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## The not-so Weisman: The Supreme Court's continuing misuse of social science research

Donald N. Bersoff

# The Not-So *Weisman*: The Supreme Court's Continuing Misuse of Social Science Research

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The relationship between social scientists and the judiciary is less than perfect.<sup>1</sup> Despite the Supreme Court's long tradition of using data gleaned from social science research, the Court has inconsistently adopted and often misused this research to augment its opinions.<sup>2</sup> In many cases, the Court has even refused to consider relevant social science data, instead choosing to rely on guidance from the "pages of human experience."<sup>3</sup>

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1. In an earlier article, one of us concluded that "if that relationship were to be examined by a Freudian, the analyst would no doubt conclude that it is a highly neurotic, conflict-ridden ambivalent affair ( . . . it is certainly no marriage)." Donald N. Bersoff, *Psychologists and the Judicial System: Broader Perspectives*, 10 L & Human Beh 151, 155 (1986).

2. It is generally acknowledged that social science materials were first used and cited by the Supreme Court in *Muller v Oregon*, 208 US 412 (1907) although Louis Brandeis's famous brief on behalf of the State "was a collection of broad, value-laden statements supported largely by casual observation and opinion," evidence that no respected psychologist would consider as social science. John Monahan and Laurens Walker, *Social Science in Law*, ch 1, 8 (Foundation, 3d ed 1994). For other general discussions and illustrations of the use of social science evidence by the judiciary and the Supreme Court in particular, see, for example, Wallace D. Loh, *Social Research in the Judicial Process* (Russell Sage, 1984); Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 Vill L Rev 1569 (1992); John Monahan and Elizabeth F. Loftus, *The Psychology of Law*, 33 Ann Rev Psych 441 (1982); J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 Ind L J 137 (1990); June Lounin Tapp, *Psychology and the Law: An Overture*, 27 Ann Rev Psych 359 (1976); Charles Robert Tremper, *Sanguinity and Disillusionment Where Law Meets Social Science*, 11 L & Human Beh 267 (1987).

3. *Parham v J.R.*, 442 US 584, 602 (1979). For critiques of common sense

One of the most recent examples of the Supreme Court's use of social science data is *Lee v Weisman*,<sup>4</sup> in which the Court decided "whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment. . . ."<sup>5</sup> The case was brought originally by the parents of a fourteen year old girl seeking to bar permanently the local school board from continuing its practice of inviting members of the clergy to give religious invocations and benedictions at middle school and high school graduation ceremonies.<sup>6</sup>

*Weisman* offered an especially challenging case for the Supreme Court to decide. The issue of invocations and benedictions at public school graduation ceremonies involves the intersection of two competing strands of Establishment Clause jurisprudence.<sup>7</sup> Graduation prayer is a traditional, ceremonial practice that takes place in the special context of the public schools. Although the Court has "tended to treat traditional practices with great deference,"<sup>8</sup> it has applied the Establishment Clause with an almost reciprocal vigor in public school cases.<sup>9</sup> The diversity of conclusions drawn in the majority, concurring, and dissenting opinions in *Weisman* evidences the difficulty the Court is having in determining the proper place for prayer in public school ceremonies and, more generally, in reaching consensus on the precise test that should be applied in resolving Establishment Clause cases. Thus, as the latest example of the Supreme Court's difficulties in settling such cases, *Weisman* is an important First Amendment decision.<sup>10</sup>

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decisionmaking, see, for example, Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L Rev 329, 368-69 (1992); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan L Rev 591, 671-72 (1981); Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 Neb L Rev 3, 22-38 (1990); Gail S. Perry and Gary B. Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as an Example*, 22 J Family L 633, 647 (1983-84).

4. 112 S Ct 2649 (1992).

5. *Id.* at 2652.

6. *Id.* at 2654.

7. The Constitution's guarantees regarding religion appear in the first sentence of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." US Const, Amend I. Both clauses apply to state as well as federal action. See *Murdock v Pennsylvania*, 319 US 105, 108 (1943); *Cantwell v Connecticut*, 310 US 296, 303 (1940). For a discussion of the history of the incorporation of the Religion Clauses under the Fourteenth Amendment, see Paul G. Kauper, *Religion and the Constitution* 45-79 (Louisiana State, 1964).

8. See, for example, *Marsh v Chambers*, 463 US 783 (1983).

9. Gregory M. McAndrew, *Invocations at Graduation*, 101 Yale L J 663, 663 (1991).

10. For reviews see, for example, Note, *Lee v. Weisman: In Search of a Defensible Test for Establishment of Religion*, 37 SLU L Rev 773, 832 (1993) (*Weisman* "is a portfolio of Establishment Clause doctrine"); Comment, *The Fate of Graduation Prayers in Public Schools after Lee v. Weisman*, 71 Wash U L Q 957, 978 (1993) ("[I]nstead of providing clarity, the Court further clouded the difficult First Amendment issues raised."); Comment, *Psycho-Coercion, A New Establishment Clause Test: Lee v. Weisman and Its*

But for those interested in the use of social science research in constitutional adjudication, the case is an exemplar of the Court's longstanding ambivalence toward social science research. In reaching its decision that the public school's use of clergy to deliver religious invocations and benedictions at graduation ceremonies violates the First Amendment, the Court's majority noted that prayer exercises in public schools carry an acute risk of indirect and subtle coercion.<sup>11</sup> It concluded that high school level students who wished in some way to dissent from such exercises would suffer real injury if forced by the State to pray in a manner antagonistic to their consciences.<sup>12</sup> The majority supported this "common assumption"<sup>13</sup> with three research articles from respected psychological journals<sup>14</sup> that purportedly quantified the presumption that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."<sup>15</sup>

We scrutinize those studies and review the larger body of research that undermines the majority's assumptions concerning the effect of peer pressure on adolescent behavior. We embed the discussion in an illustrative history of the Court's misuse and nonuse,<sup>16</sup> of social science data in which *Weisman* too easily fits.

### I. A Brief History of Establishment Clause Jurisprudence

To set the stage for our discussion of evidence used by the Court to support its psychological coercion theory in *Weisman*, we cannot avoid some discussion of Establishment Clause jurisprudence, particularly as it applies to public school settings. The first such case, *Everson v Board of Education*,<sup>17</sup> decided by the Court soon after World War II, "unofficially marked the beginning of modern Establishment Clause litigation and an era wrought with confusion and uncertainty."<sup>18</sup> In *Everson*, the Court held that reimbursement from public funds of fees paid by parents to transport their children to parochial schools did not violate the First Amendment.<sup>19</sup>

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*Initial Effect*, 73 BU L Rev 501, 518 (1993) (decision failed to clarify standard for Establishment Clause analysis).

11. *Weisman*, 112 S Ct at 2656, 2658.

12. *Id* at 2658.

13. *Id* at 2659.

14. For a discussion of these articles, see Part III.

15. *Weisman*, 112 S Ct at 2659.

16. This felicitous phrase comes from Michael J. Saks and Charles H. Baron, eds, *The Use/Nonuse/Misuse of Applied Social Research in the Courts* (Abt Books, 1980).

17. 330 US 1 (1947).

18. Note, *New York State School Boards Ass'n v. Sobol: A Commendable Attempt to Apply Confusing Establishment Clause Standards*, 38 Vill L Rev 759, 764 (1993).

