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When Enduring Value Turns to Dogma

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WHEN ENDURING VALUE TURNS TO DOGMA

KEVIN W. SAUNDERS[†]

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Professor Sedler concludes his reprise on *The Law of the First Amendment* with the conclusion that the current structure of the law is the same as it was at the time of his original 1991 article.¹ He notes at the outset that, if anything, with regard to the protection of expression, “the Court has increased the protection afforded to First Amendment rights and has resisted attempts to diminish that protection.”² He further justifies this even stronger protection as part of American humanistic values.³ These values in the United States protect “bad ideas” and “harmful speech” and indicate a belief that the government should not make decisions about which ideas should be expressed.⁴ He applauds this treatment of expression, an applause in which, for the most part, I would join.

Consistency is a positive when it comes to values. Values should be enduring. A belief in free expression, or any other constitutional value, would lose importance if it waxed and waned with the tenor of the times. A continuing belief in free expression is, indeed, one of our humanistic values.

Factual conclusions should, however, not have such endurance in the face of contrary evidence. A continued adherence to a factual belief when the evidence demonstrates its falsity represents a foolish intransigence, rather than adherence to values. The denial cannot stand

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1. Robert Sedler, *The First Amendment in Litigation: The "Law of the First Amendment*, 48 WASH. & LEE L. REV. 457 (1991).

2. Robert Sedler, *The "Law of the First Amendment" Revisited*, 58 WAYNE L. REV. 1003, 1009 (2013).

3. *Id.* at 1085.

4. *Id.* at 1085-86.

up over the long, sometimes very long, run. It leads to incorrect conclusions when mixed with values and ends up making the adherent look foolish.⁵

Two examples of this phenomenon will be presented here. The first is the Catholic Church's rejection of the heliocentric universe and its treatment of Galileo. The second is the Supreme Court's decision in *Brown v. Entertainment Merchants Association*.⁶ The two might seem very different in that the rejection of the Copernican system was purely a rejection of scientific fact, while the *Brown* video game decision was the preservation of values that all or most would applaud, but the two are similar. It has long been a feature of constitutional rights that they are not absolute.⁷ A right can be infringed if the government has a compelling interest for which the infringement is necessary or narrowly tailored.⁸ Whether there is such an interest and whether there is necessity attached to that interest are not matters of enduring values. Those questions are contingent and depend on, perhaps among other things, the state of science at the time of the infringement.

I. GALILEO AND THE CATHOLIC CHURCH

In the early seventeenth century, a commission of the Holy Office of the Catholic Church called into question the advocacy by Galileo Galilei of the Copernican theory of the solar system.⁹ The Church had a set of enduring values, including one that placed man at the center of God's creative efforts. If man were to be at the center of God's attention, presumably the home of man, Earth, would have to be at the center of the universe.¹⁰ Furthermore, there was Scripture that spoke in favor of an Earth-centered, or geocentric, universe. Joshua did not command that the Earth stand still: He commanded the sun to stand still, and that could be exceptional only if it was the sun, rather than the Earth, that normally

5. There is another way in which enduring values may lead to controversial results. Values may expand to be applied in areas where they may not belong and where they may never have been intended. See generally KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* (2003); Kevin W. Saunders, *The Framers, Children and Free Expression*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 189-91 (2011). See also *infra* note 114 and accompanying text.

6. 131 S. Ct. 2729 (2011).

7. See, e.g., *Chaplinski v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times . . .”).

8. *Brown*, 131 S. Ct. at 2738.

9. The history of the strife between Galileo and the Catholic Church is recounted in many places. References here will be primarily to JEROME J. LANGFORD, *GALILEO, SCIENCE, AND THE CHURCH* (3d ed. 1992).

10. See *id.* at 53.

moved.¹¹ In the Psalms, God is said to have made the Earth firm and not moveable.¹² There are also places in the Bible that talk of the sun rising, running its course, and setting,¹³ all indications of the movement of the sun and the fixed place of the Earth.

Under Aristotle's, and later Ptolemy's, models of the universe, the Earth occupied its proper place from a religious perspective.¹⁴ Indeed, the models worked rather well for ordinary, everyday purposes. For most of us, the sun, moon, and stars do seem to revolve around the Earth and us.

