Supreme Court extend First Amendment protection to video games.³ In that case, the Court struck down a California law banning the sale of violent video games to minors.⁴ The Court compared violent video games to works of other formats—the Grimms’ Fairy Tales, for example—to determine that it was against the First Amendment to treat video games differently than other protected mediums.⁵

However, the Court’s analysis was relatively simple. Rather than comprehensively explaining why the video game was protected by the First Amendment using the medium’s unique elements, its short analysis mainly compared video games to other protected works.⁶ Scalia wrote:

¹ Tom Wijman, *The Games Market and Beyond in 2021: The Year in Numbers*, NEWZOO (Dec. 22, 2021), <https://newzoo.com/insights/articles/the-games-market-in-2021-the-year-in-numbers-esports-cloud-gaming> [<https://perma.cc/A37T-CH8C>]; Jeffrey Rousseau, *2021 Sets Record for US Games Spending at \$60.4bn*, GAMESINDUSTRY.BIZ (Jan. 18, 2022), <https://www.gamesindustry.biz/articles/2022-01-18-2021-sets-record-for-us-games-spending-at-usd60-4bn-us-annual-report> [<https://perma.cc/QR77-KWVT>].

² Patrick Frater, *Global Box Office Hit \$21.4 Billion in 2021, Says Analyst*, VARIETY (Jan. 6, 2022), <https://variety.com/2022/film/box-office/global-box-office-2021-1235148732> [<https://perma.cc/B6YD-G8Z3>]; *Book Publishers Global Market Report 2021: COVID-19 Impact and Recovery to 2030*, BUS. RSCH. CO. (Jan. 2021); *IFPI issues Global Music Report 2021*, IFPI (Mar. 23, 2021), <https://www.ifpi.org/ifpi-issues-annual-global-music-report-2021> [<https://perma.cc/W92R-25HE>].

³ *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786 (2011).

⁴ *Id.* at 789–90.

⁵ “California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none. Certainly the books we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm’s Fairy Tales, for example, are grim indeed.” *Id.* at 795–96.

⁶ *See id.* at 790.

[L]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.⁷

However, this rationale is hardly based on established First Amendment doctrine or theory. Instead, the Court essentially used a “greater includes the lesser” theory, where video games must be protected because their constituent elements are individually protected.

In this Article, I provide the context, reasoning, and consequences of the *Brown* decision that the Court failed to include in its decision. First, I survey the theories that support a medium-based analysis of the First Amendment, explaining how mediums are defined, the protection they confer, and the aesthetic principles at stake when a medium is protected by the First Amendment. Part I applies this analysis to the *Brown* decision to demonstrate how video games should be protected if treated like other mediums.

In Part II, I review some of the ways in which video games receive disparate First Amendment protection in lower courts. The Part uses examples to demonstrate the way lower courts have granted varying protection to different video games. Given the novelty of the video game medium, it is understandable that judges may struggle to apply established legal questions in new contexts. However, the result is that judges treat some video games differently than works of other protected mediums, and works of the same game medium differently from each other. Ultimately, I reject these judge-made classifications as inconsistent with the *Brown* decision, fundamentally impractical, and antithetical to broader First Amendment principles.

Finally, I provide the context and legal grounding that the Supreme Court failed to include in its *Brown* decision. The final part defines the scope of the video game medium and justifies its constitutional protection. I use the traditional First Amendment theories of democracy, truth-seeking, and personal autonomy to justify protecting the video game medium based on its unique elements. Part III contributes a framework for lower-court judges to confront emerging legal questions in the video games and interactive media.

I. THE *BROWN* DECISION AND THE MEDIUM-BASED FRAMEWORK

The *Brown* decision granted First Amendment protection to the video game medium; however, the Court failed to define the medium’s scope. As

⁷ *Id.*

understood by an average person, a video game could be something as simple as Pac-Man or as complicated as a sophisticated \$200 million recreation of the American West.⁸ If treated literally, the Supreme Court's rule in *Brown* would require lower courts to treat all video games—regardless of their individual characteristics, sophistication, and visuals—as equally protected under the law. In this part, I discuss how to define a medium, why the framework important for understanding the First Amendment, and how to understand the *Brown* decision through a medium-based lens.

A. *Mediums and First Amendment Coverage*

Despite the seemingly clear dictate of the First Amendment, speech alone is not universally protected by the Constitution in all situations. Rather, speech is protected when it is found in certain social contexts. The First Amendment clearly provides protection to the writer of a newspaper editorial but not an attorney or a doctor defending a malpractice suit.⁹ It would protect a liar claiming he earned the medal of honor in a political race, but not if he made the same lie in sworn testimony.¹⁰ In numerous cases, the Supreme Court has held that certain forms of speech are unprotected because of the context in which they are found.¹¹ Post argues that the First Amendment does not simply protect words, “but rather particular forms of social structure.”¹² In other words, the First Amendment protects certain *mediums* of expression, which Post defines as “a set of social conventions and practices shared by speakers and audience.”¹³

⁸ See Michelle Delgado, *Why Players Around the World Gobbled Up Pac-Man*, SMITHSONIAN MAG. (May 22, 2020), <https://www.smithsonianmag.com/innovation/why-players-around-world-gobbled-up-pac-man-180974902> [<https://perma.cc/R7A2-LYMF>]; Dean Takahashi, *Red Dead Redemption 2 Could Hit 20 Million in Sales — and Turn a Profit — by December*, GAMESBEAT (Oct. 31, 2018), <https://venturebeat.com/2018/10/31/red-dead-redemption-2-could-hit-20-million-in-sales-and-turn-a-profit-by-december> [<https://perma.cc/Z88C-SFKW>].

⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *United States v. Alvarez*, 567 U.S. 709, 720–21 (2012) (arguing that in some cases, like perjury, speech is unprotected); Robert Post, *A Doctor Has Limited First Amendment Rights*, N.Y. TIMES (Aug. 21, 2014), <https://www.nytimes.com/roomfordebate/2014/08/20/when-do-doctors-have-the-right-to-speak/a-doctor-has-limited-first-amendment-rights> [<https://perma.cc/3WS4-CEHE>].

¹⁰ See generally *United States v. Alvarez*, 567 U.S. 709 (2012) (striking down a statute that made it a crime to lie about earning a medal of honor and reaffirming that the First Amendment does not protect perjury); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (striking down an Ohio statute that made it illegal to lie in a political campaign about an opponent).

¹¹ See, e.g., *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010) (holding that spoken legal aid was unprotected by the First Amendment when provided to a classified terrorist organization); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 568–69 (1942) (holding fighting words unprotected by the First Amendment); *Morse et al. v. Frederick*, 551 U.S. 393, 403 (2007) (holding speech promoting drug use unprotected for students).

¹² Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1273 (1995).

¹³ *Id.* at 1253.

The list of protected mediums and their boundaries can seem amorphous, but that is because they evolve with society's methods of communication. One example is the medium of motion pictures, which had its first date with the Supreme Court in 1915. In its first visit to the Court, the majority of justices held that movies were unprotected by the First Amendment and could be censored by the state of Ohio because—unlike newspapers—they were not “organs of public opinion” within the meaning of free speech.¹⁴ However, the Court reversed its view a few decades later. In 1952, the Court held that movies are a “significant medium for the communication of ideas” and thus protected by the First Amendment.¹⁵

As technology, communication, and social mores progress, so too does the ambit of the First Amendment. Different contexts can even cause an object to meet the criteria for a protected medium in one environment but not in another. For example, Post notes that placing a urinal as an artistic piece in an exhibit would be protected because galleries are a way to display art and society understands the urinal in this context to be artistic expression.¹⁶ By contrast, a bathroom itself is not a medium for expression. As a result, a urinal in a bathroom—with no other expressive features—would not be part of a protected medium.¹⁷ The urinal itself does not change, but our relationship with the urinal—whether in a bathroom or an art gallery—is dependent on the context that we engage with it. For this reason, the government could regulate the shape of a urinal in a bathroom for public health reasons, but not if part of an art exhibit.

B. Aesthetic Discrimination

The First Amendment rejects aesthetic discrimination based on the viewpoint or the content of protected expression.¹⁸ Once a medium is defined for the purposes of the First Amendment, its contours become more important than the substance. Anything that meets a medium's criteria must

¹⁴ The Court treated a movie as outside the First Amendment's protection because it was created with a profit motive. The Court argued that movies were equivalent to billboards. It is easy to see that this reasoning is undermined because a newspaper, book, or other protected medium could also be published with a profit motive. *Mutual Film Corp. v. Indus. Com. of Ohio*, 236 U.S. 230, 243–44 (1915).

¹⁵ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

¹⁶ Post, *supra* note 12, at 1254.

¹⁷ Although, it is easy to see other contexts where even a urinal could be protected: for example, if painted on canvas or used as a prop in a play. *Id.*

¹⁸ See, e.g., *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015) (striking down a city ordinance that set different requirements for signs based on their content); *Illinois Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 94 (1972) (striking down an ordinance that only permitted protests outside schools that were related to labor disputes); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 540 (1981) (striking down an ordinance that prohibited signs unless they had content that fit the description of one of the permitted exceptions).

be protected. In *Bleistein*, Justice Holmes persuasively wrote that any pictorial illustration should be treated equally under the law, regardless of whether it was a Rembrandt, a book illustration, or a circus advertisement drawn by a normal illustrator.¹⁹ “It would be a dangerous undertaking,” Holmes reasoned, “for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”²⁰ In this way, the Court has refused to differentiate between works that are considered “high art” and “low art.” It would be folly for judges to wade into the specialized and subjective waters of aesthetic judgement. In the eyes of the law, all are worthy of the same protection once a work meets the criteria for a protected medium.

Of course, such an approach may lead to discomfort when taken seriously. Photography is an example of a medium that may not always have a clearly identifiable idea, narrative, or message. Yet, photographs in artistic contexts are protected, no matter how mundane or exciting the photograph. In *Nussenzweig*, for example, a New York court sided with a photographer defending against privacy and right of publicity claims using a First Amendment defense after he featured individuals’ photographs in an art gallery without their consent.²¹ In the related case of *Foster*, a voyeuristic photographer took photos of his neighbors through the windows of their private residences and displayed the photos in an art gallery to show the random and potentially intimate moments throughout a neighborhood.²² Despite the intrusion, the photographer defeated a privacy-based claim as well.²³ In these cases, the courts recognized that the disputed photographs were protected because they met the criteria of a defined artistic medium: photography. The photographer may have been attempting to capture a photo for a news article, to capture an authentic moment, or to evoke emotion in an audience; each of these reasons would be grounded in a key First

¹⁹ “The word ‘illustrations’ does not mean that they must illustrate the text of a book, and that the etchings of Rembrandt or Müller’s engraving of the Madonna di San Sisto could not be protected today if any man were able to produce them. Again, the act, however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to ‘illustrations or works connected with the fine arts’ is not works of little merit or of humble degree, or illustrations addressed to the less educated classes; it is ‘prints or labels designed to be used for any other articles of manufacture.’” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

²⁰ *Id.* at 251–52 (1903) (holding that a mass-produced poster is still protected by copyright even if some would consider a circus poster low art).

²¹ *Nussenzweig v. DiCorcia*, No. 50171(U), 2006 WL 871191, at *9 (N.Y. App. Div. Feb. 8, 2006), *aff’d*, 878 N.E.2d 589 (N.Y. 2007).

²² *Foster v. Svenson*, 7 N.Y.S.3d 97, 98 (N.Y. App. Div. 2015).

²³ *Id.* at 105–06.