19. The majority asserted that the wall between church and State must be "kept high and impregnable," *Everson*, 330 US at 18, but that it was not breached in this case because the state law at issue did not aid a single religion or prefer one religion over another. The dissent argued that in view of its legislative history, the First Amendment

Fifteen years later the Court for the first time considered the constitutionality of prayer in public schools.<sup>20</sup> It struck down a local school board's order that teachers begin each school day with a state-composed, standard prayer read aloud by their students.<sup>21</sup> Of particular relevance, the Court announced that the Establishment Clause would be "violated by . . . laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."<sup>22</sup> Soon after, in *Abington Township School v Schempp*,<sup>23</sup> the Court invalidated voluntary school prayer chosen by the students' teacher, read either by the teacher or the students in rotation, because the prayer, though not composed by the State, was considered government-sponsored.<sup>24</sup>

In *Schempp*, the Court applied a two-step analysis to determine whether the challenged government practice had a secular legislative purpose and a primary effect that neither advanced nor inhibited religion.<sup>25</sup> The Court expanded the analysis to a three-part test in *Lemon v Kurtzman*,<sup>26</sup> which has been regarded as the Establishment Clause benchmark. In reviewing two state laws that reimbursed church-run elementary and secondary schools for the costs of teachers' salaries and instructional materials used in nonreligious subjects, the Court held that to withstand Establishment Clause challenges, a government action must have a secular purpose, neither advance nor inhibit religion in its primary effect, nor foster an excessive entanglement with religion.<sup>27</sup> The State's reimbursement scheme did not pass the *Lemon* test.<sup>28</sup> Although that test has prevailed for nearly two decades,<sup>29</sup> there has been a noticeable trend toward two competing alternatives.

In 1984, the Court found constitutional a city's Christmas display in a private park that included a Santa Claus house, sleigh and reindeer, Christmas

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forbade "any appropriation, large or small, from public funds to aid or support any and all religious exercises." *Id.* at 41 (Rutledge dissenting).

20. *Engel v Vitale*, 370 US 421 (1962).

21. *Id.* at 424.

22. *Id.* at 430. ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause").

23. 374 US 203 (1963).

24. *Id.* at 223.

25. *Id.* at 222.

26. 403 US 602 (1971).

27. *Id.* at 612-13.

28. The Court believed there would be excessive entanglement between the government and church-run schools because the State would have to monitor the religious schools to ensure that teachers were playing a strictly secular role. See *id.* at 615-22.

29. See, for example, *Edwards v Aguillard*, 482 US 578 (1987) (state statute requiring teaching of Creationism lacked secular purpose); *Aguilar v Felton*, 473 US 402 (1985) (state regulation providing instructional services to low-income parochial school students created excessive entanglement between church and state); *Committee for Pub Educ v Nyquist*, 413 US 756 (1973) (primary effects of three forms of state support to nonpublic schools were to subsidize and advance sectarian interests).

tree, colored lights, and a nativity scene in a creche.<sup>30</sup> Although the majority used the by-then familiar three-pronged *Lemon* test, Justice O'Connor wrote separately to suggest that the Court shift its focus from identifying purpose and effect to detecting whether the challenged practice was a governmental endorsement of religion.<sup>31</sup> This "nonendorsement" analysis soon made its way into the text of the Court's majority opinion in *Wallace v Jaffree*.<sup>32</sup> There, the Court held that a state statute created for the sole purpose of returning voluntary (silent or meditative) prayer to public schools violated the secular purpose prong of the *Lemon* test.<sup>33</sup> But in analyzing that prong, it referred to Justice O'Connor's nonendorsement refinement in *Lynch*.<sup>34</sup>

In *Marsh v Chambers*,<sup>35</sup> the Court ignored *Lemon* entirely. In upholding Nebraska's practice of employing a state-paid chaplain to open its legislative sessions with a prayer, the majority recognized that this practice has existed since the founding of the country.<sup>36</sup> The Court concluded that in light of this history, the practice had become a common and secular tradition in American society and thus did not violate the Establishment Clause.<sup>37</sup>

The Court's opinion in *Allegheny County v ACLU*<sup>38</sup> indicated it was not totally abandoning the *Lemon* analysis. In its finding that the county's display

30. *Lynch v Donnelly*, 465 US 668 (1984).

31. *Id.* at 690-91 (O'Connor concurring). Her stated purpose in shifting the emphasis of the first two prongs was to protect the interests of religious minorities. Government endorsement of any particular religion, she said, "sends a message to nonadherents that they are outsiders, not full members of the political community. . . ." *Id.* at 688.

Several of Justice O'Connor's concurring opinions eventually have been adopted by the Court's majority. Compare, for example, *Webster v Reproductive Health Services*, 492 US 490, 522 (1989) (O'Connor concurring) to *Planned Parenthood v Casey*, 112 S Ct 2791 (1992) and *Watson v Fort Worth Bank & Trust*, 487 US 977, 991-99 (1988) (O'Connor concurring) to *Wards Cove Packing Co v Atonio*, 490 US 642 (1989).

32. 472 US 38 (1985).

33. *Id.* at 55-56.

34. "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" *Id.* at 56, quoting *Lynch*, 465 US at 690 (O'Connor concurring). Justice O'Connor also wrote a concurring opinion in *Wallace*, referring extensively to her non-endorsement analysis. *Id.* at 76 (O'Connor concurring).

35. 463 US 783 (1983).

36. *Id.* at 790.

37. *Id.* at 792. The dissent applied the *Lemon* analysis and concluded that "any group of law students . . . would nearly unanimously find the practice to be unconstitutional." *Id.* at 800-01 (Brennan dissenting).

The Court uses history almost as shamelessly as it does social science evidence. For example, it relied on history and tradition (as well as religion) to uphold a state law criminalizing oral-genital sexual practices between males, *Bowers v Hardwick*, 478 US 186 (1986), but found six hundred years of reliance on twelve-person juries irrelevant in upholding a state's use of six-person juries in criminal cases. *Williams v Florida*, 399 US 78 (1970). For discussions on the legal system's misuse of history, see generally Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm & Mary L Rev 839 (1986); Michael W. McConnell, *On Reading the Constitution*, 73 Cornell L Rev 359 (1988).

38. 492 US 573 (1989).

of a creche violated the Establishment Clause, the majority used the *Lemon* test with Justice O'Connor's nonendorsement variation.<sup>39</sup> Of particular relevance in *Allegheny County* was Justice Kennedy's concurring opinion offering an alternative interpretation of the Establishment Clause. Justice Kennedy proposed that courts look at the primary effect prong of the *Lemon* test, not as a question of governmental endorsement, but as a question of whether the government was either directly or indirectly coercing involvement with religion.<sup>40</sup> This was the first time that a member of the Court had suggested using a coercion test to decide Establishment Clause cases.<sup>41</sup>

It is with this precedential history that the Supreme Court set out to decide *Lee v Weisman*. After nearly twenty years of applying *Lemon*'s three prongs to Establishment Clause cases, several members of the Court had begun to suggest alterations and alternatives. Basically, the Justices' opinions are divisible into three groups: (1) those that strictly apply the *Lemon* test; (2) those that apply the nonendorsement gloss to the first two prongs of *Lemon*; and (3) those that apply a theory of coercion. As *Weisman* was about to be heard, there was serious concern that *Lemon* might be overruled,<sup>42</sup> although it was in the school Establishment Clause cases that *Lemon* was most vigorously applied. As it turned out, the majority, concurring, and dissenting opinions in *Weisman* used all three options, raising questions as to which of the three tests would prevail in the future.<sup>43</sup>

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39. *Id.* at 594-95. The majority distinguished this case from *Lynch* because there the religious symbols were part of a larger display conveying, in the Court's opinion, nonreligious messages, celebrating the winter season rather than Christmas specifically. *Id.* at 601.

