

**THE NEW KING OF THE ENTERTAINMENT
INDUSTRY?
THE UNLIKELY STORY OF VIDEO GAMES AND THE
FIRST AMENDMENT**

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*From their humble origins in the 1950s, video games have aggressively grown both commercially and artistically as a medium. Even the industry's critics cannot ignore that its global gross revenue in 2021 exceeded the combined totals of the film and recorded music industries. In spite of the massive external economic benefits this industry generates, many vocal opponents still remain to the U.S. Supreme Court decision extending video games unqualified First Amendment protection, *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011). With the country reeling from countless school shootings, it is no surprise that some members of the public looked to video games as a scapegoat for this new normal. However, as was the situation at the time of the *Brown* decision, there remains virtually no persuasive evidence demonstrating any material relationship between violent video games and youth violence. In particular, regardless of their level of video game consumption, no other country comes even close to the level of school shootings that occur in the United States. The Article proposes that, now that a decade has passed, Justice Antonin Scalia's majority opinion in *Brown* has proven its status as sound legal precedent. Courts and scholars should turn their focus to more pressing First Amendment technological problems already at our doorstep—such as whether artificial intelligence carries with it any free-speech protections and how to regulate successor technologies to video games capable of interfacing directly with the human brain.*

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I. Introduction

Even before the COVID-19 pandemic, which devastated the film industry, the video game sector generated more global revenue than the film and recorded music industries combined.² As one legal commentator described the situation in 2012, video games represent “a highly profitable industry that has already surpassed Hollywood in revenue and influence, producing annual revenues of over sixty-five billion dollars.”³ While the film and music industries struggled, globally the video game industry generated \$155 billion in revenue in 2020 with some analysts predicting that it may exceed \$260 billion by 2025.⁴ While those are aggressive predictions, the video game industry did grow 23% between 2019 and 2020.⁵ In comparison, “[i]n 2020 the entire global theatrical and home/mobile entertainment market totaled \$80.8 billion, the lowest figure since 2016 and a decline of 18% from 2019.”⁶ Although a smaller industry than video games and film, the recorded music industry withstood the pandemic well with annual global revenues of \$23.1 billion, an increase of 7% from the prior year.⁷

In increasingly ambitious ways, video game developers have blurred the lines between reality and games through a variety of design techniques.⁸ While quite rudimentary during the first mass market introduction of video games in the 1970s, modern video games often

² See generally M. Sharon Jeannotte, *When the Gigs are Gone: Valuing Arts, Culture and Media in the COVID-19 Pandemic*, SOC. SCI. & HUMAN. OPEN (2021). See also Andrew Beattie, *How the Video Game Industry Is Changing*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/053115/how-video-game-industry-changing.asp> (last updated Oct. 31, 2021) [<https://perma.cc/6UB2-NFQ8>].

³ See Andrew L. Schlafly, *Game Over for Childhood? Violent Video Games as First Amendment Speech*, 38 RUTGERS COMPUTER & TECH. L.J. 173, 173 (2012).

⁴ Beattie, *supra* note 1.

⁵ Lara Williams, *A Pandemic Is a Dream Come True for Gamers*, BLOOMBERG (Jan. 16, 2022, 6:00 AM), <https://www.bloomberg.com/opinion/articles/2022-01-16/pandemic-s-boost-for-video-game-industry-is-a-dream-come-true-kyh9nekz> [<https://perma.cc/44FE-2S49>].

⁶ Brad Adgate, *The Impact COVID-19 Had on the Entertainment Industry in 2020*, FORBES (Apr. 13, 2021, 11:45 AM), <https://www.forbes.com/sites/bradadgate/2021/04/13/the-impact-covid-19-had-on-the-entertainment-industry-in-2020/?sh=35b9aaa8250f> [<https://perma.cc/7U86-H4CA>].

⁷ Tim Ingham, *Recorded Music Grew \$1.5 Billion in the Pandemic Year*, ROLLING STONE (Mar. 17, 2021, 9:47 AM), <https://www.rollingstone.com/pro/news/recorded-music-billion-growth-2020-1143159/> [<https://perma.cc/EX7C-X8AW>].

⁸ See Wesley W. Wintermyer, Note, *Who Framed Rogers v. Grimaldi?: What Protects Trademark Holders Against First Amendment Immunity for Video Games?*, 64 ALA. L. REV. 1243, 1243 (2013).

contain sprawling worlds, complex gameplay, and in some instances photorealistic detail.⁹ Sometimes particular hardware offers unique ways to engage an audience, especially with modern virtual reality technology.¹⁰

With video games' steady economic growth and their increasing realism, it was inevitable that the U.S. Supreme Court would weigh in on their proper treatment under the First Amendment. In 2011, the Court's *Brown v. Entertainment Merchants Association* opinion extended unqualified First Amendment protection to the medium.¹¹ The justices struck down a California statute imposing various restrictions on the sale of violent video games to minors as constitutionally flawed under a strict scrutiny analysis.¹² Seven justices agreed on that result, with the late Justice Antonin Scalia penning the majority opinion. Justice Samuel Alito and Chief Justice John Roberts issued a concurring opinion recognizing that the statute was unconstitutionally vague.¹³ Building off the decision of *United States v. Stevens* issued the prior term, the *Brown* majority rejected California's position that there was any historical basis for regulation of violent content under obscenity standards or otherwise.¹⁴ That earlier case ruled that governmental regulators could not define new categories of speech either outside or with qualified degrees of First Amendment protection.¹⁵ "The consequences of the *Stevens* and *Brown* decisions is to substantially restrict the ability of courts to make judgments regarding the *value* of speech, in the course of deciding whether to extend protection to it."¹⁶

In spite of the massively positive economic impacts of the video game industry, a decade later the *Brown* opinion remains relatively controversial. Various scholars have proposed following Justice Samuel Alito's concurring opinion that would have struck down the California statute on vagueness grounds but avoided a specific decision on what form of First Amendment scrutiny applies to video games as a medium.¹⁷ Some feel the abundance of new technology makes it

⁹ See *infra* note 229.

¹⁰ See *infra* notes 229 to 232.

¹¹ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011).

¹² *Id.* at 797-800.

¹³ *Id.* at 805.

¹⁴ See *Brown*, 564 U.S. at 791 (addressing *United States v. Stevens*, 559 U.S. 460 (2010) at length).

¹⁵ See *Stevens*, 559 U.S. at 467.

¹⁶ Ashutosh Bhagwat, *When Speech Is Not "Speech"*, 78 OHIO ST. L.J. 839, 847 (2017).

¹⁷ See, e.g., Jessica Fisher, Note, *Brown v. Entertainment Merchants Association: "Modern Warfare" on First Amendment Protection of Violent Video Games*, 8 J. BUS. & TECH. L. 525, 541 (2013); Robert B. Norris, Jr., Note, *It's All Fun and Games Until Someone Gets Hurt: Brown v. Entertainment Merchants Association and the Problem of Interactivity*, 13 N.C. J.L. & TECH. ON. 81, 115 (2011).

difficult for parents to navigate the propriety of video game content on their own.¹⁸ Various legal scholars remain concerned about the future implications of *Brown* for both new types of technology and more traditional forms of problematic speech.¹⁹

Video games present a recent iteration of the age-old battle whether core First Amendment principles apply equally to all forms of media, especially as it relates to new technology.²⁰ Before video games, detractors raised the same challenges to dime store novels, film, radio, jazz music, comic books, cartoons, television, and rap music.²¹ Prior to *Brown*, broadcast media—like radio and television broadcasts—gave rise to some bizarre First Amendment precedent tolerating quite invasive speech regulation.²² The Court has upheld blanket obscenity and related restrictions on broadcast media that would never pass muster if applied to media consumed on a more individualized basis—such as books, paintings, film, and now video games.²³ The proffered rationale for permitting such regulation of broadcast media is the peculiarly available nature of the media to children and others who might wish to avoid such content.²⁴

The author does not dispute that limiting minors' exposure to violent content is a worthy goal that justifiably concerns parents. As recently illustrated by a violent mob attempting to overthrow the U.S. Capitol on January 6, 2021, violent behavior is a real threat to stability in this country. Many government agencies have described domestic extremists, often affiliated with white nationalist groups, as a

¹⁸ See Margaret E. Jennings, Note, *Blood, Brains, and Bludgeoning, But Not Breasts: An Analysis and Critique of Brown v. Entertainment Merchants Association*, 32 LOY. L.A. ENT. L. REV. 87, 108-09 (2011).

¹⁹ See R. George Wright, *Judicial Line-Drawing and the Broader Culture: The Case of Politics and Entertainment*, 49 SAN DIEGO L. REV. 341, 355, 367 (2012); Lindsay E. Waller, Note, *Losing the Game: An Analysis of the Brown v. Entertainment Merchants Association Decision and Its Ramifications in the Area of "Interactive" Video Games*, 57 ST. LOUIS L.J. 457, 486-88 (2013) (comparable discussion of various extreme examples).

²⁰ See William E. Lee, *Books, Video Games, and Foul-Mouthed Hollywood Glitteratae: The Supreme Court and the Technology-Neutral Interpretation of the First Amendment*, 14 COLUM. SCI. & TECH. L. REV. 295, 297 (2013).

²¹ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 797-98 (2011); Ryan Paree, Note, *Free Speech After Brown v. Entertainment Merchants Association: The Future of Video Game Regulation*, 14 J.L. SOC'Y 245, 246-47 (2013).

²² See Lee, *supra* note 19, at 297-99.

²³ See Paree, *supra* note 20, at 247-48.

²⁴ See *FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978).

paramount threat to the country's national security.²⁵ Desensitization of children to violence is also a completely legitimate concern.²⁶ Nevertheless, video games are simply a more recent target of recycled arguments that the newest form of media will lead to society's moral decay.²⁷

Understandably upset with the increasing prevalence of school shootings, parents and legislatures in the 1990s rallied the cause to blame video games as a significant cause of youth violence.²⁸ However, there have always been major conceptual problems with correlating this phenomenon to video game consumption.²⁹ Even though the citizens of virtually every other developed nation in the world consume video games, not a single one of them has even a remotely comparable level of school shootings to the United States. As an illustration of this point, CNN in 2018 analyzed news reports from all major industrialized countries since 2009 to quantify how many school shootings occurred in each country.³⁰ The results were astounding. The United States had 57 times more school shootings than all the other G7 countries combined.³¹ Even when expanding the list of countries, the United States still dominated the count with 288 school shootings in the studied timeframe, with the second highest ranking country being Mexico with eight.³² The other highest ranking countries in the study all had less than seven reported school shootings, in particular South Africa, India, Pakistan, Nigeria, and Afghanistan.³³ Japan—whose citizens unquestionably consume a significant volume of video games—had no such reported events.³⁴

²⁵ See, e.g., NAT'L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM 8-14 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf> [<https://perma.cc/H5LG-42XH>].

²⁶ See Jennings, *supra* note 187, at 90.

²⁷ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 797-98 (2011); Paree, *supra* note 20, at 245-47.

²⁸ See Christopher Clements, Note, *Protecting Protected Speech: Violent Video Game Legislation Post-Brown v. Entertainment Merchants Ass'n*, 53 B.C. L. REV. 661, 661 (2012); Jennings, *supra* note 17, at 88.

²⁹ See Symposium, *The Effect of Court Rulings on Business Development*, 14 SMU SCI. & TECH. L. REV. 397, 410 (2011) [hereinafter *The Effect of Court Rulings*].

³⁰ Chip Grabow & Lisa Rose, *The US Has Had 57 Times as Many School Shootings as the Other Major Industrialized Nations Combined*, CNN, <https://www.cnn.com/2018/05/21/us/school-shooting-us-versus-world-trnd/index.html> (last updated May 21, 2018, 5:08 PM) [<https://perma.cc/XBE5-X7HB>].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See *id.*; Ben Dooley & Hikari Hida, *A Government in Japan Limited Video Game Time. This Boy Is Fighting Back.*, N.Y. TIMES, <https://www.nytimes.com/2020/06/11/business/japan-video-games.html> (last updated June 12, 2020) [<https://perma.cc/8VA3-Z87L>].

The reasons behind the extreme level of school shootings in America are complex and the subject of vigorous debate, but there is no credible argument that video games are the culprit. The simple conclusion is that “[v]iolence in the current crop of video games has not had any discernable or measurable negative impacts on children.”³⁵ While one could argue that games that Americans consume are more violent than those Japanese consumers prefer, some popular Japanese video game franchises—like *Resident Evil* and *Metal Gear Solid*—feature quite violent gameplay where firearms are the main character’s primary weapon.³⁶

Proponents of the theory that video games are the cause of many school shootings typically rely on anecdotes and egregious examples rather than any genuine scientific data.³⁷ Justice Scalia in *Brown* specifically calls out Justice Alito for engaging in this type of behavior, stating that the concurrence “recounts all these disgusting video games in order to disgust us” even though “disgust is not a valid basis for restricting expression.”³⁸ Video game detractors often conveniently overlook that movies have regularly featured highly violent content since at least as early as the 1970s.³⁹ They also fail to account for the reality that there were large contingents of the scientific community who viewed the science as dubious on which California and its allies relied during the *Brown* proceedings to support video game regulation.⁴⁰

The author appreciates that some school shooters, like the Columbine shooters, do appear to have consumed a significant amount of violent video games.⁴¹ However, there are many examples of people who committed violent acts after receiving purported inspiration from

³⁵ Norris, *supra* note **Error! Bookmark not defined.**6, at 115.

³⁶ See STEVEN L. KENT, THE ULTIMATE HISTORY OF VIDEO GAMES 259 (vol. 2 2021) [hereinafter UHVG VOL. 2] (discussing various Japanese video game franchises that are highly violent).

³⁷ See, e.g., Daniel Butler, Note, *Avoiding the First Amendment’s Crosshairs: Revisiting Precedents & Reining Arguments in Brown v. Entertainment Merchants Association*, 68 U. MIAMI L. REV. 911, 911-12 (2014) (using extremely violent example from a *Mortal Kombat* release to draw larger conclusions about video games as a medium); Wuller, *supra* note 198, at 457-458.

³⁸ See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 798-99 (2011).

³⁹ See *infra* text accompanying notes 474 to 480.

⁴⁰ See Angela J. Campbell, *Newbs Lose, Experts Win: Video Games in the Supreme Court*, 95 NEB. L. REV. 965, 968 (2017); *The Effect of Court Rulings*, *supra* note 298, at 400-01, 407.

⁴¹ See STEVEN L. KENT, THE ULTIMATE HISTORY OF VIDEO GAMES 544-55 (2001) [hereinafter UHVG Vol. 1]; Campbell, *supra* note 39, at 966.

other forms of media, such as Stephen King's novels.⁴² Perhaps most famously, the individual who attempted to assassinate President Ronald Reagan had an unhealthy fascination with the movie *Taxi Driver*.⁴³ John Lennon's murderer was similarly obsessed with the novel *Catcher in the Rye*, in particular the main character's disaffected relationship with society.⁴⁴ Law enforcement found a copy of *Catcher in the Rye* on the coffee table of President Reagan's attempted assassin.⁴⁵ One could draw a simplistic link between the two events as evidencing the radically dangerous nature of this novel, yet it remains a staple of high school and college curriculums.

Now that a decade has passed since *Brown*'s issuance, legal scholarship on video games and the First Amendment is poised to enter a new phase. A major challenge with the existing scholarship is that many legal commentators themselves appear to have limited familiarity with video games as a medium.⁴⁶ Given how potentially dangerous various scholars and several current members of the Supreme Court consider this medium to be, one could describe it as irresponsible that these deficiencies exist in legal scholarship. Because the judiciary has unleashed this purportedly threatening beast on the world, the author believes the legal profession has a societal obligation to better articulate the nuances of this form of speech to the general public and academics in all fields.

The author's position is that there are far worse speech problems out there for society to grapple with than to spend time relitigating the core holdings of *Brown*. One legal commentator accurately characterized the situation as follows: "The courtroom jousting between states and entertainment advocacy groups [supporting video games] has led to a supreme waste of time and taxpayer dollars."⁴⁷ While there is genuine room for disagreement about certain aspects of the *Brown* opinion, the vast majority of proposed fixes to the decision are far more problematic than letting it stand.

⁴² See Brian J. Callaway, Note & Comment, *Muddy Brown: Supreme Court's Unnecessarily Sweeping Video Game Decision Tangles First Amendment Jurisprudence Involving Children*, 22 TEMP. POL. & CIV. RTS. L. REV. 493, 518 (2013).

⁴³ See Ryan Bort, et al., *Eight Horrible Real-Life Crimes that Were Inspired by a Movie (or Novel)*, NEWSWEEK (Apr. 14, 2017, 3:31 PM), <https://www.newsweek.com/nine-horrible-real-life-crimes-were-inspired-movie-or-novel-583828> [<https://perma.cc/D8E8-YFLU>].

⁴⁴ See *id.*

⁴⁵ Lisa Marie Fuqua, *The Catcher in the Rye's Connection to Murder—True Crime*, MEDIUM (Apr. 10, 2020), <https://medium.com/true-crime-addiction/the-catcher-in-the-ryes-connection-to-murder-true-crime-5c920e88d6d8> [<https://perma.cc/5Y3R-9YHK>].

⁴⁶ See *infra* notes 180 to 181.

⁴⁷ See Clements, *supra* note 287, at 689.

Part II of this Article provides a general overview of the gaming industry targeted at those unfamiliar with that sector of the economy. Part III addresses the history of legislative efforts to regulate video games, the resulting *Brown* decision, and the first decade of post-*Brown* scholarship. To better understand whether *Brown* was correctly decided in the first instance, Part IV takes a comprehensive look at the history of video games as a medium from their creation in the 1950s through the end of the Three-Dimensional Era in video game history coinciding with the commencement of the Eighth Generation of video game consoles in 2012. Conveniently, that end date coincides well with the 2011 decision date of *Brown*. The remainder of the Article in Part V examines the ongoing viability of *Brown* against this historical backdrop. As addressed in Part V.C, it is the Author's position that artificial intelligence ("AI") and emerging technologies that permit direct interface between a device and the human brain present significantly more pressing First Amendment problems for society to address than violent video games.

II. Understanding the Video Game Industry

A. Comments on Video Games as a Medium

Before delving into the nuances of the video game industry, it is important to keep in mind what media actually qualifies as a video game. The process of distinguishing a video game from another type of media can be surprisingly difficult.

One of the best examples of a cross-medium release comes from a relatively new member of the video game marketplace, Netflix. While Netflix currently has a small gaming portfolio, it intends to grow that portion of its business to diversify its overall product offerings, especially as its streaming service userbase has lagged behind investor demands.⁴⁸ The company in 2019 released an entry in the science-fiction Black Mirror franchise titled *Bandersnatch*, wherein the viewer can choose various courses of action and experience various different

⁴⁸ See Derrick Morton, *What Netflix's Entrance in Gaming Means for Big and Small Gamers Alike*, FORBES (Nov. 8, 2021, 7:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2021/11/08/what-netflixs-entrance-in-gaming-means-for-big-and-small-gamers-alike/?sh=36a98d4036e5> [https://perma.cc/S8SP-72KS].

endings, features common to many video games.⁴⁹ Consciously leaning into the release's similarity to a game, the story focuses on a teenager's struggles designing a video game and the surreal horrors he encounters along the way.⁵⁰ On top of his production deadline for his project, the main character battles with mental-health problems that manifest in terrifying ways.⁵¹

While *Bandersnatch* is perhaps also a video game if one does not view media as exclusive to a given format, this type of "choose your own adventure" release has long appeared in both visual and print media. Some eBook releases have relied on a comparable branching format to permit the reader to choose from sometimes in excess of a hundred different story paths.⁵² Notably, the existence of such choice-based releases in formats besides video games provided a strong analytical linchpin in Justice Scalia's majority opinion in *Brown* that granted video games the same First Amendment treatment as other media.⁵³

From the author's perspective, the fact that it becomes more difficult each year to distinguish video games from other media directly illustrates the sage wisdom of Scalia's opinion in *Brown*. The opinion facilitates artists in all types of media create interactive art, including through a blend of media formats.⁵⁴ In any event, this Article uses the following definition from Merriam-Webster for the term video game: "an electronic game in which players control images on a video screen."⁵⁵ The author does not claim that this definition is a perfect one, but, as explained in greater detail in Part IV.A, this definition is reliable for the purposes of explaining the difference between the first video game and its non-video game progenitors.

Due to the high level of complexity of this topic, this Article does not provide a separate dedicated discussion about the technology underpinning video games.⁵⁶ Unsurprisingly, there are massive

⁴⁹ See Aisha Harris, et al., '*Bandersnatch*' Has Many Paths, But Do Any of Them Add Up to Anything?, N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/arts/television/bandersnatch-black-mirror-netflix.html> [<https://perma.cc/F3WW-T6QT>].

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See Lee, *supra* note 19, at 327-29 (covering modern features of interactive ebooks).