Amendment interest.²⁴ It did not matter what content the photo actually included; once the court found it met the definition for an artistic medium, it was protected.²⁵

In another context, however, a photograph might not be protected because a court does not deem it to fall within the public discourse medium of photography. A New York court held in *Brinkley*, for example, that a mass-produced poster did not meet the First Amendment requirements to beat a privacy claim when it consisted purely of a person's unauthorized photograph to sell a product.²⁶ This is because the Supreme Court has held that commercial speech gets "lesser protection" than "other constitutionally guaranteed expression" as it does not implicate the same First Amendment interests.²⁷ Commercial speech—like a product advertisement, for instance—is informational rather than artistic or political; its primary purpose is to propose a commercial transaction.²⁸ Merchandise—like a coffee mug or keychain—also generally falls under commercial speech if its pure salability arises from the exploitation of another's image or a copyrighted work, rather than its own unique elements.²⁹ Due to its lesser protection, the government can regulate commercial speech for consumer protection, truthfulness, and privacy as long as it meets the *Central Hudson* four-prong test, a more lenient standard than what is usually applied in the free speech realm: strict scrutiny.³⁰ This treatment of commercial speech

²⁴ Photographers must choreograph their subjects, choose the correct camera angle, and manage a multitude of other factors to create their photographs. See Seth Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335 (2011); *Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086 (1998).

²⁵ *Foster*, 7 N.Y.S. 3d at 103.

²⁶ *Brinkley v. Casablancas*, 438 N.Y.S.2d 1008, 1008–09 (N.Y. App. Div. 1981) (holding that the use of someone's likeness without permission purely to sell a product consisted of commercial speech, and received lower First Amendment protection than other photography).

²⁷ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980) (creating a four-prong test to determine when the regulation of commercial speech is permissible).

²⁸ See *id.* at 562 (reaffirming that there is a "commonsense" difference between "speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech").

²⁹ See William Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 1, 3 (2012) (arguing that many courts err by treating video games as merchandise—like a coffee mug or poster—rather than a protected artistic medium).

³⁰ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (holding that "the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech,'" (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993))); *Reed v. Town of Gilbert*, 576 U.S. 155, 155–56 (reaffirming that content and viewpoint-based restrictions are subject to strict scrutiny). See also *Edenfield v. Fane*, 507 U.S. 761, 775–76 (1993) (holding that while accountants could personally solicit potential clients without invitations, the government could properly prevent lawyers from doing so without violating the First Amendment because attorneys are "trained in the art of persuasion," making potential audiences "susceptible to manipulation"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468

makes intuitive sense; a non-profit political campaign can use the president's image in an attack ad, but a corporation cannot use the president's image to endorse its product in an advertisement without permission.

In the case of photographing individuals, the invasion of privacy was arguably greater in *Foster* and *Nussenzweig* than *Brinkley*. The litigant, however, was successful in *Brinkley* because—as opposed to the other two invasion of privacy cases—commercial speech and merchandise has less protection than an artistic or political work.³¹ Ultimately, the strength of the underlying First Amendment protection—no matter if it is a photograph or a urinal—depends on its context: is the item used as a bathroom, an advertisement, a piece of news, or as an artistic work?

C. *The Implications of Brown*

The Court added video games to the list of constitutionally protected mediums in *Brown* because they advance key First Amendment interests; games incorporate elements of already-protected mediums—like animation, dialogue, and music—and new communicative elements, such as interactivity.³² The Court, however, did not define what constitutes a work under the video game medium, nor did it distinguish between different types of video games. Nevertheless, the Court gave video games the same blanket protection as movies, books, and other communicative mediums. Taken seriously, this means that when a piece of media meets the definition of a video game—whatever the requirements for the medium might be—it gets full protection under the First Amendment regardless of its content. Courts must give the most complex and creative worlds as much protection as simple and uncreative games. Since the First Amendment rejects the idea that judges should act as aesthetic arbiters for protected mediums—and rejects a distinction between “low art” and “high art”—each video game must receive the same protection as another protected work.

Normally, this idea seems intuitive; a 7-year-old's first attempt at a poem would get just as much First Amendment protection as a Homer epic. However, in the field of video games, it may seem strange that a \$200 million recreation of the American West receives the same constitutional protection as Pong, a very simple digital rendition of table tennis.³³ It might also be

(1978) (holding that the government is permitted under the First Amendment to prevent lawyers from soliciting clients in an uninvited manner).

³¹ *Brinkley*, 438 N.Y.S.2d at 1010–12 (holding the work unprotected because it had a purely commercial function); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 557 (concluding that while “the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression,” it still receives some protection from unwarranted or arbitrary regulation).

³² *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 790 (2011).

³³ Takahashi, *supra* note 8.

strange to give a digitized version of chess more protection in a video game format than it would receive as a board game. In Part III, I attempt to define the video game medium in a workable manner. For now, it is important to recognize that the Supreme Court's decision taken literally provides very strong First Amendment protection to a broad range of interactive entertainment products.

II. SQUARING BROWN'S MANDATE AND LOWER-COURT CONFUSION

Despite this theoretically uniform protection, lower courts have instead attempted to protect different video games in inconsistent ways based on their content. For lower courts to treat the video game medium as they treat other mediums, the essential question should be: "is this work a video game?" Then, the courts should apply uniform protection if the answer is yes. However, lower courts are asking all sorts of irrelevant questions to parse between different types of video games before granting them the same First Amendment protection as other formats. A common question asked by lower courts is: "does this type of video game get First Amendment protection?" Using this method, courts have attempted to protect different video games in inconsistent ways based on their content. This inconsistency means that one of two claims is true: either (a) the lower courts are failing to adequately and uniformly protect the video game medium as required by the Supreme Court or (b) the video game medium has a narrower scope in reality than the Supreme Court originally intimated.

This section will survey several of the ways courts have attempted to differentiate between different types of video games for varied First Amendment protection, striving to explain these judge-created categories as they have understood them. While some of these classifications may seem intuitive at first glance, I ultimately reject them. These lower-court classifications are untenable theoretically, against the command of *Brown*, and inconsistent with broader First Amendment doctrine.

A. *Categorical distinctions: Narrative, simulation, and basic video games*

A simulation-based game is one that attempts to replicate a real-life phenomenon authentically.³⁴ For example, there are many sports games that recreate realistic match settings. Each year, millions of players buy the newest iteration of FIFA, a video game that includes life-like stadiums,

³⁴ See, e.g., MICROSOFT FLIGHT SIMULATOR (Microsoft 2020) (simulating the experience of a pilot); CITIES: SKYLINES (Paradox Interactive 2015) (simulating the experience of an urban planner); THE SIMS 4 (Electronic Arts 2014) (simulating the life of people, albeit in a satirical way).

physics, and graphical elements.³⁵ Most of the real-time game elements of FIFA are intended to recreate the feeling of watching a soccer game live on television.³⁶ Other simulation games attempt to recreate phenomena ranging from flying a plane, to driving a long-haul truck, to living a life as a goat.³⁷ While certain games may be constrained by smaller budgets, thus limiting their ability to replicate real life at the highest fidelity, the core premise of such games is to closely mirror real-life phenomena, much like a photograph.

Another type of game is a narrative-based game.³⁸ Such games focus on unique creative elements instead of simulation. Like other animated works, narrative games may feature unique characters with voice acting, creative new locales, or reinterpretations of familiar stories. One game might take place in the American West, another in Nordic mythology, and another in a vampire-infested Victorian London.³⁹ Just as there are a plethora of film and book genres, so too are there a diverse range of game types.

Some games may not fit neatly into either of these categories. Consider a game like Pac-Man, where a yellow creature navigates through a maze, attempting to gobble up as many dots as possible without being caught by a ghost.⁴⁰ This game is clearly not a simulation, but it may not be sufficiently sophisticated to meet the threshold for a narrative game. Yes, there is some sort of barebones backstory—a yellow creature attempts to stay alive by

³⁵ Tom Ivan, *Following a Record Launch, EA Claims FIFA 23 Sales are up 10% on Last Year's Game*, VIDEOGAMESCHRONICLE (Nov. 1, 2022), <https://www.videogameschronicle.com/news/following-a-record-launch-ea-claims-fifa-23-sales-are-up-10-on-last-years-game> [<https://perma.cc/3484-UPCS>] (revealing that 10.3 million people played the newest FIFA game within its first week of availability).

³⁶ See Jordan Oloman, *FIFA 23 Review*, IGN (Oct. 8, 2012), <https://www.ign.com/articles/fifa-23-review> [<https://perma.cc/SS9T-KSVU>] (detailing the realistic elements of the newest FIFA game).

³⁷ See, e.g., GOAT SIMULATOR (Coffee Stain Studios 2014) (simulating the experience of a goat); EURO TRUCK SIMULATOR 2 (SCS Software 2012) (simulating the experience of a long-haul truck driver).

³⁸ "Narrative is a chain of causal events (e.g., a thing happens that causes something else to happen). Most good narratives are due to a character wanting something and having to do something to obtain it, with consequences if they fail." See *What Is Narrative in Video Games*, INTO INDIE GAMES (July 19, 2020), <https://www.intoindiegames.com/what-is-narrative-in-video-games> [<https://perma.cc/LZ9H-7TKK>] (providing a quick synopsis of narrative within video games). "The primary difference between video game narrative and all others, of course, is choice. In a book, you follow along as a character does things, while in a video game, you as the player control the character. You can often make choices that move the narrative in very different directions." *Id.*

³⁹ See, e.g., RED DEAD REDEMPTION 2 (Rockstar Games 2018) (featuring a 50-hour-long story set in the American West where the player controls a member of a bandit gang); GOD OF WAR (Sony Interactive Entertainment 2018) (featuring a story where the player controls the Greek god of war as he attempts to forge a new life among Nordic gods and mythology); THE ORDER: 1886 (Sony Computer Entertainment 2015) (telling a story set in Victorian London where the Knights of the Round Table protect the city against werewolves and vampires).

⁴⁰ PAC-MAN (Namco 1980).

nourishing itself and avoiding ghosts—but there is little practical depth.⁴¹ The visuals themselves are incredibly simple—just a maze—and the sound effects consist of bleeps and bloops.⁴² Alternatively, consider a digital version of Chess.⁴³ One can come up with a heroic narrative about how two warring sides are attempting to capture the other side’s King. But at their core, these basic games have little more than simple visuals and a collection of encoded game rules. These basic games have few creative additions other than the core gameplay elements and aesthetic features.

In several cases, courts have held that non-narrative games are insufficiently creative for full First Amendment protection.⁴⁴ For example, *No Doubt* was a case that involved Activision’s title *Band Hero*, a music-based video game that allowed users to play dozens of songs using a controller in the shape of a guitar.⁴⁵ As required by copyright, the game developer licensed all the game’s music and even the likenesses of the band members themselves.⁴⁶ The developers also included a game element that spurred the lawsuit: a player could use the avatar of any featured artist to play the licensed music of another band.⁴⁷ The feature could theoretically allow a user to select the avatars of The Beatles to play a Spice Girls song. In the lawsuit, Gwen Stefani’s band No Doubt argued that the use of its likeness to play lyrics of another band was unauthorized because it did not consent in its licensing contract.⁴⁸

Applying California’s transformative use test—used for right of publicity lawsuits—the court held that such a use did not qualify for full First Amendment protection because the use of Stefani’s likeness was not sufficiently transformative.⁴⁹ The court argued that the game did not add

⁴¹ *Id.*

⁴² *Id.*

⁴³ *E.g.*, PURE CHESS (Ripstone 2012).

⁴⁴ *See* *No Doubt v. Activision Publishing Inc.*, 122 Cal. Rptr. 3d 397 (Cal. Dist. Ct. App. 2011) (holding that a video game developer could not use an artist’s avatars to sing songs that they did not write); *Keller v. Elec. Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013) (holding that a video game developer could not use the likenesses of college football players without authorization); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (holding that a video game developed could not use the likeness of college football players without authorization); *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015) (holding in favor of 6,000 former NFL players against EA for their inclusion in football video games); *Ultimate Creations, Inc. v. THQ Inc.*, No. CV-05-1134-PHX-SMM, 2008 WL 215827 (D. Ariz. 2008) (holding that a wrestler’s likeness was pirated in a wrestling video game).