40. *Id.* at 655 (Kennedy concurring).

41. The Court had consistently held that coercion was not a necessary element in deciding such cases. See, for example, *Wallace v Jaffree*, 472 US 38, 72 (1968) (O'Connor concurring) (prior Establishment Clause cases acknowledge coercion implicitly but turned on fact that government was sponsoring the religious exercise); *Nyquist*, 413 US at 786 (proof of coercion not necessary element of any Establishment Clause claim); *Schempp*, 374 US at 223 (although violation of Free Exercise Clause is predicated on coercion, Establishment Clause violation need not be).

42. See, for example, Linda Greenhouse, *Washington Talk; Justices Define Limits of Own Power*, NY Times A14 (Nov 22, 1991); Marcia Coyle, *Not Just a Prayer*, Nat'l L J 1 (Nov 11, 1991); David G. Savage, *U.S. Seeks to Ease Ban on School Prayer; High Court: Attorneys for Administration Urge Justices to Permit 'The Acknowledgement of God' at Graduation Ceremonies But Not in Classrooms*, LA Times A19 (Nov 7, 1991).

43. This brief recitation of Establishment Clause history does not, of course, do justice to the topic. For more intensive scrutiny of the Supreme Court's work in this area see, for example, Robert S. Alley, *School Prayer: The Court, the Congress, and the First Amendment* (Prometheus, 1994); Laurence H. Tribe, *American Constitutional Law*, ch 14 1158-79, 1204-32 (Foundation, 2d ed 1988); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 Cornell L Rev 905 (1987).

## II. *Weisman*: Facts, Opinions, and the Emergence of Psychological Coercion

Four days before fourteen year old Deborah Weisman was to graduate from a public middle school, her father sought a temporary restraining order (TRO) prohibiting school officials from including a religious invocation and benediction offered by local clergy at the graduation ceremony.<sup>44</sup> The challenged practice was a discretionary but customary feature of middle and high school graduations in the jurisdiction.<sup>45</sup> Explaining that it did not have enough time to consider the TRO, the federal district court denied the motion.<sup>46</sup> Deborah and her family attended the graduation during which a rabbi, chosen by school principal Robert Lee, recited a nonsectarian but religious invocation and benediction.<sup>47</sup> The graduates sat together, apart from their families.<sup>48</sup>

After graduation, Mr. Weisman sought a permanent injunction seeking to bar prayer exercises at future middle and high school graduation ceremonies.<sup>49</sup> The district court, applying the *Lemon* test and finding that the invocation and benediction advanced religion, granted the injunction.<sup>50</sup> The appellate court affirmed, with the majority adopting the opinion of the lower court.<sup>51</sup>

Despite this rather mundane procedural and substantive history, the Court agreed to review the case. In a somewhat fragmented opinion, a five-member majority held that religious prayers conducted at a public school graduation, under circumstances where young objecting students were induced to participate in those prayers, violated the Establishment Clause.<sup>52</sup> Justice Kennedy, writing for himself and Justices Blackmun, Stevens, O'Connor, and Souter, based his opinion on three major facts. First, it was a state official who directed the performance of a formal religious exercise in a public school ceremony.<sup>53</sup> Second, even for those students who objected to the religious

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44. *Weisman*, 112 S Ct at 2653-54.

45. *Id* at 2652.

46. *Id* at 2654.

47. *Id* at 2652-53.

48. *Id* at 2653.

49. *Id* at 2654.

50. *Weisman v Lee*, 728 F Supp 68 (D RI 1990).

51. *Weisman v Lee*, 908 F2d 1090 (1st Cir 1990).

52. Although it basically ignored *Lemon*, the Court did not, as many strict separationists feared it would, overrule or explicitly reconsider *Lemon*'s three-part test. See *Weisman*, 112 S Ct at 2655. However, "[e]ven under the *Lemon* analysis, the [ ] school district would, in all probability, still have violated the Establishment Clause on excessive entanglement grounds." Note, 38 Vill L Rev at 781 n 115 (cited in note 18).

53. The principal decided that the invocation and benediction would be given, chose the religious participant to offer them, and provided the clergy member with guidelines for the text of the prayers. Thus, the Court concluded that the principal, as the agent of the state, "directed and controlled the content of the prayer." *Weisman*, 112 S Ct at 2656.



exercise, attendance and participation was in a real sense obligatory despite the fact that attendance at graduation was not a condition for receiving the diploma.<sup>54</sup> Third, as noted,<sup>55</sup> students who were opposed to the inclusion of religious prayer but were obligated to participate could be harmed psychologically by indirect coercion.<sup>56</sup>

There were two concurring opinions in the case, by Justices Blackmun and Souter. Justice Blackmun, joined by Justices Stevens and O'Connor, had no trouble agreeing that religious benedictions and invocations at public school graduation violated the Establishment Clause,<sup>57</sup> but parted company with Justice Kennedy on the issue of coercion. Proof of government coercion, Justice Blackmun said, though certainly sufficient, was not necessary to hold a practice unconstitutional under the Establishment Clause.<sup>58</sup>

Justice Souter's concurring opinion was also joined by Justices Stevens and O'Connor. Justice Souter agreed with Justice Kennedy that prayers at public school graduations indirectly coerced religious observance and thus ran afoul of the Establishment Clause.<sup>59</sup> However, he wrote separately to apply the nonendorsement variation of the *Lemon* test, arguing that the Establishment Clause forbade not only state practices that aid or prefer one religion over another, but those that aid all religions generally.<sup>60</sup>

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54. The Court stated that requiring that a religious dissenter take "unilateral and private action" to avoid compromising religious ideals "turns conventional First Amendment analysis on its head." *Id.* at 2660. The "State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.*

55. See text accompanying notes 11-15.

56. *Weisman*, 112 S Ct at 2658. We will examine the empirical support for this speculation in Part III. In any event, the majority concluded that the government should no more be allowed to "use social pressure to enforce orthodoxy than it may use more direct means" of coercion. See *id.* at 2659. The Court emphasized that it was students who were to be subjected to religious exercises and thus distinguished *Weisman* from *Marsh*, 463 US at 783 (the Nebraska Legislative Prayer Case), in which the participants were adults who could enter and exit the chamber freely, with little impact on or comment from others. *Weisman*, 112 S Ct at 2660.

57. He found that the prayers advanced religion and that the state was excessively entangled in their exercise. Thus, he would have found a violation under *Lemon*. *Weisman*, 112 S Ct at 2664 (Blackmun concurring).

58. "[I]t is not enough that the government restrain from compelling religious practices: it must not engage in them either." *Id.* at 2664 (Blackmun concurring). See also *Schempp*, 374 US at 305.