⁵³ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 798 (2011); Harris, et al., *supra* note 48.

⁵⁴ See *Brown*, 564 U.S. at 798; *infra* Part V.B.

⁵⁵ Video Game, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/video%20game> [<https://perma.cc/6H2B-YCC6>] (last visited Feb. 26, 2022).

⁵⁶ The single most comprehensive resource the author has located on the general history of video game technology is Professor Brian J. Wardyga's excellent 2019 textbook on video games. See generally BRIAN J. WARDYGA, THE VIDEO GAME TEXTBOOK (2019).

differences between modern video game technology and that behind the first video games released in the 1950s and 1960s.⁵⁷ Part IV of this Article covers many of those technological innovations as they relate to the historical growth of the medium. To differentiate certain eras of gaming in a more concrete way, both scholars and those in the industry divide up different periods of video game hardware into discrete generations.⁵⁸ The author will frequently refer to those generations as presenting dividing lines in the medium's history.

B. The Past and Present of the Video Game Economy

The distribution and monetization structure for video games has changed dramatically since the medium's commercial inception in the 1960s. Initially restricted to bulky machines available at local arcades, consumers can now purchase video games on many different platforms, such as their mobile phones or dedicated video game consoles.⁵⁹ Pre-*Brown*, video games certainly were not as reliable of an economic contributor as they are today, with various ups and downs for the domestic video game market in the 1980s and 1990s.⁶⁰ However, since that time, global sales figures have grown sharply and consistently.⁶¹ For example, the industry's domestic revenue broke \$20 billion by the early 2010s.⁶²

The ecosystem for modern online multiplayer games is often staggeringly complex. Some massively multiplayer online games ("MMOs") simultaneously host millions of players across many different computer servers, sometimes with those different servers featuring their own unique iteration of game circumstances to which

⁵⁷ See *infra* Part IV.

⁵⁸ 56See, e.g., WARDYGA, *supra* note 55, at 20, 52, 154, 212 (using console generation structure to demarcate time periods in gaming history); Garrett Mathew-James Mott, Comment, *Game Over for Regulating Violent Video Games? The Effect of Brown v. Entertainment Merchants Ass'n on First Amendment Jurisprudence*, 45 LOY. L.A. L. REV. 633, 650 (2012) (same).

⁵⁹ See *infra* Part IV.

⁶⁰ See UHVG VOL. 1, *supra* note 40, at 500; *infra* Part IV (discussing general history of video game industry, with Atari as strong example of company that struggled during a downturn).

⁶¹ See UHVG VOL. 2, *supra* note 35, at 274 ("In 1998, Americans spent \$6.2 billion on video games. In 2001, they spent \$9.3 billion. In 2005, U.S. video game sales rose to \$10.5 billion.")³⁶

⁶² See *id.* at 378; Geoffrey F. Palachuk, *Transformative Use Test Cannot Keep Pace with Evolving Arts*, 16 U. DENV. SPORTS & ENT. L.J. 233, 234 (2014).

players can regularly return.⁶³ Many historic MMOs relied on a monthly subscription model to generate ongoing revenue after the initial game purchase, with some more recent releases abandoning that model by eliminating subscriptions or sometimes even any purchase cost to download the game.⁶⁴ Offering a game at no cost is typically called a free-to-play model, where players can spend their actual dollars in game on various functional perks, costumes, or other in-game content.⁶⁵

There are three companies who define the modern home console market, in order of their chronological entry to that market Nintendo, Sony, and Microsoft. Using a console, consumers can purchase new games at local retailers for use with the device or—as has become increasingly common—digitally through electronic storefronts accessible with an internet connection.⁶⁶ While these console developers release games for their platforms via their wholly owned first-party studios, a large assortment of third-party studios design games for release on a multiplatform or sometimes console-exclusive basis.⁶⁷

These three companies' current home console offerings are the Nintendo Switch, the Sony PlayStation 5, and the Microsoft Xbox Series X/S. Nintendo is a Japanese company with origins dating back to 1889 in the playing card industry.⁶⁸ As discussed in more detail in Part IV.B.2, Nintendo in the early 1980s became a major player in the arcade and later the home console market. Sony, in comparison, began in the 1940s as an electronics company finding its footing in post-World War II Japan.⁶⁹ After developing into a major consumer electronics company with formidable movie and music production divisions, Sony dabbled in the video-game software market with its own game

⁶³ See DUSTIN HANSEN, *GAME ON!: VIDEO GAME HISTORY FROM PONG AND PAC-MAN TO MARIO, MINECRAFT, AND MORE* 223 (2016).

⁶⁴ See UHVG VOL. 2, *supra* note 35, at 200, 457; Jon Radoff, *Game Economics, Part 3: Free-to-Play Games*, MEDIUM (Apr. 30, 2021), <https://medium.com/building-the-metaverse/game-economics-part-3-free-to-play-games-78aa790d55ae> [<https://perma.cc/2SW8-L4NZ>].

⁶⁵ See Radoff, *supra* note 63.

⁶⁶ See, e.g., WARDYGA, *supra* note 56, at 381 (discussing ability to purchase games digitally on some consoles).

⁶⁷ See *id.* at 223.

⁶⁸ See BLAKE J. HARRIS, *CONSOLE WARS* 36 (2014).

⁶⁹ See Gene Park, *Perfecting Final Fantasy 7's Legacy, as Told by Its Creators*, WASH. POST (Apr. 3, 2020, 1:12PM), <https://www.washingtonpost.com/video-games/2020/04/03/final-fantasy-7-legacy-creators/> [<https://perma.cc/T5A2-NKN3>]; Andrew Yoshimura, *Your Turn: A Brief History of Sony and the PlayStation*, THE SYDNEY MORNING HERALD, <https://www.smh.com.au/technology/your-turn-a-brief-history-of-sony-and-the-playstation-20131023-2vyql.html> (last updated Oct. 23, 2013, 4:13 AM), [<https://perma.cc/6BJP-9YBT>].

studios.⁷⁰ Following a dramatic split with Nintendo after it backed out of a relationship with Sony to develop new console hardware, Sony in the mid-1990s launched its own console—the first PlayStation.⁷¹

Although the youngest of these three companies, Microsoft has always maintained a strong relationship to the video game industry. Throughout the company's winning streak in the 1990s from its various highly popular Windows operating systems for personal computers, game developers flocked to this PC infrastructure.⁷² While flirting with the idea of entering the market for years, Microsoft in a formal way entered the sector when it launched its Xbox console in 2001, a brand that has resulted in three successor consoles.⁷³

It is often not obvious to outsiders how large the video game industry actually is or how inextricably connected it has become to other segments of the economy. It is now extraordinarily common for the parent organization of major film studios to also own sometimes quite large video game development departments. Besides Sony which has a robust film department, Warner Bros. Pictures likewise has a sister video game development arm.⁷⁴ Even dedicated video game developers lacking any separate company operations besides game development own “massive intellectual property portfolios” which they monetize through various means.⁷⁵

An important third-party industry group associated with the Supreme Court's lenient treatment of video games is the Entertainment Software Rating Board (“ESRB”).⁷⁶ This entity is a non-governmental organization that issues various ratings for video games to indicate their relative level of appropriateness for given age groups.⁷⁷ The rating examiners who review gaming submissions have no connection to the video game industry and generally have a background dealing with children.⁷⁸ There are many similarities between the ESRB and the analogous rating organization for film content, specifically the Motion

⁷⁰ See HARRIS, *supra* note 68, at 118, 280, 304, 439.

⁷¹ See *id.* at 136-37, 303-05, 345, 348-50; see *infra* Part IV Section C.2.

⁷² See UHVG VOL. 2, *supra* note 35, at xvii-xxiv.

⁷³ See *infra* notes 439-440 to 441-442.

⁷⁴ See UHVG VOL. 2, *supra* note 35, at 173 (discussing Warner and other companies' video game branches).

⁷⁵ See Palachuk, *supra* note 61, at 234.

⁷⁶ See *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 803 (2011).

⁷⁷ See Paree, *supra* note 20, at 253.

⁷⁸ See *id.* at 254.

Picture Association of America (“MPAA”).⁷⁹ Like the MPAA scale, video games fall into several different categories: (a) EC - Early Childhood; (b) E - Everyone; (c) E10+ - Everyone 10+; (d) T - Teen; (e) M - Mature; (f) AO - Adults Only; and (g) RP - Rating Pending.⁸⁰

While the ESRB has no governmental authority, it does have the ability to take various actions including pursuing corrective relabeling or issuing sanctions.⁸¹ The entity’s recognition as the one providing the rating standards for the industry permits such non-governmental enforcement.⁸² The ESRB system ran into various difficulties in its early years according to studies by the Federal Trade Commission, but by the time of *Brown*’s issuance the organization had a strong performance record—including outperforming the established MPAA in enforcement effectiveness to avoid minors obtaining games improperly.⁸³

III. A New Challenger: The Supreme Court and Video Games

A. Prelude to Battle: Early Legal Skirmishes on Violence and Video Games

Fortunately, various scholars have covered pre-*Brown* precedent bearing on speech protection for video games.⁸⁴ Because of that reality and with *Brown* providing the controlling standard for such speech protections, this portion of the Article focuses on the larger societal battle over violent content in video games. The push to regulate violence in video games dates back to the 1970s, coinciding with the mass market’s introduction to the medium.⁸⁵ As one scholar described the situation: “Concerns about video game violence are almost as old as the video game industry.”⁸⁶

An entirely new phase of the battle on regulating violent game content coincided with the 1992 release of two games, the home console

⁷⁹ See *Brown*, 564 U.S. at 803; Amanda E. Beckwith, Note, *There’s No R in Smoking: A Modified Rating System to Curb Adolescent Smoking*, 38 HASTINGS COMM. & ENT. L.J. 249, 252, 256 (2016).

⁸⁰ See HANSEN, *supra* note 62, at 108-09.

⁸¹ See Butler, *supra* note 3637, at 918-19; Paree, *supra* note 20, at 255.

⁸² See Paree, *supra* note 20, at 255.

⁸³ See *id.* at 256, 267; *Brown*, 564 U.S. at 803.

⁸⁴ See, e.g., Butler, *supra* note 36, at 913-17 (coverage of pre-*Brown* precedent); Kathryn E. Maldonado, Comment, *Grand Theft Free Speech? An Analysis of First Amendment Restrictions on Violent Video Game Legislation*, 81 UMKC L. REV. 725, 731-32 (2013) (same).

⁸⁵ See William K. Ford, *The Law and Science of Video Game Violence: What Was Lost in Translation*, 31 CARDOZO ARTS & ENT. L.J. 297, 310 (2013).

⁸⁶ *Id.*

game *Night Trap* and the arcade game *Mortal Kombat*.⁸⁷ The public reaction to these two games played a major role in the eventual congressional intervention in 1993, with the U.S. Senate conducting exhaustive hearings on the portrayal of violence in video games.⁸⁸ Before things came to a head, video game industry stalwarts had worried that heavy handed congressional intervention could destroy the market for video games.⁸⁹ One positive outcome of those hearings was implementation of an industry wide standard on video game ratings (akin to film ratings) via the industry group the ESRB.⁹⁰

Perhaps the best example of overreach on the part of critics of violent video game content is the hysterical reaction to the relatively innocuous game *Night Trap*. By today's standards, the game is quite tame—especially when comparing it to the many extremely violent horror and slasher films of the 1970s and 1980s.⁹¹ *Night Trap* plays like a cheesy B movie, with the game's events primarily occurring at a spooky house where several teenage girls have gathered for a slumber party.⁹² A group of vampires tries to invade the home to capture the occupants to steal their blood.⁹³ To increase graphical quality, the game relies heavily on pre-recorded video scenes featuring well over an hour of corny acting from live characters.⁹⁴ Modern audiences would scratch their heads at why the game was deemed highly objectionable, especially as the player's role is to protect the main characters from the antagonists by trapping these enemies.⁹⁵

The original *Mortal Kombat*, in comparison, lives up to its infamy. Few gaming franchises have ever drawn the level of parental wrath that came to pass after the game's release. The game's high degree of violence broke new ground in terms of that seen in a mass-market video game.⁹⁶ The movie industry similarly monetized stylized

⁸⁷ See *id.* at 310-11; HARRIS, *supra* note 67, at 280.

⁸⁸ See Ford, *supra* note 84, at 310; Clements, *supra* note 27, at 677 n.146.

⁸⁹ See HARRIS, *supra* note 67, at 404, 479.

⁹⁰ See HANSEN, *supra* note 62, at 106; Clements, *supra* note 27, at 676 n.146.

⁹¹ See HARRIS, *supra* note 67, at 342; UHVG VOL. 1, *supra* note 40, at 275; Roger Ebert, *The Texas Chainsaw Massacre*, ROGER EBERT.COM, <https://www.rogerebert.com/reviews/the-texas-chain-saw-massacre-1974> [<https://perma.cc/V9MW-ZGC8>] (original 1974 review from Roger Ebert).

⁹² See HARRIS, *supra* note 67, at 342.

⁹³ See UHVG VOL. 1, *supra* note 40, at 275.

⁹⁴ See HARRIS, *supra* note 67, at 279-80.

⁹⁵ See *id.* at 342; UHVG VOL. 1, *supra* note 40, at 275.

⁹⁶ See HANSEN, *supra* note 63, at 106-07.

martial-arts movies throughout the 1980s and 1990s.⁹⁷ While the graphics are dated by today's standards, the degree of harm a player could inflict on the opposing player's character was without comparison when contrasted to older games.⁹⁸ As one example, complex "fatality" moves requiring sometimes intricate memorization of a button sequence unique to each selectable character became available to a player only after completely winning the match against the opponent.⁹⁹ Two examples of these fatalities involve pulling an opponent's heart out of their chest or extracting the player's spine and skull.¹⁰⁰ Aware that the game may cause a stir as a home console release, the developer of the Sega Genesis console, Sega, formally created the SEGA Videogame Rating Council because of this game and assigned it an MA-13 (suitable for those over thirteen).¹⁰¹ Sega continued to use this rating council for subsequent releases, an industry first.¹⁰²

There were games featuring gore before *Mortal Kombat*, but its hyperbolic violence that bordered on comical with excess was new to many players. The game rode the wave of renewed consumer interest in player-versus-player arcade fighting games that followed the massive success of the Japanese *Street Fighter* franchise.¹⁰³ While there is certainly a lot of violence in *Street Fighter* and the various imitations that followed, the violence was largely stylized with little to no blood or gore.¹⁰⁴ One should not discount the genuine depth of the combat system that kept players shelling out the quarters, but the extreme gore and violence of *Mortal Kombat* was undoubtedly a major draw. Sensing potential public backlash, Nintendo asked the game's developers to replace the blood with grey sweat on the Super Nintendo home console version.¹⁰⁵ In comparison, the upstart Japanese developer, Sega, saw an opportunity to appeal to an older audience with more mature content than gamers were typically used to at that stage,

⁹⁷ See UHVG VOL. 1, *supra* note 40, at 462.

⁹⁸ See Dennis A. DeMarco, Note, *The Price of Porn & Pugilism: Reconciling Brown v. Entertainment Merchants Association with Ginsberg v. New York Through a Media-Specific Approach*, 19 WM. & MARY J. OF WOMEN & L. 609, 615-16 (2013).

⁹⁹ See UHVG Vol. 1, *supra* note 40, at 464.

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 479; HANSEN, *supra* note 62, at 106.

¹⁰² See HANSEN, *supra* note 62, at 106.

¹⁰³ See UHVG VOL. 1, *supra* note 40, at 462; HANSEN, *supra* note 62, at 100-101.

¹⁰⁴ See KEN HOROWITZ, *THE SEGA ARCADE REVOLUTION: A HISTORY IN 62 GAMES* 195-96 (2018); See UHVG VOL. 1, *supra* note 40, at 462.

¹⁰⁵ See HANSEN, *supra* note 63, at 106.

with the game releasing inclusive of full blood and gore on the Sega Genesis console.¹⁰⁶

Facing a nation full of angry parents exasperated with such releases, in 1993 Congress began holding joint hearings to investigate the marketing of video game violence to children.¹⁰⁷ U.S. Senator Joseph Lieberman reportedly became concerned about the topic when his chief of staff told him about *Mortal Kombat* after that staffer's son requested a copy of the game.¹⁰⁸ *Night Trap* also found itself on the congressional radar, among other reasons because the final scene featured an attack on a woman in her bathroom clothed in lingerie.¹⁰⁹ Senator Lieberman rallied the cause that video game developers were peddling the equivalent of R-rated materials to children.¹¹⁰ While the demographics of the gaming consumer audience skew much older now, at the time the average age of an audience member for video games was relatively young.¹¹¹

In addition to soliciting testimony from various industry stakeholders, senators called experts about the impact of violence on children and the associated risks of video games for a youth audience.¹¹² Ultimately, Congress did not pass any new legislation, but to head off public outcry stakeholders in the video game industry agreed to follow the ESRB rating system which launched in 1994.¹¹³ Sega's institution of a prior rating system helped provide a model upon which the ESRB built.¹¹⁴ After realizing the scope of potential fallout from full-scale congressional intervention, video game developers accepted that they had much to gain from a uniform system controlled by a third-party organization.¹¹⁵

While certainly more robust after *Brown*, the early scholarship on video games and the First Amendment made serious efforts to examine the relationship between the two.¹¹⁶ This Article does not devote much time to addressing that body of scholarship given that

¹⁰⁶ See *id.* at 106; HARRIS, *supra* note 67, at 406 (explaining that the Sega Genesis console was first released in America in 1989); See UHVG VOL. 1, *supra* note 40, at 404.

¹⁰⁷ See UHVG VOL. 1, *supra* note 40, at 462-63.

¹⁰⁸ See *id.* at 467.

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 468; HARRIS, *supra* note 68, at 475.

¹¹¹ See HARRIS, *supra* note 67, at 476-78.

¹¹² See *id.* at 484-85; DeMarco, *supra* note 97, at 617-18.

¹¹³ See HARRIS, *supra* note 67, at 423-24; UHVG VOL. 1, *supra* note 40, at 469-71.

¹¹⁴ See HARRIS, *supra* note 67, at 428-29, 477-78.

¹¹⁵ See *id.* (discussing pre-ESRB rating system used by Sega); UHVG VOL. 1, *supra* note 40, at 473-80.

¹¹⁶ See generally Wuller, *supra* note 18.

Brown both: (a) unquestionably altered the landscape of such regulation on a likely permanent basis with seven justices concurring on the result; and (b) had more fundamental conflict amongst the separate opinions than a typical First Amendment case.¹¹⁷ For a comprehensive discussion of the general parameters of pre-*Brown* scholarship, the most comprehensive article the author has found is a student piece with the *St. Louis Law Journal*.¹¹⁸ Various law review articles provide excellent detail on the early cases struggling with the question of whether video games constitute protected speech.¹¹⁹

B. Command & Conquer: The Supreme Court Blesses a Protected Medium

Because the author's focus in this entire piece is the *Brown* decision, this section provides a high-level discussion of the decision with comprehensive coverage on discrete topics in subsequent portions of the article. While fascinating in its own right, commentators have already extensively addressed the legislative, factual, and procedural history leading up to the opinion.¹²⁰

The California statute at issue in the case imposed additional package labelling requirements for "violent video games" and restricted their sale to minors absent consent from a parent, guardian, or other specified relative.¹²¹ The statute defined that term to include content "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being."¹²² Tracking directly from statutory language previously upheld by the Supreme Court bearing on restrictions of the sale of sexually explicit content to minors in *Ginsberg v. New York* (1968),¹²³ the California statute included various savings clauses.¹²⁴ In particular, language that purported to exclude from that statutory definition content that the California legislature did not deem obscene or that had serious artistic merit.¹²⁵

Many who watch the Court's docket expressed surprise that the justices agreed to hear the case because the lower courts were virtually

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Butler, *supra* note 36, at 913-16; Mott, *supra* note 57, at 636-42; see generally Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 12 (2002).

¹²⁰ See, e.g., Campbell, *supra* note 39, at 978-83; *The Effect of Court Rulings*, *supra* note 28, at 422-23; Fisher, *supra* note 16, at 526-28, 531-32.

¹²¹ See *Brown*, 564 U.S. at 789; *id.* at 838-39 (Thomas, J., dissenting).

¹²² *Id.* at 789 (majority opinion).

¹²³ *Ginsburg v. New York*, 390 U.S. 629 (1968).

¹²⁴ See *Brown*, 564 U.S. at 789, 793-94.