Aristotle explained this apparent motion through the use of spheres on which the moon, sun, planets, and stars reside, revolving around the Earth.¹⁵ This system had a problem with the retrograde motion of planets, the apparent movement of the planets in one direction, followed by a reverse in course, and then again followed by motion in the original direction.¹⁶ The problems were not seen as making the theory irredeemable.¹⁷ They just required more spheres, with Aristotle employing fifty-five, including four connected spheres for Mars alone.¹⁸ It was the interconnected motion of these spheres that made the planets seem to change direction.¹⁹

Ptolemy made some changes to the system of Aristotle, and it is his improved system that served as the accepted model at the time of Galileo's prosecution.²⁰ Ptolemy replaced the spheres employed by Aristotle with circles.²¹ His explanation of retrograde motion involved placing the planets on much smaller circles, epicycles, revolving around points on the larger circle of planetary orbit.²² This was an improvement over Aristotle and justifies attaching his name to the model. It explained the changes in the speed of motion of the planets, as well as change in

11. This also led Martin Luther to reject a sun-centered universe. *See id.* at 35.

12. *See id.* at 52-53.

13. *See id.* at 53.

14. There are, again, any number of sources for material on these and the later Copernican models, but for simplicity, the citations here will be to short but more than adequate explanations put forth in LANGFORD, *supra* note 9.

15. LANGFORD, *supra* note 9, at 23-29 (explaining Aristotle's system). Aristotle was not the first to suggest these spheres but was preceded by Eudoxus and Callippus. *See id.* at 27.

16. *Id.*

17. *Id.*

18. *See id.* at 27.

19. Note that in an Earth-centered universe, it was not just an appearance of a change in direction but an actual change.

20. LANGFORD, *supra* note 9, at 27.

21. *Id.* at 29-32 (explaining Ptolemy's system).

22. *See id.* at 30.

direction, since apparent motion along an epicycle would be faster at those points closest to and furthest from the Earth. It also explained changes in brightness, since a planet would be brightest when it was at the point of the epicycle closest to the Earth.²³

Thus, things stood for well over a millennium until Copernicus offered an alternative view.²⁴ Copernicus placed the sun at the center of the universe, with the Earth, along with the other planets, orbiting the sun.²⁵ The model was simpler from the astrophysics perspective, if not the religious.²⁶ But it was only somewhat simpler, eliminating some spheres or cycles.²⁷ Because of Copernicus's assumption that orbits are circular, it could not explain all observations and still required epicycles to explain the retrograde motion of the planets.²⁸ It was only when Kepler posited that the orbits are not circular but elliptical, with the sun at one of the foci, that the appearance of retrograde motion ceased to be a problem.²⁹

Galileo's credit, and sin, was in providing evidence for the hypothesis offered by Copernicus. Galileo had the advantage of the then-recent invention of the telescope.³⁰ With it, he observed the moons of Jupiter and the phases of Venus.³¹ The moons of Jupiter showed that some "planets" orbited not the Earth but another planet, although if that planet orbited the Earth, it might not be much more of a problem than epicycles. The phases of Venus, however, were explainable only by the fact that Venus orbited the sun, rather than the Earth.³² That would seem to discredit the Ptolemaic system, but there was still another model developed by Tycho Brahe.³³ That model had the planets, including Venus, revolving around the sun, while the sun revolved around the Earth.³⁴ Thus, those who insisted on a geocentric universe had only to accept a more complicated model than that espoused by Galileo to maintain the centrality of humanity and its habitat in God's creation.³⁵

23. *See id.* at 29-30.

24. *Id.* at 29.

25. *Id.* at 32-39 (briefly discussing the work of Copernicus).

26. LANGFORD, *supra* note 9, at 32-39.

27. *Id.* at 35.

28. *See id.* at 37.

29. *Id.*

30. *Id.* at 40.

31. *See id.* at 40-44.

32. LANGFORD, *supra* note 9, at 44.

33. *Id.* at 44-45.

34. *See id.* at 46-48.

35. *Id.*

This challenge to man's place and Scripture proved to be too much for the Catholic Church. In 1616, the Consultors of Holy Office were asked to decide the acceptability of Copernicus's views.³⁶ Two propositions were submitted.

- I. The sun is the center of the world and completely immovable by local motion.
- II. The earth is not the center of the world, nor immovable, but moves according to the whole of itself, and also with a diurnal motion.³⁷

In response, the Consultors determined, "The first proposition was declared unanimously to be foolish and absurd in philosophy and formally heretical inasmuch as it expressly contradicts the doctrine of Holy Scripture in many passages, both in their literal meaning and according to the general interpretation of the Fathers and Doctors."³⁸ As to the second, "[a]ll were agreed that this proposition merits the same censure in philosophy, and that, from a theological standpoint, it is at least erroneous in the faith."³⁹ The distinction in the two findings was that, while both were erroneous and contrary to faith, only the first was directly contrary to scripture.⁴⁰

When the Pope and cardinals met to discuss the findings, things did not go well for Galileo:

His Holiness ordered the Most Illustrious Cardinal Bellarmine to call Galileo before himself and warn him to abandon these opinions; and if he should refuse to obey, the Father Commissary, in the presence of notary and witnesses, is to issue him an injunction to abstain completely from teaching or defending that doctrine and opinion or from discussing it; and further, if he should not acquiesce, is to be imprisoned.⁴¹

36. While the Sacred Congregation of the Holy Office consisted of cardinals, the Consultors, the advisors to the Holy Office, were clerics, religious and secular, who were learned in church law and theology. *See id.* at 88.