59. *Weisman*, 112 S Ct at 2667 (Souter concurring). Like Justice Blackmun, Justice Souter rejected a coercion analysis: "[A] literal application of the coercion test would render the Establishment Clause a virtual nullity." *Id.* at 2673.

60. See *id.* at 2667 (Souter concurring). Justice Souter also rejected the school district's suggestion that it would promote diversity and avoid Establishment Clause problems by rotating the denominations of the clergy. *Id.* at 2671. That, he argued, would worsen government/church entanglement problems because the State would then have to make judgments about what religions to include and the frequency with which each representative clergy would appear. *Id.*

Justice Scalia and his colleagues in dissent argued for an accommodationist position eschewing strict separation between church and state.<sup>61</sup> He viewed this case as analogous to *Marsh* in which some forms of governmental support for religion were an accepted part of the political and cultural heritage of the United States.<sup>62</sup> He also disputed the majority's reliance on facts supporting excessive governmental entanglement with religious exercises,<sup>63</sup> rejecting the assertion that the students were compelled to participate in the invocation and benediction.<sup>64</sup> The fact that dissenting students were asked to stand with their classmates did not necessarily mean that they were forced to join in the prayers.<sup>65</sup>

Justice Scalia saved his most hostile remarks to attack the majority's adoption of a theory of "psycho-coercion"<sup>66</sup> and viewed its reliance on that theory to decide an Establishment Clause challenge as a fundamental flaw.<sup>67</sup> Historically, he argued, coercion meant requiring colonists to adopt a particular religious orthodoxy and to provide financial support to a state church under threat of penalty,<sup>68</sup> "a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud."<sup>69</sup> Thus, Justice Scalia concluded, the majority's new test "suffers from the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself."<sup>70</sup> It is, in sum, he said, a "juris-

61. Id at 2678. "Whereas strict separation disallows any interaction between church and state, the 'accommodationist' approach evinces a degree of judicial tolerance for statutes despite the incidental benefits or burdens they may confer on religion." Note, 38 Vill L Rev at 765 (cited in note 18). At various times, the Supreme Court has implicitly or explicitly adopted an accommodationist position. See, for example, *Lynch v Donnelly*, 465 US at 673; *Walz v Tax Comm'n of New York City*, 397 US 664, 669-70 (1970); *Everson*, 330 US at 1. Nevertheless, it is probably true that "[t]he Court has never adopted the separationist stance sought by liberals. . . . It has not adopted the accommodationist stance sometimes sought by major religious groups. . . . In short, it has kept absolutely nobody happy." William P. Marshall, *Unprecedented Analysis and Original Intent*, 27 Wm & Mary L Rev 925, 928-29 (1985/1986).

62. *Weisman*, 112 S Ct at 2678 (Scalia dissenting).

63. The school, he said, merely invited the clergy member and gave general advice on the use of prayer in civil ceremonies. Id at 2683 (Scalia dissenting). Thus, the clergy member was not "a mouthpiece of the school officials," id, and the school neither "directed [nor] controlled the content of [the] prayer." Id.

64. Id at 2681-82 (Scalia dissenting).

65. Id at 2681 (Scalia dissenting). Even if students, due to subtle coercive pressure, were required to stand, Justice Scalia insisted that such participation would only be done to show respect for the prayers of others; it would not amount to coerced participation in collective prayers. Id at 2682.

66. Id at 2685.

67. Id at 2683.

68. Id.

69. Id at 2684 (Scalia dissenting).

70. Id at 2685 (Scalia dissenting). Even if a "psycho-coercion," test were the correct test to use, Justice Scalia speculates that the religious indoctrination that the majority

prudential disaster.”<sup>71</sup>

### III. The Scientific Basis for Psychological Coercion

The majority relied on three articles gleaned from respected social science journals to support its use of a coercion test to resolve challenges to school prayers under the Establishment Clause.<sup>72</sup> These articles were cited to support the majority's “common assumption” that adolescents are especially susceptible to conformity as a result of peer pressure and that, as a result, they must be protected from the harm such pressure causes.<sup>73</sup> However, a closer analysis of the methodology and conclusions of these studies, and an examination of the

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sought to avoid is improbable in a setting, as in *Weisman*, that involves a single occurrence where parents, relatives, and friends are present for moral support. *Id.* The speculation that students are more susceptible to peer pressure in situations in which they are without alternate role models is offered without empirical support, not a surprising finding given Justice Scalia's antagonism to the use of psychological research in Supreme Court cases. See, for example, *Stanford v Kentucky*, 492 US 361 (1989). In holding that the Eighth Amendment did not bar the execution of sixteen and seventeen year old defendants, Justice Scalia rejected surveys of public opinion as evidence of evolving standards of decency, stating that “socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon.” *Id.* at 378. He had even greater disdain for the majority's use of social science research to support its holding in *Weisman*, acerbically opining that “interior decorating is a rock-hard science compared to psychology practiced by amateurs.” *Weisman*, 112 S Ct at 2681.

71. *Id.* at 2685. Justice Scalia, however, stated that he did not think the decision would have any practical effect. Schools, he believed, could avoid Establishment Clause problems by simply adding a boilerplate disclaimer in the graduation program “to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so.” *Id.*

Despite Justice Scalia's disparagement of psychological coercion, it was added as a mode of analysis in a subsequent case. See *Jones v Clear Creek Ind Sch D*, 977 F2d 963, 966-72 (5th Cir 1992), cert denied, 113 S Ct 2950 (1993). Nevertheless, although the *Lemon* test has been characterized “somewhat like a family patriarch on his deathbed, spoken of with respect, but not taken all that seriously,” Donald L. Beschle, *Paradigms Lost: The Second Circuit Faces the New Era of Religion Clause Jurisprudence*, 57 Brooklyn L Rev 547, 569-70 (1991), in cases decided in the Term following *Weisman*, the Court returned to the use of the *Lemon* test. See *Zobrest v Catalina Foothills Sch D*, 113 S Ct 2462 (1993); *Lamb's Chapel v Ctr Moriches Union Free Sch D*, 113 S Ct 2141 (1993); *Bd of Educ of Kiryas Joel Sch D v Grumet*, 114 S Ct 2481 (1994). However, in striking down a state legislature's creation of a school district that followed a religious sect's boundaries, the Court made only brief mention of *Lemon*. Justice O'Connor noted that “the slide away [from using the *Lemon* test] is underway.” *Id.* at 2500 (O'Connor concurring).

72. The three articles are Clay V. Brittain, *Adolescent Choice and Parent-Peer Cross-Pressures*, 28 Am Soc Rev 385 (1963); B. Bradford Brown, Donna Rae Clasen, and Sue Ann Eicher, *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior among Adolescents*, 22 Dev Psych 521 (1986); Donna Rae Clasen and B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J Youth & Adolescence 451 (1985).

73. *Weisman*, 112 S Ct at 2659.

greater body of psychological evidence, reveals the weakness of the majority's conclusions.