¹²⁵ See *id.*

unanimous on the protected status of video games.¹²⁶ That prior jurisprudence includes decisions from the Seventh and Eighth Circuits,¹²⁷ and then the pro-challenger opinion from the Ninth Circuit directly appealed to the Court.¹²⁸ In an effort to break that losing streak, California leaned heavily on the prior *Ginsberg* opinion as espousing a workable standard to regulate sale of violent content to minors.¹²⁹

California did itself no favors by retaining counsel that lacked experience presenting cases to the Supreme Court.¹³⁰ The Entertainment Merchants Association (“EMA”), in comparison, retained highly skilled counsel with Jenner & Block who had an extensive history of Supreme Court advocacy.¹³¹ Professor Angela Campbell has provided a thorough analysis of the relative quality of EMA’s case presentation compared to that of California.¹³² The large volume of amicus briefs supportive of EMA’s position from those in disparate industries also helped bolster its chances of success, for instance with nine states and many distinguished scholars opposing California’s arguments.¹³³

The Court appears to have labored heavily on the specifics of *Brown*, waiting until the last day of its term to issue the opinion.¹³⁴ The case does not split cleanly on ideological lines, with Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan joining the majority.¹³⁵ Justice Kagan acknowledged in a subsequent interview that the *Brown* decision was a “really hard case.”¹³⁶ As one of the earliest law review articles covering the opinion relates, the decision “contains enough peculiarities and doctrinal oddities to keep law professors and their students busy for years to come.”¹³⁷ With four separate opinions offering dramatically divergent views on the proper

¹²⁶ See David G. Post, *Sex, Lies, and Videogames: Brown v. Entertainment Merchants Association*, 2010-2011 CATO SUP. CT. REV. 27, 39 (2011); Butler, *supra* note 36, at 928-29.

¹²⁷ See Interactive Digital Software Ass’n v. St. Louis Cnty., 329 F.3d 954, 957-59 (8th Cir. 2003); Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

¹²⁸ See Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d at 959-61 (9th Cir. 2009), *aff’d sub nom; Brown*, 564 U.S. at 786.

¹²⁹ See Lee, *supra* note 19, at 347-49.

¹³⁰ See Campbell, *supra* note 39, at 972-74.

¹³¹ See *id.*

¹³² See *id.* at 985-1002.

¹³³ See *id.* at 1005-09.

¹³⁴ See Post, *supra* note 123, at 39.

¹³⁵ See Lee, *supra* note 19, at 303-04; see *Brown*, 564 U.S. at 786.

¹³⁶ See Campbell, *supra* note 39, at 1020-21.

¹³⁷ Post, *supra* note 123, at 27.

First Amendment treatment of video games and their sale to minors, *Brown* provides fertile ground for scholarly discussion.

When grappling with a decision of this level of complexity, it can be easy to forget that it was uncontested that video games are a protected medium under the First Amendment.¹³⁸ As one scholar describes the situation, the Court “treated First Amendment coverage for interactive video games as a largely self-evident proposition.”¹³⁹ Rather, the real battle was over the proper standard under which to evaluate the medium—strict scrutiny versus some lesser standard of protection.¹⁴⁰ That additional procedural hurdle made it far more difficult for California to persuade the Court of the constitutional firmness of the statute.¹⁴¹ California’s emphasis on the potential impacts for children became secondary considerations after it lost at this critical step.¹⁴² Some scholars have heavily analogized the result in *Brown* to the Court’s technology-neutral approach applied in *Citizens United v. FEC* (2010)¹⁴³ that led to invalidation of various election regulations implicating the distribution of films and books.¹⁴⁴

Besides setting the applicable First Amendment standard for regulation of video games, many consider *Brown*’s most important holding to be that violent content, unless independently qualifying as sexually obscene, falls outside the bounds of obscenity.¹⁴⁵ While foretold in *Stevens* in which the Court struck down criminal laws targeting violent “crush videos” showing “women slowly crushing small animals to death,” *Brown* unequivocally concludes that there is no historical basis to regulate the portrayal of violence.¹⁴⁶ The opinion rejects the notion that violent content has ever qualified as obscene in a judicially cognizable way.¹⁴⁷ Similarly, *Stevens* imposes an overarching restriction that governmental entities cannot rely on *ad hoc* balancing of societal benefits and harms arising from speech to substitute for a legitimate historical foundation supporting the contemplated regulation.¹⁴⁸

¹³⁸ See *Brown*, 564 U.S. at 790 (“California correctly acknowledges that video games qualify for First Amendment protection.”); Paree, *supra* note 20, at 257 (discussing this aspect of *Brown*).

¹³⁹ Charles W. “Rocky” Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 406 (2014).

¹⁴⁰ *Id.*

¹⁴¹ See Post, *supra* note 123, at 42.

¹⁴² See, e.g., Butler, *supra* note 36, at 925-26.

¹⁴³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹⁴⁴ See Lee, *supra* note 19, at 358-59.

¹⁴⁵ See, e.g., *id.* at 300-01, 350-51.

¹⁴⁶ Bhagwat, *supra* note 15, at 846-47; accord Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168-69, 2174-77 (2015) (discussing the complexities of *Stevens*).

¹⁴⁷ See *Brown*, 564 U.S. at 794-99.

¹⁴⁸ See Lee, *supra* note 19, at 349-50.

The core of the *Brown* decision is a refusal to engage courts in the process of judicial line drawing between “political speech and entertainment speech.”¹⁴⁹ The majority finds it compelling that landmark literature dating back to ancient Greek and medieval times sometimes contain incredibly graphic portrayals of violence.¹⁵⁰ The opinion also emphasizes that texts historically shown to young children, like *Grimm’s Fairy Tales*, do not hesitate to present quite violent scenarios to children—including where children participate in the violence.¹⁵¹ For a twentieth century example, Justice Scalia points to the book, *Lord of the Flies* (1954), as trusting children to sort through an emotionally unsettling narrative where a variety of young boys transform into violent antagonists when isolated from adults.¹⁵²

Justice Scalia quickly dispenses of various studies purporting to draw a link between youth violence and video game consumption, expressing that they “have been rejected by every court to consider them.”¹⁵³ The majority emphasizes that these studies articulate no more significant relationship between youth violence and violent video games than one sees when children watch typical cartoons or play video games “that are rated ‘E’ (appropriate for all ages).”¹⁵⁴ California’s specific targeting of video games while excluding other forms of media led the Court to find the statute “wildly underinclusive” under strict scrutiny.¹⁵⁵ The Court also found the legislation overinclusive because it permitted parents or relatives to purchase for children allegedly highly graphic material.¹⁵⁶ The majority expresses that this dynamic revealed that California impermissibly tried to put its thumb on the scale against video games because the statute’s “entire effect is only in support of what the State thinks parents *ought* to want.”¹⁵⁷ Justice Scalia relies heavily on the Court’s prior 1952 opinion of *Joseph Burstyn, Inc. v. Wilson* that dispensed of comparable arguments raised in favor of broad regulation of film content.¹⁵⁸

One of the more complex portions of the majority opinion addresses whether the interactive dynamic of video games justifies

¹⁴⁹ Wright, *supra* note 18, at 344-45.

¹⁵⁰ See *Brown*, 564 U.S. at 796.

¹⁵¹ See *id.* at 795-96.

¹⁵² See *id.* at 796.

¹⁵³ *Id.* at 800.

¹⁵⁴ See *id.* at 801; Lee, *supra* note 19, at 353-54.

¹⁵⁵ See *Brown*, 564 U.S. at 801-02.

¹⁵⁶ *Id.* at 804.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* at 790, 797 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

separate treatment under free-speech laws.¹⁵⁹ This Article more comprehensively analyzes that specific topic in Part V.B.¹⁶⁰ The Court treats the interactivity dynamic of video games as one of kind than consequence.¹⁶¹ Justice Scalia explains that interactivity is a positive feature of quality art, and certainly not one unique to video games.¹⁶² The majority further emphasizes the strong track record of the video game industry with the ESRB rating system, including beating its analog in the movie industry, the MPAA, in actual enforcement exercises by governmental agencies.¹⁶³

For those seeking an alternative to the *Brown* majority's approach, Justice Alito's concurrence has fared well from a scholarly perspective.¹⁶⁴ The primary reservation that Justices Alito and Roberts express is that, while the statute at issue was unconstitutionally vague, the majority prematurely decided that strict scrutiny should govern as the standard for regulation of video games.¹⁶⁵ This concurrence spends a great deal of time addressing how reportedly novel dynamics of video game technology warrant further caution in making broad pronouncements about the medium's proper First Amendment status.¹⁶⁶ While the author believes that this concurrence displays too much caution about video games specifically, as addressed in Part V.C there are various legitimate points the opinion raises worth consideration when the time comes to address technology that is truly distinct from video games.¹⁶⁷ In terms of specific problems with the opinion, Justice Alito fails to account for how video games contained highly violent images since the mid-1990s with no corresponding impact of a discernable nature on children.¹⁶⁸

Justice Thomas' dissent concludes that there is no First Amendment basis to strike down legislation regulating speech to minor children in a way that prevents minors from bypassing parents—as California's system contemplated.¹⁶⁹ Some have described his opinion as “originalism on steroids.”¹⁷⁰ Especially when obscenity is tied to contemporary community standards, scholars have expressed that relying on child-rearing treatises from the seventeenth and eighteenth

¹⁵⁹ *Id.* at 802.

¹⁶⁰ *Infra* Part V.B.

¹⁶¹ *See* Wuller, *supra* note 18, at 472.

¹⁶² *See Brown*, 564 U.S. at 798.

¹⁶³ *See id.* at 803.

¹⁶⁴ *See id.* at 805-821 (Alito, J., concurring).

¹⁶⁵ *See id.* at 820-21 (Alito, J., concurring).

¹⁶⁶ *See Lee*, *supra* note 19, at 355-56.

¹⁶⁷ *See id.* at 805-821 (Alito, J., concurring).

¹⁶⁸ *See Mott*, *supra* note 57, at 651-52; Norris, *supra* note 16, at 115.

¹⁶⁹ *See Brown*, 564 U.S. at 821-23 (Thomas, J., dissenting).

¹⁷⁰ *See Post*, *supra* note 125, at 45-46.

centuries is a weak position.¹⁷¹ Furthermore, Justice Thomas' conceptions of absolute parental authority seem out of place with more recent Supreme Court opinions, including the 2021 opinion of *Mahanoy Area School District v. B.L.* where Justice Thomas found himself as the sole dissenting vote.¹⁷² That dispute extended free-speech protections to a cheerleader's off-campus speech via social media that used vulgar language to criticize a school coach.¹⁷³ In that 8-1 opinion authored by Justice Breyer, the majority emphasizes that "courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all."¹⁷⁴

Justice Breyer's dissent in *Brown*, which concludes that the California statute meets First Amendment scrutiny, has similarly not held up well to the test of time. Some have characterized the Breyer opinion as "all balance and nuance" in representing the "other end of the spectrum from Justice Thomas' rigid and uncompromising stance."¹⁷⁵ With its comprehensive discussion that includes two lengthy appendices with a list of academic journal articles, one could say that this dissent crosses the line into excessive judicial factfinding in a manner not proper for a First Amendment analysis.¹⁷⁶ The majority expresses concern that Justice Breyer was considering a large amount of material that was outside the case record.¹⁷⁷ Perhaps the greatest flaw with the Breyer opinion is that it relies on potential uncertainty about the danger of video games as justification for upholding the California legislation¹⁷⁸ even though many prior decisions squarely place the burden even with intermediate scrutiny on the government to justify the regulation at issue.¹⁷⁹ Some would label this dissent as a prime contender of unwarranted judicial hostility towards new technology.¹⁸⁰

¹⁷¹ See Post, *supra* note 125, at 45-46.

¹⁷² See generally *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

¹⁷³ See *id.* at 2046-48.

¹⁷⁴ *Id.* at 2046.

¹⁷⁵ See Post, *supra* note 125, at 48.

¹⁷⁶ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 840-72 (2011) (Breyer, J., dissenting).

¹⁷⁷ See *id.* at 802 n.8 (majority opinion).

¹⁷⁸ See *id.* at 853-55 (Breyer, J., dissenting).

¹⁷⁹ See, e.g., *United States v. Playboy Entm't Group*, 529 U.S. 803, 817 (2000).

¹⁸⁰ See Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1653 (2021).

C. The First Decade of the Post-*Brown* Era

While there are still chapters to be written when it comes to *Brown*'s legacy, scholars have remained highly engaged with the opinion in the first decade after its issuance. From the author's perspective, the most glaring deficiency with existing legal scholarship on *Brown* has little to do with the First Amendment.¹⁸¹ In many law review pieces where one would expect innovative analysis, it is often genuinely surprising to see how little discussion appears about either video games as a medium or the larger industry—even when the article is specifically on the topic of video games' relationship with the First Amendment.¹⁸²

Especially for scholarly pieces that take a vigorously anti-*Brown* stance, it is difficult to take those arguments seriously when the respective author appears to have limited understanding of video games or even the operation of the industry. Scholars have lodged this same criticism at the Supreme Court justices themselves.¹⁸³ However, it is an unavoidable reality that judges sometimes have to rule on societal phenomena with which they are unfamiliar.¹⁸⁴

Commentators focusing on less speech-central aspects of the video game industry have helped to some degree to fill these scholarly gaps.¹⁸⁵ Likewise, student-authored law review pieces have definitely overperformed in their contribution to this discussion—with several of the most insightful articles on the First Amendment and video games coming from students.¹⁸⁶ Perhaps the reason for the relative strength of student articles in this area is that the consumer audience for video games has historically skewed towards those around the typical age of law students.¹⁸⁷

Virtually no scholars dispute at least one of the fundamental holdings in *Brown*, specifically that video games are a protected form

¹⁸¹ See Massaro, *supra* note 179.

¹⁸² See generally Martin Guggenheim, *Violent Video Games and the Rights of Children and Parents: A Critique of Brown v. Entertainment Merchants Association*, 41 HASTINGS CONST. L.Q. 707 (2014) (providing analysis contra to *Brown* but providing virtually no discussion of video game technology); Schlafly, *supra* note 2 (same); Wright, *supra* note 18 (same).

¹⁸³ See Ford, *supra* note 84, at 297-304.

¹⁸⁴ See Ford, *supra* note 84, at 297-304; Campbell, *supra* note 39, at 969-71.

¹⁸⁵ See, e.g., William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 56-58, 69-70 (2012); Palachuk, *supra* note 62, at 233-35.

¹⁸⁶ See generally Clements, *supra* note 27; Jennings, *supra* note 17; Parea, *supra* note 20; Waller, *supra* note 18.

¹⁸⁷ *Id.*

of expression under the First Amendment.¹⁸⁸ As mentioned previously, California effectively conceded that point, with Justice Scalia characterizing it as not challenging that proposition.¹⁸⁹ Additionally, there does not seem to be any genuine question about the accuracy of the Court's conclusion on the absence of any meaningful—or more particularly consistent—history of regulation of violent content across forms of media, although some scholars still disagree with the rigid application of *Stevens* as foreclosing regulation of such content.¹⁹⁰

However, there is still significant debate over whether video games warrant the protections of strict scrutiny, effectively the highest level of speech protection.¹⁹¹ Many *Brown* critics have taken up the mantle of Justice Alito's concurrence, which is based on the fundamental notion that it is premature to extend video games full First Amendment protection.¹⁹² A much smaller contingent propose following aspects of either Justice Thomas or Justice Breyer's separate dissenting opinions.¹⁹³

Perhaps the most radical proposal to overturn the result in *Brown* is to recharacterize a consumer's interaction with a video game as non-protected conduct as opposed to protected speech.¹⁹⁴ This deceptively simple approach would create enormous conflicts with existing precedent on speech protections for expressive conduct.¹⁹⁵ Conduct that communicates ideas, even if only indirectly, typically receives unqualified speech protection.¹⁹⁶ Various First Amendment decisions treat as protected speech everything from: (1) flag burning; (2) nude dancing; (3) tattoo art; (4) student usage of profanity via

¹⁸⁸ See, e.g., Guggenheim, *supra* note 181, at 749-52, 759-69 (criticizing various aspects of *Brown* but acknowledging that the Court “was correct in rejecting California's effort to place video games outside of ordinary First Amendment regulation as a new genre materially different from anything that came before”).

¹⁸⁹ See *Brown*, 564 U.S. at 790.

¹⁹⁰ See Campbell, *supra* note 39, at 1012-15 (discussing portions of oral argument at *Brown* where justices emphasized that there was “no consensus, no judicial opinions” on violent content); Norris, *supra* note 16, at 115.

¹⁹¹ Campbell, *supra* note 39, at 1012-15.

¹⁹² See, e.g., Guggenheim, *supra* note 181, at 749-50, 759-69; Wuller, *supra* note 18, at 486-88.

¹⁹³ See, e.g., DeMarco, *supra* note 97, at 626-28 (arguing that the Court should have upheld the California statute); Jennings, *supra* note 17, at 108-09, 114-16 (same).

¹⁹⁴ See Callaway, *supra* note 41, at 496, 513-14 (proposing this method to modify the result in *Brown* and citing other scholars suggesting that approach).

¹⁹⁵ See Rhodes, *supra* note 138, at 429-31, 438-40 (explaining breadth of protections for nonlinguistic conduct).

¹⁹⁶ See Bhagwat, *supra* note 15, at 871-72.

social media outside of school hours to criticize school officials; and (5) cigarette advertising even if that may have negative consequences to minors.¹⁹⁷ It defies belief that modern video games are more dangerous and less expressive than these other protected forms of speech.

While one could argue about the analytical process the Court used to weigh scientific evidence, some have expressed that a more robust consideration of such evidence would not likely have changed the result in *Brown*.¹⁹⁸ Perhaps a better presentation by California and the amicus briefs supporting its arguments would have resulted in a plurality with one or more justices in the majority joining Alito's concurrence, but the California statute still remains defective.¹⁹⁹ Long before *Brown*, the government has always carried the burden to justify regulation of speech under either strict or intermediate scrutiny.²⁰⁰ Maybe there are legitimate arguments about refining how the Supreme Court and other judicial bodies evaluate scientific evidence in areas heavy in judicial policymaking, like First Amendment jurisprudence.²⁰¹ However, any such problems are far more expansive than critiquing any particular decision.²⁰²

Echoing Justice Alito's critique, some have bemoaned the lack of significant legislative enactments from states attempting to regulate violent video games.²⁰³ This criticism presupposes that video games are both dangerous to minors and an inferior type of speech that should face heightened regulation, arguments rejected by virtually every court to consider them.²⁰⁴ This position is also more a critique of the consequences of the strict scrutiny standard than any particular holding of *Brown*.²⁰⁵ The entire purpose of strict scrutiny is to keep legislatures and courts out of the business of regulating speech.²⁰⁶ It is

¹⁹⁷ See *Mahanoy*, 141 S. Ct. at 2046-48 (protecting vulgar off-campus speech of student on social media); Rhodes, *supra* note 138, at 435-36 (discussing various forms of protected conduct); Wright, *supra* note 18, at 349-50 (discussing nude dancing and tattoos); Beckwith, *supra* note 78, at 251-52 (discussing various First Amendment implications for movie advertisements involving smoking).

¹⁹⁸ See Ford, *supra* note 84, at 298-99.

¹⁹⁹ See Callaway, *supra* note 41.

²⁰⁰ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736-38 (2017); *United States v. Playboy Entm't Group*, 529 U.S. 803, 817 (2000).

²⁰¹ See Ford, *supra* note 84, at 301-08.

²⁰² See, e.g., Erick D. Reitz, Note, *Children and Categorization: Maintaining a Standard for Recognizing Speech Categories in Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), 91 NEB. L. REV. 998, 1006-08, 1016, 1019-21 (2013).

²⁰³ See Campbell, *supra* note 39, at 966-68; Guggenheim, *supra* note 181, at 771.

²⁰⁴ See, e.g., Butler, *supra* note 36, at 911-12, 933-34 (criticizing core holdings of *Brown*).

²⁰⁵ See Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1445 (2017).

²⁰⁶ See Butler, *supra* note 36.

a dangerous proposition with devastating potential economic consequences to provide courts with the power to decide the relative value of given artistic media.²⁰⁷ It would stifle artistic creativity and the development of new forms of media to hold otherwise, requiring artists to carry the burden of expensive and protracted lawsuits to litigate whether their speech deserves full First Amendment protection.²⁰⁸ EMA, for instance, incurred well over a million dollars in attorney's fees litigating the *Brown* case through to its conclusion.²⁰⁹ Carving out exceptions to content neutrality presents many dangers to all kinds of protected speech that are much larger than any purported benefits society would reap from stricter video game regulations.²¹⁰

Some scholars have proposed that federal or state legislatures should mandate that video game companies participate in the ESRB rating system, or otherwise some legislative implementation of comparable solutions drawing from that system.²¹¹ Although it is almost uniformly applied across the domestic retail channel for distribution of video games, this rating system is technically a voluntary one.²¹² Nevertheless, virtually every game receives a rating from this organization.²¹³ While the ESRB system has a strong track record of keeping potentially objectionable content out of the hands of minors, the fundamental problem with this approach is that it would not withstand First Amendment scrutiny.²¹⁴ Legislatures have taken similar efforts to mandate that movie theaters participate in the MPAA rating system or to tax film products receiving an adult rating, with courts striking down such laws as unconstitutional.²¹⁵

That is not to say that society should forego cooperative interaction with industry groups like the ESRB to help them better

²⁰⁷ See Massaro & Norton, *supra* note 179, at 1646-47 (discussing how free speech benefits "development of intellectual and informational goods and services").