37. *Id.* at 89 (citation omitted).

38. LANGFORD, *supra* note 9, at 89 (citation omitted).

39. *Id.* (citation omitted).

40. *See id.* at 90.

41. Annibale Fantoli, *The Disputed Injunction and Its Role in Galileo's Trial*, in *THE CHURCH AND GALILEO* 117, 118 (Ernan McMullin ed., 2005) (citation omitted).

Cardinal Bellarmine provided Galileo a certificate stating that Galileo "has only been notified of the declaration made by the Holy Father and published by the Sacred Congregation of the Index, whose content is that the doctrine attributed to Copernicus . . . is contrary to Holy Scripture, and therefore cannot be defended or held."⁴² Interestingly, years later a second document was found in the Holy Office's archives in which Galileo was enjoined "henceforth not to hold, teach, or defend [the doctrine] in any way whatever, either orally or in writing. . . . Galileo acquiesced in the judgment and promised to obey."⁴³ The emergence of the second document has been attributed to anything from fraud, in a later attempt to convict Galileo of disobedience, to a relatively contemporaneous revision of the minutes.⁴⁴

Whatever may have been the genesis of that revised report, it clearly played a role in Galileo's later trial. In 1630, Galileo completed his *Dialogue on the Great World Systems*,⁴⁵ and in 1632 it was made available to the public.⁴⁶ Galileo is said to have "gambled that by presenting the glaring defects of the Ptolemaic system and defending the logic of the Copernican theory under the guise of feigned neutrality, he could compel the Church to see its mistake, revoke the prohibition, and adopt the new astronomy."⁴⁷ He lost the gamble; publication was suspended and unsold copies were confiscated.⁴⁸ He was also charged with violating orders given him not to defend the Copernican system and failing to recognize the absolute injunction against him "'not to hold, teach, or defend in any way, verbally or in writing' his Copernican opinions."⁴⁹

Galileo was summoned to Rome and, in 1633, was brought before the Holy Office for a hearing.⁵⁰ There was dispute over what order had been presented to Galileo, with the prosecution resting on the order not to "hold, teach, or defend in any way," a seemingly broader order violated by what was a clear defense of Copernicus.⁵¹ Despite the fact that the *Dialogues* has received the imprimatur of church officials, Galileo was convicted before its publication.⁵² The decision of Pope

42. *Id.* at 119 (citation omitted).

43. *Id.* at 120 (citation omitted).

44. *See id.* at 121-22.

45. *See* LANGFORD, *supra* note 9, at 116, 129.

46. *See id.* at 132.

47. *Id.* at 133-34.

48. *See id.* at 134.

49. *Id.* at 135.

50. Fantoli, *supra* note 41, at 137-158.

51. *See id.* at 135.

52. *Id.* at 134.

Urban VIII provided that Galileo would undertake private penance, abjure his views, and remain under house arrest in addition to requiring Galileo's book to be forbidden.⁵³ When the actual decision was handed down, his formal sentence was condemnation to the prison of the Holy Office and a penance of three years of weekly recitation of the Penitential Psalms.⁵⁴ His sentence was eventually commuted, with his daughter, a nun, reciting the Psalms, and Galileo first living at the palace of the Archbishop of Siena and later at Galileo's own country estate.⁵⁵ Galileo's works did not fare as well, at least in the short term. Works espousing the Copernican system remained on the forbidden index until 1822,⁵⁶ and the works of Copernicus and Galileo themselves until 1835.⁵⁷

Much later, in 1979, Pope John Paul II expressed his hope for an examination of the Galileo case.⁵⁸ The work of the Galileo Commission concluded in 1992 with a discourse prepared for the Pope.⁵⁹ Rather than a clear apology for its dogmatic refusal to accept science, the whole Galileo affair was seen as a "tragic mutual incomprehension."⁶⁰ Galileo, it seems, was as much at fault as the Church. The principal conclusions of the discourses were that

(1) Galileo did not understand that, at that time, Copernicanism was only "hypothetical" and that he did not have scientific proofs for it—thus he betrayed the very methods of modern science of which he was a founder; (2) "theologians" were not able, at that time, to correctly understand Scripture; (3) Cardinal Robert Bellarmine understood what was "really at stake"; (4) when scientific proofs for Copernicanism became known, the Church hastened to accept Copernicanism and to admit implicitly that it had erred in condemning it.⁶¹

One of the founders of modern science failed to understand science. He was at fault because "he rejected the suggestion made to him to present the Copernican system as an hypothesis, inasmuch as it had not been

53. *See id.* at 150.