Overall, the studies, at best, marginally support the Court's opinion. As we will show, Brittain merely concluded that the extent to which adolescents conform to peer pressure is determined by the situation confronting them.<sup>74</sup> The Brown and Clasen and Brown, Clasen, and Eicher articles indicated only that peer pressure is more salient in guiding prosocial rather than antisocial activity.<sup>75</sup> Furthermore, although the three articles agreed that adolescents tend to conform to their peers in making certain kinds of choices, two of the articles acknowledged that prior studies of adolescent perception of and response to peer pressure often provided conflicting conclusions.<sup>76</sup> The general and admittedly tentative conclusions the authors derived from the research cited by Justice Kennedy are a far cry from his unrestrained certainty that adolescents will feel indirectly coerced by their peers to participate in graduation prayers. Further examination reveals the errors Justice Kennedy made in generalizing from the research he cited to the resolution of the issues confronting the Court in *Weisman*.

Brittain presented hypothetical vignettes to 280 adolescent girls in Alabama and Georgia middle and high schools.<sup>77</sup> Each vignette presented a situation in which a female adolescent had to choose between an alternative favored by her parents and one favored by her friends.<sup>78</sup> Among the situations confronting the research participants were choosing what dress to wear to a party, whether to report a classmate who had participated in vandalism, and what part-time job to take.<sup>79</sup> Brittain found that adolescents' choices were mediated by the type of situation in which guidance was sought. Thus, the participants responded more favorably to peer pressure in vignettes concerning dress, appearance, and attendance at social gatherings, but in vignettes concerning such important life decisions as choosing a job or where personal values were tested, they were more controlled by parental choices.<sup>80</sup>

Clasen and Brown examined adolescent perceptions of peer pressure regarding involvement with peers, family, and school, conformity to group norms, and misconduct.<sup>81</sup> The participants were a sample of 689 students in grades seven through twelve from two Midwestern communities.<sup>82</sup> They were

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74. Brittain, 28 Am Soc Rev at 389 (cited in note 72).

75. Clasen and Brown, 14 Youth & Adolescence at 460-61 (cited in note 72); Brown, Clasen, and Eicher, 22 Dev Psych at 529 (cited in note 72).

76. See Brittain, 28 Am Soc Rev at 385 n 1 (cited in note 72) (noting controversy about legitimacy of common belief that adolescents opt in favor of peer group); Clasen and Brown, 14 Youth & Adolescence at 453 (cited in note 72) ("Studies of adolescent peer-group interactions have yielded contradictory conclusions about peer pressure.").

77. Brittain, 28 Am Soc Rev at 387 (cited in note 72).

78. *Id.* at 385.

79. *Id.* at 387.

80. *Id.* at 388.

81. Clasen and Brown, 14 J Youth & Adolescence at 451 (cited in note 72).

82. *Id.* at 454.

asked to fill out a questionnaire in which they rated on a scale of one to seven the level of peer pressure they perceived in several situations.<sup>83</sup> The results revealed that the adolescents reported a high degree of peer pressure when issues involved peers and school but less peer pressure concerning misconduct.<sup>84</sup> Most important, the authors found that participants in the higher grade levels reported diminishing pressure from friends toward conformity to peers than did their younger counterparts.<sup>85</sup>

Brown, Clasen, and Eicher examined the extent to which self-perceptions of peer pressure to conform to social norms were translated into self-reports of conforming behavior.<sup>86</sup> The sample included 1,027 students in middle and high schools in two midwestern communities.<sup>87</sup> The measure of perceived peer pressure was the same used in the Clasen and Brown study<sup>88</sup> and a parallel form measuring conforming behaviors asked participants how many of these behaviors they had engaged in during the previous month.<sup>89</sup> The results corroborated Clasen and Brown's findings that perceptions of pressure to conform were high in matters of peer and school involvement but lower regarding misconduct<sup>90</sup> and that perceived peer pressure diminished in older students.<sup>91</sup> Significantly, the study found that, for all students, perceived pressure only accounted for a relatively small amount of self-reported behavior.<sup>92</sup> Although participants often reported high levels of perceived pressure to conform in social situations, this pressure was not converted consistently into behaviors that complied with peer expectations. As a result, the authors explicitly cautioned "against inferring adolescents' conformity behavior strictly from measures of conformity dispositions."<sup>93</sup>

With these descriptions, it is now possible to critique the conclusions the majority drew from the studies. First, it would be improper to generalize from the three studies Justice Kennedy cited to adolescents' perceptions of and compliance with peer pressure in group prayer situations. To provide empirical support for the argument that peer pressure could cause students to be coerced into participating in religious graduation exercises, the majority should have cited research that studied adolescents in these specific situations.<sup>94</sup> Because

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83. *Id.* at 458.

84. *Id.* at 464. Conduct involving peers included spending free time with friends and interacting with members of the opposite sex; conduct involving school included participating in academic and extracurricular activities; conduct involving misconduct included drug and alcohol use, truancy, vandalism, and sexual intercourse. *Id.* at 457.

85. *Id.* at 464.

86. Brown, Clasen, and Eicher, 22 *Dev Psych* at 522 (cited in note 72).

87. *Id.*

88. Clasen and Brown, 14 *J Youth & Adolescence* at 451 (cited in note 72).

89. Brown, Clasen, and Eicher, 22 *Dev Psych* at 523 (cited in note 72).

90. *Id.* at 528.

91. *Id.* at 524-25.

92. *Id.* at 529.

93. *Id.*

94. See Monahan and Walker, *Social Science in Law* at 50 (cited in note 2) (findings

this kind of research appears to be nonexistent,<sup>95</sup> the majority cited studies it may have perceived as analogous. However, to use analogous research effectively, there must be specific contextual similarities between the situations that were examined and the facts of the case under review. In the three articles cited by the majority, the researchers examined adolescents in everyday situations in which they interacted only with their peers. In *Weisman*, the setting was a ceremonial, one-time, highly important life event implicating issues central to the integrity of the family in which both parents, other family members, and peers were involved. As a result of this dissimilarity, the majority overgeneralized the range of application of the cited research, inappropriately stretched the research to fit the facts and seriously diminished the validity of its ultimate opinion.

Second, Justice Kennedy conveniently overlooked the consistent findings of two of the studies that in later adolescence, strong group affiliations and perceived pressures to meet group norms become less salient.<sup>96</sup> Thus, even if the studies Justice Kennedy cited were applicable to the facts of the case (and they are not), they would pertain, if at all, primarily to middle school students; high school students are much less likely to be coerced into behaving in a prescribed way by their peers.<sup>97</sup> This trend toward the decreasing potency of peer pressure was even recognized by Justice Scalia who criticized the majority for underestimating the ability and growing independence from parents and peers of adolescents: "I had thought that the reason graduation from high school is regarded as so significant an event is that it is generally associated with transition from adolescence to young adulthood. . . . Why, then, does the

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of study may not generalize to other settings or places); Donald T. Campbell and Julian C. Stanley, *Experimental and Quasi-Experimental Designs for Research* 6 (Rand McNally, 1963) (effects of experimental arrangement may preclude generalization of effect to other settings).

95. We conducted an extensive search of the relevant social science databases and could find no such studies. Perhaps *Weisman* will stimulate such research.

96. Brown, Clasen, and Eicher, 22 Dev Psych at 521 (cited in note 72) ("With the development of a more autonomous sense of self later in adolescence, strong group affiliation and conformity to peer group norms become less essential for a sense of well-being."); Clasen and Brown, 14 J Youth & Adolescence at 464 (cited in note 72) ("Across grades, adolescents reported diminishing pressures from friends toward conformity to peer norms. . . ."). Brittain, 28 Am Soc Rev at 385 (cited in note 72), did not address the issue.