²⁰⁸ See Massaro & Norton, *supra* note 179, at 1646-47; Campbell, *supra* note 39, at 976.

²⁰⁹ Campbell, *supra* note 39, at 976.

²¹⁰ See Campbell, *supra* note 39.

²¹¹ See Guggenheim, *supra* note 181, at 765-67; Clements, *supra* note 27, at 690-91.

²¹² See HANSEN, *supra* note 62, at 109; Clements, *supra* note 27, at 677.

²¹³ See Clements, *supra* note 27, at 686-87.

²¹⁴ See Paree, *supra* note 20, at 263-64 (discussing litigation over such legislative efforts).

²¹⁵ See, e.g., *E. Fed. Corp. v. Wasson*, 316 S.E.2d 373, 374 (S.C. 1984) (striking down tax on "X" rated movies); William Cross, Note and Recent Development, *Hot Coffee and Freeze-Dried First Amendment Analysis: The Dubious Constitutionality of Using Private Ratings for Public Regulation of Video Games*, 4 FIRST AMEND. L. REV. 299, 324-27 (2006) (discussing various cases involving constitutionality of a governmental entity imposing MPAA or comparable rating standards).

accomplish their mission.²¹⁶ No industry group is perfect, and various scholars have lodged criticism at the organization.²¹⁷ However, one day the ESRB may significantly change its approach to video game ratings to better address consumer needs.²¹⁸ One reason the ESRB has achieved success is that private companies first experimented with video game rating methods before this organization's approach became the standard model.²¹⁹ Furthermore, perhaps a different industry group will one day take up the ESRB's mantle as the authoritative organization issuing these rating standards.²²⁰ A statutorily mandated rating procedure would stifle such marketplace innovation.²²¹ For these and many other reasons, it is unwise—and more importantly constitutionally impermissible—for legislatures to dictate any mandates related to the ESRB rating system.²²²

IV. The History of Video Games as a Commercial and Artistic Medium

While any dividing lines when talking about a medium as complex as video games are to some degree arbitrary, this Article separates video game history into four eras: (1) the Primordial Era from 1950 to 1962 when video games were in their infancy as a medium; (2) the Two-Dimensional Era from 1962 to 1984; (3) the Three-Dimensional Era from 1984 to 2012; and (4) the Modern Era from 2012 to the present. Examining this medium from a longer-term perspective provides an important check against *Brown's* reasoning—both at the time of the decision and moving forward. Whether one is for or against *Brown*, it also cannot be disputed that its detractors must grapple with the realities of *stare decisis*.²²³ The Court is unlikely to ignore pertinent developments in video game history if it is ever asked to expand upon or overturn the opinion.

It is important to emphasize that two-dimensional games continue to be released to the present day, so it is difficult to draw a clean separation between the Two-Dimensional Era and the Three-

²¹⁶ See Clements, *supra* note 27, at 689-90 (emphasizing the benefits of such an approach).

²¹⁷ See Jennings, *supra* note 17, at 96-97, 114; Maldonado, *supra* note 83, at 736-37.

²¹⁸ See Paree, *supra* note 20, at 271-72 (suggesting changes to ESRB model).

²¹⁹ See HARRIS, *supra* note 67, at 428-29, 477-78; UHVG VOL. 1, *supra* note 40, at 553.

²²⁰ See Paree, *supra* note 20, at 272-73 (discussing such a possibility).

²²¹ See Clements, *supra* note 27, at 678.

²²² Mike Musgrove, *On the Hill and in Court, a Shootout Over Ratings*, WASH. POST (2006), https://www.washingtonpost.com/wp-dyn/content/article/2006/10/25/AR2006102501792_2.html [https://perma.cc/7H7X-SVSR].

²²³ *With Roe overturned, legal precedent moves to centerstage*, A.B.A. (June 24, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/stare-decisis-takes-centerstage/> [https://perma.cc/4SVE-RUBL].

Dimensional Era. As discussed below in Part IV.C, the reason the author has chosen 1984 as the beginning point of the Three-Dimensional Era is that the first truly three-dimensional game was released that year.²²⁴ In terms of the conclusion point for the Three-Dimensional Era, modern gaming platforms can deliver experiences quite distinct from their predecessors with the advent of photorealistic detail and novel formats such as virtual reality.²²⁵ For these reasons, it is logical to set an endpoint for that era in 2012 when the first of the consoles launched of the technologically robust Eighth Generation.²²⁶

Games from the Modern Era typically release in three-dimensional or, less commonly, two-dimensional formats.²²⁷ A hallmark of the Modern Era is that gaming is no longer tied to any specific hardware with consumers able to play games on traditional consoles, arcade cabinets, handhelds, and mobile phones.²²⁸ While one can quibble about the details of what photorealism actually means, it is widely recognized that video game developers are now capable of achieving that standard with current technology.²²⁹ There are all kinds of devices through which gamers can try new experiences, for instance virtual reality headsets that project video directly to the players' eyes.²³⁰ Some predict that virtual reality will one day replace television, with Netflix, for instance, taking an interest in the format.²³¹ While virtual reality devices have been around for decades, some of the early iterations of the technology were commercial flops.²³² Modern virtual

²²⁴ *First 3D Video Game*, HIST. OF VIDEO GAMES, <https://his135-video-game-history.weebly.com/first-3d-video-game.html> [<https://perma.cc/7EFF-RE58>].

²²⁵ Johanna Roettl & Ralf Terlutter, *The same video game in 2D, 3D or virtual reality – How does technology impact game evaluation and brand placements?*, 13(7) PLOS ONE, 1, 1-3 (2018) (discussing the change in the video game industry, specifically with virtual reality).

²²⁶ *History of video game consoles (eighth generation)*, GOOGLE ARTS & CULTURE, <https://artsandculture.google.com/entity/history-of-video-game-consoles-eighth-generation/mo87k9?hl=en> [<https://perma.cc/NJ8R-UCMK>].

²²⁷ History.com Editors, *Video Game History*, HIST. (Oct. 17, 2022), <https://www.history.com/topics/inventions/history-of-video-games> [<https://perma.cc/A6AS-YMMR>].

²²⁸ See UHVG VOL. 1, *supra* note 40, at 414-15 (discussing early handheld market).

²²⁹ See UHVG VOL. 2, *supra* note 35, at xi-xii; Maldonado, *supra* note 83, at 738. *But see* DeMarco, *supra* note 97, at 633-34 (2013 article questioning whether video games have reached photorealism).

²³⁰ See HANSEN, *supra* note 62, at 347-49; Fisher, *supra* note 16, at 543.

²³¹ See HANSEN, *supra* note 62, at 348.

²³² See HARRIS, *supra* note 67, at 340-41; UHVG VOL. 1, *supra* note 40, at 518-19; Graham Flanagan, *The incredible story of the 'Virtual Boy' – Nintendo's VR headset from 1995 that failed spectacularly*, BUS. INSIDER (Mar. 26, 2018, 9:58 AM),

reality devices offer experiences that are extremely sophisticated when compared to the earliest iterations of such content.²³³

Because, from this author's standpoint, video games demonstrated their entitlement to full First Amendment protection no later than the close of the Fifth Generation, the focus of this Article is on the Two-Dimensional Era and the early to middle portions of the Three-Dimensional Era.²³⁴ With the increasing complexity of video games, the author emphasizes that there is a vast amount of legal scholarly content undeveloped from the later Three-Dimensional Era and the Modern Era.²³⁵

A. The Primordial Era: 1950 to 1962

Given the inability of general members of the public to access computers in the 1950s and 1960s, the first games ever created were a byproduct of government-operated research facilities and universities, or sometimes private companies.²³⁶ Computers in this time period were often large enough to fill an entire room, so only a select few had sufficient access to them to design a complete video game.²³⁷

While not even considered by some as true video games due to their rudimentary graphical capabilities, the first creations that could conceivably be labelled as video games date back to the early 1950s.²³⁸ These earliest releases typically replicated in electronic form an established children's game with the purpose of the machine's

<https://www.businessinsider.com/nintendo-virtual-boy-reality-3d-video-games-super-mario-2018-3> [<https://perma.cc/74ZS-DGA8>].

²³³ Vladislav Angelov, Emiliyan Petkov, Georgi Shipkovenski & Teodor Kalushkov, *Modern Virtual Reality Headsets*, HORA, June 2020, at 1, 1 (discussing how the virtual reality has evolved).

²³⁴ Patrick M. Garry, *Video Games*, MTSU (Sept. 2017), <https://www.mtsu.edu/first-amendment/article/1152/video-games#:~:text=The%20U.S.%20Supreme%20Court%20has,entitled%20to%20First%20Amendment%20protection> [<https://perma.cc/HUD2-BLKD>].

²³⁵ ANDY RAMOS ET AL., *THE LEGAL STATUS OF VIDEO GAMES: COMPARATIVE ANALYSIS IN NATIONAL APPROACHES*, 10 (2013).

²³⁶ See UHVG VOL. 1, *supra* note 40, at 16-17; WARDYGA, *supra* note 55, at 4; *infra* notes 241-49 (discussing examples of private companies).

²³⁷ See UHVG VOL. 1, *supra* note 40, at 16-17.

²³⁸ While one could arguably describe early pinball machines as the first video games, scholars typically treat them as distinct from computer-generated video games. See *id.* at 2-4; WARDYGA, *supra* note 55, at 3. Conceptually, it is easier to think of the earliest pinball machines as advanced physically interactive games akin to carnival and other amusement games, especially because those pinball machines did not even necessarily use electricity. See UHVG VOL. 1, *supra* note 40, at 2-4; WARDYGA, *supra* note 55, at 3.

assembly primarily to demonstrate a computer's real-world capabilities.²³⁹

Some consider the first video game to be a glorified Tic-Tac-Toe machine called *Bertie the Brain* (1950).²⁴⁰ The reason why *Bertie the Brain* and other comparable early inventions do not cleanly fit the definition of a video game is that, while they do feature interactivity with a computer, they lack “the additional element of moving graphics that led to what is widely considered a true video game.”²⁴¹ The thirteen-foot tall machine housing the game—of which apparently only one was ever produced—was built in Toronto by Josef Kates for the 1950 Canadian National Exhibition.²⁴² Kates had worked at the company designing and building radar tubes during World War II.²⁴³ In affiliation with the University of Toronto, he later helped design one of the first working computers in the world.²⁴⁴ Players at the 1950 exhibition entered their move on *Bertie the Brain*'s three-by-three keypad that mapped to the display grid where X's and O's appeared on a grid of lights overhead.²⁴⁵ The player competed against the machine, which had several difficulty levels that could be selected for its skill level.²⁴⁶ The game was unceremoniously disassembled after its two-week display window.²⁴⁷

A few other early releases fall into this murky territory of pseudo-video games.²⁴⁸ One ran on a Nimrod computer built in the United Kingdom for the 1951 Festival of Britain by the company Ferranti.²⁴⁹ The machine could replicate in electronic form (although

²³⁹ Alexander Smith, *The Priesthood at Play: Computer Games in the 1950s*, THEY CREATE WORLDS (Jan. 22, 2014), <https://videogamehistorian.wordpress.com/2014/01/22/the-priesthood-at-play-computer-games-in-the-1950s/> [<https://perma.cc/VH2K-4A9D>]; See WARDYGA, *supra* note 55, at 4.

²⁴⁰ See WARDYGA, *supra* note 55, at 4.

²⁴¹ See *id.*

²⁴² See *id.*; Matt Blitz, *Bertie the Brain Still Lives*, POPULAR MECHANICS (Nov. 2, 2016), <https://www.popularmechanics.com/technology/gadgets/a23660/bertie-the-brain/> [<https://perma.cc/XE59-62M8>].

²⁴³ Blitz, *supra* note 241.

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ See *id.*

²⁴⁷ *Id.*

²⁴⁸ 10 Oldest Video Games in the World, OLDEST.ORG, <https://www.oldest.org/entertainment/video-games/> [<https://perma.cc/5SCX-7TLD>].

²⁴⁹ See WARDYGA, *supra* note 55, at 4; Chris Baker, *Nimrod, the World's First Gaming Computer*, WIRED (June 2, 2018, 8:00 AM), <https://www.wired.com/2010/06/replay/> [<https://perma.cc/95GX-4ZE2>].

non-animated) the game of Nim, where players take turns removing at least one object from a set of objects, with players competing to be the one to remove the last object.²⁵⁰ Another is *OXO* (1952) created by A.S. Douglas as part of his thesis on human-computer interaction at the University of Cambridge.²⁵¹ Like *Bertie the Brain*, *OXO* was a computerized game of Tic-Tac-Toe.²⁵²

Some credit as the inventor of the first true video game the American nuclear physicist William Higinbotham who created *Tennis for Two* while working at the Brookhaven National Laboratory.²⁵³ This first video game premiered in October 1958 at one of the laboratory's public exhibitions.²⁵⁴ The release receives undisputed credit as a video game because it features both interactivity with a computer and moving graphics replicated on a screen—two criteria that many believe serve as the absolute floor when labelling something as a video game.²⁵⁵

Tennis for Two displayed on a small, 5-inch oscilloscope, boasting a rudimentary monochromatic screen.²⁵⁶ Players used two custom aluminum controllers to compete against one another in a tennis match where the player must lob the ball across a net in the center of the screen.²⁵⁷ Later variations of the game featured larger screens and alternate modes, in particular different gravity settings that would impact the momentum of the tennis ball.²⁵⁸ Like other releases in this era, the designers did not intend the game to be something for general commercial or public use.²⁵⁹

B. The Two-Dimensional Era: 1962 to 1984

1. The Dawn of Commercialized Gaming

Admittedly, there is no straightforward way to delineate the conclusion of the Primordial Era. Because true video games in the Primordial Era are also two dimensional in design, the Author believes that it is better to use as a demarcation point for this next era the first

²⁵⁰ See Baker *supra* note 248.

²⁵¹ See WARDYGA, *supra* note 55, at 4; Oliver Perez Latorre, *The European Videogame: An Introduction to Its History and Creative Traits*, 28 EUR. J. OF COMM. 136, 140 (2013).

²⁵² See Latorre, *supra* note 250, at 140.

²⁵³ See WARDYGA, *supra* note 55, at 4; Kristin Kalning, *The anatomy of the first video game*, NBC NEWS (Oct. 23, 2008, 9:13 AM), <https://www.nbcnews.com/id/wbna27328345> [<https://perma.cc/N869-XAQH>].

²⁵⁴ WARDYGA, *supra* note 55, at 4.

²⁵⁵ See *id.*; *Video Game*, *supra* note 54.

²⁵⁶ WARDYGA, *supra* note 55, at 4.

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ See *id.*; Kalning, *supra* note 252.

material circulation of a video game to a significant commercial audience.²⁶⁰ In comparison, video games from the Primordial Era had no material consumer base.²⁶¹ There are few events in video game history that more quickly spurred the medium's development than the advent of an actual marketplace for video games.

From the Author's perspective, the 1962 release of *Spacewar!* marks the beginning of the Two-Dimensional Era.²⁶² A group of individuals affiliated with the Massachusetts Institute of Technology ("MIT") worked together to create this first known space shooter.²⁶³ This was the first video game circulated outside of an institution to any meaningful degree or featured apart from an exhibition.²⁶⁴ Capitalizing on the game's early popularity in smaller circles, the designers presented the game to Digital Equipment Corporation at a company conference, eventually leading to the company pre-loading the game on all its PDP-1 computers sold.²⁶⁵ Because the designers had PDP-1 machines available to them at MIT, they seized this opportunity for a viable outlet that could run a new video game creation.²⁶⁶

Still playable through a modern computer, *Spacewar!* involves a simple duel between space ships that can fire weapons, with one player controlling each ship.²⁶⁷ The original version features four switches which the player could operate to maneuver the ship, to thrust the ship's rockets for a speed increase, and to fire torpedoes.²⁶⁸ Scholars have credited this game as featuring the first wired video game controller,²⁶⁹ which was a rudimentary control box the player held in their hand to operate the game.²⁷⁰ It took the lead developer, Steve Russell, roughly 200 hours across six months to complete the game

²⁶⁰ Dominic Arsenault, *Video Game Genre, Evolution and Innovation*, 3 J. FOR COMPUT. GAME CULTURE 149, 149-51 (2009) (discussing the evolution and innovation of video games).

²⁶¹ See UHVG VOL. 1, *supra* note 40, at 14-15.

²⁶² See WARDYGA, *supra* note 55, at 4.

²⁶³ See *id.*

²⁶⁴ See *id.*; Latorre, *supra* note 250, at 140.

²⁶⁵ Ryan P. Smith, *How the First Popular Video Game Kicked Off Generations of Virtual Adventure*, SMITHSONIAN MAG. (Dec. 13, 2018), <https://www.smithsonianmag.com/smithsonian-institution/how-first-popular-video-game-kicked-off-generations-virtual-adventure-180971020/> [https://perma.cc/A5LW-TNNC].

²⁶⁶ *Id.*

²⁶⁷ UHVG VOL. 1, *supra* note 40, at 18-19.

²⁶⁸ WARDYGA, *supra* note 55, at 4.

²⁶⁹ ALASTAIR H. CUMMINGS, THE EVOLUTION OF GAME CONTROLLERS AND CONTROL SCHEMES AND THEIR EFFECT ON THEIR GAMES 2 (2006).

²⁷⁰ See UHVG VOL. 1, *supra* note 40, at 18-19.

design.²⁷¹ The programming resources available to even a sophisticated facility like MIT were so basic by today's standards that there was not enough computing power available to design a competent computerized opponent.²⁷² *Spacewar!* was the first of many space shooters to follow, with some of the most successful early video games from the Two-Dimensional Era appearing in this genre.²⁷³

2. The Arcade Golden Age

While the precise window of years that commentators consider to comprise the original arcade golden age can be inconsistent,²⁷⁴ it is undisputed that the most successful financial period for arcades occurred from the 1970s to the early 1980s.²⁷⁵ The author does not dispute that, because of major technological limitations at the time, proponents of even hallmark games from this period would face challenges persuading a court that they qualify as truly expressive First Amendment creations.²⁷⁶ In any event, *Brown* rests upon a sophisticated record that included video game creations through the first decade of the 2000s.²⁷⁷

One of the first pioneers of the early arcade market is Sega, a company based in Japan that remained a major player in video game hardware development through the early 2000s.²⁷⁸ Incidentally, while Sega is headquartered in Japan and has a Japanese corporate culture, it was actually founded by Americans.²⁷⁹ Its American connections helped it gain a strong foothold in the domestic market.²⁸⁰ One of Sega's earlier releases was, *Periscope* (1968), an electromechanical game that "used lights and plastic waves to stimulate sinking ships from a submarine."²⁸¹ Some describe this release as the first video game in

²⁷¹ See *id.*

²⁷² *Id.* at 19.

²⁷³ See HANSEN, *supra* note 62, at 9-11 (discussing *Space Invaders* (1978)).

²⁷⁴ Rebecca Northfield, *Gaming's golden age: top 10 retro-vintage arcade classics*, THE INST. OF ENG'G & TECH. (July 17, 2018), <https://eandt.theiet.org/content/articles/2018/07/gaming-s-golden-age-top-10-retro-vintage-arcade-classics/#:~:text=The%20late%201970s%20to%20mid,were%20highlights%20of%20this%20period> [https://perma.cc/2BLC-YQ34].

²⁷⁵ See HOROWITZ, *supra* note 103, at 62-63 (covering struggles of arcade industry in the early 1980s); UHVG VOL. 2, *supra* note 35, at 170-71 (stating that "[i]n terms of quarters and cash boxes, the golden age ended in 1982"); Butler, *supra* note 36, at 913.

²⁷⁶ See Butler, *supra* note 36, at 913-16; Mott, *supra* note 57, at 636-39.

²⁷⁷ *Brown v. Ent. Merchs. Ass'n*, 567 U.S. 788, 790 (2010).

²⁷⁸ See HOROWITZ, *supra* note 103, at 3-10; UHVG VOL. 1, *supra* note 40, at 101-02.

²⁷⁹ UHVG VOL. 1, *supra* note 40, at 332-43.

²⁸⁰ See *id.*; HOROWITZ, *supra* note 103, at 9-11, 61-63, 282.