⁴⁵ *No Doubt*, 122 Cal. Rptr. 3d at 297; *BAND HERO* (Activision 2009).

⁴⁶ *No Doubt*, 122 Cal. Rptr. 3d at 400.

⁴⁷ *Id.* at 401.

⁴⁸ *Id.* at 401–02.

⁴⁹ Readers may confuse the test used here for the “fair use” test used in copyright analysis. While both the “fair use” analysis and the test used here examine the transformative nature of the work, they implicate different types of intellectual property. The “fair use” test scrutinizes the use of copyrighted

“creative elements [to] significantly transform the celebrity depiction.”⁵⁰ The opinion treated the game as if it were merchandise—where the image of a celebrity is exploited to sell a product—rather than a protected artistic work.⁵¹ Even though Activision had already paid for a license to use No Doubt’s music, the court held that the use here had the “overall goal of creating literal, conventional depictions” of the band to exploit its fame.⁵² The court treated the use of the band’s likeness as if it were a non-expressive product, thus warranting less First Amendment protection, because it was used purely for commercial exploitation rather than art.

The court attempted to distinguish the celebrities in *Band Hero* with those featured in Andy Warhol’s paintings, which frequently used the likenesses of famous individuals.⁵³ The opinion reasoned that “Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images,” unlike the avatars in the *Guitar Hero* game.⁵⁴ However, the court did little to explain how Andy Warhol’s paintings were more transformative than the animated depictions in *Guitar Hero*.⁵⁵ Somehow, a Warhol’s painting was pathbreaking art that conveyed an important idea, whereas *Band Hero* was an exploitative uncreative work. The court in this analysis clearly discriminated between its analysis of a video game and painting, despite a virtually identical use of an individual’s likeness.⁵⁶

In *Champion*, another case involving a simulation game, a New York judge explicitly argued that non-narrative games did not get equal First

works, whereas the “transformative use” test used in California decides privacy-related torts, primarily the appropriation of celebrities’ likenesses. *Id.* at 400.

⁵⁰ *Id.* at 407 (citing *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 106 Cal. Rptr. 2d 126 (2001)).

⁵¹ See Ford & Liebler, *supra* note 29 (describing the difference between merchandize lacking First Amendment protection and an artistic work).

⁵² *No Doubt*, 122 Cal. Rptr. 3d at 408 (citing *Comedy III Prod. Inc.*, 106 Cal. Rptr. 2d).

⁵³ *Id.*

⁵⁴ *Id.* (citing *Comedy III Prod. Inc.*, 106 Cal. Rptr. 2d).

⁵⁵ Currently, the Supreme Court is deciding a case about whether Andy Warhol’s paintings of celebrities are protected by the First Amendment and may ultimately decide that the works are unprotected. Nina Totenberg, *The Supreme Court Meets Andy Warhol, Prince and a Case That Could Threaten Creativity*, NPR (Oct. 12, 2022), <https://www.npr.org/2022/10/12/1127508725/prince-andy-warhol-supreme-court-copyright> [<https://perma.cc/Y9N5-EHNF>]. However, the resolution of this case does not imperil my analysis. My argument is not that Andy Warhol’s paintings and the *Band Hero* video game should both be protected or not; my argument is that both works should be treated equally because they are both works protected by the First Amendment. The *No Doubt* decision reasoned that Warhol’s works were transformative, but Activision’s video game was not despite a very similar use of a celebrity’s likeness. The problematic aspect of the case isn’t the underlying result, but that the works were treated differently despite both of them theoretically having the same First Amendment protection.

⁵⁶ I would argue that Warhol’s works are even less transformative than *Band Hero*. His paintings were almost entirely composed of his subjects—with limited added content—whereas *Band Hero* had a whole game with hours of content and thousands of animations built up around its characters.

Amendment protection as narrative ones. Going beyond the scope of the case itself, the judge wrote:

While video games may conceptually qualify for protection under the Free Speech Clause, [citation omitted] not every video game constitutes fiction or satire. . . . The holding in *Gravano* that “Grand Theft Auto V” was a qualifying work was premised on the “unique” nature of the game in that it contained a “story, characters, dialogue, and environment.” Certainly, games entirely lacking these qualities—for example Pong and Pac-Man—*do not meet this literary standard*. [emphasis added.] It is apparent from the *Lohan* and *Gravano* decisions that “Grand Theft Auto V” contains a detailed plot created by the game designers through which the user proceeds and acts as a predefined character. [citation omitted.] By contrast . . . in *NBA2K18* the users create the plot, storyline and completely define their character. Based on these fundamental differences, a determination that *NBA2K18* is protected fiction or satire as a matter of law is untenable.⁵⁷

The judge argued that “not every video game constitutes fiction or satire,” but this distinction was one manufactured out of thin air by the opinion and not required by the Supreme Court.⁵⁸ *Brown* held that video games are protected because they generally have a narrative, characters, or interactability, but the decision did not require a video game to have these constituent elements as a prerequisite before receiving constitutional protection.⁵⁹

B. Uniqueness of Characters

In other cases where video game companies were taken to court on Right of Publicity claims, judges focused on the transformative nature of an individual character, rather than the work as a whole.⁶⁰ This distinction is

⁵⁷ *Champion v. Take Two Interactive Software, Inc.*, 100 N.Y.S.3d 838, 847–48 (N.Y. App. Div. 2019).

⁵⁸ *Id.* at 847.

⁵⁹ See *Brown v. Ent. Merch. Assn.*, 564 U.S. 786, 795–96 (2011).

⁶⁰ See *Champion*, 100 N.Y.S.3d at 847 (holding that the use of an individual’s “secondary” nickname was not sufficient to lodge a successful right of publicity claim in a basketball video game); *Hamilton v. Speight*, 413 F. Supp. 3d 423, 433–34 (E.D. Pa. 2019) (holding that using a wrestler’s likeness in a narrative shooting game was adequately transformative to defeat a right of publicity claim). See also *Noriega v. Activision/Blizzard, Inc.*, No. BC551747, 2014 WL 5930159 (Cal. Super. Ct. Oct. 16, 2014) (holding that the use of Panamanian dictator Manuel Noriega’s likeness was permitted in a war-based video game); *E.S.S. Entm’t 2000, Inc. v. Rockstar Videos, Inc.*, 547 F.3d 1095, 1100–01 (9th Cir. 2008) (holding that a famous Los Angeles strip club could not succeed in a claim against Rockstar when a very similar-looking strip club was in the *Grand Theft Auto* video game); *Lohan v. Take-Two Interactive Software Inc.*, 31 N.Y.3d 111 (2018) (defeating a claim that Lindsey Lohan’s likeness was used in *Grand Theft Auto*); *Hamilton v. Speight*, 413 F. Supp. 3d 423; *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607 (holding that a performer could not succeed on a right of publicity claim when Sega included a similar-looking but transformed character integral to the story); *Dillinger, LLC v. Elec. Arts Inc.*, 795 F. Supp.

similar to the last section, but it focuses on the transformation of a specific video game character rather than the work as a whole. For example, a singer sued game publisher Sega in the case of *Kirby*, claiming that a character in the music video game “Space Channel 5” video game copied her likeness.⁶¹ While the game character shared familiar mannerisms as the celebrity, the court ultimately held that the use was protected by the First Amendment.⁶² The court used a “transformative test,” which examines “whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.”⁶³ In direct contrast to *Champion*, the *Kirby* court argued that the character is not required to be a satire or commentary because “[w]hether the Ulala character conveys any expressive meaning is irrelevant to a First Amendment defense.”⁶⁴ The *Kirby* court understood what the *Champion* court did not: once a work is categorically protected by the First Amendment, courts are not supposed to inquire into the work’s merit. *Kirby* was focused on the use of the character itself, rather than the sophistication of the entire work.

Other courts have conducted a character-based analysis differently. In a series of cases, courts held that the use of athletes’ likenesses in sports video games without consent was not protected by the First Amendment.⁶⁵ Using the same “transformative use” test as in *No Doubt*, the court held that the video game at issue was not protected by the First Amendment against a right of publicity claim “because it literally recreates [the plaintiff] in the very setting in which he has achieved renown.”⁶⁶ The courts held that using player likenesses was not a transformative use because the developers attempted to simulate the subjects in their natural environments, rather than creating something creative from scratch.⁶⁷ Even though the developers spent millions of dollars and countless hours on the various game animations, physics, sounds, and game elements, the *Keller* majority felt the work was not sufficiently transformative because its core purpose was to pirate and

2d 829, 835 (S.D. Ind. 2011) (holding that EA could use the “Dillinger” name on its gun in a mafia-related video game story).

⁶¹ *Kirby*, 50 Cal. Rptr. 3d at 608–09 (2006); SPACE CHANNEL 5 (Sega 1999).

⁶² *Id.* at 617–18.

⁶³ *Id.* at 615 (citing *Comedy III Prod.*, 25 Cal. Rptr. 2d at 406).

⁶⁴ *Id.* at 617.

⁶⁵ See *Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1284 (9th Cir. 2013) (holding that a video game developer could not use the likenesses of college football players without permission); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013) (holding the same as *Keller*); *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172, 1181 (9th Cir. 2015) (holding in favor of 6,000 former NFL players against EA for their inclusion in football video games).

⁶⁶ *Keller*, 724 F.3d at 1271.

⁶⁷ *Id.*

exploit the players' likenesses for financial gain.⁶⁸ Game developers would argue that creating an interactive true-to-life experience, one where a player forges their own story path in a realistic work, requires significant creative effort, but the *Keller* court found the argument unpersuasive.⁶⁹

In dissent, Judge Thomas argued that “[t]he athletic likenesses are but one of the raw materials from which the broader game is constructed. The work, considered as a whole, is primarily one of EA’s own expression. The creative and transformative elements predominate over the commercial use of likenesses.”⁷⁰ Thomas argued that the commercial value of the game arose predominantly from its core gameplay—the ability to play unique and realistic matches of college football with their favorite teams—rather than football player themselves.⁷¹ Thomas understood that works must be judged for protection as a whole, rather than piecemeal based on individual characters.⁷² This analysis accords to the protection granted to biopics and unauthorized biographies, where the creative value comes from the artist’s unique interpretation of the individual rather than a subject themselves. Thomas focused on the millions of lines of computer code the developers wrote as the predominant expression in the work, rather than the likenesses of the players.⁷³ Essentially, the majority’s reasoning distilled the game to a piece of merchandise that relied on exploiting players purely for the purpose of profit, whereas Thomas’s dissent understood the game as a complicated, work-intensive, and creative piece of art built up from scratch—one which used player likenesses as a part of the work’s foundation rather than its only marketable feature.⁷⁴

C. *What is wrong with these differentiations?*

These judge-created categories may seem commonsense at first glance, but they are problematic at several levels. The classifications treat video games differently than other mediums, violate Supreme Court precedent, and in practice are unworkable.

1. *A Violation of Brown*

The lower-court cases differentiating video games violate the Supreme Court’s precedent in *Brown*, and certainly contravene its spirit holding

⁶⁸ *Id.* at 1274.

⁶⁹ *Id.* at 1276–77.

⁷⁰ *Id.* at 1286 (Thomas, J., dissenting).

⁷¹ *Id.*

⁷² *Id.* at 1285.

⁷³ *Id.* at 1286.