54. *See id.* at 153.

55. *Id.* at 157.

56. Fantoli, *supra* note 41, at 162.

57. *See* George V. Coyne, *The Church's Most Recent Attempt to Dispel the Galileo Myth*, in *THE CHURCH AND GALILEO* 340, 346 (Ernan McMullin ed., 2005).

58. *See id.* at 348.

59. *Id.* at 341.

60. *Id.* (quoting John Paul II, *Lessons of the Galileo Case*, *ORIGINS* 22 § 10, ¶ 1 (1992)).

61. *Id.* at 341.

confirmed by irrefutable proof”⁶²—despite the fact that “irrefutable proof” is seemingly not the stuff of science.

II. *BROWN* AND THE REJECTION OF PSYCHOLOGICAL AND BRAIN SCIENCE

In July of 2011, the Supreme Court reacted in the same medieval way that the Catholic Church had centuries earlier.⁶³ *Brown v. Entertainment Merchants Association*⁶⁴ grew out of California’s attempt to limit the access of children to violent video games. The statute may have, in fact, been badly drafted, and, perhaps, it should have been struck down as vague, the position taken by a two-justice concurrence in the result.⁶⁵ But that was not the route taken by the majority.⁶⁶ The majority followed a route similar to that taken by the Catholic Inquisition.⁶⁷

In *Brown*, “Pope Antonin I” and his college of four cardinals similarly dismissed science that conflicted with free-expression dogma that speech never harms anyone.⁶⁸ For the most part, that is true, but it seems untrue with regard to children and their exposure to violence. While the views of Copernicus—even with the observation added by Galileo—might have taken some time to gain general acceptance, there appears to be little to no real debate among those engaged in psychological research as to the negative impact of media violence on children.⁶⁹ Also, there appears to be special concern with regard to the active participation, even if virtual, in videogame violence.⁷⁰

The Court seemed to view the science on the impact of video games on children through the lens of dogma. There was an almost religious fervor for free expression values that could be seen as matching that of the Inquisition. And, it was a fervor that was present not only for adult

62. *Id.* at 342 (quoting John Paul II, *supra* note 60, at § 5, ¶2).

63. Galileo probably should not be referred to as medieval, but the reaction of the Church may properly be so characterized.

64. 131 S. Ct. 2729 (2011).

65. *See id.* at 2742-51 (Alito, J., concurring).

66. *Id.* at 2733-34.

67. *See supra* Part I.

68. *See* 131 S. Ct. at 2739.

69. *See infra* notes 115-17 and accompanying text.

70. There are those, even those with Ph.Ds, who disagree, just as there are those with Ph.Ds who disagree with evolution. The degree of acceptance of these conclusions, however, is indicated by statements of all of the major health organizations concerned with the psychological wellbeing of children. These statements were cited by Justice Breyer in his dissent in *Brown*. 131 S. Ct. at 2769 (Breyer, J., dissenting) (quoting *Policy Statement—Media Violence*, 124 PEDIATRICS 1495, 1498 (2009); AM. PSYCHOL. ASS’N, RESOLUTION ON VIOLENCE IN VIDEO GAMES AND INTERACTIVE MEDIA (2005)).

expression, but for expression targeted at children as well.⁷¹ The Court seemed no more able to accept the possibility that expression can be harmful, whatever scientists may say, than the Church was of moving man away from the center of the universe. It is true that the Catholic Church's effect in punishing Galileo was to limit speech, while the Supreme Court protected speech, but both ignored science.