²⁸¹ See HOROWITZ, *supra* note 103, at 8; UHVG VOL. 1, *supra* note 40, at 102.

arcade form.²⁸² While not a particularly memorable game from a technical standpoint, by some accounts it was the first coin-operated game to charge twenty-five cents per play, with comparable games prior to that point typically costing a dime per play.²⁸³ Some arcade owners in America imported this game, which later led to domestic game developers imitating the design.²⁸⁴

Some describe the arcade game *Pong* (1972) as the godfather of video games given its massive success that helped introduce the public to the medium.²⁸⁵ Elegant in its simplicity, the game involves a rudimentary tennis match where two players compete to score goals by bouncing a ball into the opponent's goal.²⁸⁶ On the original arcade cabinets, players would use a metal knob that rotates to move their respective paddle to deflect the approaching ball.²⁸⁷ The designer, Nolan Bushnell who went on to found Atari, placed the first arcade cabinet in a bar in California to gauge consumer reaction.²⁸⁸ It took him three months to create a working prototype.²⁸⁹ The screen was a rudimentary Hitachi black-and-white television that he purchased for \$75 at a nearby store.²⁹⁰ Bushnell hardwired hundreds of circuits himself in a cabinet which had innards resembling a switchboard.²⁹¹ To keep the scale of the game interesting as the customer continues to play, the ball would accelerate after the players had bounced it between them long enough without anyone scoring a goal.²⁹² Word quickly spread about this new creation, with waves of customers curious to try it for themselves.²⁹³

Sensing a major market opportunity, Bushnell did everything he could to grow Atari as quickly as possible, deciding that it was better to manufacture the game himself than sell it to a larger company.²⁹⁴ He leased an abandoned roller-skating rink to begin production of arcade cabinets for mass distribution.²⁹⁵ The company continued to grow,

²⁸² See Blitz, *supra* note 241.

²⁸³ See UHVG VOL. 1, *supra* note 40, at 102; HOROWITZ, *supra* note 103, at 8-10.

²⁸⁴ UHVG VOL. 1, *supra* note 40, at 102.

²⁸⁵ See HANSEN, *supra* note 62, at 1; PAREE, *supra* note 20, at 252-53.

²⁸⁶ See HANSEN, *supra* note 62, at 1-4.

²⁸⁷ *Id.* at 2-4.

²⁸⁸ See *id.*; WARDYGA, *supra* note 55, at 10.

²⁸⁹ See UHVG VOL. 1, *supra* note 40, at 42.

²⁹⁰ HANSEN, *supra* note 62, at 2-4.

²⁹¹ UHVG VOL. 1, *supra* note 40, at 42.

²⁹² *Id.* at 41.

²⁹³ See HANSEN, *supra* note 62, at 3-4; WARDYGA, *supra* note 5, at 12.

²⁹⁴ UHVG VOL. 1, *supra* note 40, at 51-52.

²⁹⁵ HANSEN, *supra* note 62, at 4-5.

with the sizeable flow of orders for *Pong* cabinets making it near impossible to keep up with demand.²⁹⁶ Atari went on to become the market leader in the home console market for video games until later dethroned by Nintendo over a decade later.²⁹⁷ Warner Communications in the mid-1970s acquired Atari for \$28 million.²⁹⁸

Although still in operation, Atari is a shadow of its former self, now publishing a few new games per year.²⁹⁹ Nonetheless, the company is a legend in the video game industry, for instance employing for a time Steve Jobs and Steve Wozniak prior to their departure to found the company Apple Computers.³⁰⁰ Atari thrived in its heyday by fostering a creative culture in its California offices that rewarded innovation and experimentation.³⁰¹ The business was known for its “corporate philosophy of smart work and hard partying.”³⁰²

Jobs’ first big success with the company was the game *Breakout* (1976).³⁰³ The release was similar to *Pong* but required the player to bounce a ball against various colored bricks at the top of the screen to clear individual rows as opposed to competing against another player.³⁰⁴ To cut down on production costs, Atari tried to reduce the amount of computer chips for the *Breakout* arcade cabinet given that each resulted in a roughly \$100,000 reduction in manufacturing costs for a fleet of machines.³⁰⁵ A well-designed game at that point by Atari’s standards required around 75 chips.³⁰⁶ Wozniak baffled his colleagues with his ability to reduce the chips required for *Breakout* down to 50, with no one able to recreate his design.³⁰⁷ To make the game easier to replicate down the line, the initial production version had 100 chips.³⁰⁸

Not to be outdone by their American counterparts, several Japanese companies moved in to capitalize on the burgeoning market for video games. Nintendo made its entry into this market in the early 1980s, initially with limited success for its first releases.³⁰⁹ The first of

²⁹⁶ UHVG VOL. 1, *supra* note 40, at 51-52.

²⁹⁷ See HANSEN, *supra* note 62, at 4-5; HARRIS, *supra* note 67, at 10-11, 194; WARDYGA, *supra* note 55, at 52-57, 109-16.

²⁹⁸ See UHVG VOL. 1, *supra* note 40, at 104-05.

²⁹⁹ See HARRIS, *supra* note 67, at 9-10, 15-16 (discussing Atari’s highs and lows as a company); Colin Campbell, *Inside Atari’s Plan to Reinvent Itself, Again*, POLYGON (Jan. 14, 2022, 9:00 AM), <https://www.polygon.com/features/22880558/atari-50th-anniversary-plans> [<https://perma.cc/EN8W-ZTC2>].

³⁰⁰ See HANSEN, *supra* note 62, at 40-41; UHVG VOL. 1, *supra* note 40, at 69-70, 102.

³⁰¹ See HANSEN, *supra* note 62, at 6-7.

³⁰² UHVG VOL. 1, *supra* note 40, at 65.

³⁰³ *Id.* at 71.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 71-72.

³⁰⁸ *Id.* at 72.

³⁰⁹ See *id.* at 155-58.

many breakout successes for the company was the arcade game *Donkey Kong* (1981).³¹⁰ The consumer appetite for arcade games was primed for something different, which Nintendo delivered with its quirky game about a carpenter named Jump Man attempting to rescue his girlfriend from a giant gorilla.³¹¹

In *Donkey Kong*, the player moves the character upwards while avoiding various obstacles in an effort to rescue the character's girlfriend, simply dubbed Lady.³¹² The designer Shigeru Miyamoto, who remains with Nintendo to this day, is credited with introducing a jump mechanic to video games where the character can jump over obstacles and between platforms—a design technique that countless games have since implemented.³¹³ He went on to develop many games and founded a variety of the company's most famous franchises, in particular Super Mario Bros., Legend of Zelda, and Star Fox.³¹⁴ Some consider Miyamoto “the most successful game designer in history.”³¹⁵

Incidentally, Nintendo later changed the name of Donkey Kong's adversary, Jump Man, to Mario with an eye towards distinguishing the character commercially to star in his own game entries.³¹⁶ Nintendo was one of the first video game developers to perfect the art of layering different characters into multiple game releases and, eventually, separate gaming franchises.³¹⁷ Mario remains the single most recognized character globally of all video game characters.³¹⁸

3. Battle for the Home Console Market

The Magnavox Odyssey, credited by many as the first home console, helped drive sales directly to the living room in the 1970s.³¹⁹ Among many technological differences, the key distinctions between an arcade cabinet and a home console is that a console is far smaller, much cheaper, and typically capable of playing multiple games.³²⁰ While a

³¹⁰ See HANSEN, *supra* note 62, at 34-35; WARDYGA, *supra* note 55, at 51, 109-16.

³¹¹ See UHVG VOL. 1, *supra* note 40, at 158-60.

³¹² See HANSEN, *supra* note 62, at 36-37.

³¹³ See *id.*; WARDYGA, *supra* note 55, at 51, 113-16.

³¹⁴ See HANSEN, *supra* note 62, at 51-63.

³¹⁵ UHVG Vol. 1, *supra* note 40, at 320.

³¹⁶ See HANSEN, *supra* note 62, at 36-38; WARDYGA, *supra* note 55, at 51.

³¹⁷ See HARRIS, *supra* note 67, at 196, 310-13.

³¹⁸ See Kim Bhasin, *Why Mario Is the Most Popular Video Game Character Ever*, BUS. INSIDER (Mar. 1, 2012, 11:44 AM), <https://www.businessinsider.com/why-mario-is-the-most-popular-video-game-character-ever-2012-3> [<https://perma.cc/ME3M-6FP8>].

³¹⁹ See UHVG VOL. 1, *supra* note 40, at 54; WARDYGA, *supra* note 55, at 5-6, 19.

³²⁰ See WARDYGA, *supra* note 55, at 51-53, 62-64, 379-80.

home console may come with one or more games already available to the purchaser, the owner has the option of purchasing additional games—for early consoles on cartridges but now more commonly on a computerized disc like a DVD or Blu-ray.³²¹

The Odyssey gained little attention at first but ultimately sold 100,000 units in its initial year.³²² The console had only a few years in its retail life cycle, with some crediting its commercial obscurity to Magnavox making the mistakes of: (1) allowing only Magnavox-exclusive dealers to sell the system; and (2) suggesting in their advertising that the console worked only on Magnavox televisions.³²³ In spite of a relatively reasonable \$99.95 introductory price for the Odyssey, consumers soon moved on to other home console offerings.³²⁴

While it continued to develop successful arcade games, Atari turned its attention towards the much potentially larger home console market.³²⁵ After testing the market with a home-based version of *Pong*, Atari went on to launch the Atari 2600 in 1977 for the price of \$229.³²⁶ Electronics retailers, familiar with the Odyssey's lackluster sales, were initially skeptical of Atari's efforts.³²⁷ The original Atari 2600, released in 1977, "was light years ahead of the other systems on the market at the time of its release."³²⁸ This dynamic benefitted in-house Atari and third-party developers seeking to implement novel game design techniques to distinguish a particular release on the market.³²⁹ By the early 1980s, Atari controlled 75 percent of the growing home console market.³³⁰

What ultimately limited the adoption of the early Atari consoles was both the technological limits of the hardware and the poor design of many games.³³¹ With the explosive growth in consumer electronics, it became increasingly easy for a company to leapfrog a competitor technologically simply by devoting enough financial resources to the problem.³³² Atari implemented this strategy itself with the 2600 series release.³³³ At least by today's standards, the Atari 2600 and any

³²¹ See *id.* at 5-8; UHVG VOL. 1, *supra* note 40, at 98; *infra* notes 444 to 446.

³²² See *supra* note 315.

³²³ See UHVG VOL. 1, *supra* note 40, at 80.

³²⁴ See WARDYGA, *supra* note 55, at 5-10.

³²⁵ See UHVG VOL. 1, *supra* note 40, at 80.

³²⁶ See *id.* at 80-81, 87; HANSEN, *supra* note 62, at 40.

³²⁷ See UHVG VOL. 1, *supra* note 40, at 81.

³²⁸ WARDYGA, *supra* note 55, at 12.

³²⁹ See *id.*

³³⁰ See UHVG VOL. 1, *supra* note 40, at 126-28.

³³¹ See WARDYGA, *supra* note 55, at 114, 121-24.

³³² See *id.*

³³³ See *id.* at 12.

comparable consoles released in the same timeframe feature incredibly weak computer-processing and video-rendering capabilities.³³⁴

As many console developers have learned over the years, a console is heavily dependent on the quality and quantity of games it can deliver to keep customers interested.³³⁵ Poor quality games served as a major deterrent to consumers spending on newly released games.³³⁶ Perhaps the most famous example of a rushed video game that flopped commercially is the video game tie-in to the movie, *E.T.: The Extra-Terrestrial* (1982), an Atari 2600 release.³³⁷

E.T. is one example of Hollywood's earliest efforts to churn out a game of any kind—irrespective of quality—to launch alongside a movie to increase overall revenue from that intellectual property.³³⁸ The game was so poorly received that “Atari famously buried three million copies” of the game “in a New Mexico landfill.”³³⁹ This legendary failure wears its poor execution on its sleeve, with the game bordering on unplayable from a design perspective and offering virtually nothing to maintain the player's interest.³⁴⁰ The development team consisting of one person received less than six weeks to complete the game from scratch, which effectively doomed the project from the start.³⁴¹ One of Sega's top marketing employees famously kept a copy of the game framed on his wall to remind himself of the dramatic consequences of poor game design.³⁴²

While largely coincidental in timing, a fitting end to the Two-Dimensional Era was the 1983 economic crash of the American video game industry.³⁴³ Both domestic arcades and home console markets experienced a significant downturn, with customers losing interest in

³³⁴ See Chris Kohler, *Racing the Beam*, WIRED (Mar. 13, 2009, 12:26 PM), <https://www.wired.com/2009/03/racing-the-beam/> [<https://perma.cc/9RAQ-3883>].

³³⁵ See Lars Bartschat, *Success Factors of Video Game Consoles 10-11* (Nov. 28, 2016) (Seminar Paper, University of Münster) [<https://perma.cc/R6QQ-RBLV>].

³³⁶ See HANSEN, *supra* note 63, at 45-49.

³³⁷ See *id.* at 43-47; HARRIS, *supra* note 68, at 10.

³³⁸ See Geoff Brumfiel, *Total Failure: The World's Worst Video Game*, NPR (May 31, 2017, 12:30 PM), <https://www.npr.org/2017/05/31/530235165/total-failure-the-worlds-worst-video-game> [<https://perma.cc/8YL4-VJT2>].

³³⁹ HARRIS, *supra* note 68, at 10.

³⁴⁰ See HANSEN, *supra* note 63, at 43-47; UHVG Vol. 1, *supra* note 41, at 238-39.

³⁴¹ See HANSEN, *supra* note 63, at 46-49.

³⁴² See HARRIS, *supra* note 68, at 32-33, 63-65.

³⁴³ See Nathan Grayson, *Atari's Bad E.T. Game Wasn't Responsible for the 1983 Video Game Crash, Capitalism Was*, KOTAKU (Jan. 29, 2021, 6:30 PM), <https://kotaku.com/ataris-bad-e-t-game-wasnt-responsible-for-the-1983-vid-1846161918> [<https://perma.cc/NZD9-HYW2>].

aging technology that struggled to deliver novel experiences.³⁴⁴ This downturn left the American-based Atari in an extremely poor financial situation, ultimately leading to billions in losses for the company.³⁴⁵ The company found itself in complete disarray after the downturn, never again reaching its former glory.³⁴⁶ In 1984, Warner Communications sold Atari to an individual purchaser for \$240 million in promissory notes.³⁴⁷

After Atari's fall from commercial grace, two of its Japanese competitors, Nintendo and Sega, became the dominant players in the home console market through the end of the Fourth Generation.³⁴⁸ These two rivals vigorously competed against one another during the 1980s and 1990s, each releasing a console across both the Third and Fourth Generations with varying levels of success.³⁴⁹ Many companies that succeeded in the video game market in the decades following this downturn took a long-term perspective of the importance of game consoles, viewing them as a key foothold into the consumer's living room to sell other entertainment products.³⁵⁰ While not entering the console market until the 1990s, Sony realized that it could leverage content from its other divisions—like its music and movie production branches—with the PlayStation brand to strengthen its overall consumer portfolio.³⁵¹

C. The Three-Dimensional Era: 1984 to 2012

1. Early Struggles with the Third Dimension

Drawing a clean line between the Two-Dimensional Era and the Three-Dimensional Era is no simple task due to the underlying complexity of game technology. While one could in theory credit *Battlezone* (1980) and *Monster Maze* (1982) as the earliest three-dimensional games, the more persuasive position is that those games are not true three-dimensional games.³⁵² During the 1980s and early

³⁴⁴ See UHVG Vol. 1, *supra* note 41, at 226-30, 235-40; DeMarco, *supra* note 98, at 616.

³⁴⁵ See HANSEN, *supra* note 63, at 47-48; HARRIS, *supra* note 68, at 10.

³⁴⁶ See UHVG Vol. 1, *supra* note 41, at 267-70; Campbell, *supra* note 299.

³⁴⁷ UHVG Vol. 1, *supra* note 41, at 268.

³⁴⁸ See HANSEN, *supra* note 63, at 88-92.

³⁴⁹ See HARRIS, *supra* note 6768, at 15-16, 58, 137-39, 352-58, 386-97, 452-53, 481, 495, 500; UHVG Vol. 1, *supra* note 41, at 492-97; DeMarco, *supra* note 98, at 616-17.

³⁵⁰ See HARRIS, *supra* note 68, at 349-50, 539-41.

³⁵¹ See *id.* at 344-50.

³⁵² See WARDYGA, *supra* note 56, at 37; Chris Moyse, *3D Monster Maze Is 16K of Pure Nightmare Fuel, but What Creeps You Out in Gaming?*, DESTRUCTOID (Oct. 28, 2018, 2:00 PM), <https://www.destructoid.com/3d-monster-maze-is-16k-of-pure-nightmare-fuel-but-what-creeps-you-out-in-gaming/> [<https://perma.cc/HQ3U-KB6Z>].

1990s, game developers used a variety of visual tricks to render games that create the illusion that they are three-dimensional but that are in reality rendered in an essentially two-dimensional manner.³⁵³ This phenomenon is sometimes called creating a 2.5 dimensional game.³⁵⁴

The Guinness World Record for the first three-dimensional arcade game is held by *Subroc-3D* (1982), an arcade game released by Sega.³⁵⁵ The game created a visual 3D effect by using a periscope device where the player has a different screen affiliated with each eye, thus visually creating the perception of three dimensions.³⁵⁶ However, the enemy sprites rendered in the game are two-dimensional, so it is difficult to describe *Subroc-3D* as actually rendering graphics in a three-dimensional format.³⁵⁷ Arguably, the first game truly implementing three-dimensional graphics is *Elite* (1984), a space shooter where the player's ship can move and change its view in any direction in an outer space environment.³⁵⁸ While the graphics are incredibly basic by today's standards, the enemy ships are rendered such that the player can see all sides of those ships and also fully rotate around them from every angle.³⁵⁹ When figures are fully rendered in such a manner and the player can interact against an x, y, and z axis, then it is appropriate to describe the game as rendered in three dimensions.³⁶⁰ *Subroc-3D*, in comparison, does not meet these criteria.³⁶¹

³⁵³ See HOROWITZ, *supra* note 104, at 136; WARDYGA, *supra* note 56, at 37-39.

³⁵⁴ See WARDYGA, *supra* note 56, at 41.

³⁵⁵ See HOROWITZ, *supra* note 104, at 52-53; *First 3D Arcade Videogame*, GUINNESS WORLD RECORDS, <https://www.guinnessworldrecords.com/world-records/88255-first-3d-arcade-videogame> [<https://perma.cc/FPS8-34NM>].

³⁵⁶ See HOROWITZ, *supra* note 104, at 52-53.

³⁵⁷ See *id.* (explaining how the game could be switched to 2D mode without materially changing anything on the game's graphical rendering capabilities).

³⁵⁸ See Latorre, *supra* note 251, at 142.

³⁵⁹ See *Remembering 'Elite', the Most Important Game of the Early 80s*, VICE (May 26, 2015, 11:00 PM), <https://www.vice.com/en/article/xyw38w/remembering-elite-the-most-important-game-of-the-early-80s> [<https://perma.cc/HNH3-5DE8>].

³⁶⁰ See *id.*; HANSEN, *supra* note 63, at 131-33. While the Author believes that 3D rendering of polygonal models is the proper line for describing a game as truly three-dimensional, this opinion is not necessarily a universally held one. See WARDYGA, *supra* note 56, at 41 ("And while first-person and third-person perspective games have their roots in 3D (utilizing the three-dimensional plane called the Z axis), games are only considered true 3D if objects in the game appear to extend beyond the boundaries of the screen, such as in stereoscopic (S-3D) video game.").

³⁶¹ As *Subroc-3D* does technically present in a stereoscopic manner, it would likely meet Professor Wardyga's test for a "true 3D" game. See WARDYGA, *supra* note 56, at 41. As stated previously, the question with early three-dimensional material often focuses on whether the

As the Three-Dimensional Era progressed, video games truly entered a new phase of their prestige as a medium. The confluence of more powerful hardware, greater consumer recognition for the medium, and creative game developers led to the release of many of the most impressive games in the medium's history.³⁶² Technological progression allowed video game developers to create genres with no true analog in other media formats.³⁶³

2. The Fifth Generation: 3D Gaming Hits Its Stride

The Fifth Generation is considered by many to be a mixed bag that saw dramatic improvements in storytelling techniques but various missteps in implementing three-dimensional gameplay. Certainly, many three-dimensional games from that era have stood the test of time, like the masterful *Super Mario 64* (1996) released on Nintendo's home console entry for that generation, the Nintendo 64.³⁶⁴ The game has such finely tuned gameplay that it still feels fresh by today's standards, with Nintendo largely sticking with that game's core control mechanics in more recent Mario entries such as *Super Mario Odyssey* (2017).³⁶⁵

Arguably the single most important development during the Fifth Generation was Sony entering the home console market with the original PlayStation, the first in a long line of Sony consoles. As was typical at the time, the console first released in Japan in December 1994 and then in North America in September 1995.³⁶⁶ Starting in the early 1990s, Sony had various game development teams working on releases for other companies' consoles.³⁶⁷ But the opportunity to release its own console soon became the gaming division's focus.³⁶⁸ In an early

game *appears* to be three-dimensional from the perspective of the player or whether the game *actually renders* with three-dimensional modeling. See text accompanying *supra* note 354. The Author believes games that can satisfy the latter of these two standards actually qualify as true 3D because tricking human perception is not the same thing as rendering a game in three dimensions.