97. The evidence for the decreasing influence of peer pressure in later adolescence is not limited to the two studies cited in *Weisman*. For corroborating research, see, for example, Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Dev Psych 608 (1979); B. Bradford Brown, Mary Jane Lohr, and Eben L. McClenahan, *Early Adolescents' Perceptions of Peer Pressure*, 6 J Early Adolescence 139 (1986); Philip R. Costanzo and Marvin E. Shaw, *Conformity as a Function of Age Level*, 37 Child Dev 967 (1966); Michael M. Omizo, Sharon A. Omizo, and Lisa A. Suzuki, *Children and Stress: An Exploratory Study of Stressors and Symptoms*, 35 Sch Counselor 267 (1988).

Court treat them as though they were first-graders?"<sup>98</sup>

Third, if Justice Kennedy had cast a broader net for relevant social science research he would have found that, in fact, Justice Scalia's developmental hypothesis was supported empirically.<sup>99</sup> The research data show that older adolescents' ability to make important decisions is comparable to that of adults.<sup>100</sup> Contrary to the majority's theory, it is more likely that dissenting adolescents would not be coerced easily into participating in prayer and would respond in a manner similar to adults.<sup>101</sup>

Fourth, the majority overlooked an important finding in one of the studies cited to bolster its psychological coercion theory. Brown, Clasen, and Eicher found differences between self-reported perceptions of peer pressure and self-reported levels of conformity behavior, concluding that the two phenomena were not directly and causally related.<sup>102</sup> In fact, the authors cautioned against inferring adolescents' behavior from measures of perceptions.<sup>103</sup> Thus, even supposing that adolescents perceived the need to conform to peer norms at graduation prayer exercises, it would not be correct to infer that such perceptions would lead to actual participation.

Finally, social science research indicates that the effects of peer pressure are

98. *Weisman*, 112 S Ct at 2682 (Scalia dissenting).

99. Unlike Justice Kennedy, who opted to substantiate his empirical conclusions with psychological data, misguided though that attempt was in this case, Justice Scalia often makes empirical statements that he leaves entirely unsupported. Given his view in cases like *Stanford v Kentucky*, 492 US at 378 ("socioscientific, ethicoscience, or even purely scientific evidence is not an available weapon"), it is unlikely that Justice Scalia would rely on empirical bases for his opinions.

100. Donald N. Bersoff, *Children as Research Subjects: Problems of Competency and Consent*, in J. Henning, ed, *The Rights of Children: Legal and Psychological Perspectives* 186, 211 (Charles C. Thomas, 1982) ("[C]hildren are capable of making . . . decisions no less disastrously than adults"); Lucy Rau Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement*, 34 J Soc Issues 114, 120 (1978) ("All the available evidence on cognitive development and the growth of intellectual abilities suggests that the adolescent's capacity for exercising independent judgment is limited, as compared to the adult's, only by a lack of relevant experience and information"); Catherine C. Lewis, *Minors' Competence to Consent to Abortion*, 42 Am Psych 84, 87 (1987) ("[M]inors may equal adults in their competence to reason about decisions. . . ." (emphasis in original)); Leon Mann, Ros Harmoni, and Colin Power, *Adolescent Decision-making: The Development of Competence*, 12 J Adolescence 265 (1989) (concluding that high schoolers demonstrate capacity for creative problem-solving equal to that of adults); Lois A. Weithorn, *Children's Capacities in Legal Contexts*, in N. Dickon Reppucci, et al, eds, *Children, Mental Health, and the Law* 25 (Sage, 1984) (collecting relevant studies). See also studies cited in note 129.

101. Brittain, 28 Am Soc Rev at 385 (cited in note 72); Brown, Clasen, and Eicher, 22 Dev Psych at 521 (cited in note 72); Clasen and Brown, 14 J Youth & Adolescence at 451 (cited in note 72).

102. Brown, Clasen, and Eicher, 22 Dev Psych at 529 (cited in note 72) ("[T]he relative size of effects for perceived pressures and conformity disposition was not consistent across domains of self-reported behavior.").

103. *Id.*

often mediated by parental influence, depending on the specific situation. Thus, the views of parents and family often predominate, particularly in decisions about values and style of life, while decisions about less socially weighty issues such as appearance and friends are more influenced by peers.<sup>104</sup>

In sum, the social science research the majority cites fails to substantiate a theory of psychological coercion, at least as applied to the facts of this case. Justice Kennedy's social science support is under-researched and overgeneralized. Although there is a reasonably large literature on the topic of peer pressure and conforming behavior, Justice Kennedy cited only three isolated, marginally analogous studies from which he drew conclusions that were unwarranted and went far beyond those to which the authors of the studies themselves came.

#### IV. Social Science and the Court: Supreme Ignorance

The Supreme Court's inapt use of social science data in *Weisman* is not a unique event by any means. The case is merely one the most recent exemplars of the Court's mistreatment of social science evidence. The Court has (1) misused or misapplied data when it believes the data will enhance the persuasiveness of its opinions;<sup>105</sup> (2) ignored or rejected data despite its assertion of empirically testable statements; and (3) disparaged data when the research does not support its views. In some cases, it has done all three.

The classic example of misapplication of social science research is *Brown v Board of Education of Topeka*,<sup>106</sup> in which the Court embroidered its opinion that separate educational facilities for black and white children were inherently unequal by citing, among five other sources, the Clarks' doll studies<sup>107</sup> and Deutscher and Chein's survey of professional opinion on the effects of segregation.<sup>108</sup> But under the cruel glare of scientific scrutiny, the Clarks' doll studies and Deutscher and Chein's survey were sharply criticized

104. See, for example, Thomas J. Berndt and Keunho Keefe, *Friends' Influence on Adolescents' Perceptions of Themselves at School*, in Dale H. Schunk and Judith L. Meece, eds, *Student Perceptions in the Classroom* 51 (Erlbaum, 1992); Brittain, 28 Am Soc Rev at 388-89 (cited in note 72); Lyle E. Larson, *The Influence of Parents and Peers during Adolescence: The Situation Hypothesis Revisited*, 34 J Marriage & Family 67 (1972).

105. "Like an insensitive scoundrel involved with an attractive but fundamentally irksome lover who too much wants to be courted, the judiciary shamelessly uses the social sciences." Bersoff, 10 L & Human Beh at 155-56 (cited in note 1).

106. 347 US 483 (1954).

107. The citation in *Brown* is: "K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950)." 347 US at 494 n 11. However, the research that Prof. Clark testified about at trial in *Briggs v Elliott*, 98 F Supp 529 (E D SC 1951), came from Kenneth B. Clark and Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in Theodore M. Newcomb and Eugene L. Hartley, eds, *Readings in Social Psychology* 169 (Henry Holt & Co., 1947).