In the majority opinion in *Brown*, Justice Scalia flatly rejected the science.⁷² He noted that it had been rejected by all of the lower courts to consider it.⁷³ That was clearly true of all the considerations given the science at what might be seen as the level of bishop, the courts of appeals, beginning with the analysis of, perhaps, "Archbishop" Richard Posner.⁷⁴ It was not true, however, among the parish priests of this analogy, the federal district judges.⁷⁵ Those judges, as most in touch with the laity, are those who examined the science and the scientists. In the first two cases involving limits on children's access, cases coming from Indianapolis and from St. Louis County, federal district courts upheld the limits.⁷⁶ It was only when "Archbishop" Posner reversed the Indianapolis decision that the district courts also began to strike down state and local efforts.⁷⁷

Justice Scalia, in his majority opinion, seemed almost to ignore the science.⁷⁸ Only Justice Breyer, in his dissent, presented any real analysis of the evidence.⁷⁹ When Justice Scalia did comment on the science, he either simply got it wrong or asked for evidence that it would have been unethical, or even illegal, to develop.⁸⁰ Justice Scalia stated that all science has been able to show is a correlation between real-world aggressiveness and playing violent video games without a demonstration of causation.⁸¹ But, as Justice Breyer recognized, there are methods, longitudinal studies, and laboratory experiments that establish more than correlation; they show causation.⁸²

71. See *Brown*, 131 S. Ct. at 2739.

72. *Id.*

73. *Id.*

74. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

75. See *id.*

76. See *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 964 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001).

77. *Kendrick*, 244 F.3d at 577-78.

78. *Brown*, 131 S. Ct. at 2739.

79. *Id.* at 2767-72.

80. *Id.* at 2739.

81. *Id.*

82. *Id.* at 2768 (Breyer, J., dissenting).

Justice Scalia also complained that the increased aggressiveness in some of the studies was a far cry from violence.⁸³ He said that all that has been shown in laboratory studies is some small increase in feelings of aggression.⁸⁴ It is true that the studies show, for example, an increasing willingness to administer a loud noise after having played violent video games and being mildly provoked.⁸⁵ Justice Scalia wanted more, but imagine trying to get a study through the committee that approves research on human subjects in which children would play violent video games, experience provocation, and receive deadly weapons. As the trial judge in the first of the video game cases, *American Amusement Machines Association v. Kendrick*,⁸⁶ said,

[I]t is completely unremarkable that an academic study would use proxy variables to stand in for measures of actual, harmful aggression. The prospect of controlled experiments with human subjects that could result in aggression inflicting actual harm raises a few ethical issues, to put it mildly. Surely the constitutionality of the law does not depend on whether such experiments have been conducted.⁸⁷

Justice Scalia's main criticism of the science was to note that the scientific studies had been "rejected by every court to consider them."⁸⁸ Again, that is a bit of an exaggeration, as the first district court to consider the issue did accept the scientific evidence, although its opinion was overturned on appeal,⁸⁹ and later courts simply adopted the view of that first appellate case.⁹⁰ Moreover, the opinions of those lower courts relied on by Justice Scalia reflect either an inability to understand statistics—and otherwise intelligent individuals do often have difficulty with statistics—or a limitation on the courts viewing the science by the same ideological blinders that affected both the 17th century Catholic Church and the 21st century Supreme Court.

A favorite example is the federal district court in *Entertainment Software Association v. Hatch*.⁹¹ The court, speaking of the work of the

83. *Id.* at 2732, 2739.

84. *Brown*, 131 S. Ct. at 2739.

85. Craig A. Anderson & Christine R. Murphy, *Violent Video Games and Aggressive Behavior in Young Women*, 29 *AGGRESSIVE BEHAV.* 423-29 (2003).

86. 115 F. Supp. 2d 964.

87. *Id.* at 964.

88. *Brown*, 131 S. Ct. at 2739.

89. *See Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

90. *Id.* at 572.

91. 443 F. Supp. 2d 1065 (D. Minn. 2006).

leading psychologist studying videogames, said, “Dr. Anderson’s meta-analysis seems to suggest that one can take a number of studies, each of which he admits do not prove the proposition in question, and ‘stack them up’ until a collective proof emerges.”⁹² But that, of course, is exactly what meta-analysis does, and while the statistical methods may have some complexity, the theory is intuitively easy to understand. As an intuitive example, the fact that player A gets more hits than player B in any individual baseball game does not show him to be the better hitter. But stack up these insignificant results over the season, and it does show that player A is the better hitter.

Other judges seem to have concluded that the failure of an experiment to show correlation is evidence that there is no correlation.⁹³ It is, of course, not necessarily a demonstration that there is no correlation. There may even have been some correlation but a lack of significance, and that might be nothing more than the result of too small of a sample to assure a significant result.

There was also a failure to consider a developing and important area with regard to the impact of media violence. Relatively recent developments in the neuroscience of the teenage brain show a failure of proper function in the prefrontal cortexes, the seat of judgment and inhibition, of children exposed to significant media violence.⁹⁴ The majority opinion in *Brown* did not even mention this science.⁹⁵ Only Justice Breyer cited it, writing, “[c]utting-edge neuroscience has shown that ‘virtual violence in video game playing results in those neural patterns that are considered characteristic for aggressive cognition and behavior.’”⁹⁶

The treatment of this science by the only lower court to do so also indicates a strong willingness to disregard science that conflicts with First Amendment dogma, while crediting any science that supports the unflinching belief that expression can cause no harm.⁹⁷ In *Entertainment*

92. *Id.* at 1069 n.1.