⁷⁴ *Id.*

games equally worthy for protection as other mediums.⁷⁵ *Brown* did not distinguish between narrative, simulation, and simple video games; instead, the case held that video games were protected because, like other mediums including books and movies, video games *have the capacity* to communicate ideas through familiar narrative elements.⁷⁶ While many games do expertly employ narrative and other artistic features, *Brown never required* these elements as a condition for protection.⁷⁷ It makes sense; no other medium requires narrative elements as a prerequisite of protection. Nobody doubts the protection of simple photographs or abstract drawings, even if they lack literary or narrative elements. It is simply enough that paintings and writings generally use narrative features to protect the entire medium; intuiting the message of a Jackson Pollock painting is unnecessary as a precondition of First Amendment protection.

When read correctly, it is clear that many lower court judges so far have fundamentally misunderstood the Supreme Court’s rule in *Brown*.⁷⁸ The *Champion* judge, for example, argued that narrative elements—story, characters, plot, etc.—were a necessary condition for First Amendment Protection.⁷⁹ Using this imaginary rule, the judge concluded that the basketball game at issue did not meet the threshold for protection because it lacked the requisite features.⁸⁰ No other recognized medium faces such discriminatory requirements.⁸¹ The Supreme Court has recognized, for example, “the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”⁸² Yet, these works lack narrative elements like plot and dialogue.⁸³ Still, these creations are protected under the First Amendment because written and painted works are protected as a whole—including Carroll’s nonsense poem *Jabberwocky* and Pollock’s incomprehensible works—regardless of each work’s

⁷⁵ *Brown v. Ent. Merch. Assn.*, 564 U.S. 786, 790 (2011).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Champion v. Take Two Interactive Software, Inc.*, 100 N.Y.S.3d 838 (N.Y. App. Div. 2019).

⁸⁰ *Id.*

⁸¹ See Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423–81 (2014) (describing that meaningless expression and other nonsense receives First Amendment protection, and justifies why this protection is necessary).

⁸² *Hurley v. Irish-Am. Gay*, 515 U.S. 557, 569 (1995).

⁸³ See Jackson Pollock, *Blue Poles* (painting), in Kit Messham-Muir, *Here’s looking at: Blue poles by Jackson Pollock*, CONVERSATION (Dec. 9, 2015), <https://theconversation.com/heres-looking-at-blue-poles-by-jackson-pollock-51655> [<https://perma.cc/9E2M-WV7T>]; Lewis Carroll, *Jabberwocky*, POETRY FOUND (1983), <https://www.poetryfoundation.org/poems/42916/jabberwocky> [<https://perma.cc/C62M-H7PD>].

individual content.⁸⁴ The *Brown* decision reaffirmed the principle that “[u]nder our Constitution, esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”⁸⁵ Yet, these lower-court judges have repeatedly attempted to test video games using an impermissible standard before giving the works equal treatment, a prerequisite proscribed by the First Amendment.⁸⁶ These judges have failed to honor the command of *Brown*, opting instead to make up imaginary requirements to grant a game its full First Amendment protection.

2. Discriminatory Treatment

The cases I have reviewed treated video games differently than similar works of other mediums. For example, the use of athletes’ likenesses was upheld as protected under the First Amendment when used for baseball cards, an arguably commercial product, and in Fantasy Baseball, an online gambling game.⁸⁷ Both baseball cards and online fantasy games directly copy the likenesses of players in their products; they do not substantively transform the image of their subjects.⁸⁸ Similarly, a journalist still retains the copyright of their photograph if they take one of a celebrity or an athlete, even if the celebrity does not consent to the use of their likeness.⁸⁹ Some have questioned whether it is morally questionable for the paparazzi to win suits against celebrities when their unauthorized photos are used by the celebrities

⁸⁴ See generally Blocher, *supra* note 81, at 1423 (arguing that if nonsense lacks protection, it opens an untenable Pandora’s Box where the protection of artistic works relies on the comprehension and discretion of judges).

⁸⁵ *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786, 790 (2011) (citing *United States v. Playboy Enter. Grp., Inc.*, 529 U.S. 803, 818 (2000)).

⁸⁶ See *id.* (holding that video games have the same protection as other mediums).

⁸⁷ Compare *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818 (8th Cir. 2007) (permitting the use of player likenesses in an online Fantasy Baseball platform) and *Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 335 F.3d 1161 (10th Cir. 2003) (permitting the use of player likenesses on parody baseball cards); *Keller v. Elec. Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013) (denying the use of a player likenesses in an NCAA video game).

⁸⁸ See John Dudley, *BY THE NUMBERS: Fact or Fiction #3- Don’t Buy Unlicensed Cards*, CARDSHOP LIVE (Apr. 8, 2022), [thecardshop.live/2022/04/08/by-the-numbers-fact-or-fiction-3-dont-buy-unlicensed-cards](https://perma.cc/4BXP-422S) [https://perma.cc/4BXP-422S] (discussing some of the history of unlicensed baseball cards, which are those lacking the MLB trademark license, but still use the likenesses of baseball players); *Fantasy Baseball*, ESPN, <https://www.espn.com/fantasy/baseball> [https://perma.cc/XZ9X-DTBY] (allowing users to play a game based on the performance of baseball players in their real-life matches).

⁸⁹ See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (recognizing for the first time that a photographer’s copyright claim will defeat a subject’s right of publicity claim); *Maloney v. T3Media, Inc.*, 853 F.3d 1004 (9th Cir. 2017) (holding that a photographers owned the copyright and right to use the photos they took of college baseball players, even though the photos were taken without consent).

for their own use.⁹⁰ For now, however, the First Amendment affords strong protection for photographers using the likenesses of others without permission if for a newsworthy or entertainment purpose.⁹¹ Thus, in communicative mediums except video games, the First Amendment unquestionably protects the use of others' unauthorized likenesses in protected works.⁹² Despite the longstanding doctrine holding the unauthorized use of likenesses permissible in other mediums, video games thus far have received clearly disparate treatment.

Works of no other mediums must meet an expressiveness-based criteria as a prerequisite for First Amendment protection; it is intuitive that if you create a political poster, no judge is going to spend time deciding if the poster actually conveys a message before finding it deserving of First Amendment protection. Music, abstract art, and nonsense (quite literally, meaningless artistic works that have no narrative elements) are all protected by the Constitution, even when these works are not expressive.⁹³ Nobody asks whether a book needs to make sense before it gets First Amendment protection. Yet, when video games are the subject matter, judges have had no problems making aesthetic judgements. The reasoning in *Champion* was internally contradictory precisely because Judge Kahn determined Pac-Man did not qualify for First Amendment protection when it lacked cohesive narrative elements; however, nobody could credibly argue that the game's

⁹⁰ See Jamie E. Nordhaus, *Celebrities' Rights to Privacy: How Far Should the Paparazzi be Allowed to Go*, 18 REV. LITIG. 285 (1999) (arguing that celebrities should have greater privacy rights against the paparazzi, but that the First Amendment provides broad protection in public spaces); Philip Ewing, "Influencing" Copyright Law: *Re-Evaluating the Rights of Photographic Subjects in the Instagram Age*, 17 OHIO ST. TECH. L. J. 321 (2021) (arguing that celebrities should have stronger right of publicity protections against non-consensual photos taken by other people); see, e.g., Ellen Durney, *Emily Ratajowski Has Settled A History-Making Copyright Lawsuit That Was Filed Against Her After She Posted A Paparazzi Picture Of Herself On Her Instagram Story*, BUZZFEED NEWS (Apr. 14, 2022), <https://www.buzzfeednews.com/article/ellendurney/emily-ratajowski-settled-paparazzi-copyright-lawsuit> [<https://perma.cc/F375-X4L9>] (detailing a settlement paid by a model after she posted an unlicensed photo of herself taken by the paparazzi).

⁹¹ *O'Neil v. Ratajowski*, 563 F. Supp. 3d 112, 125 (S.D.N.Y. 2021) (finding that the photograph met the "extremely low" standard for originally required for a copyright, and thus Ratajowski could not mount a defense that the ownership of her own likeness prevented a photographer from licensing a photo featuring her).

⁹² See Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUSTON L. REV. 903, 904 (2003) (arguing that constitutional doctrine has clearly held that the right of publicity does not apply to prevent the use of unauthorized likenesses in noncommercial speech, "such as news, movies, and the like," but does apply in commercial advertisements and merchandise).

⁹³ Expression does not require meaning or narrative for First Amendment protection, and some of the most famous artistic works—like Jackson Pollock paintings—are *nonsense* in a literal sense. See Joseph Blocher, *supra* note 81 at 1423–81; Alan Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381 (2015); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *Hurley v. Irish-Am. Gay*, 515 U.S. 557 (1995).

music or visuals—if isolated and examined standing alone—would lose their protection for the same reason.⁹⁴ *Champion*'s line of reasoning fails to square why a narrative analysis is required for the gaming medium, but no other.⁹⁵

Consider also the use of individual likenesses in books and film. The central purpose of biographies and biopics, for example, is to create authentic recreations of real-life people and their stories. Much like a simulation game, these works intend to recreate the experience of other individuals in a way that is interesting, novel, and insightful—although the authenticity and dramatization of such works can certainly vary.⁹⁶ “The Hurt Locker,” for example, was a film that depicted a deployed soldier in Iraq as he regularly defused bombs.⁹⁷ Sarver, the subject of the movie, sued the movie studio, arguing that he did not consent to the use of his likeness.⁹⁸ The court dispensed of this claim quickly under California’s anti-SLAPP law, arguing that the First Amendment “safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.”⁹⁹ Compare the majority’s analysis in *Sarver* to Judge Thomas’s dissent in *Keller*, where he made a parallel argument to justify the use of football players’ likenesses in a video game.¹⁰⁰ The majority in *Keller* ignored the argument used for other First Amendment mediums; instead, the majority held that the game at issue did not constitute a new creation, a clear departure from the way other mediums would be treated under the same circumstances.¹⁰¹

The plaintiff in *Keller* appeared to have won, in significant part, because he argued that his likeness was used for commercial gain.¹⁰² However, speech does not get less protection when it is sold for a profit. This is intuitive when we think about newspapers and books, and the Supreme Court said as

⁹⁴ *Champion v. Take Two Interactive Software, Inc.*, 100 N.Y.S.3d 838 (N.Y. App. Div. 2019).

⁹⁵ *Id.*

⁹⁶ *See, e.g.*, *THE SOCIAL NETWORK* (Columbia Pictures 2010) (telling the unauthorized story of Facebook’s origins in an unflattering way); *BEN MEZRICH, ACCIDENTAL BILLIONAIRES: THE FOUNDING OF FACEBOOK* (2009) (telling the same unauthorized and unflattering story of Facebook that the movie was based on).

⁹⁷ *See THE HURT LOCKER* (Voltage Pictures 2008); *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016).

⁹⁸ *Sarver*, 813 F.3d at 895–97.

⁹⁹ *Id.* at 905. *See also* *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001) (explaining that California’s anti-SLAPP statute was “enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation,” like those at issue in *Sarver*.)

¹⁰⁰ *Keller v. Elec. Arts Inc.*, 724 F.3d 1286 (9th Cir. 2013) (Thomas, J., Dissenting).

¹⁰¹ *Keller*, 724 F.3d at 1276–77.

¹⁰² *Id.* at 905.

much in *Burstyn*.¹⁰³ Unauthorized biographies are unquestionably protected by the First Amendment, even if the subject of the book did not approve of their likeness's use and the book is sold for profit.¹⁰⁴ Just imagine if former President Trump had veto power over who could write a biography of his life; the *Keller* line of cases creates such a power within video games.