³⁶² See *Game On: The History of Video Games & Gaming Consoles: Modern Era: 3D Generation* (Sep. 3, 2021, 11:59 AM) (A Virtual Exhibit to Accompany the "Game On" Exhibit in Founders Gallery, Northern Illinois University), <https://libguides.niu.edu/retrogaming/ModernEra> [<https://perma.cc/69CL-DR4W>].

³⁶³ See Michael Ray, *Online Gaming*, ENCYCLOPEDIA BRITANNICA (Oct. 29, 2021), <https://www.britannica.com/technology/online-gaming> [<https://perma.cc/S2HG-JTE4>].

³⁶⁴ See UHVG Vol. 1, *supra* note 4041, at 490-91, 522-23, 529-39.

³⁶⁵ See *id.* at 522-23, 529-39; Jacob Siegal, *21 Years Later, 'Super Mario Odyssey' Is the Sequel to 'Super Mario 64' I'd Been Dreaming About*, BGR (Oct. 31, 2017, 1:48 PM), <https://bgr.com/entertainment/20-years-later-super-mario-odyssey-is-the-sequel-to-super-mario-64-id-been-dreaming-about/> [<https://perma.cc/KU8V-JEJU>].

³⁶⁶ See WARDYGA, *supra* note 56, at 201.

³⁶⁷ See HARRIS, *supra* note 6768, at 542-45.

³⁶⁸ See *id.*; Park, *supra* note 69.

misstep, Nintendo left Sony executives flabbergasted after terminating a commercial relationship between the two companies.³⁶⁹ Sony had invested a great deal of financial resources to develop a disc-based peripheral to be used with the Super Nintendo console.³⁷⁰ However, Sony's development team concluded they could move the project forward as a standalone console, thus allowing Sony to establish its own brand.³⁷¹ While initially not a popular decision internally, the company proceeded with releasing its own console under the PlayStation brand.³⁷² Sony impressed the industry by putting forward a console with more power than its technologically closest competitor, the CD-ROM based Sega Saturn.³⁷³

Perhaps the smartest decision of the PlayStation developers was to release games on compact discs as opposed to traditional game cartridges.³⁷⁴ Developers greatly appreciated the decreased production cost and significant comparative benefits with storage space that discs provided.³⁷⁵ Nintendo, by comparison, stuck with game cartridges for its Nintendo 64 based on various speed benefits with game rendering and stronger anti-piracy measures the format offered.³⁷⁶ To Nintendo's chagrin, many game developers simply refused to release their games on the Nintendo 64 because of the sometimes insurmountable difficulty of porting games with a large amount of content better suited to a disc format.³⁷⁷ The resulting financial windfall to Sony was staggering.³⁷⁸ Sony's new machine also had plenty of horsepower to deliver full-fledged 3D experiences, a feature lacking in virtually every console on the market at the time.³⁷⁹

While Sony's gaming division has seen financial ups and downs over the years, it is impossible to ignore the enormous commercial impact of the PlayStation franchise. For instance, the original PlayStation, the PlayStation 2, and the PlayStation 4 all took the market leader position against competitor consoles for their respective

³⁶⁹ See HARRIS, *supra* note 68, at 303-05; UHVG Vol. 1, *supra* note 41, at 451-52.

³⁷⁰ See HARRIS, *supra* note 68, at 303-05; UHVG Vol. 1, *supra* note 41, at 451-52.

³⁷¹ See UHVG Vol. 1, *supra* note 4041, at 503-05.

³⁷² See HARRIS, *supra* note 68, at 345-50, 505-07; Park, *supra* note 69.

³⁷³ See UHVG Vol. 1, *supra* note 41, at 508-09.

³⁷⁴ See Park, *supra* note 69.

³⁷⁵ See HANSEN, *supra* note 63, at 153-55.

³⁷⁶ See *id.*

³⁷⁷ See *id.*; MATT LEONE, 500 YEARS LATER: AN ORAL HISTORY OF FINAL FANTASY VII 68-69 (2018).

³⁷⁸ See Park, *supra* note 69.

³⁷⁹ See *id.*; HARRIS, *supra* note 68, at 452-53.

generation.³⁸⁰ Sony capitalized on Sega's struggles in the Fifth Generation, with the Sega Saturn console released in the mid-1990s experiencing a poor financial showing that led to a rushed release of its successor, the Sega Dreamcast.³⁸¹ After suffering massive losses from the Dreamcast released in 1998, Sega exited the market for home console hardware entirely while still releasing many software titles on other company's consoles.³⁸² Sony's success in part stemmed from its sophisticated understanding of the gaming and home entertainment markets, knowledge which allowed it to quickly disrupt the market.³⁸³

Many credit the Fifth Generation as the time when video game developers created a variety of games that, to this day, stand amongst the most well-regarded storytelling endeavors in gaming history.³⁸⁴ Especially when taking into account its ongoing commercial success as a franchise, the Final Fantasy brand's mainline entries on the PlayStation One sit high on that list.³⁸⁵ When the Japanese company Square (now Square Enix) released *Final Fantasy VII* to audiences in 1997, the game became an international pop culture phenomenon.³⁸⁶ As the *Washington Post* articulated, this release made a permanent mark on gaming history:

Final Fantasy 7 was the rare game that exceeded all expectations. Its release coincided with growing awareness of Japan's pop culture, particularly anime. As a cyberpunk story about personal delusions, mental illness, climate change and class warfare, it was Blade Runner for millennials. It single-handedly put role-playing video games on the global map.³⁸⁷

³⁸⁰ See UHVG VOL. 2, *supra* note 36, at 4-5; WARDYGA, *supra* note 56, at 212, 229, 264-65; Ben Gilbert, *The PlayStation 4 Is Still Outselling Every Other Console, Including Nintendo's Red-Hot Switch*, BUS. INSIDER (Apr. 27, 2018, 7:46 AM), <https://www.businessinsider.com/ps4-playstation-4-sales-success-2018-4> [<https://perma.cc/7QFN-5DN7>].

³⁸¹ See HARRIS, *supra* note 68, at 464-69, 530-537; UHVG Vol. 1, *supra* note 41, at 501-02, 558-66.

³⁸² See HARRIS, *supra* note 68, at 550-53; UHVG Vol. 1, *supra* note 41, at 501-02, 558-66, 578-82, 589-90.

³⁸³ See HARRIS, *supra* note 68, at 542-45.

³⁸⁴ See *The Fifth Generation of Console Video Games*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/UsefulNotes/TheFifthGenerationOfConsoleVideoGames> [<https://perma.cc/9ZKN-Z3ML>].

³⁸⁵ See Travis Fahs & Marty Silva, *IGN Presents the History of Final Fantasy*, IGN (Jun. 18, 2009, 5:44 PM), <https://www.ign.com/articles/2009/06/18/ign-presents-the-history-of-final-fantasy> [<https://perma.cc/9YVN-LEVY>].

³⁸⁶ See HANSEN, *supra* note 63, at 156-61.

³⁸⁷ Park, *supra* note 69; accord Palachuk, *supra* note 62, at 235 (describing this game as "legendary").

While sometimes appearing in the same fictional universe, the mainline numbered entries in this franchise all feature distinct casts of characters and stories.³⁸⁸

This release fundamentally challenged the audience's conception of what a game could be, offering a sprawling three-dimensional world that on a regular playthrough, without exploring all the side content, takes a user in the range of sixty hours to complete.³⁸⁹ "The game pioneered 3D graphics techniques, helped Sony's PlayStation outperform its competitors, established Japanese RPGs in the West and went on to sell more than 11 million copies."³⁹⁰ Although the game lacked any audio dialogue, it had an expansive script, over 300 distinct locations, and dozens of significant characters.³⁹¹ Pulling out all the stops, Square commissioned a lavish original soundtrack with 51 original instrumental tracks totaling over two hours that appear at different points in the game.³⁹²

Final Fantasy VII falls within the role-playing game ("RPG") genre. These games often feature expansive stories with large casts of characters, intricate battle systems, and a levelling mechanic where the main characters increase in strength and gain additional abilities as the game progresses.³⁹³ A traditional Japanese RPG features a turn-based combat system where the action gradually shifts between the player and enemy characters, often with the player facing no penalty for taking the time to think about their next move.³⁹⁴ Frequently calculated right on the screen for the player, characters suffer damage to their hit point meter from attacks and regain hit points via healing.³⁹⁵ Players typically have a number of special or magical moves allocated to each character, which may perform heightened damage or inflict positive or negative status effects that impact the flow of combat.³⁹⁶

³⁸⁸ See UHVG Vol. 1, *supra* note 40, at 540-43.

³⁸⁹ See HANSEN, *supra* note 63, at 158-59.

³⁹⁰ LEONE, *supra* note 376, at 22.

³⁹¹ See HANSEN, *supra* note 632, at 158-59; Simon Parkin, *Final Fantasy 7 Review*, EUROGAMER, <https://www.eurogamer.net/articles/2012-08-28-final-fantasy-7-review> [<https://perma.cc/DHG8-MPDH>] (last updated Aug. 28, 2012).

³⁹² See HANSEN, *supra* note 62, at 160; LEONE, *supra* note 376, at 105.

³⁹³ See HANSEN, *supra* note 62, at 158-59, 219.

³⁹⁴ See *id.*

³⁹⁵ See 2 FINAL FANTASY ULTIMANIA ARCHIVE 115-17 (2012) [hereinafter FF ULTIMANIA ARCHIVE].

³⁹⁶ See *id.*; Jay Boor, *Final Fantasy VII*, IGN, <https://www.ign.com/articles/1997/09/04/final-fantasy-vii> [<https://perma.cc/WJH7-4WBX>] (last updated Apr. 30, 2019, 5:18 PM).

Final Fantasy VII was released at a time when video game audiences were craving something that told a mature story and that genuinely expanded gameplay mechanics beyond the limitations of the prior hardware generation.³⁹⁷ With a development budget of over \$45 million—the largest budget for any video game at that time—the 120-plus member development team set out to create a game like nothing that came before it.³⁹⁸ While initially conceptualizing the game as a two-dimensional entry for the Super Nintendo console from the Fourth Generation, after experimenting with the performance deliverable on the PlayStation the development team opted to design the game as a three-dimensional one.³⁹⁹

After releasing almost every *Final Fantasy* game exclusively on Nintendo consoles, Square made the tough decision to break this tradition and take a gamble on Sony.⁴⁰⁰ The publicly stated reasons for the change were the technological benefits of using a CD-ROM-based console, although many Square employees have acknowledged that they were less enthusiastic about Nintendo's hardware and dissatisfied with the company's poor level of communication.⁴⁰¹ It certainly helped Square in making a decision that Sony stepped up with a marketing budget in excess of \$100 million for *Final Fantasy VII*.⁴⁰²

The designers realized they could tell a more complex story with a new generation of hardware, especially in terms of delivering a game with an epic scope, full-motion video content, and an expansive soundtrack.⁴⁰³ With the vast amount of content the game featured, the developers spread the code across three separate CD-ROM discs which the player switched at a few pre-defined intervals during the game.⁴⁰⁴ Because the movie industry had already taken major strides forward in the realm of computer-generated graphics, sophisticated rendering technology became easier to acquire as the 1990s progressed.⁴⁰⁵ Fueled by their ambition to create something unique and spurred onwards by the absence of any material limit on resources Square was willing to commit, the design team completed the game in just over a year.⁴⁰⁶

While quite technically sophisticated for its time, what especially cemented the longer-term relationship many consumers built with the game is its complex and engaging story.⁴⁰⁷ The

³⁹⁷ See Park, *supra* note 698.

³⁹⁸ See *id.*; HANSEN, *supra* note 632, at 158-60.

³⁹⁹ See LEONE, *supra* note 376, at 36-37, 40-41, 45-46; Park, *supra* note 698.

⁴⁰⁰ See LEONE, *supra* note 376, at 29, 36-37, 58-59.

⁴⁰¹ See *id.* at 61; Park, *supra* note 68.

⁴⁰² UHVG VOL. 2, *supra* note 365, at 513.

⁴⁰³ See Park, *supra* note 698.

⁴⁰⁴ See HANSEN, *supra* note 62, at 159-60.

⁴⁰⁵ See *id.* at 120-21.

⁴⁰⁶ See *id.* at 158-60; LEONE, *supra* note 376, at 75-78, 84-85.

⁴⁰⁷ See LEONE, *supra* note 376, at 223.

protagonist, Cloud Strife, is a brooding ex-military soldier who begins the game as a hired mercenary in the futuristic city Midgar.⁴⁰⁸ The game immediately throws the player into a high stakes mission where Cloud is assisting an ecoterrorist group, Avalanche, to blow up a reactor extracting Mako energy from the earth.⁴⁰⁹ The group correctly believes these activities are causing permanent harm to the planet.⁴¹⁰ Cloud initially maintains his emotional distance from the early party members, his childhood friend Tifa Lockheart and Avalanche's leader Barrett Wallace.⁴¹¹ As the story progresses, the player must navigate Cloud's relationship with eight separate playable compatriots as they tackle increasingly complex situations in their efforts to take down the malevolent and militaristic company, Shinra, Inc., in charge of Mako production.⁴¹² As one illustration of narrative choice offered to the player, a variety of in-game dialogue selections impact which character Cloud takes on a date at the Golden Saucer amusement park—an iconic location featuring a host of activities and complicated mini-games.⁴¹³

Much of the game's story revolves around actual or threatened environmental catastrophes. With many serious environmental topics already a part of public discourse in the mid-1990s, the game developers did not hesitate to make bold statements about the inherent fragility of our planet.⁴¹⁴ Eventually, the player's group must prevent a cataclysmic meteor from destroying the earth, a catastrophe summoned by the game's primary antagonist, Sephiroth.⁴¹⁵ As the game progresses, the player learns that Sephiroth was a former super soldier for Shinra who broke ties with the organization after discovering his origin as a biological experiment created by the company.⁴¹⁶ Sephiroth's ultimate goal is to use the near-death of the planet to harness the Earth's energy generated when attempting to heal itself to make himself the most powerful being in existence.⁴¹⁷

The game designers also shocked audiences by killing off one of the main characters, Cloud's primary love interest Aeris Gainsborough,

⁴⁰⁸ Christopher Gates, *Cloud's Entire Final Fantasy 7 Timeline Explained*, SVG, <https://www.svg.com/158742/clouds-entire-final-fantasy-7-timeline-explained/> [<https://perma.cc/PG28-HGRR>] (last updated July 9, 2020, 6:41 PM).

⁴⁰⁹ See FF ULTIMANIA ARCHIVE, *supra* note 394, at 14, 70-73.

⁴¹⁰ See *id.* at 14.

⁴¹¹ See *id.* 14-25, 30-33.

⁴¹² See *generally id.* at 14-53.

⁴¹³ See *id.* at 25, 29, 33, 39-41, 45.

⁴¹⁴ See *id.*; Parkin, *supra* note 390.

⁴¹⁵ See FF ULTIMANIA ARCHIVE, *supra* note 394, at 54-57.

⁴¹⁶ See *id.*; HANSEN, *supra* note 632, at 94.

⁴¹⁷ See FF ULTIMANIA ARCHIVE, *supra* note 394, at 55-57.

at the end of the game's first disc.⁴¹⁸ Prior to that point, game developers rarely eliminated core characters, among other reasons out of fear of eliciting a negative audience reaction.⁴¹⁹ The developers wanted the audience to grapple with more emotionally challenging story elements not regularly touched upon in earlier video games—like what happens after a person dies and how people create false personas for themselves.⁴²⁰ As the game progresses, the player learns that the group leader, Cloud, has suppressed his memories about who he really is and that he does not have the formidable military credentials that he purportedly possessed.⁴²¹ In a narratively complex sequence, he speaks with different versions of himself from throughout his life to unravel his past and reconstruct his fractured mind.⁴²² His allies must further reconcile their own conceptions of Cloud, who has lied about his past but who has also steadfastly led the group through many dire situations.⁴²³

To further grow the Final Fantasy franchise itself, the company quickly developed the similarly ambitious *Final Fantasy VIII* (1999) and *Final Fantasy IX* (2000) that both released during the Fifth Generation.⁴²⁴ Each features its own separate universe and distinct cast of characters.⁴²⁵

What has further kept *Final Fantasy VII* embedded in the public consciousness is Square's effective long-term management of that intellectual property. To video game consumers across the world, the Final Fantasy franchise is arguably the single most recognizable RPG series.⁴²⁶ This seventh entry was the first Final Fantasy installment where the developer greenlit several financially successful game spinoffs, a feature-length movie, and most recently the first installment in an entirely remade version of the game designed to modern design standards, entitled *Final Fantasy VII Remake* (2020).⁴²⁷ Some associated with the project have described this remake as "perhaps the biggest remake effort in gaming" history to date.⁴²⁸

⁴¹⁸ LEONE, *supra* note 376, at 111, 114-16.

⁴¹⁹ *See id.*; Parkin, *supra* note 390.

⁴²⁰ *See* LEONE, *supra* note 376, at 13-16, 115-16; Park, *supra* note 698.

⁴²¹ *See* FF ULTIMANIA ARCHIVE, *supra* note 394, at 16-21.

⁴²² *See id.* at 16-21; Boor, *supra* note 395.

⁴²³ *See* LEONE, *supra* note 376.

⁴²⁴ *See* LEONE, *supra* note 376, at 209-10.

⁴²⁵ *See* FF ULTIMANIA ARCHIVE, *supra* note 394, at 119-277 (comprehensive coverage of contents of these two games).

⁴²⁶ *See* Park, *supra* note 698.

⁴²⁷ *See id.*; Ethan Gach, *Square Enix Is Finally Making the Final Fantasy VII Cinematic Universe Playable*, KOTAKU (Feb. 27, 2021, 4:30 AM), <https://www.kotaku.com.au/2021/02/square-enix-is-finally-making-the-final-fantasy-vii-cinematic-universe-playable/> [<https://perma.cc/73MD-FPNH>].

⁴²⁸ Park, *supra* note 698.

When reviewing the elaborate, and at that time often hand-drawn, conceptual art for a game like *Final Fantasy VII* or the medieval-themed *Final Fantasy IX*, one is astounded by the level of detail these developers placed on these games' art production. Virtually all that work takes place before the game even enters principal production, with often dramatic changes occurring between the original designs and the fully rendered character models.⁴²⁹ The extreme attention to detail on every design aspect helps explain why these two releases, in particular, are considered to be among the best games in the franchise and, by some accounts, in all of gaming history.⁴³⁰ There are persistent rumors that Square Enix is currently remaking *Final Fantasy IX* from the ground up for modern consoles.⁴³¹

2. The Sixth and Seventh Generations: 3D Gaming Perfected

From the author's perspective, by the end of the Fifth Generation there was a sound record of the artistic and commercial accomplishments of video games as a medium to justify full First Amendment protection. The medium continued to grow a commercial foothold in the marketplace, evolving from a more cyclical industry to a consumer staple by the end of the 1990s.⁴³² Because the focus of this Article is on *Brown's* ongoing viability, the Article provides only a general synopsis of key events moving forward from the beginning of the Sixth Generation in 1998 and through to the Modern Era beginning in 2012.⁴³³

The Sixth and Seventh Generations were some of the most commercially lucrative on record for the video game industry.⁴³⁴ While the recent COVID-19 pandemic was the equivalent of a mass extinction

⁴²⁹ See generally FF ULTIMANIA ARCHIVE, *supra* note 394; see Dan Birlew & H. Leigh Davis, THE ART OF FINAL FANTASY IX (2001).

⁴³⁰ See Kyle Hilliard, *Reader's Choice Top 300 Games of All Time*, GAME INFORMER (Mar. 19, 2018, 11:30 AM), <https://www.gameinformer.com/b/features/archive/2018/03/19/readers-choice-top-300-games-of-all-time.aspx> [<https://perma.cc/T8R7-VJCZ>] (listing both of these games in the top fifty entries of listing of three hundred games chosen as the best of all time by audience); Parkin, *supra* note 390; Birlew & Davis, *supra* note 429.

⁴³¹ See Saqib Mansoor, *Final Fantasy 9 Remake Is Now All but Officially Confirmed*, SEGMENTNEXT (Feb. 10, 2022), <https://segmentnext.com/final-fantasy-9-remake-confirmed/> [<https://perma.cc/NF95-R7AZ>].

⁴³² See UHVG VOL. 2, *supra* note 365, at xiv.

⁴³³ See HOROWITZ, *supra* note 103, at 245-46 (discussing first consoles of the Sixth Generation).