93. *See, e.g.,* *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2002).

94. *See infra* notes 96-101 and accompanying text. *See also* Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695 (2005).

95. *See Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729 (2011).

96. *Id.* at 2768 (Breyer, J., dissenting) (quoting Weber, Ritterfeld, & Mathiak, *Does Playing Violent Video Games Induce Aggression? Empirical Evidence of a Functional Magnetic Resonance Imaging Study*, 8 MEDIA PSYCHOL. 39, 51 (2006)).

97. *See Am. Amusement Mach. Ass’n v. Kendrick*, 115 F. Supp. 2d 943, 964 (S.D. Ind. 2000).

Software Association v. Blagojevich,⁹⁸ Dr. William Kronenberger, the person who had performed some of the experiments, testified regarding these impacts.⁹⁹ The video games industry found a competing expert, and such a competing expert always seems to be available for any conclusion, who effectively responded that the fact that functioning in this area was impaired did not mean that such executive function was not occurring elsewhere in the brain.¹⁰⁰ The court accepted the view of the skeptic, despite a lack of evidence that these functions ever occur elsewhere in the brain.¹⁰¹

Maybe federal judges simply lack the capacity to understand relatively simple statistical methods and statistical and scientific concepts. But perhaps the better explanation is not a shortage of intellectual ability. Instead, it seems more likely to be the result of an ideologically based refusal to accept the scientific conclusions, either statistical or neurological.

98. 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

99. *Id.* at 1063-66.

100. The expert on whom the industry relied, Dr. Howard Nusbaum, found fault with the assumptions on which the Kronenberger study was based:

Initially, Dr. Nusbaum testified, Dr. Kronenberger made two incorrect assumptions. First, he assumed a one-to-one relationship between various parts of the brain and particular behaviors. Dr. Nusbaum testified that particular brain activity can affect multiple behaviors, and specific behaviors can be influenced by activity in multiple areas of the brain. . . . Second, Dr. Kronenberger assumed that decreased activity in one part of the brain equaled impaired or deficient brain activity. Dr. Nusbaum disagreed, stating that decreased activity can signal expertise or use of an alternate method to complete the assigned task.

. . . [I]n discussing Dr. Kronenberger's neurocognitive testing study alone, Dr. Nusbaum testified that such testing used particular patterns of behavior to infer the part of the brain that was activated, but because of the many-to-many relationship between brain regions and behavior, it is not possible to make "those clear kinds of inferences."

. . . Even if the images were read to show decreased brain activity for these groups in certain areas of the brain, Dr. Nusbaum stated, there were several alternative reasons, such as the development of expertise or the use of another part of the brain to perform the same function.

Id. at 1066-67.

101. A telling study looked at the behavior of two individuals who had suffered early physical injuries to the prefrontal cortex. Steven W. Anderson et al., *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCIENCE 1032 (1999). The study concluded that the two exhibited "severely impaired social behavior despite normal basic cognitive abilities," were insensitive to the consequences of their behavior, and were not amenable to correction of their behavior through punishment." *Id.* at 1032. If these functions also occur elsewhere in the brain, it would seem that the injuries would not have had that impact.

Coming back to the Supreme Court decision in *Brown*, Justice Scalia questioned why the California statute was limited to video games, but psychologists have expressed particular concern with those games because of their interactive nature.¹⁰² Interactivity is said to provide a stronger learning environment.¹⁰³

Here, too, Justice Scalia dismissed the concerns of social scientists.¹⁰⁴ He did so, as had Judge Posner in an earlier case, through a classic informal fallacy.¹⁰⁵ He equivocated on the word “interactive.”¹⁰⁶ Justice Scalia and Judge Posner both agreed that video games are interactive but said that so is all literature.¹⁰⁷ But, while literature may try to draw the reader into the story, the empathy it seeks is a far cry from the participation found in video games. One would not want to fly with a pilot whose “interactivity” was limited to reading the biography of Charles Lindbergh or viewing a number of films in which pilots were the major characters. The interactivity that helps make one a good pilot is found in the flight simulator, and it is the flight simulator, rather than the book or film, that is the equivalent of the participation found in video games. Psychologists understand the difference between empathy and participation, and to dismiss the conclusion of psychologists through this equivocation again seems to be a dogmatic denial of the science.