Commercial speech is a distinct category—speech proposing a commercial transaction—and receives reduced First Amendment protection.¹⁰⁵ As a result, Right of Publicity claims are more likely to succeed in commercial speech cases because a plaintiff's likeness is exploited to sell a product.¹⁰⁶ However, video games—like a movie or a book—are the product. The creation of a video game is not itself commercial speech; it is a protected work just like a book or movie. In the analysis of the video game decisions so far, judges have failed to differentiate between profitable products that *consist* of protected speech and the commercial speech used to actually sell products.¹⁰⁷

While the First Amendment balances the rights of speech with the rights of a celebrity when commercial speech is implicated (e.g., advertisements and merchandise), protected works should win without issue against publicity-related claims *even when such an outcome seems unfair*.¹⁰⁸ A simple way to understand this dichotomy is again with the use of player likenesses in video games. Frequently, the a game publisher will pay an

¹⁰³ "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. 11Link to the text of the note. We fail to see why operation for profit should have any different effect in the case of motion pictures." Joseph Burstyn v. Wilson, 343 U.S. 495, 501–02 (1952).

¹⁰⁴ David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537 (2010) (describing how copyright holders have begun to misuse copyright law to take down unauthorized works because the right of publicity and privacy protections have consistently lost out against the First Amendment); Teri N. Hollander, *Enjoining Unauthorized Biographies and Docudramas*, 16 LOY. L.A. END. L.J. 133 (1995) (same).

¹⁰⁵ See *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–72 (holding that it does not violate the First Amendment to regulate commercial speech for deception and falsity); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (establishing a three-part test to determine when government regulation of commercial speech is permitted).

¹⁰⁶ See, e.g., Volokh, *supra* note 92, at 904.

¹⁰⁷ See Ford & Liebler, *supra* note 29, at 1 (describing the confusion among lower-court judges separating video games featuring real-life people from merchandise that is sold based on pirating individuals' likenesses).

¹⁰⁸ See *Rosa and Raymond Parks Inst. For Self Dev. v. Target Corp.*, 812 F.3d 724 (11th Cir. 2016) (grappling with the important considerations of public discourse against commercial speech). In the case, Target sold a variety of products that featured Rosa Parks, including a plaque that included a picture of Parks. *Id.* Despite a lawsuit claiming that Target pirated Parks's likeness, the retailer won the case because the works were protected, despite the fact that their commercial viability centered around Parks's fame.

athlete to put them the game's marketing in order to sell a video game, including on the plastic case of a game.¹⁰⁹ That way, a potential shopper may buy a game after seeing a prominent player on the display case. The use of a player's likeness on the marketing for a product is fundamentally different than the use of a likeness within the game itself. One sells a protected work, the other *is* the protected work.

While the opinions in the video game athlete cases concluded that the publishers were pirating the likenesses of football players to sell a profitable product; as we have seen, the profitableness of a product is not supposed to have a bearing on First Amendment protection.¹¹⁰

Nor does a work receive less protection if it's value increases with the inclusion of another's likeness.¹¹¹ Judge Ambro made precisely this point in his *Hart* dissent, where he distinguished between principles of fairness and those of the First Amendment:¹¹²

Were this case viewed strictly on the public's perception of fairness, I have no doubt Hart's position would prevail. . . . The protection afforded by the First Amendment to those who weave celebrities into their creative works and sell those works for profit applies equally to video games. Thus EA's use of real-life likenesses as "characters" in its NCAA Football video game should be as protected as portrayals (fictional or nonfictional) of individuals in movies and books. . . . applying the Transformative Use Test in the manner done by my colleagues creates a medium-specific metric that provides less protection to video games than other expressive works. . . . [T]he Supreme Court's decision in *Brown* forecloses just such a distinction.¹¹³

Judge Ambro understood that the majority in *Hart* was making the decision it felt was *fairer*, but the result was to give video games a lower

¹⁰⁹ See, e.g., Rory Brigstock-Barron, *Lionel Messi's Four-Year Association with EA Sports Set to End with Barcelona Star's Contract for FIFA Games Expiring this Year*, DAILY MAIL (Jan. 5, 2016), <https://www.dailymail.co.uk/sport/football/article-3386307/Lionel-Messi-s-four-year-association-EA-Sports-set-end-Barcelona-star-s-contract-FIFA-games-expire-year.html> [<https://perma.cc/W786-7QYY>] (describing Lionel Messi's 4-year contract to appear on the marketing for FIFA games).

¹¹⁰ See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (2013); *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (2015) (holding in favor of 6,000 former NFL players against EA for their inclusion in football video games).

¹¹¹ "My colleagues' understanding of the Transformative Use Test underplays the creative elements of NCAA Football by equating its inclusion of realistic player likenesses to increase profits with the wrongful appropriation of Hart's commercial value. This approach is at odds with the First Amendment protection afforded to expressive works incorporating real-life figures. That protection does not depend on whether the characters are depicted realistically or whether their inclusion increases profits. See Guglielmi, 603 P.2d at 460-62 (Bird, C.J., concurring) (concluding that acceptance of this argument would chill free expression and mean "the creation of historical novels and other works inspired by actual events and people would be off limits to the fictional author")." *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 174 (3d Cir. 2013) (Ambro, J., dissenting).

¹¹² *Id.* at 171.

¹¹³ *Id.* at 171-74.

level of protection usually reserved for commercial speech.¹¹⁴ As a result, Ambro argued that video games were treated in a discriminatory manner compared to other forms of expression; nobody would bat an eyelash if a movie studio made millions of dollars on a biopic featuring the life story of a football player.¹¹⁵ This medium-based inconsistency is aesthetic-based discrimination and impermissible under the First Amendment. In this sense, no other protected medium is routinely scrutinized as harshly as video games.

3. *Distinctions Are Impractical and Untenable*

Even if permitted under the First Amendment, these judicial distinctions are untenable to maintain in practice. Compare the following images, for example:



Tekhan World Cup (1986).¹¹⁶

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ TEHKAN WORLD CUP (Tecmo 1986); Jaime Parada Vila, Tekhan World Cup Arcade (screenshot), in *Los Videojuegos del Mundial*, VIDEOSHOCK (June 13, 2014), <https://www.videoshock.es/articulos/2014/06/los-videojuegos-del-mundial> [https://perma.cc/Q5RB-E9VD].



FIFA 22 (2021).¹¹⁷

The judges in opinions above suggest that unprotected games are those that simulate real life elements and add little to transform a work.¹¹⁸ These simulation games theoretically take real-life individuals and copy them into a game exactly as they would exist in real life. Compare these two games above released 25 years apart from one another. Which would be closest to meeting this transformative requirement?

Perhaps one could argue that the newest game gets the least amount of protection. After all, the game has the highest fidelity to the subject matter. The developers copied a player's jersey, facial details, and other minute details. Arguably little thought went into creating absolutely new elements. By contrast, the oldest game has the smallest amount of detail. Most of the work done on the 1986 game went into the gameplay itself rather than the player designs, and today the simple game could take a novice game developer little time to create. The simple game looks much different than one we would see on television. Does that mean that the newest game gets the least protection, according to these judges, because it has the fewest creative elements?

Alternatively, one could argue that newer games merit the most protection. The developers of the newest game put in the largest amount of time and money working on the player designs and animations. The developers of the new game likely wrote code thousands of times longer than

¹¹⁷ FIFA 22 (EA 2021); Chris Penwell, *Fifa 22 (screenshot)*, in *FIFA 22's introduction is a football fan's fantasy in game form*, GAMEPUR (Sep. 24, 2021).

¹¹⁸ See, e.g., *Champion v. Take Two Interactive Software, Inc.*, 100 N.Y.S.3d 838 (N.Y. App. Div. 2019) (suggesting that a simulation sports game is not sufficiently transformative).

in the old game, a colossal creative and technical feat.¹¹⁹ Whereas the old game had simple avatars for the players, the newest game did meticulous work in the newest game to transform real-life players into an animated form. If anything, the developers put the most physical labor and creativity into making the newest animations compared to the oldest one. So, would this mean that the newest game has the most novel and creative elements?

Time is another factor is important to consider. As technology progresses, game developers have more sophisticated tools at their disposal to add creative and realistic elements to their games. The first game would have been the most realistic product available on the market in 1986. Nowadays, the game looks like it was played in the stone age. Alternatively, the design might look novel and creative. Many developers today make a deliberate artistic choice to develop games that look older or “retro.”¹²⁰ Does that mean a developer’s creative choice to transform players into a low-fidelity format makes them more likely to get First Amendment protection because of a deliberate art style change? To receive protection, would a modern game simply need to make its graphics look worse to distance itself from accurately replicating the real-life thing?

Whatever principle a judge adopts would be malleable because of technological changes. A game that appears to be a realistic simulation today may seem like an interesting artistic interpretation in a few decades. A game’s look and gameplay features are dependent on the technology available at the time. If we are to make aesthetic judgements to determine a video game’s First Amendment protection, these judgements will themselves become outdated as technology evolves.

Suppose there were an objective line you could draw between simulation game and a narrative game—how easily would it be for a developer to add minimal content as a loophole to circumvent a classification as a simulation game? Ultimately, adding “narrative” features would be relatively easy to do. A few years ago, the FIFA soccer video games added

¹¹⁹ The most hyperrealist games today cost exponentially more to produce than before, even though advanced technology has continued to get cheaper. Jason Schreier, *Why Video Games Cost So Much To Make*, KOTAKU (Sep. 18, 2017), <https://kotaku.com/why-video-games-cost-so-much-to-make-1818508211> [<https://perma.cc/HN3X-UH6L>].

¹²⁰ Because the games with the highest production values are so expensive to create, many developers have decided to use simplistic, unique, or intentionally “retro” art styles to sidestep increasing development costs. See JESPER JUUL, *HANDMADE PIXELS: INDEPENDENT VIDEO GAMES AND THE QUEST FOR AUTHENTICITY* (2019) (explaining the way in which independent game developers use experimental design styles in different ways as a way to both signal authenticity, but also to circumvent expensive design requirements). Today, creating a game that looks like Tehkan World Cup would likely be seen as a *deliberate and artistic design choice* to make the game look older, whereas in 1986 the game was considered one of the most realistic soccer games you could play.

in a story mode for the first time.¹²¹ Part of the game existed as a simulation soccer game like it always had. However, the developers added in a 10-hour narrative mode that chronicled a player's rise from a young player to a soccer star. With this mode, the developers transformed a solely simulation-based game into a narrative-based game with new characters and dialogue. If there is a line differentiating a narrative and simulation video game, developers will simply hire a writer to add any requisite narrative elements to cross the necessary threshold.

4. *Chilling Speech and Ambiguity*

Ambiguous standards also chill otherwise-protected speech. The Supreme Court has repeatedly affirmed the principle that the First Amendment must allow for “breathing space” in order to reduce the likelihood that individuals will self-censor.¹²² However, such amorphous aesthetic standards would contravene this principle, as it would be difficult for a game developer to differentiate the line between a protected and unprotected video game. For example, in *Hart* the defendant argues that the football characters are transformed because players can alter their “hair styles, faces, accessories” and other aesthetic elements.¹²³ The court held that these adjustments are not sufficient to avoid liability because they still “maintain the avatar’s resemblance” to the plaintiffs.¹²⁴ Compare that to *Winter*—an earlier case cited favorably in *Hart*—where the plaintiffs were still clearly identifiable but transformed into “worm-like creatures.”¹²⁵ Somewhere between altered hairstyles and two-inch invertebrates, the court makes an aesthetic judgement to decide that the character is adequately transformed for full protection. For game developers, the line between these two legal differences is difficult to understand.

Complicated First Amendment doctrine can chill protected speech, as game developers lack a clear line to understand where their creation is protected and where it is at risk of liability. In the case of football video games, the chilled-speech phenomenon has already occurred. After the *Davis* and *Hart* decisions, EA stopped releasing its NCAA Football video games

¹²¹ Edgar Alvarez, *FIFA 18’s Story Mode Has Become the Franchise’s Best Feature*, ENGADGET (Sept. 21, 2017), <https://www.engadget.com/2017-09-21-fifa-18-review.html> [<https://perma.cc/229G-3RL4>].