⁴³⁴ See WARDYGA, *supra* note 55, at 230-33, 264-65, 317-18.

event for arcades, they saw a resurgence as the 1990s came to a close—fueled by slick new releases targeted at larger groups of players.⁴³⁵ Many imitators followed, but the original *Dance Dance Revolution* (1998) on its own created a major financial boon for arcades worldwide.⁴³⁶ The game delivers a novel play experience with a multi-button dancing controller where the players execute moves with their feet.⁴³⁷ The players select from different songs with varying levels of dance difficulty, with each player also controlling a player-specific difficulty setting.⁴³⁸ Many games in the Sixth Generation and beyond embraced variable difficulty settings to avoid scaring away casual audiences less enthusiastic about a punishingly difficult experience that seasoned players may prefer.⁴³⁹ It remains to be seen if arcades can recover to their pre-pandemic levels.

Perhaps the single biggest development of this generation was Microsoft entering the video game console business with the launch of the Xbox in 2001, which then led to the release of the Xbox 360 in 2005 that kicked off the Seventh Generation.⁴⁴⁰ With an already strong relationship to PC gaming because of its dominant Windows operating system, the allure of the increasingly profitable video game market proved too enticing for Microsoft to remain on the sidelines.⁴⁴¹ Many familiar with the situation say “that Sony’s entrance into the game industry served as a sobering wake-up call” to Microsoft of the need to act on its ambitions.⁴⁴²

Gaming technology also saw stunning leaps forward in the Sixth and Seventh Generations in terms of graphical and general computing capability.⁴⁴³ Sony actively marketed the Emotion Engine featured in the PlayStation 2 as capable of replicating more realistic emotions than previously available on consoles, with relatively low developer investment necessary.⁴⁴⁴ While the format would have succeeded on its own, many credit the PlayStation 2 as speeding the adoption of DVDs over VHS tapes given the developer’s decision to upgrade from a CD-ROM drive.⁴⁴⁵ Current video game consoles with disc drives

⁴³⁵ See HOROWITZ, *supra* note 103, at 245-53; UHVG VOL. 2, *supra* note 35, at 174-86.

⁴³⁶ See HANSEN, *supra* note 632, at 180.

⁴³⁷ See *id.* at 180-82.

⁴³⁸ See *id.*

⁴³⁹ See Kaleb Eberhart, *Development of Difficulty in Games*, GAME DEVELOPER (Feb. 26, 2019), <https://www.gamedeveloper.com/design/development-of-difficulty-in-games> [<https://perma.cc/GQC4-7KV4>].

⁴⁴⁰ See UHVG VOL. 1, *supra* note 41, at 574-76, 591.

⁴⁴¹ See UHVG VOL. 2, *supra* note 35, at xvii-xxiv, 67-70.

⁴⁴² See *id.* at 67.

⁴⁴³ Riad Chikhani, *The History of Gaming: An Evolving Community*, TECHCRUNCH (Oct. 31, 2015), <https://techcrunch.com/2015/10/31/the-history-of-gaming-an-evolving-community/> [<https://perma.cc/7X8K-TZU4>].

⁴⁴⁴ See UHVG VOL. 1, *supra* note 40, at 560-61.

⁴⁴⁵ See *id.* at 562-63, 570-71.

generally use a Blu-ray drive, which can hold well over five times the content that a single DVD can support.⁴⁴⁶ These expansions in storage space have opened all kinds of new opportunities for game developers.⁴⁴⁷

This nationwide pressure to regulate violent and otherwise explicit content in video games came to a head at the close of the Three-Dimensional Era, with the *Brown* opinion releasing on June 27, 2011.⁴⁴⁸ Fittingly, the Modern Era begins just over a year later with the release of Nintendo's newest console installment for the Eighth Generation, the Wii U, on November 18, 2012.⁴⁴⁹

V. The Future of Video Games and the First Amendment

A. *Deus Ex Scalia*: A Defense of *Brown*'s Likely Enduring Position in First Amendment Jurisprudence

There is no debating that the First Amendment extends at least some level of protection to all kinds of dangerous speech—whether fake news, bigotry, or hate speech.⁴⁵⁰ Speech receives significant protection even if its primary purpose is to “embarrass, offend, disgust, shock, or address any other ‘field of human interest.’”⁴⁵¹ Even blatant falsehoods, especially if fairly characterized as political speech, receive significant flexibility against government regulation because of the heavy judicial skepticism of permitting any abridgment of speech rights.⁴⁵²

When keeping those foundational principles in mind, the *Brown* decision seems quite typical among modern free-speech cases. Many protected forms of speech have far more potential negative social and economic consequences than video games. With the video game

⁴⁴⁶ See UHVG VOL. 2, *supra* note 35, at 409 (discussing these differences in the context of the popular release *Metal Gear Solid 4* (2008)).

⁴⁴⁷ See *id.*

⁴⁴⁸ See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 786 (2011).

⁴⁴⁹ Ryan Craddock, *The Wii U First Launched Eight Years Ago Today*, NINTENDOLIFE (Nov. 18, 2020), https://www.nintendolife.com/news/2020/11/the_wii_u_first_launched_eight_years_ago_today [<https://perma.cc/LV6Y-DD84>].

⁴⁵⁰ See Ryan M. Walters, *How to Tell a Fake: Fighting Back Against Fake News on the Front Lines of Social Media*, 23 TEX. R. L. & POL. 111, 134-35 (2018).

⁴⁵¹ Rhodes, *supra* note 138, at 401-02 (footnotes omitted) (quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945)).

⁴⁵² See *United States v. Alvarez*, 567 U.S. 709, 718-722 (2012) (plurality opinion); Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 678-79 (2017).

industry surpassing yearly global gross revenues of both the film and recorded music industries,⁴⁵³ the case for significantly departing from the majority opinion seems increasingly weak. None of the terrible consequences that any of the separate *Brown* opinions predicted have come to pass, although the author acknowledges that some successor technologies described in Part V.C may require distinct treatment from traditional video games.⁴⁵⁴ While available to some degree at the time of the *Brown* decision, it is also important to remember that video game console manufacturers regularly include specific parental control settings that a parent can enable to limit children's access to objectionable content.⁴⁵⁵

The author is not disputing that *Brown's* key predecessor, *Stevens*, can be a challenging opinion to apply in practice.⁴⁵⁶ Perhaps there are legitimate arguments for softening its edges in some contexts, as the Alito concurrence in *Brown* recommends.⁴⁵⁷ *Brown* was likely difficult for a variety of the justices because it exemplified a collision course of societal values and a rapidly growing technology.⁴⁵⁸

On potential risks of future technology, as discussed in more detail in Part V.C the author believes that some of the concerns Justice Alito identified in his concurrence will eventually become real challenges. Because we cannot predict all types of technology that will exist in the future, it is premature to write off all cautionary pronouncements from this concurrence.⁴⁵⁹ In any event, with a well-established preference in First Amendment case law for technological neutrality dating back to the mid-twentieth century, there is no question that the Court's default position is to extend speech protections to new forms of communicative technology.⁴⁶⁰

However, leaving First Amendment protections for video games in place does not require resolution of every potential jurisprudential problem down the line. There is a strong case that *Brown* presents a straightforward and non-controversial application of *Stevens*, especially when considering that this earlier case dealt with highly graphic and live-action "crush videos" featuring "extreme cruelty" to animals.⁴⁶¹ Well before *Stevens*, the Supreme Court in *Ashcroft v. Free*

⁴⁵³ See *supra* notes 3 to 7.

⁴⁵⁴ See *Wuller, supra* note 18, at 479-90.

⁴⁵⁵ See *Paree, supra* note 20, at 268-69.

⁴⁵⁶ See *Lakier, supra* note 145, at 2168-69, 2174-75 (discussing challenges with *Stevens*); *Wright, supra* note 18, at 353.

⁴⁵⁷ *Id.*

⁴⁵⁸ See *Wuller, supra* note 18, at 467.

⁴⁵⁹ See *Bhagwat, supra* note 15, at 883-84.

⁴⁶⁰ See *Rhodes, supra* note 138, at 404-05.

⁴⁶¹ *United States v. Stevens*, 559 U.S. 460, 461-62 (2010).

Speech Coalition recognized that sexual content featuring morphed faces designed to make the actors look like children deserves First Amendment protection.⁴⁶² In that 2002 opinion, the Court recognizes that “the visual depiction of an idea—that of teenagers engaging in sexual activity”—was at that time “a fact of modern society and [something that] has been a theme in art and literature throughout the ages.”⁴⁶³ Artistic simulations of any kind, like those at issue in *Free Speech Coalition*, find a strong analogy in computer-generated graphics that appear in video games.⁴⁶⁴

On the more specific subject of speech targeted to minors, the Supreme Court has long expressed skepticism towards regulating such speech absent unique circumstances like obscene speech.⁴⁶⁵ The Court has many times before recognized that “the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.”⁴⁶⁶ It is a non-controversial proposition in free-speech cases that “minors are entitled to a significant measure of First Amendment protection.”⁴⁶⁷ *Brown* did nothing to change these principles but rather simply determined that violent content falls outside the realm of obscenity.⁴⁶⁸ For this reason, some scholars have expressed that *Brown* is actually quite narrowly about only the issue of the proper classification of violent content.⁴⁶⁹

When taking the ubiquitous nature of violent content in American media in perspective, it becomes clear how it is virtually impossible to shield children from violent content. Some have argued further that it would be irresponsible to try and do so. As Judge Posner explained ten years before *Brown* was decided: “To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”⁴⁷⁰ Within that same year as Judge Posner’s opinion, the entire country watched on September 11th as terrorists crashed multiple planes into the World Trade Center buildings, killing almost 3,000 people and prompting a

⁴⁶² See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246-49 (2002).

⁴⁶³ *Id.* at 246-47.

⁴⁶⁴ See *id.*; Bhagwat, *supra* note 204, at 1447-48.

⁴⁶⁵ See *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011).

⁴⁶⁶ *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975).

⁴⁶⁷ See *id.* at 212.

⁴⁶⁸ See *Brown*, 564 U.S. at 792-93.

⁴⁶⁹ See Lee, *supra* note 19, at 300-01; see also Reitz, *supra* note 201, at 1025-26.

⁴⁷⁰ *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

twenty-year war in Afghanistan.⁴⁷¹ It is a fool's gambit to ask future voters to exercise their civic responsibilities intelligently without a proper understanding of the existence and consequences of violent action.

Likewise, it is not fair to force video game developers or artists working in other media to guess where an amorphous line may be on prohibited portrayals of violence.⁴⁷² America's relationship with violence in art is too convoluted for a court to be in a position to meaningfully apply a traditional obscenity analysis to such content. For no comparable type of media does the First Amendment tolerate legislatures reserving "an implied threat over the industry" to regulate protected speech based merely on theoretical harms that might arise.⁴⁷³

Some historical perspective on other forms of media is also instructive. "In the 1970s, formerly taboo subjects such as sexuality, death, and divorce once more became acceptable in media aimed at youth."⁴⁷⁴ Compared to print media, film provides a stronger historical comparison to video games, including because of the visual nature of the medium and because courts have very rarely found print media to be obscene.⁴⁷⁵ The level of violent content in major films since the 1970s grew significantly, with film studios relying heavily on action blockbusters to increase their revenues.⁴⁷⁶ One high grossing film of the decade, *Jaws* (1975), centered around a shark devouring humans.⁴⁷⁷ That film, however, was based on a true story which likely blunted criticism of its violent depictions.⁴⁷⁸ More directly on point, horror films of the era also showed no hesitation to raise the stakes on graphic expression of violent content—like the original versions of both *The Last House on the Left* (1972) and *The Texas Chainsaw Massacre* (1974) to name a few.⁴⁷⁹ The 1970s featured a variety of film content

⁴⁷¹ See Leslie Gornstein, *Photos of 9/11 and Its Aftermath to Mark the 20-year Anniversary*, CBS NEWS (Aug. 23, 2021, 12:18 PM), <https://www.cbsnews.com/pictures/911-attacks-photos-aftermath/> [<https://perma.cc/UE5U-AWT5>].

⁴⁷² See *Snyder v. Phelps*, 562 U.S. 443, 452 (2011); Massaro & Norton, *supra* note 179, at 1658-60.

⁴⁷³ See Guggenheim, *supra* note 181, at 769 (stating that *Brown* incorrectly removed this threat).

⁴⁷⁴ PATTI M. VALKENBURG & JESSICA TAYLOR PIOTROWSKI, PLUGGED IN: HOW MEDIA ATTRACT AND AFFECT YOUTH 14 (2017).

⁴⁷⁵ See Sean Howell, *A "Hot" and "Cool" First Amendment: Analyzing Speech Effects in a Shifting Media Environment*, 104 CALIF. L. REV. 1259, 1283-86 (2016).

⁴⁷⁶ UNDERSTANDING MEDIA AND CULTURE 388-89 (Univ. of Minn. Librs. Publ'g ed. 2016) (2010).

⁴⁷⁷ *Jaws* (1975), BOX OFF. MOJO, https://www.boxofficemojo.com/title/tt0073195/?ref_=bo_se_r_1 [<https://perma.cc/7WY5-GFVN>].

⁴⁷⁸ See Michael Capuzzo, *The True Story of Jaws*, BBC CULTURE (July 13, 2016), <https://www.bbc.com/culture/article/20160713-the-true-story-of-jaws> [<https://perma.cc/5ZUC-2KWR>].

⁴⁷⁹ See Ebert, *supra* note 90.

that one could consider equally objectionable when compared to the numerous violent video game examples on which Justice Alito relies in his *Brown* concurrence.⁴⁸⁰

Moving forward to the 1990s when Congress was flexing its muscle against the video game industry, *Saving Private Ryan* (1998) and *The Matrix* (1999) exemplify the selective outrage society has applied to violent content. Among other violent content throughout the film, the first thirty minutes of *Saving Private Ryan* feature an incredibly graphic portrayal of the Allied forces' invasion of Normandy during World War II.⁴⁸¹ That season at the Academy Awards, the movie won the prizes for Best Director, Best Cinematography, Best Film Editing, Best Sound, and Best Sound Effects Editing.⁴⁸² As one legal commentator describes the film: "*Saving Private Ryan* communicates complex and difficult concepts using graphic images, violence, profanity, action, and camaraderie."⁴⁸³ Many predicted it would win Best Picture, with *Shakespeare in Love* (1998) staging a relative upset that year.⁴⁸⁴ Along these same lines, the characters in the blockbuster success, *The Matrix*, engage in highly stylized gunfights throughout the entirety of the film.⁴⁸⁵ Yet, the film faced little backlash in spite of the country's sensitivity to school shootings, winning four Oscars in the process.⁴⁸⁶

While scholars should still continue to examine Justice Alito's thoughtful concurrence, the author proposes that society should put the two dissenting opinions in *Brown* out of their misery as viable alternatives. If adopted, either Justice Breyer or Justice Thomas' opinions would create major tension with existing First Amendment case law. The Breyer framework commits far too much discretion to

⁴⁸⁰ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 818-19 (2011) (Alito, J., concurring).

⁴⁸¹ See Ford, *supra* note 84, at 338; Hazel Malcolmson, Comment, *Copyright Infringement in the Digital Age: The Issue of Unfixed Works*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 297, 300-01 (2005).

⁴⁸² See Michael Ellison, *No Salvation for Private Ryan as Oscar Falls in Love with Shakespeare in a Big Way*, THE GUARDIAN (Mar. 22, 1999, 9:49 PM), <https://www.theguardian.com/uk/1999/mar/23/michaelellison> [<https://perma.cc/UQ6K-3VXR>].

⁴⁸³ See Malcolmson, *supra* note 480, at 300-01.

⁴⁸⁴ See Ellison, *supra* note 481.

⁴⁸⁵ See UHVG Vol. 1, *supra* note 40, at 548; Alan Scherstuhl, *Reckoning with The Matrix's Gun Problem*, VULTURE (Feb. 7, 2019), <https://www.vulture.com/2019/02/reckoning-with-the-matrixs-gun-problem.html> [<https://perma.cc/MWL6-DWUM>].

⁴⁸⁶ See Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 91 (2015) (discussing film's success); *supra* note 485.

legislatures in regulating new forms of media and takes a simplistic view of how prevalent violence actually is in comparable forms of media.⁴⁸⁷ While the type of regulatory deference that Justice Breyer displays in his dissent might pass muster in the more contorted area of deference to obscenity regulations for broadcast media,⁴⁸⁸ such indulgence of nuance to salvage problematic laws is increasingly rare amongst the reliably pro-First Amendment justices currently on the Court. Justice Roberts, for example, has regularly sided with challengers of laws invoking various forms of First Amendment protection.⁴⁸⁹ As discussed previously, all of the justices except Justice Thomas joined in the significant recent pro-minor speech opinion, *Mahanoy Area School District v. B.L.* (2021).⁴⁹⁰

From a practical perspective, there is little momentum towards either of the two dissenting opinions. It certainly does not bode well for the prospects of Breyer's dissent that he retired in 2022. He announced his decision to step down at the age of 83.⁴⁹¹ His successor, Justice Ketanji Brown Jackson formerly of the U.S. Court of Appeals for the District of Columbia Circuit, was born in 1970 and lived through the technologically forward era of the 1980s. The other dissenting justice, Justice Thomas, is already a frequent outlier on major First Amendment opinions, for instance as the sole dissent in *Mahanoy Area School District*.⁴⁹² Incidentally, Justice Thomas has cited *Brown* approvingly in a recent decision addressing the free-speech rights of "crisis pregnancy centers" against regulatory efforts about their efforts to regulate information they provide to pregnant women, an opinion which Justices Roberts, Alito, and Neill Gorsuch joined.⁴⁹³

It often takes a number of years for a new justice to make a significant impact on the Court⁴⁹⁴, and leading the charge against *Brown* does not seem like an obvious choice for a newly appointed

⁴⁸⁷ See Ford, *supra* note 84, at 313-14.

⁴⁸⁸ See Lee, *supra* note 19, at 297-99, 306-07.

⁴⁸⁹ See Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 116-17 (2016).

⁴⁹⁰ See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

⁴⁹¹ Amy Howe, *Jackson will be Sworn in on Thursday as Breyer Steps Down*, SCOTUSBLOG (Jun. 29, 2022), <https://www.scotusblog.com/2022/06/jackson-will-be-sworn-in-on-thursday-as-breyer-steps-down/> [<https://perma.cc/HB5K-N2AV>].

⁴⁹² *Mahanoy*, 141 S. Ct. 2038.

⁴⁹³ See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2638, 2372 (2018) (relying on a quote that originally appeared in *Brown* bearing on the need for a historical tradition to regulate a given category of speech).

⁴⁹⁴ See generally Amelia Thomson-DeVeaux, *How Ketanji Brown Jackson Could Change the Supreme Court*, FIVE THIRTY-EIGHT, (Feb. 25, 2022 11:04 AM) <https://fivethirtyeight.com/features/how-ketanji-brown-jackson-could-change-the-supreme-court/> (discussing Justice Jackson's previous rulings, predicted jurisprudence and how she may impact the Court in the future.) [<https://perma.cc/3GSU-JKBK>]

justice from either political party. This logic seems particularly apt for an appointee of President Joseph Biden whose two liberal counterparts both joined the lead opinion in *Brown*, although Justice Jackson did clerk for Justice Breyer. In part based on the fact that Justice Jackson assumed her position with the D.C. Circuit in 2021, there is no record of her having passed upon *Brown* at an appellate level. It also does not appear she addressed the opinion during her time as a U.S. District Court Judge.

Perhaps most importantly, Justice Scalia's name remains hallowed in conservative circles. One would not expect it to be a popular Republican cause moving forward to overturn any of his major opinions. Among current members of the Court not present when *Brown* was decided, the odds seem poor that either Justice Gorsuch or Amy Comey Barrett would vote to overturn the case. Justice Barrett clerked for Justice Scalia, and both Justice Barrett and Justice Gorsuch are acknowledged Scalia acolytes.⁴⁹⁵ While he did not author any separate opinion, the fact that Justice Kennedy joined the majority in *Brown* likely decreases the chances that either Justice Brett Kavanaugh or Justice Gorsuch—both former Kennedy clerks—would lightly overrule the opinion.

Justice Alito might stick to his *Brown* concurrence, but Justice Roberts has vocally supported *stare decisis* in various opinions siding with his colleagues appointed by presidents elected from the Democratic Party.⁴⁹⁶ As evidence of that dynamic, Justice Roberts cited *Brown* approvingly in a 2015 decision bearing on the ability of states to ban judicial candidate solicitation of donations, a majority opinion signed by Justices Breyer, Sotomayor, Kagan, and Ginsburg.⁴⁹⁷ Most likely because seven justices agreed with the result, *Brown* does not appear to be particularly controversial at the present time amongst members of the Court.

The biggest problem with revival of a *Ginsberg*-like standard for sale of violent content to children, whether for video games or all media, is that such a standard would be unworkable—especially

⁴⁹⁵ See Anthony P. Picadio, *In Scalia's Wake: The Future of the Second Amendment Under an Originalist Supreme Court Majority*, 92 PENN. BAR ASS'N Q. 145, 148 (2021).