The failure of the majority to credit the science is in sharp contrast to the consideration given by Justice Breyer.¹⁰⁸ Justice Breyer actually examined the science.¹⁰⁹ He provided appendices with studies that support the concerns of the state and studies that might be seen as contrary. The first contained well over one hundred studies;¹¹⁰ the second contained thirty-four.¹¹¹ Among those thirty-four, some raise perhaps legitimate concerns over testing protocols or over publication bias that favors publication of studies with significant results over those that fail

102. *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2739 (2011).

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

104. *Brown*, 131 S. Ct. at 2739.

105. *Id.*; *Kendrick*, 244 F.3d at 577.

106. *Brown*, 131 S. Ct. at 2737-38.

107. The majority took the position that there is nothing new about interactivity. “As Judge Posner has observed, all literature is interactive. ‘[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.’” *Id.* at 2738 (quoting *Kendrick*, 244 F.3d at 577).

108. *Brown*, 131 S. Ct. at 2761-78 (Breyer, J., dissenting).

109. *Id.*

110. *See id.* at 2772-78.

111. *See id.* at 2778-79.

to demonstrate anything with any significance.¹¹² But others are not even really contrary to the studies providing support for the state.¹¹³ Furthermore, courts seem to fail to realize that not finding significant evidence of correlation or causation is not a demonstration that such a relationship does not exist;¹¹⁴ it may be simply a failure to find anything.

Justice Breyer concluded his examination of the science by stating,

I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.¹¹⁵

Interestingly, the majority chose to mention the admission in the first sentence, without noting the second sentence.¹¹⁶ Justice Breyer also included the statements that swayed him, statements by all the major health organization concerned with the welfare of children.¹¹⁷ He concluded his examination of the science with the following statement:

112. *Id.*

113. For example, a study demonstrating improved video game performance when a game contains violence does not negate concerns that there will be an “improvement” in the infliction of real world violence as well. See Bösch, *Violent Content Enhances Video Game Performance*, 21 J. MEDIA PSYCHOL.: THEORIES, METHODS, & APPLICATIONS 145 (2009).

114. One of the studies in the negative list was Fleming & Rickwood, *Effects of Violent Versus Nonviolent Video Games on Children’s Arousal, Aggressive Mood, and Positive Mood*, 31 J. APPLIED SOC. PSYCHOL. 2047 (2001), cited in in *Brown*, 131 S. Ct. at 2779. The study found no correlation between violent video game play and aggression, but used a game of a far different nature than those in the other studies. *Id.* The “violent game” played by the eight to twelve-year-olds, *Hero’s Adventure*, put the player in the role of Hero, traveling through ancient Greece to rescue Persephone from Hades, and in the process slaying Cyclops monsters and skeletons. *Id.* The study’s authors noted that the failure to find an aggressiveness-inducing effect may simply result from the game not being seen as very violent. *Id.* Ethical concerns led them to choose a “very mild game.” See *id.* at 2065. The game was actually rated as appropriate for children age eight and older, so it is unsurprising that playing the game had no negative effect on children whose average age was ten years, six months, and the authors themselves suggested that a more violent game may have led to a different result. *Id.* at 2052-53, 2065.

115. *Brown*, 131 S. Ct. at 2769.

116. See *id.* at 2739.

117. He quoted a statement by the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association, which said,

Unlike the majority, I would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature's conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases.¹¹⁸

It should also be pointed out that, while not providing the level of analysis as that provided by Justice Breyer, the concurrence by Justice Alito, joined by Chief Justice Roberts, was also critical of the majority's treatment of the science, saying "[w]e should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution."¹¹⁹

[O]ver 1000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children. . . [and, though less research had been done at that time, preliminary studies indicated that] the impact of violent interactive entertainment (video games and other interactive media) on young people . . . may be *significantly more severe* than that wrought by television, movies, or music.

Brown, 131 S. Ct. at 2769 (internal citation omitted). He also quoted a later resolution adopted by the American Psychological Association saying: "[C]omprehensive analysis of violent interactive video game research suggests such exposure . . . increases aggressive behavior, . . . increases aggressive thoughts, . . . increases angry feelings, . . . decreases helpful behavior, and . . . increases physiological arousal." *Id.* at 2769 (quoting AM. PSYCHOL. ASS'N, RESOLUTION ON VIOLENCE IN VIDEO GAMES AND INTERACTIVE MEDIA (2005), available at <http://www.apa.org/about/governance/council/policy/interactive-media.pdf>).

He further cited a statement by the American Academy of Pediatrics regarding the sort of interactive media represented by video games:

Studies of these rapidly growing and ever-more-sophisticated types of media have indicated that the effects of child-initiated virtual violence may be *even more profound than those of passive media* such as television. In many games the child or teenager is "embedded" in the game and uses a "joystick" (handheld controller) that enhances both the experience and the aggressive feelings.