¹²² “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” Nat’l Ass’n for Advancement of Colored People v. Button, 371 U.S. 415, 433 (1963). See also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (arguing for a high standard for liable—especially within advertisements for a newspaper—because holding otherwise would substantially chill protected speech, particularly on the civil rights movement).

¹²³ *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 168 (3d Cir. 2013).

¹²⁴ *Id.*

¹²⁵ *Winter v. DC Comics*, 69 P.3d 473, 476 (2003).

entirely.¹²⁶ Even if EA was willing to pay the football players to use their likenesses, it would still be impossible to create the game. At the time, the NCAA banned players from signing Name, Image, and Likeness (NIL) deals.¹²⁷ As a result, there was no way for EA to license the rights to include these players in its annual college football game even if it were willing to pay. These lower-court cases actually—not just theoretically—chilled otherwise-protected speech.

No matter which line or standard were drawn to differentiate between different video games, the arbiter would ultimately have to make judgements based off a game's aesthetics. Even if such a line were easy to create and judge, game developers would change their works to meet whatever burden set by the courts. No other medium is required to meet a narrative standard because courts understand that setting aesthetic standards would be folly.¹²⁸ Yet, judges insist such judgements are practical and constitutionally permissible when applied to video games.¹²⁹ These differentiations are impractical on their face, antithetical to First Amendment principles, and certainly inconsistent with the clear rule in *Brown*.¹³⁰

III. DEFINING VIDEO GAMES & JUSTIFYING FIRST AMENDMENT PROTECTION

The *Brown* decision unfortunately lacked two significant features that would have made the opinion more thoughtful and its rule clearer to lower courts.¹³¹ First, other than providing a parallel to other protected mediums, *Brown* did not provide a significant basis or rationale to justify why the video game medium warrants protection under First Amendment theories or interests.¹³² Second, the Court did not provide a definition for a video game;

¹²⁶ Kevin Sweeny, *Why Did EA Sports Stop Making NCAA Football Video Games?*, SPORTS ILLUSTRATED (Feb. 2, 2021), <https://www.si.com/college/2021/02/02/ncaa-football-ea-sports-stopped-making-games> [https://perma.cc/GFK3-9RCD].

¹²⁷ See Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (finding it a violation of antitrust law for the NCAA to prevent student athletes from signing NIL deals, which was the rule of the organization for decades).

¹²⁸ See, e.g., Hurley v. Irish-Am. Gay, 515 U.S. 557, 569 (1995) (holding that a parade constitutes protected speech, as do other works that are not clearly expressive or clearly meaningful).

¹²⁹ See, e.g., Champion v. Take Two Interactive Software, Inc., 100 N.Y.S.3d 838 (N.Y. App. Div. 2019) (attempting to make a distinction between games that have creative elements and those that are simply copies of real-life phenomena).

¹³⁰ See *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 794–97 (2011) (holding the games are protected like other mediums of expression, without any special carveout or exception to this rule, and striking down the law here because violent works of other mediums cannot be regulated in the way done by California to games).

¹³¹ See *Brown*, 564 U.S. at 786.

¹³² *Id.* at 790.

simply holding that they are protected as a category.¹³³ This omission opens a significant question for lower courts: how do you know when a certain work is a video game, and thus protected, in the first place?

In this Part, I provide both of these missing pieces. I first lay out why video games advance the interests of the three important First Amendment theories identified by scholars and courts. Hopefully, this section gives the grounding to justify video game protection for those that found the Court's reasoning unconvincing. Next, I provide a definition for video games that distills the medium's primary identifying factors down in a way that makes it clear for judges deciding relevant cases in the future.

A. First Amendment Theories

Courts and scholars have formulated three primary theories to justify and define the purpose of the First Amendment's guarantee to free speech. These theories are the search for truth, democratic discourse, and personal autonomy.¹³⁴ Academics and judges employ these theories to explain why the First Amendment protects traditionally accepted mediums. In the *Brown* decision, however, the Court did little to justify First Amendment protection of video games based on any First Amendment theories.¹³⁵ Instead, the Court simply analogized video games to other protected mediums—including movies and books—arguing that video games both share similar characteristics with other mediums and also have unique elements of their own.¹³⁶

This reasoning is shaky because it does little to justify protection for the video game medium in its own right. As a result, some judges in the previous section interpreted video game protection as ancillary to other established media, only protecting video games insofar as they are related to established mediums like movies or written scripts.¹³⁷ In this section, I show why the game medium must be protected as its own unique medium under the First Amendment. The section summarizes each of the important First Amendment theories and survey whether they necessitate the protection of the video game medium. In doing so, I hope to provide justification for uniform medium-wide protection that was lacking in the *Brown* opinion.

¹³³ *Id.*

¹³⁴ *See, e.g.*, Alexander Meiklejohn, *The First Amendment Is an Absolute*, SUP. CT. REV. 245 (1961).

¹³⁵ *Brown*, 564 U.S. at 786–99.

¹³⁶ *Id.* at 790.

¹³⁷ *See, e.g.*, *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47 (2006) (holding that the right of publicity claim would lose because the work at issue completely transformed the character at issue and made it integral to the central story).

1. *Democracy*

Free speech is essential for self-government, and numerous Supreme Court cases have recognized this important interest in deciding First Amendment cases.¹³⁸ Meiklejohn argues that voting is merely the final step in the decisionmaking process that citizens embark on in a democracy.¹³⁹ Before a ballot is cast, individuals must understand the important issues that face the nation, judge current leaders on the ability to address those issues, and—if necessary—choose new leaders to address important problems.¹⁴⁰ Essentially, the First Amendment protects the speech necessary for the citizenry to discuss and ultimately make decisions in a democracy.

While initially it may seem that this free speech interest solely protects only explicitly political speech, a broader array of speech protection is required for self-government. Artistic, philosophical, and scientific speech enhance our decisionmaking processes. Meiklejohn argued that the arts, for example, include communication “from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.”¹⁴¹ Like more traditional political speech, art can also portray a viewpoint or new information. In a way traditional political communication may not, art has the capacity to evoke an individual’s empathy.¹⁴²

Individuals struggle to empathize with others in many democracies, especially those with different political views and life circumstances.¹⁴³ The lack of empathy, experts argue, has perpetuated tribalism and gridlock, grinding democracy to a near halt and motivating some voters to cast ballots

¹³⁸ See, e.g., *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (striking down as unconstitutional an ordinance requiring individuals to first notify city officials before canvassing because it imperiled free democratic interests); *Watchtower Bible & Tract Soc’y of New York, Inc., et. al. v. Village of Stratton et al.*, 536 U.S. 150 (2002) (holding that door-to-door canvassing to be a fundamental part of American democracy and its political history).

¹³⁹ See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

¹⁴⁰ *Id.* at 255.

¹⁴¹ *Id.* at 256.

¹⁴² See, e.g., Jay Greene et al., *The Educational Value of Field Trips*, EDU. NEXT (Sept. 16, 2013), <https://www.educationnext.org/the-educational-value-of-field-trips/> [<https://perma.cc/46Q6-C5NY>] (finding in a large-scale study that field trips to art museums increases empathy, critical thinking, and tolerance).

¹⁴³ Experts define empathy as “perspective taking” or as “the ability to see and entertain as conditionally appropriate, as conditionally appropriate, connections between intentions, circumstances.” Kaya Yilmaz, *Historical Empathy and Its Implications for Classroom Practices in Schools*, 40 HIST. TCHR. 331, 331–37 (2007).

See Peter J. Lee & Rosalyn Ashby, *Empathy, Perspective Taking, and Rational Understanding*, in HISTORICAL EMPATHY AND PERSPECTIVE TAKING IN THE SOCIAL STUDIES, (O. L. Davis, et al. eds., 2001); Keith C. Barton, *Did the Evil Just Run Out of Justice? Historical Perspective Taking Among Elementary Students* (paper presented at the annual meeting of the Am. Educ. Rsch Ass’n, New York, 1996).

purely based on a hatred of the other party.¹⁴⁴ Interestingly enough, a new study showed that those most polarized actually *do* have a significant amount of empathy, it is just directed at members of their own group identity rather than the public at large.¹⁴⁵ These empathetic individuals are extremely cognizant of in-group harms, but these feelings are fueled by negative feelings toward the outgroup.¹⁴⁶ As a result, empathy is not alone sufficient to heal democracy's polarization, but is a necessary condition. The problem is not necessarily that empathy is nonexistent in democratic societies like America, but that it must be harnessed to direct empathy between opposing groups.

Given our democracy's challenges with empathy, it is more important than ever that the First Amendment protects forms of communication that enhance a society's intergroup empathy. Fiction authors frequently argue that their works enhance empathy, and studies have confirmed that art has the unique ability to allow a viewer to empathize with a work.¹⁴⁷ For example,

¹⁴⁴ Hanna Rosin, *The End of Empathy*, NPR (Apr. 15, 2019), <https://www.npr.org/2019/04/15/712249664/the-end-of-empathy> [<https://perma.cc/9M8N-UPC6>]; Tom Dixon, *Here's how we solve the global crisis of tribalism and democratic decay*, WORLD ECON. F. (Jan. 9, 2019), <https://www.weforum.org/agenda/2019/01/can-globalization-tackle-tribalism-and-democratic-decay> [<https://perma.cc/U5R4-5HLG>]; *Partisan Antipathy: More Intense, More Personal*, PEW RSCH. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal> [<https://perma.cc/6ELF-FF4N>]; *Mood of the Nation Poll examines empathy, or lack thereof, between parties*, PENNSTATE (Dec. 6, 2018), <https://www.psu.edu/news/research/story/mood-nation-poll-examines-empathy-or-lack-thereof-between-parties> [<https://perma.cc/SS7Q-CQZP>] (finding that Americans find those of opposite parties to be less empathetic, less patriotic, and morally corrupt); Alan Abramowitz & Steven Webster, *Negative Partisanship: Why Americans Dislike Parties But Behave Like Rabid Partisans*, 39 ADVANCES POL. PSYCH. 119 (2018) (finding that most individuals make their voting choice based on negative partisanship—strong disagreement with the opposite party—rather than positive feelings about their own); Thomas Edsall, *What Motivates Voters More Than Loyalty? Loathing*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/opinion/negative-partisanship-democrats-republicans.html> [<https://perma.cc/RV3Z-ZFWV>]. See also Lee Drutman, *How Hatred Came To Dominate American Politics*, FIVETHIRTYEIGHT (Oct. 5, 2020), <https://fivethirtyeight.com/features/how-hatred-negative-partisanship-came-to-dominate-american-politics> [<https://perma.cc/28RA-72DA>]; Shanto Iyengar & Masha Krupenkin, *The Strengthening of Partisan Affect*, 39 POL. PSYCH. 201 (2019).

¹⁴⁵ Elizabeth Simas et al., *How Empathic Concern Fuels Political Polarization*, 114 AM. POL. SCI. REV. 258 (Oct. 31, 2019).