108. Max Deutscher and Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J Psych 259 (1948).



for their methodological ineptness, lack of pertinence, and faulty conclusions.<sup>109</sup>

A more recent example of misuse is found in *H.L. v Matheson*.<sup>110</sup> In upholding a state law requiring that physicians notify parents before they perform an abortion on their unemancipated minor patients, the Court said that the "emotional, and psychological consequences of an abortion are serious and can be lasting . . . particularly so when the patient is immature."<sup>111</sup> The Court cited two articles to support its conclusion,<sup>112</sup> both published before *Roe v Wade*<sup>113</sup> was decided, when elective abortions were difficult to obtain and most abortions were illegal or performed only for therapeutic reasons. The first article limited its study to women receiving therapeutic abortions, i.e., abortions where there is a substantial risk that continuation of pregnancy would gravely impair the physical or mental health of the woman.<sup>114</sup> In fact, the authors candidly admitted that "this study is sociologically skewed (since it draws in its entirety upon young unmarried women) as well as methodologically skewed because of the high follow-up refusal rate (which may have resulted in a heavier weighting toward those experiencing difficulties)."<sup>115</sup> The second article<sup>116</sup> "was in fact an account of rather unsystematic psychoanalytic impressions of a sample of adolescents who carried their pregnancy to term."<sup>117</sup>

The studies on which the Court relied in *H. L. v Matheson*, like those in *Weisman*, were not wholly applicable to the legal issue at hand, and like those

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109. See, for example, Edmond Cahn, *Jurisprudence*, 30 NYU L Rev 150 (1955); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 S Ct Rev 75; Ernst Van Den Haag, *Social Science Testimony in the Desegregation Cases: A Reply to Professor Kenneth Clark*, 6 Vill L Rev 69 (1960). Perhaps the two most often cited criticisms of the Clarks' study are that: (1) Prof. Clark himself conducted the interviews with the children who participated in the doll studies, a methodological flaw that can guide, if not bias, both responses and results; and, (2) the Clarks failed to indicate that northern Black children not subjected to segregation responded to the black and white dolls, in the main, in the same ways as segregated southern Black children. Deutscher and Chein were criticized for the biased nature of their survey sample—the vast majority of whom were liberal scientists studying race relations—that almost guaranteed that respondents would find segregation harmful. Footnote 11 in *Brown v Board* has been called "the most controversial . . . in American constitutional law." Paul L. Rosen, *History and State of the Art of Applied Social Research in the Courts*, in Saks and Baron, eds, *Misuse of Applied Social Research* ch 1 at 9 (cited in note 16).

110. 450 US 398 (1981).

111. *Id.* at 411.

112. *Id.* at 411 n 20.

113. 410 US 113 (1973).

114. Judith S. Wallerstein, Peter Kurtz, and Marion Bar-Din, *Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 *Archive Gen Psychiatry* 828 (1972).

115. *Id.* at 831.

116. Hrair M. Babikian and Adila Goldman, *A Study in Teen-Age Pregnancy*, 128 *Am J Psychiatry* 755 (1971).

117. Gary Melton and Anita J. Pliner, *Adolescent Abortion: A Psycholegal Analysis*, in G. Melton, ed, *Adolescent Abortion* 11 (Nebraska, 1986).

in *Brown*, had significant methodological flaws that make them inadequate to support the Court's empirically-based judgments. *Weisman* is simply another case in an almost century-long history<sup>118</sup> of the Court's confusion and unprincipled misuse of social science research.

Given its predilection for finding irrelevant research, it is interesting to observe the Court's concurrent penchant for ignoring relevant research. *Weisman*, if viewed as a case revealing the Court's perceptions of older minors, again provides the model for the Court's persistent practice of refusing to recognize the existence and applicability of relevant social science data. The Court has consistently held the view, as Justice Powell reiterated in *Bellotti v Baird*,<sup>119</sup> that "[s]tates validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."<sup>120</sup> That power, he said, was "grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."<sup>121</sup> Similarly, in *Parham*, then Chief Justice Burger repeated the Court's belief that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."<sup>122</sup>

In this apparent solicitude for the putative vulnerability of childhood, the Court has upheld a number of practices that treat children more onerously than adults. Children may be physically punished by institutional officials,<sup>123</sup> detained prior to trial,<sup>124</sup> censored in the course of a political campaign,<sup>125</sup> seized and searched on less than probable cause,<sup>126</sup> prevented from reading

118. See note 2.

119. 443 US 622 (1979).

120. *Id.* at 635.

121. *Id.*

122. *Parham*, 442 US at 603.

123. *Ingraham v Wright*, 430 US 651 (1977). In upholding corporal punishment in the schools (although physical punishment of inmates in prisons is unconstitutional, see *Jackson v Bishop*, 404 F2d 571, 579-80 (8th Cir 1968)), the Court cited no empirical studies, relying mainly on a few unobtainable education texts and reports. There is, however, substantial research by psychologists delineating the detrimental effects of physical punishment. See Bersoff, 37 Vill L Rev at 1600-01 nn 166-67 (cited in note 2), for citations to this research.

124. *Schall v Martin*, 467 US 253, 265 (1984) (acknowledging that pretrial detention for adults raises constitutional questions but justifying restraint of juvenile suspects, stating that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves.")

125. *Bethel Sch D v Fraser*, 478 US 675, 682 (1986) ("simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, [it does not follow that] the same latitude must be permitted [] children"). The "child" here was a high school student making a speech to his classmates supporting a candidate for class president.

126. *New Jersey v T.L.O.*, 469 US 325, 341 (1985) ("accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the

nonobscene material available to adults,<sup>127</sup> and admitted to mental hospitals over their objection and without a hearing.<sup>128</sup> The Court's assumptions about the developmental incapacities of minors are all empirically testable. But, in none of these cases did the majority cite any social science evidence to support its assumptions, nor could it since the available and appropriate research points in the opposite direction.<sup>129</sup>

The social science data on the competence of adolescents were known to the Supreme Court when it decided a number of cases involving the constitutionality of state statutes regulating the right of minors to abortion. The American Psychological Association (APA) submitted *amicus curiae* briefs to the Court in these cases,<sup>130</sup> arguing that psychological theory and sound research about cognitive, social, and moral development strongly support the conclusion that most adolescents are competent to make informed decisions. But, the Court failed to cite any of these studies and persisted in maintaining the fiction of adolescent incompetence. For example, in the 1990 companion cases of *Hodgson v Minnesota*<sup>131</sup> and *Ohio v Akron Center for Reproductive Health*,<sup>132</sup> the Court upheld the right of the State to require prior notification

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requirement that searches be based on probable cause. . . .").

127. *Ginsberg v New York*, 390 US 629, 638 n 6 (1968) ("[R]egulations of communication addressed to [children] need not conform to the requirements of the first amendment in the same way as those applicable to adults.").

128. *Parham*, 442 US at 584.

129. There has been substantial empirical research testing adolescents' decisionmaking performance when faced with various types of practical problems involving treatment and non-treatment decisions. Some of these studies specifically compare the performance of adolescents to that of adults in making such decisions. The vast majority of this research indicates that by age fourteen most adolescents have developed adult-like intellectual and social capacities, including specific abilities outlined in law as necessary for understanding alternatives, considering risks and benefits, and giving legally competent consent. For a sampling of such research, see Howard S. Adelman et al, *Competence of Minors to Understand, Evaluate, and Communicate about Their Psychoeducational Problems*, 16 Prof Psych 426 (1985); Bruce Ambuel and Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 L & Human Beh 129 (1992); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal L Rev 1134 (1980); Thomas Grisso and Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 Prof Psych 412 (1978); Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 Child Dev 538 (1981); Jeffrey C. Savitsky and Deborah Karras, *Competency to Stand Trial among Adolescents*, 19 Adolescence 349 (1984); Lois A. Weithorn and Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Dev 1589 (1982). See also studies cited in note 100.