Id. at 2769-70 (quoting *Policy Statement—Media Violence*, 124 PEDIATRICS 1495, 1498 (2009) (emphasis added)).

118. 131 S. Ct. at 2770.

119. *Brown*, 131 S. Ct. at 2742 (Alito, J., concurring). The opinion was, nonetheless, a concurrence because Justice Alito and Chief Justice Roberts found the statute to be unconstitutionally vague. "I would hold only that the particular law at issue here fails to provide the clear notice that the Constitution requires. I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem." *Id.* at 2751 (Alito, J., concurring).

The Supreme Court certainly has the authority to reinterpret or strengthen its own cases, as it did when it cited *Winters v. New York*¹²⁰ as striking down as unconstitutionally vague a New York law aimed at depictions of violence, while ignoring the caveat of the *Winters* Court that its conclusions with regard to vagueness should not be taken as implying that the state could not limit this sort of matter through a properly drawn statute.¹²¹ It can also find history irrelevant, as it did when it insisted that the obscenity exception is limited to sex and is not relevant to violence, despite the fact that the concept of obscenity was broader in the era of the framing and became focused on sex only in *Swearingen v. United States*.¹²²

The Court can even say that science is irrelevant. Even accepting the conclusions of social scientists, neuroscientists, and all the major health organizations, the Court could announce that the freedom of expression is more important than harm to children. Where the Court went beyond its competence is in saying that the science is wrong.¹²³ The justices have no more competence to say that psychology is wrong than psychologists have in saying that the Court's understanding of the Constitution is incorrect. The Court cannot have relied on scientific expertise—an expertise it lacks. It can only be a dogmatic refusal to accept any science that conflicts with the firm belief that expression can never cause any harm.

III. CONCLUSION

The Commission of the Holy Office refused to accept the science Galileo espoused, and the rejection was not based on the sort of contradictory evidence that is the proper source of scientific criticism.¹²⁴ It was instead based on dogma. The Ptolemaic, geocentric system better fit a biblical view in which the Earth is at the center of God's creative effort and therefore of the universe.¹²⁵ Given this religious view, Galileo had to be wrong; religious dogma trumped science.¹²⁶

When Galileo continued to advocate for a heliocentric solar system, he was eventually tried for, and effectively convicted of, heresy.¹²⁷ The

120. 333 U.S. 507 (1948).

121. *Id.* at 520.

122. 161 U.S. 446 (1896). See FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 19 (1976) (discussing the role of the case in limiting obscenity to sex).

123. *Brown*, 131 S. Ct. at 2739.

124. See *supra* Part I.

125. See *supra* Part I.

126. See *supra* Part I.

127. See *supra* Part I.

cost to Galileo of the Church's rejection of the science, which he correctly advocated, was being placed under house arrest for the rest of his life.¹²⁸ The cost to the Catholic Church was well over three centuries of looking increasingly foolish, until the Church's eventual apology to Galileo in the last decade of the twentieth century.¹²⁹

The cost of the Supreme Court's recent decision is also likely to be an increasing appearance of foolishness as the science develops. More importantly, the costs may include generations of children who will suffer psychological and neurological damage and perhaps be the victims of videogame-induced violence. That is a cost too great to bear.¹³⁰ While the Court can usually blame the impact of its decisions on others, such as the Congress that gave us a statute, or the Framers for giving us the constitutional provision at issue, that is not the case here. As Justice Thomas shows in his dissent, the Framers would have been appalled by the Court's decision.¹³¹ With no one else to blame, the damage to the nation's youth must be charged to the Court.

So, there may, under the right circumstances, be much to be said in favor of enduring values. Like Professor Sedler, I believe that our society's adherence to the values behind free expression has helped further democracy and the ability of individuals to develop their personalities. Yet some free expression controversies call for an analysis that includes not only these enduring values but a combination of those values and factual issues as well. When the enduring value becomes dogma with a strength to lead courts to ignore the findings of science, those factual issues lose their role, accepted rules to justify infringement of a constitutional right become empty, and damage may be done to government interests even as compelling as the interest in the physical and psychological well-being of children.

128. *See supra* Part I.

129. *See supra* Part I.

130. *See* Kevin W. Saunders, *The Cost of Errors in the Debate over Media Harm to Children*, 3 MICH. ST. L. REV. 771 (2005).

131. Justice Thomas's view of the intention of the Framers indicated that the state should have been allowed to impose the limits it did:

The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents.

Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2752 (2011) (Thomas, J., dissenting).