⁴⁹⁶ See, e.g., *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134-39 (2020) (Roberts, C.J., concurring).

⁴⁹⁷ See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015).

compared to the categorical approach of the *Brown* majority.⁴⁹⁸ Even proponents of stricter regulation of video games recognize that the *Ginsberg* opinion can be unwieldy when applied to new scenarios.⁴⁹⁹ While more recent case-law restrictions have narrowed obscenity rules to patently offensive speech utterly without social value, the obscenity framework involves application of contemporary community standards to assess the propriety of the involved sexual content.⁵⁰⁰ Any actual governmental enforcement of obscenity standards is unquestionably on the decline, but there are at least a developed body of standards on sexual content that provide artists with some level of fair notice whether their conduct violates the law.⁵⁰¹ Opponents of *Brown* overlook that there was no pre-existing movement in obscenity case law towards the embrace of more restrictive standards towards either minor speech or speech targeted to minors.⁵⁰²

B. Interactivity of the Medium: Video Games Versus Other Multimedia

As more time has passed since *Brown*, it has become increasingly apparent that reliance on interactivity as a material parameter for distinguishing video games from other forms of media has an unacceptably infirm foundation. There is a very strong case that, at the time *Brown* was decided, some protected forms of expression already displayed major aspects of interactivity with their respective audiences.

Some have criticized Justice Scalia's opinion for too quickly dispensing of interactivity as a defining characteristic of video games.⁵⁰³ The author does not dispute that other media formats may involve a theoretically distinguishable type of interactivity. However, as recognized in *Brown*, any such distinctions are materially insufficient

⁴⁹⁸ See Clements, *supra* note 27, at 690-91 (discouraging any revival of *Ginsberg* as a standard to regulate video games); Reitz, *supra* note 201, at 1015-21; *but see* Guggenheim, *supra* note 181, at 759-69 (thoughtful attempt to move beyond *Ginsberg* to an acceptable realm of violent content regulation after *Brown*).

⁴⁹⁹ 182 See Guggenheim, *supra* note 181, at 753-69.

⁵⁰⁰ 475 See *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413, 418-19 (1966); Howell, *supra* note 476, at 1294-95.

⁵⁰¹ See Lee, *supra* note 19, at 381-88.

⁵⁰² See Post, *supra* note 125126, at 55-56 (discussing how *Brown* "appears to resurrect a version of *Ginsberg* that had been, if not exactly sent to the glue factory, at least turned out to pasture some time ago").

⁵⁰³ See Howell, *supra* note 476475, at 1263-64.

to justify treating video games differently from a First Amendment standpoint.⁵⁰⁴

The position that traditional artistic mediums—like literature, music, and film—operate in an inherently static manner falls apart upon closer inspection.⁵⁰⁵ The author laments that some commentators have such a poor opinion of the evolutionary ability of these artistically rich forms of media. The author agrees with those scholars who recognize that “attempts to treat particular media differently for First Amendment purposes have become increasingly problematic as media have converged.”⁵⁰⁶ The Author does not dispute that many individual pieces of art from other forms of media are largely static, but *Brown*’s detractors often rely on stark overgeneralizations about both: (a) these media formats themselves; and (b) how audiences actually consume media besides video games.

While certainly a traditional art piece hanging on the wall is a static creature, modern analogs to paintings blow that assumption out of the water. In particular, non-fungible tokens (“NFTs”) that the owner can display in hologram form—and that may themselves have dynamic characteristics—dramatically undercut the foundations of this position.⁵⁰⁷ Society is still figuring out what to do with blockchain-based NFTs, as they have a broad range of potential applications even if many consider them to be speculative investments with little underlying value.⁵⁰⁸ Whatever one’s thoughts about NFTs, it is hard to dispute that they present a new spin on one or more older forms of media, such as paintings and sculpture.⁵⁰⁹ Some credit 2012 as the first year any such artistic creation came into being, so the Court could not have analogized to NFTs in the 2011 *Brown* decision.⁵¹⁰

Thinking of the issue from a different perspective, it is quite bizarre that detractors of video games concede they are superior in interactivity to other media yet believe the medium should receive inferior treatment under First Amendment.⁵¹¹ Critics in this camp often

⁵⁰⁴ See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011).

⁵⁰⁵ See Lee, *supra* note 1920, at 320-21 (emphasizing adaptability of media technology).

⁵⁰⁶ Howell, *supra* note 476475, at 1295.

⁵⁰⁷ See Andrew Steinwold, *The History of Non-Fungible Tokens (NFTs)*, MEDIUM (Oct. 7, 2019), <https://medium.com/@Andrew.Steinwold/the-history-of-non-fungible-tokens-nfts-f362ca57ae10> [<https://perma.cc/4B6M-B59A>].

⁵⁰⁸ See Elizabeth Howcroft, *Unreal Demand? Irregular Sales Worth Billions Fire Up Wild NFT Market*, Reuters (Feb. 6, 2022, 11:23 PM), <https://www.reuters.com/article/fintech-nft-looksrare-idCAKBN2KCoFZ> [<https://perma.cc/4VG8-L78T>].

⁵⁰⁹ See Steinwold, *supra* note 508507.

⁵¹⁰ See *id.*

⁵¹¹ See, e.g., Butler, *supra* note 3637, at 939-41.

rely on a parade of horrors of what future technology may yield, struggling in the process to articulate any actual reason why the Court should overrule *Brown*.⁵¹² It would be a strange result for free-speech protections to punish a medium for its novel achievements, especially when a bedrock principle of constitutional jurisprudence is to encourage development of new forms of expression.⁵¹³

Just because courts may not have provided the best explanations on this interactivity dynamic is a different matter than whether those historical examples exist. Admittedly, opinions addressing the earliest iterations of these interactivity arguments sometimes reached to draw persuasive analogies between video games and other media. For instance, it is hard to debate that interacting with a DVD menu to select specifically a violent action scene is less interactive than a user participating in the violent acts via their video game character.⁵¹⁴ However, modern eBooks can be surprisingly complicated, sometimes featuring a great deal of related video content and even in some instances complex branching story paths that the reader may select.⁵¹⁵

Putting aside modern technology, many different types of art over the centuries have relied upon interactive elements. Live musical and dramatic performances represent one of the most ancient forms of interactive entertainment, with each performance in theory amounting to a unique display which only that audience experiences.⁵¹⁶ For a mid-twentieth century example, Orson Welles created a national panic with his 1938 radio adaptation of the novel *War of the Worlds* by persuading possibly over a million listeners that the country was under invasion.⁵¹⁷ For a contemporary illustration, every year a large portion of the United States stops whatever else they are doing to watch the Super Bowl—with members of the public and businesses regularly planning their own events around the broadcast. The audience interacting with their media of choice allows such phenomena to happen.

In this Author's view, the *Brown* decision would have received less criticism if it spent more time explaining how interactivity already constitutes a key element of various forms of protected artistic expression. In any event, the logic has remained strong that speech should not suffer a penalty for First Amendment purposes because the

⁵¹² See *id.* at 911-12, 939-41; Norris, *supra* note 16 **Error! Bookmark not defined.**, at 103-05.

⁵¹³ See Rhodes, *supra* note 138139, at 429-34.

⁵¹⁴ See *Interactive Digit. Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 957-59 (8th Cir. 2003) (making this analogy).

⁵¹⁵ See Lee, *supra* note 1920, at 327-29.

⁵¹⁶ See Rhodes, *supra* note 138139, at 402-03, 430-31; Wright, *supra* note 1819, at 348-49.

⁵¹⁷ See Walters, *supra* note 451450, at 123-26.

user has gained additional control over the experience due to technological advancements.⁵¹⁸ To conclude otherwise would give the government too much power to regulate every emerging artistic medium.⁵¹⁹ Most importantly, such a ruling would have created major conflicts with First Amendment precedent to apply any form of relaxed scrutiny to a medium like video games where a person purchases the content deliberately to use privately—the same means through which people typically consume books, music, and video content.⁵²⁰

C. The Next Level: Future First Amendment Battlefronts for Video Games and Comparable Forms of Speech

It is never too early to start thinking about new types of technology where the Supreme Court will have to grapple with *Brown* and comparable decisions expressing a preference for technological neutrality. From the author's perspective, artificial intelligence should be at the top of that list. This topic overlaps heavily with video games, in particular as video games increasingly feature sophisticated enemy and ally AI to enhance the user's experience.⁵²¹

The author emphasizes that the relationship between AI and the First Amendment is a highly complex topic for which this Article does not attempt to provide concrete answers. Within the next several decades, there is likely to be a major U.S. Supreme Court opinion on whether—and to what degree—the First Amendment provides protection to AI as speech. This battle is coming because AI has reached a major inflection point where the capabilities of the technology grow rapidly ever year.⁵²² How AI impacts society, especially if those consequences are harmful, will undoubtedly influence how the Court ultimately treats the technology from a free-speech standpoint.⁵²³

⁵¹⁸ See *Interactive Digit.*, 329 F.3d at 957-59.

⁵¹⁹ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011); *Winters v. New York*, 333 U.S. 507, 510 (1948).

⁵²⁰ See Paree, *supra* note 2021, at 247-48.

⁵²¹ See, e.g., Madeline Lamo & Ryan Calo, *Regulating Bot Speech*, 66 UCLA L. REV. 988, 1026-27 (2019); Mott, *supra* note 5758, at 635.

⁵²² See Lamo & Calo, *supra* note 522521, at 990-1002.

⁵²³ See Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U.L. REV. 1169, 1171 (2016).

The urge to regulate AI must be tempered with the reality that the First Amendment encourages the creation of new technology.⁵²⁴ As one set of scholars describes the situation: “Thus to declare it uniformly good or bad, useful or disruptive, presumptively protected from government regulation or presumptively subject to regulation, would be foolish.”⁵²⁵ The more concrete regulatory problems for the legal system to address are: (1) what we allow people to do with AI; and (2) what we allow AI itself to do. A third problem that will play out as the technology progresses is how we allow third parties to interact with AI.

An introduction to the third problem helps illustrate just how important those first two problems are. In 2016, Microsoft introduced to the world its promising AI invention, essentially a highly sophisticated chatbot, which it named Tay.⁵²⁶ Microsoft designed Tay largely to mimic the speech and habits of an American teenage girl but with the technological underpinnings of “complex learning algorithms, which made it capable of incorporating humor and randomness into its responses” to make it seem more human.⁵²⁷ The company launched Tay on Twitter to have the program flex its adaptive learning capabilities via real-time human interaction.⁵²⁸ The problem was that, in a matter of hours after incorporating a wide variety of user input, Tay began expressing racist, sexist, and other inflammatory ideas.⁵²⁹ Microsoft shuttered this AI personality within a matter of hours after its public introduction.⁵³⁰ In spite of Microsoft pulling the plug on this failed project, the sociological lessons from the experiment are profound. Perhaps the biggest lesson is that, especially when not programmed to the contrary, AI can learn all kinds of behavior simply by exposure to it—including malicious behavior.⁵³¹

When it comes to the general regulatory dynamics for human designers and AI itself, one basic First Amendment question is whether

⁵²⁴ See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 90-91 (2014); Massaro & Norton, *supra* note 524523, at 1171.

⁵²⁵ Massaro & Helen Norton, *supra* note 524523, at 1171.

⁵²⁶ See Hilda Kajbaf, Note, *The First Amendment and Modern Technology: The Free Speech Clause and Chatbot Speech*, 47 HASTINGS CONST. L.Q. 337, 340 (2020).

⁵²⁷ *Id.* at 343.

⁵²⁸ *See id.*

⁵²⁹ See Elle Hunt, *Tay, Microsoft’s AI Chatbot, Gets a Crash Course in Racism from Twitter*, THE GUARDIAN (Mar. 24, 2016, 2:41 AM), <https://www.theguardian.com/technology/2016/mar/24/tay-microsofts-ai-chatbot-gets-a-crash-course-in-racism-from-twitter> [<https://perma.cc/JE6R-LB3V>].

⁵³⁰ See Kajbaf, *supra* note 527526, at 343.

⁵³¹ Oscar Schwartz, *In 2016, Microsoft’s Racist Chatbot Revealed the Dangers of Online Conversation*, IEEE SPECTRUM (Mar. 25, 2019), <https://spectrum.ieee.org/in-2016-microsofts-racist-chatbot-revealed-the-dangers-of-online-conversation#toggle-gdpr> [<https://perma.cc/4MU4-RNAY>].

human creation of AI technology constitutes speech.⁵³² It appears relatively settled that creation of software and other computer programs amounts to protected speech, although raw computer data will not necessarily qualify as such.⁵³³ There is a raging debate over whether AI should fall outside of or into a lesser category of First Amendment protection.⁵³⁴ *Brown* informs this discussion because interactivity between humans and technology is not a disqualifying metric for free-speech protection.⁵³⁵ Especially given the potentially profound implications, the author does not attempt to answer such questions.

In comparison to speech rights for creators of AI, a weaker argument exists that AI speakers themselves have their own speech rights. Under common law principles, courts ascribe no intent (creative or otherwise) to a machine or other non-human speaker.⁵³⁶ To oversimplify a complex discussion, constitutional originalists more likely take the position that machine and AI speech fall outside constitutional protection given the absence of any comparable type of speech at the time of the Constitution's ratification.⁵³⁷ In comparison, some argue that AI speech is a natural extension of already protected speech categories such that AI could warrant treatment as a protected speaker without any ongoing human involvement.⁵³⁸ As early as the 1990s, some have proposed the possibility of extending legal personhood to AI—at least under certain circumstances such as when the AI's activities are distinct from those of a human.⁵³⁹ Some scholars have analogized this possibility to the extension of such protections to other unnatural persons, like corporations and comparable entities.⁵⁴⁰ These debates should continue given the enormous consequences that

⁵³² See Massaro & Norton, *supra* note 524523, at 1172.

⁵³³ See, e.g., Bambaauer, *supra* note 525524, at 58-61, 70.

⁵³⁴ See, e.g., Massaro & Norton, *supra* note 524523, at 1172-73; Kajbaf, *supra* note 527526, at 338-39, 359-60.

⁵³⁵ See Kajbaf, *supra* note 527526, at 350 (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 786, 790, 798 (2011)).

⁵³⁶ See, e.g., Toni M. Massaro, et al., *Siri-Ously 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2506-07 (2017).

⁵³⁷ See Kajbaf, *supra* note 527526, at 338-39.

⁵³⁸ See *id.* at 338-39; Massaro & Norton, *supra* note 524523, at 1179-80 (discussing these problems and gathering sources).

⁵³⁹ See Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1258-79 (1992); Kajbaf, *supra* note 527526, at 353-54.

⁵⁴⁰ See Massaro & Norton, *supra* note 524523, at 1179-80; Kajbaf, *supra* note 527526, at 355-56.

could flow from granting speech protections directly to non-human AI.⁵⁴¹

The discussion over regulating violent content in video games seems trivial in comparison to these highly complex problems with AI. Certainly, the regulatory structure governing AI will have a far more profound impact on the world than regulation of video game content. The societal implications of AI technology cannot be overstated.

Returning to new technologies comparable to video games, the best potential for the Court to distinguish *Brown* is society's eventual creation of technology dramatically distinct from existing video games.⁵⁴² It is the author's position that it is extremely unlikely that any current video game technology widely available to the public—like virtual reality or motion-sensing controllers—can persuasively justify a distinction of this magnitude.

The type of technology that might warrant such a distinction may look more like something out of the Twilight Zone than a traditional video game. As one student article described the situation: “Eventually, video games may create a much more real virtual reality—something akin to the way in which the Marines in the film ‘Avatar’ experience their avatars, or, if your views run more to the dystopic, the way in which people plugged into the Matrix experience the simulated reality of the ‘Matrix’ films.”⁵⁴³ This concern is not simply a theoretical one. Technology of this nature is closer to market than we might like to believe. As one high-profile video game developer, Gabe Newell, recently stated: “We’re way closer to The Matrix than people realize.”⁵⁴⁴ Elaborating on that thought, he expressed: “The Matrix is a movie and it misses all the interesting technical subtleties and just how weird the post-brain-computer interface world is going to be. But it’s going to have a huge impact on the kinds of experiences we can create for people.”⁵⁴⁵ Some companies have even received approval from the U.S. Food & Drug Administration to conduct human trials of implantation of neural devices into human brains.⁵⁴⁶ If these devices can deliver on their proposed functionality, they can potentially “translate the

⁵⁴¹ See Massaro, et al., *supra* note 537536, at 2523-24

⁵⁴² See Paree, *supra* note 2021, at 266-67 (discussing this prospect).

⁵⁴³ See Callaway, *supra* note 4142, at 520-21.

⁵⁴⁴ Steven Messner, *Gabe Newell: 'We're Way Closer to The Matrix than People Realize,'* PC GAMER (Mar. 18, 2020), <https://www.pcgamer.com/gabe-newell-were-way-closer-to-the-matrix-than-people-realize/> [<https://perma.cc/9Y4Z-N5JN>]; see also HANSEN, *supra* note 63, at 166-78 (explaining Gabe Newell's history in industry).

⁵⁴⁵ Messner, *supra* note 544.

⁵⁴⁶ See Alena Botros, *Elon Musk's Neuralink brain computer startup is beat again. This time a competitor implanted its device into its first U.S. patient*, FORTUNE (July 18, 2022, 5:15 PM), <https://fortune.com/2022/07/18/elon-musk-neuralink-beat-by-synchron-brain-computer-startup-us-human-trial/>.

patient's thoughts into action through commands sent to a computer."⁵⁴⁷ The time is ripe for legal scholars to evaluate these categories of technology from all types of regulatory perspectives.

If there is a basis to distinguish *Brown* in the context of future technology besides AI, the author believes that a true new regulatory problem exists with technology that permits direct interfacing between a machine and the human brain. It is not difficult to imagine such technology potentially resulting in significant physical and mental harms, for instance if the technology malfunctions or disconnects unexpectedly in a way that injures the user. Technology sometimes evolves into unanticipated and dangerous forms that require unique treatment.⁵⁴⁸ The author does not dispute that there are major, unanswered regulatory and First Amendment problems about such forms of technology. While these criticisms are premature when it comes to traditional video games, they are fair concerns to raise with new forms of technology.⁵⁴⁹

However, we should also resist making overly negative pronouncements about technological offshoots of video game technology. To help military veterans suffering from post-traumatic stress disorder, various medical professionals have experimented with video game simulations to help them grapple with past trauma.⁵⁵⁰ As one example, the "Virtual Iraq program involves patients wearing a headset and being exposed to sounds, images, smells, and vibrations that are controlled by a doctor to stimulate some of the experiences soldiers experienced while in Iraq or Afghanistan."⁵⁵¹ One study found that "around 80% of program participants demonstrated a statistical and clinical reduction in PTSD, anxiety, and depression."⁵⁵² For medical applications of video game technology, the author believes it is typically best to leave the propriety of treatment modalities to the medical profession and affiliated medical organizations.

⁵⁴⁷ *See id.*

⁵⁴⁸ *See Walters, supra* note 451450, at 163-65, 177 (discussing comparable First Amendment challenge with distribution of fake news across social media and other platforms).

⁵⁴⁹ *See Wuller, supra* note 1819, at 488-89.

⁵⁵⁰ *See Fisher, supra* note 16**Error! Bookmark not defined.**, at 545.

⁵⁵¹ *See id.*

⁵⁵² *See id.* (discussing this study).

VI. Conclusion

As evidenced by their massive commercial success, video games have become one of the most prevalent ways that cultures across the world communicate their ideas and principles to one another. In an era of increasing social division, it seems foolish to relegate video games to a second-tier status when they help bring people from highly different cultures together. The medium has also stepped up to the plate in terms of its positive economic contributions, effectively stealing the limelight from the once lucrative film industry that experienced a complete upheaval following the COVID-19 pandemic.

The evolution of historic forms of protected expression by their adaptation of elements often labelled as unique to the video game format illustrates the competitive development of the different media forms—especially when placed in the hands of creators capable of artistic breakthroughs. NFTs stand as one of the most obvious post-*Brown* examples in terms of the arguable birth of a new medium.⁵⁵³ We should not forget that there will be other potential contenders during the twenty-first century. Legislators and regulators should resist the reflexive urge to view technological advancements as more likely to harm society than to help it.⁵⁵⁴ The success of video games as a medium demonstrates precisely why the First Amendment requires that we err on the side of protecting potentially dangerous types of speech.⁵⁵⁵

⁵⁵³ See HANSEN, *supra* note 6263, at 347-51; *supra* text accompanying notes 508-11507510.

⁵⁵⁴ See Bambauer, *supra* note 525524, at 117-18.

⁵⁵⁵ See *The Effect of Court Rulings*, *supra* note 2829, at 402-03.