¹⁴⁶ *Id.*

¹⁴⁷ Barbara Kingsolver argues, for example, that fiction “takes you somewhere and asks you to look through the eyes of another person, to live another life. Literature sucks you into another psyche. So the creation of empathy necessarily influences how you’ll behave to other people. How can that not affect you politically?” Maya Jaggi, *A life in writing: Barbara Kingsolver*, THE GUARDIAN (June 11, 2010), <https://www.theguardian.com/books/2010/jun/12/life-in-writing-barbara-kingsolver> [<https://perma.cc/76SH-AJC9>]. See Elivs Metchell, *Noah Hawley: ‘Anthem,’ KCRW* (Jan. 11, 2022) (calling fiction an “empathy delivery device”), <https://www.kcrw.com/culture/shows/the-treatment/noah-hawley-anthem> [<https://perma.cc/L9H5-L6ZQ>]; Matt Cooper, *Nathan Harris and ‘The Sweetness of Water,’* UNIV. OR. (Jan. 19, 2022), <https://around.uoregon.edu/content/nathan-harris-and-sweetness-water> [<https://perma.cc/F89B-P6WV>].

one series of experiments found that fiction significantly improved a reader's ability to empathize with another's mental state.¹⁴⁸ Another study found that medical students that invested time in the arts turned out to have better empathy, emotional intelligence, and wisdom as doctors.¹⁴⁹ Given art's propensity to spur empathy, it can be used in a political way to bridge divides, or at the very least encourage a viewer to better understand the experiences and viewpoints of others.

As *Brown* notes, video games have their own unique elements, but the opinion did little to describe what these elements are or how they advance First Amendment principles.¹⁵⁰ Unique to video games is interactivity, which is particularly effective at heightening a player's capacity for empathy.¹⁵¹ Take *Until Dawn*, for example, a video game in the horror genre.¹⁵² The game features eight characters, any of which can survive or die throughout the game based on a player's in-game choices. In movies and books, the reader very rarely has agency to change the outcome in the piece of media. In *Until Dawn*, however, every outcome—either positive or negative—can be traced back to the player, who actively participates in the story's unraveling. The video game medium can hold individuals accountable for their choices in a way no other medium can, in this case tying the survival or death of characters to a player's actions.

At first, it may seem like this fiction game is far from the world of politics. However, one's political activity has an impact on others through the policies their government adopts. *Until Dawn* empowers a player sees how decisions can have unintended and potentially negative consequences down the line. If a player feels the choices they make are powerful—that they have a significant impact on the way the world is shaped—perhaps they will feel a similar sense of responsibility and power in their own lives. When a player builds a connection with an in-game character that goes on to perish due to faulty decisionmaking, it could provide an empathetic perspective to

¹⁴⁸ David Comer Kidd & Emanuele Castano, *Reading Literary Fiction Improves Theory of Mind*, 342 SCI. 377 (2013).

¹⁴⁹ Casey Lesser, *Study Finds Med Students Who Make Time for Art Have More Empathy*, ARTSY (Jan 30, 2018), <https://www.artsy.net/article/artsy-editorial-med-students-time-art-empathy> [<https://perma.cc/7ZB7-LPET>].

¹⁵⁰ "Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 790 (2011).

¹⁵¹ See, e.g., Osswald Greitemeyer et al., *Playing Prosocial Video Games Increases Empathy and Decreases Schadenfreude*, 10 EMOTION 796, 796–802 (2010) (finding that prosocial video games increases empathy and reduces pleasure at another's misfortune).

¹⁵² UNTIL DAWN (Sony Computer Entertainment 2015).

the player on the plight of others. At the very least, it could provide the developer's viewpoint on the way that certain decisions affect others.

Another famous game franchise is *Mass Effect*, a series of action games that takes place in outer space and entrusts the player with hundreds of choices.¹⁵³ Certain large choices can determine whether a civilization lives or dies, whereas another decision may determine the player's in-game romantic partner. Notably, the decisions and dialogue choices a player makes in the first *Mass Effect* game carry over to the second and third game in the series, a saga that spans 80 hours of gameplay. The game's story explores choices beyond a bipolar good and evil, exploring survival, selfishness, and utilitarianism. Whereas works of other mediums have a defined plot, video games enable the player to be more than a viewer, but an active participant or even storyteller. As the primary agent, players are accountable for what transpires.

In *Mass Effect*, it is clear how the plot can be understood in a political manner through its many different species, nations, and conflicts. Even if set in space, the story in *Mass Effect* demonstrates through a 60-hour interactive saga the way the developers think the world works. If the game provides a sandbox to test universal human elements—diplomacy, romance, violence, hierarchy, etc.—a player may end up understanding these issues in a new way after an extensive interaction with the work.

Another game—*Before Your Eyes*—is unique because it is played by physically blinking. When a player blinks, it the game's story advances using motion-sensing technology. The core premise explores the way in which a person's life frequently flashes before their eyes in a way they cannot even control. In a literal sense, the player is totally in control. After all, the game will not advance until the player physically blinks. On the other hand, the game is out of the player's control because everyone has to blink at some point. You may delay the inevitable by bringing your eyes to water, but ultimately the story—a tribute to human life—moves on no matter how hard a player tries to keep it from progressing. *Before Your Eyes* shares the empathetic interaction of other video games, but it does so with a gameplay mechanic that is unique to the video game medium. The game literally puts players in the eyes of the main character, allowing them to empathize and share the storyteller's perspective in an unparalleled manner.

Across these three games is just a sampling of the diversity of experiences offered in today's video games, and research confirms that video games—like other fiction—offers these empathetic effects.¹⁵⁴ Due to the

¹⁵³ MASS EFFECT (EA 2007); MASS EFFECT 2 (EA 2010); MASS EFFECT 3 (EA 2012).

¹⁵⁴ See Osswald Greitemeyer et al., *supra* note 151 (finding that prosocial video games increases empathy and reduces pleasure at another's misfortune); Andrew Chen et al., *Teaching Empathy: the*

medium's immersion, storytelling, and choice, video games have unique features that *Brown* failed to fully recognize. The video game medium stands on its own, not merely one that combines elements from other formats. In this way, video games have a unique role in safeguarding democracy through their ability to evoke empathy.

2. *Truth-Seeking*

The First Amendment also protects the principle of “truth seeking,” commonly understood as the “marketplace of ideas” first enunciated by Justice Holmes in *Abrams*.¹⁵⁵ This principle is so strong that the First Amendment even provides broad protection to false statements of fact in public discourse.¹⁵⁶ Theoretically, in the battle between truth and untruth, truth will win out; it is not the government's role to dictate society's truths.¹⁵⁷ In *Alvarez*, Justice Kennedy reaffirmed this principle by writing that “[t]he remedy for speech that is false [is] speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.”¹⁵⁸

The video game medium fulfills this purpose through several means. Video games provide a playground within which a gamer can experiment. The developers encode certain rules to the in-game environment, and you interact within the limits of these rules. At the most basic, you can imagine encoding a physics model. Developers can create a baseball video game using real-life calculations, allowing players to experiment with the interaction between the angle of the incoming baseball, its speed, the angle of the bat, and the collision between the two objects.¹⁵⁹ A user could test whether players run fast enough to catch a ball, or whether the batter will

Implementation of a Video Game into a Psychiatry Clerkship Curriculum, 42 ACAD. PSYCH. 362 (2018) (finding that medical students had increased empathy after playing the video game “The Dragon, Cancer,” and that this method of empathy training was preferable among medical students compared to other mediums); Jeffrey Ho & Ryan Ng, *Perspective-Taking of Non-Player Characters in Prosocial Virtual Reality Games: Effects on Closeness, Empathy, and Game Immersion*, 41 BEHAV. & INFO. TECH. 1185 (2020).

¹⁵⁵ This principle was famously enunciated by Justice Holmes in *Abrams v. US*. “The best test of truth is the power of the thought to get itself accepted in the competition of the market.” 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁵⁶ See e.g., *U.S. v. Alvarez*, 567 U.S. 709 (2012) (holding the Stolen Valor Act unconstitutional because there is a First Amendment right to lie about winning the Medal of Honor); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (protecting the right of an advocacy organization to make false statements of fact during a political campaign).

¹⁵⁷ See, e.g., *Alvarez*, 567 U.S. at 709; see also *Susan B. Anthony List*, 573 U.S. at 149.

¹⁵⁸ *Alvarez*, 567 U.S. at 727.

¹⁵⁹ See Dreamcode99, *MLB The Show & Pro Spirits Baseball — A Hitting Simulation Comparison*, MEDIUM (Apr. 24, 2021), <https://medium.com/dreamcodegames/mlb-the-show-pro-spirits-baseball-a-hitting-simulation-comparison-161ec6e81e31> [<https://perma.cc/N3AJ-QXUL>] (analyzing the technical and physical accuracy of various baseball games on the market today).

have enough time to round the bases before the baseball is intercepted. Another video game could create an environment to test explosions that would be expensive, dangerous, or impractical to do so in real life.¹⁶⁰ In a strategy game, a player can experiment with large-scale wartime strategy before carrying it out.¹⁶¹ At its most basic, a video game creates the ability to experiment with real-world phenomenon in a way that might be impossible in real life.¹⁶²

In this way, a developer gives the player a chance to test truth by creating a sandbox that recreates real-life phenomena. In each space there is competition for fidelity and, when there are several games available within the same genre, users can choose to play those that they believe best replicate real-life phenomena. Recall the flight simulator from earlier, for example.¹⁶³ Several game developers have created competing aviation simulators, giving consumers the choice to decide which experience they believe is most authentic.¹⁶⁴ Under the marketplace of ideas theory—where the truth wins out—consumers looking for the most realistic simulator would power the best simulator to success.

Video games can accomplish this truth-seeking mission in abstract ways too. By creating an in-game universe, developers can help players discover truths both personally and universally. For example, just as there are reality TV shows where people date, there is a genre of dating video games.¹⁶⁵ By playing such a game, an individual may figure out personal truths about themselves: the type of partner they find compatible, their sexuality, or their dating weaknesses. Or, a developer might use a game as a vehicle to create a self-aware work that scrutinizes the genre itself.¹⁶⁶

The way in which a game responds to a player's choices can reveal personal truths about players themselves or society generally. Even an abstract question like “are people inherently good” could be tested in a game environment. For example, *Infamous* is a game that allows players to choose

¹⁶⁰ See, e.g., *KERBAL SPACE PROGRAM* (Private Division 2015) (allowing players to create and test various spaceships and rockets using real-life physical phenomena).

¹⁶¹ See, e.g., *EUROPA UNIVERSALIS IV* (Paradox Interactive 2013); *HEARTS OF IRON IV* (Paradox Interactive 2016).

¹⁶² See, e.g., *ULTIMATE EPIC BATTLE SIMULATOR 2* (Brilliant Game Studios 2022) (simulating massive battle simulations between potentially tens of thousands of soldiers of different timelines, mythologies, and other player-made characters).

¹⁶³ *MICROSOFT FLIGHT SIMULATOR* (Microsoft 2020).

¹⁶⁴ See also *X-PLANE 12* (Laminar Research 2022); *FLYINSIDE* (Flyinside Inc. 2018).

¹⁶⁵ See, e.g., *MONSTER PROM* (Three Awesome Guys 2018); *BOYFRIEND DUNGEON* (Kitfox Games 2021) (allowing players to date an in-game partner while fighting through dungeons together).

¹⁶⁶ See, e.g., *DOKI DOKI LITERATURE CLUB* (Team Salvato 2017) (providing a commentary on dating games as a whole by breaking the fourth wall and making its characters aware that they exist within a dating game).

whether they play as a benevolent superhero or an evil supervillain.¹⁶⁷ Ultimately, an overwhelming majority of 85 percent of players—much more than I would have guessed—chose to play the path of good over evil.¹⁶⁸ Despite the fact that players could choose the evil path with only virtual consequences, most people wanted to be superheroes, not supervillains.¹⁶⁹ In this way, a video game could test an idea that would be very difficult to do in a laboratory setting and help reveal society’s deeper truths.

3. *Autonomy*

Finally, free speech protects the important interest of personal autonomy and self-expression. Autonomy is also termed “individual self-realization,” a combination of both an individual’s freedom and desire for self-fulfillment.¹⁷⁰ Part of self-fulfillment is the ability of an individual to develop their human faculties.¹⁷¹ That is, the First Amendment protects the ability of individuals to connect and reach the full capacity of their own humanity.¹⁷² For this reason, this value broadly protects an individual’s ability to participate in and consume artistic exploits. Ballet or abstract art may not communicate concrete ideas to a viewer, but they allow both the creator and the recipient to connect with their humanity.

Some free-speech regulations are justified by arguing that it is necessary for the government to protect the audience; but what if the audience wants to access the material despite the potential harm the government believes the expression would inflict?¹⁷³ Under the personal autonomy theory, not only does an individual have a right to express themselves, but a potential audience also has the freedom to access the expression—despite its purported harms—because an individual has the freedom to choose the content they consume and their own path to

¹⁶⁷ INFAMOUS (Sony Computer Entertainment 2009); INFAMOUS 2 (Sony Computer Entertainment 2011).

¹⁶⁸ Chris Suellentrop, *Pick Your Weapon, Your Moral Path and the Response of Your Public*, N.Y. TIMES (Mar. 30, 2014), <https://www.nytimes.com/2014/03/31/arts/video-games/infamous-second-son-keeps-its-morality-black-and-white.html> [<https://perma.cc/T39S-DE2A>].

¹⁶⁹ *Id.*

¹⁷⁰ Martin Redish, *Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

¹⁷¹ *Id.* at 627.

¹⁷² *See id.* at 629 (arguing that in its purest form, speech allows us to express ourselves—even if the speech at issue amounts to a “primal scream”).

¹⁷³ *See, e.g.,* City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) (holding that while pornography is protected expression, the government has an interest to protect the public from accessing its potential harms); *see also* Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991) (same holding, but with a regulation concerning nude dancing in a public establishment).

enlightenment.¹⁷⁴ In its sex-related cases, the Supreme Court’s justices have argued over this principle—yes, the right to access and participate in pornography is protected by the First Amendment, but how far is the government allowed to go to minimize its alleged harms to make these materials more difficult to access?¹⁷⁵

Under the value of personal autonomy, video games should also receive protection. On the end of the game developers, they are able to create an in-game environment to fulfill their own visions. Whether derived from real-life phenomena or their own imagination, the creation of video games manifests an experience stemming from the developer’s own humanity.¹⁷⁶ As a painter does with a canvas, game developers use code, software, and level designs as tools to bring a game world to life that originates in their imagination. Likewise, the player benefits from the personal autonomy value when interacting with a video game because each player can choose how they interact with the work within the constraints dictated by the developer.

Frequently, a video game gives players the freedom to make decisions unavailable to them in real life. For example, the FIFA games each year might help individuals create an imaginary soccer career—enhancing their own happiness—where their skills in real life would make such a path nonexistent.¹⁷⁷ As a result, video games expand the possible and give players the opportunity to realize their dreams in a way otherwise unthinkable. In this way, a video game greatly expands an individual’s freedom to make choices.

Personal autonomy—which may also be bundled with the “pursuit of happiness” —encompasses the idea that an individual has the freedom to choose how to live a fulfilling life.¹⁷⁸ A player can find personal fulfillment by playing a video game because it is enlightening, interesting, or just fun. Just as a fiction writer may find personal fulfillment from creating a short

¹⁷⁴ See Larry Alexander, *Reddish on Freedom of Speech*, 107 NW. U. L. REV. 593, 599 (2013) (arguing that the government infringes our own self-realization when it blocks an attempt to read or experience a certain piece of expression).

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., THAT DRAGON, CANCER (Numinous Games 2016) (telling a story of a family that loses their child to terminal cancer); Jason Tanz, *A Father, a Dying Son, and the Quest to Make the Most Profound Videogame Ever*, WIRED (Jan. 2016), <https://www.wired.com/2016/01/that-dragon-cancer> [<https://perma.cc/97EZ-SY52>] (showing how the game developers were partly able to process the loss of their child through the process of developing a game chronicling their own feelings and experiences).

¹⁷⁷ See FIFA 22 (EA 2021).

¹⁷⁸ Carol Hamilton, *The Surprising Origins and Meaning of the “Pursuit of Happiness,”* HIST. NEWS NETWORK (2008), <http://hnn.us/articles/46460.html> [<https://perma.cc/MXR2-VLE2>] (explaining that John Locke, and eventually Thomas Jefferson through the Declaration of Independence, employed this phrase as a fundamental aspect of liberty, where individuals can choose how to achieve their own happiness through their choices).

story—even if it is never published anywhere—or a viewer can enjoy watching a movie, so too can a player can derive significant enjoyment from playing a game. From both the side of the developer and the side of the player, video games can advance society’s interest in protecting personal autonomy.

B. *Defining Video Games*

In giving video games First Amendment protection, the Supreme Court failed to define precisely what works fall within the reach of the video game medium.¹⁷⁹ A definition for the medium is vital, because in order for courts to treat the video game medium as it treats other mediums, the question should not be “is this video game expressive,” but instead becomes “is this work a video game?” Courts must have a video game definition as a guideline before they can determine if a particular work falls within the medium’s ambit. A standard video game definition will reduce the confusion I detailed in the previous sections.

A few characteristics describe the video game medium. To start, developers create a game environment for an audience.¹⁸⁰ Unique to video games is that developers pre-program responses to player interactions. As in a conversation, where an individual will listen to and respond to another person, a video game developer will have responses that vary and depend on player interactions. Video games are not just a one-way communicative medium like a movie, where there is a speaker and an audience. Instead, video games are an active two-way communication between the player and developer. Given these factors, I define a video game in the following way: “An electronic audiovisual work made for the primary purpose of entertainment (as opposed to education or training), where the work responds to a player’s continuous interaction with feedback. The feedback may take the form of a change in the game’s environment, story, or characters.” Using this definition will aid judges treat the video game medium in an egalitarian and standardized way in cases.

1. *For the purpose of entertainment*

A few details in my video game definitions are particularly important to note. First, the primary purpose of a video game is entertainment broadly—although it can also have secondary purposes like education or persuasion. Since a particular communication medium depends on its *context*, so too does the use of a particular interactive medium. For example,

¹⁷⁹ See *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786 (2011).

¹⁸⁰ I use the word “audience” loosely to mean a player that ultimately interacts with the game. If a developer creates a game to play alone—and it never sees the light of day—there would still be an audience of one.

Microsoft has released a game called *Microsoft Flight Simulator*, a game intended to replicate the controls, physics, and environments of a pilot.¹⁸¹ If a consumer buys the product to play on their own computer, this falls within the video game medium. The primary purpose, even though it is a replicative simulator, is still entertainment or fun. A consumer should not attempt to fly a plane in real life based on the in-game controls, and the game's creator will not be held liable in a resulting plane crash if a new pilot trained only using the game.

Other mediums function similarly. In one case, for example, mushroom enthusiasts became severely ill after picking mushrooms and relying on information in a book titled “Encyclopedia of Mushrooms.”¹⁸² The Ninth Circuit held that due to the First Amendment, the encyclopedia was protected against liability because the publisher had no duty to investigate the accuracy of contents in its book. Falsity is protected by the First Amendment if within a protected medium. If the publisher were subject to liability, it could have a severe “chilling” effect and constrain First Amendment rights, dissuading similar books from every getting published due to the risk of liability.¹⁸³ Just as the “Encyclopedia of Mushrooms” would not be subject to product liability theory, neither would *Microsoft Flight Simulator*.¹⁸⁴

Compare that, however, to flight software marketed as an authentic virtual simulator to train new pilots. Imagine the US military uses the software to train new recruits to fly military planes. In this case, the primary purpose of the software is not entertainment, but training. The company never intended for its software to be used as entertainment, and the military did not use it for that purpose. If the software had a significant flaw—such as incorrectly training new pilots how to land a plane—it would be appropriate to open the software publisher to suit under a product liability theory. When not intended as entertainment or hobbyist software, the work would not fall within the video game medium.

2. *Electronic Audiovisual Work*

The video game medium is both electronic and audiovisual. This means that video games must actually have a visual element broadcast on an electronic format, usually a TV screen, computer monitor, or mobile phone (although other electronic formats also exist). Notably, this means the video game medium does not cover analog board games or physical sports. These other formats might still have protection, just under another medium. Certain

¹⁸¹ MICROSOFT FLIGHT SIMULATOR (Microsoft 2020).

¹⁸² See generally *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

features of a board game—including its art or storyline—might still be protected under the First Amendment, just not under the video game medium.¹⁸⁵ The same is true with electronic games without audiovisual elements. For example, choose-your-own adventure books have existed for a long time. If someone recorded such a book in audiobook format for a visually impaired individual, the story would still get First Amendment protection, just not as a video game. A *video* game must have both audiovisual elements and be on a digital or electronic format.

3. *Interactivity and feedback*

Finally, unique to a video *game* is its interactivity. For a work to be a video game, the player must actually interact with the work, and these interactions must have an impact on the in-game environment. Interaction can take many forms. One game may require someone to just press a button to move the story along, another may have the player fly a plane, or another might require the player to blink their eyes to move the game along. Regardless, a video game at its core depends on the player for its purpose to be fulfilled. Without an audience, other mediums frequently can still exist. A movie or song can play without an audience, a book exists on the bookshelf without any interaction, and a portrait can hang on the wall without anyone looking at it. A video game's distinct elements can exist without interaction, too—its art, dialogue, and characters, for example, can be affixed in a digital file. However, a video game itself does not exist without a player's interaction, and the game itself provides feedback based on an individual's own actions.

The video game experience depends on the players themselves, and as a result each playthrough of a video game is wholly unique to the player—a factor exclusive to this medium. Yes, you can read a book at different speeds or think about the content in a different way, but the text at issue will be fundamentally the same in each read-through. It is virtually impossible, however, for two playthroughs of a video game to be exactly the same, and as a result the phenomenon of gameplay is wholly unique with each experience even as the underlying game stays the same. Even if two players see much of the same content in a video game, by differentiating their button-presses and in-game movements by a small amount, these two players will have a unique set of feedback each time.

¹⁸⁵ See, e.g., *Watters v. TSR, Inc.*, 715 F. Supp. 819, 821-23 (1989) (holding that game materials of the board game “Dungeons & Dragons”—such as the game’s manuals and written lore—is protected under the First Amendment); see also *Hammerhead Enter., Inc. v. Brezenoff*, 707 F.2d 33 (1983) (protecting the critical and allegedly stereotypical cartoon depictions within the board game “Public Assistance—Why Bother Working for a Living,” as they would also be protected within a political cartoon).

CONCLUSION

As the video game industry continues to grow, judges must be prepared to encounter novel legal questions concerning the medium. The *Brown* decision mandates comprehensive First Amendment protection for video games, and judges must be prepared to follow this command to its appropriate legal conclusion. In some cases, doing so may seem unfair or uncomfortable. Such feelings are natural as judges begin to deal with a new and potentially unfamiliar medium for the first time. As I have shown in this Article, however, the First Amendment requires judges to be neutral arbiters, regardless of their own aesthetic preferences. The *Brown* decision requires judges to treat the simplest video game with equal *legal* respect as Hamlet, or any other historically distinguished work.

To treat video games properly, the question for a judge should not be whether the specific video game at issue is one that is protected. Instead, the key question should be whether the work at issue is a video game in the first place. If the work meets the criteria of a video game, it must be granted full protection under the First Amendment. Doing so is justified under the three prominent First Amendment theories: truth-seeking, democracy, and personal autonomy. Affording such protection to video games is not only legally required, but simpler. Judges no longer have to veer outside of their expertise to haphazardly decide whether they believe certain video games deserve protection. Instead, the inquiry is much easier. The First Amendment protects all these works, regardless of whether it is Pac-Man, The Legend of Zelda, or Tolstoy's War and Peace.