130. See, for example, *Amicus Curiae Brief of American Psychological Association, Ohio v Akron Ctr for Reproductive Health* (No. 88-1125), 497 US 502 (1990); *Hodgson v Minnesota* (No. 88-1309), 497 US 417 (1990); *Amicus Curiae Brief of American Psychological Association, Hartigan v Zbaraz* (No. 85-673), 484 US 171 (1987). Prof. Bersoff served as general counsel for the APA during this period (1979-89).

131. 497 US 417 (1990).

132. 497 US 502 (1990).

to parents before a physician can perform an abortion on unmarried, unemancipated young women below eighteen years of age. The Court held these same restrictions unconstitutional as to adults in 1983.<sup>133</sup> Nevertheless, the majority in *Hodgson* agreed that the "[s]tate has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."<sup>134</sup>

A final example of the Court's studied ignorance, if not deliberate rejection, of relevant social science data is *Bowers v Hardwick*,<sup>135</sup> the controversial, heavily publicized 5-4 decision in which the Court held that the Constitution does not confer a fundamental right upon consenting homosexuals to engage in oral or anal intercourse in private. As a result, it upheld a Georgia statute criminalizing sodomy. The APA contributed an *amicus* brief in that case, with a great deal of scientific and clinical data concerning the beneficial aspects of diverse methods of intercourse, the absence of any evidence that either sexual orientation or method of intercourse is pathological in and of itself, and the harmful effects of deterring such conduct.<sup>136</sup> Yet, the Court rejected this evidence in favor of religious tradition. In his concurring opinion, Chief Justice Burger wrote that sodomy statutes were "firmly rooted in Judaeo-Christian moral and ethical standards."<sup>137</sup>

Perhaps the most glaring example of the Court's practice of disparaging troublesome data is *Lockhart v McCree*,<sup>138</sup> a case whose social science

133. See *City of Akron v Akron Ctr for Reproductive Health*, 462 US 416, 427 n 10 (1983).

134. *Hodgson*, 497 US at 444. The Court revisited the issue in *Planned Parenthood v Casey*, 112 S Ct at 2791, but merely reiterated its view in three short paragraphs and without citing new social science evidence supporting earlier research findings that older adolescents have the decisionmaking capabilities of average adults.

Ironically, the Court has not always adopted such an absolutist position concerning children's incompetency. In *Fare v Michael C.*, 442 US 707 (1979), decided on the same day as *Parham*, the Court held that a sixteen-year-old, poorly educated, crying boy had knowingly and intelligently waived his right to remain silent during a custodial interrogation. It has also upheld state statutes permitting the execution of sixteen- and seventeen-year-olds. *Stanford v Kentucky*, 492 US 361 (1989); *Thompson v Oklahoma*, 487 US 815 (1988). In light of *Michael C.* and the juvenile death penalty cases, the Court apparently believes that when children commit crimes they magically assume the decisionmaking ability and personal culpability of adults. However, when they are about to be placed in a mental hospital or seek to secure health care treatment without parental or state involvement, they are but immature, unthinking, children who must rely on their parents' judgment as to what is in their best interest. *Weisman* simply reinforces the notion that minors are passive, unthinking, exploitable, and barely autonomous human beings.

135. 478 US 186 (1986).

136. See research collected in *Amicus Curiae* Brief of the American Psychological Association, *Bowers v Hardwick* (No. 85-140), 478 US 186 (1986). See generally Donald N. Bersoff and David W. Ogden, *APA Amicus Curiae Briefs: Furthering Lesbian and Gay Male Civil Rights*, 46 Am Psych 950 (1991).

137. *Bowers*, 478 US at 196.

138. 476 US 162 (1986).

origins were rooted in the Court's 1968 opinion in *Witherspoon v Illinois*.<sup>139</sup> There, the Court was asked to rule whether the asserted biasing effects of using "death-qualified" juries during the guilt phase of the trial violated a defendant's rights to a representative jury and a fair trial. Death qualification is a process that eliminates prospective jurors from deciding the guilt or innocence of the defendant in a first degree murder trial if they have moral or religious scruples that would prevent them from voting for the imposition of the death penalty under any and all circumstances. The *Witherspoon* defendant presented three social science studies to show that those jurors remaining after the completion of the death qualification process were more prone to support the prosecution and more disposed toward guilty verdicts.<sup>140</sup> The *Witherspoon* Court held that, given the present state of knowledge, it could not rule that death qualification violated the constitutional rights of capital defendants. The Court said that the three studies were too "tentative and fragmentary" to be useful<sup>141</sup> but left open the possibility it would rule differently if further research more clearly demonstrated that these death-qualified juries were prosecution prone.<sup>142</sup>

It is very rare for the Court to leave open an issue in this way, and rarer still for the Court to send such an invitation to social scientists to develop data to help it resolve crucial points of constitutional law. Not surprisingly, social scientists responded to this invitation with enthusiasm and for the next two decades produced a great deal of what appeared to be legally relevant, methodologically sound research on the issue. Much of that research was originally published or reviewed in 1984 in a special issue of *Law and Human Behavior*, the official, peer-reviewed journal of the American Psychology-Law Society.<sup>143</sup>

Although the dissent was impressed with the social science evidence, calling it "overwhelming,"<sup>144</sup> Justice Rehnquist, writing for the majority, found "several serious flaws"<sup>145</sup> in the research cited by defendant/respondent McCree. Justice Rehnquist's methodological critique was worthy of a hostile

139. 391 US 510 (1968).

140. For a detailed exposition of the studies cited in *Witherspoon* and discussed or rejected in *Lockhart*, see, for example, Donald N. Bersoff, *Social Science Data and the Supreme Court: Lockhart as a Case in Point*, 42 Am Psych 52 (1987); Bersoff, 37 Vill L Rev at 1597-1600 (cited in note 2). See also *Amicus Curiae* Brief of American Psychological Association, *Lockhart v McCree* (No. 84-1865), 476 US 162 (1986).

141. *Witherspoon*, 391 US at 517.

142. *Id.* at 518.

143. See 8 L & Human Beh 1 (1984). Seven members of the Supreme Court have agreed that "submission to the scrutiny of the scientific community is a component of 'good science,'" and more particularly, "[t]he fact of publication . . . in a peer-reviewed journal . . . will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S Ct 2786, 2797 (1993).

144. *Lockhart*, 476 US at 184 (Marshall dissenting).

145. *Id.*, 476 US at 168.

dissertation chairman. Of the fifteen studies cited by McCree in support of his claims, the majority rejected outright eight studies as "only marginally relevant to the" constitutional questions at issue.<sup>146</sup> It rejected a ninth experiment, which investigated the biasing effects of voir dire to identify jurors who could not be fair and impartial as to guilt because of their adamant objection to the death penalty,<sup>147</sup> on the ground that the State must use voir dire to exclude these "nullifiers."<sup>148</sup>

Of the six remaining studies, three were those introduced in *Witherspoon*. The Court said that "if these studies were 'too tentative and fragmentary' [in 1968] . . . the same studies . . . are still insufficient to make out [a constitutional] claim in this case."<sup>149</sup> The Court then complained that the three new studies did not use actual jurors deliberating in actual capital cases and only one included nullifiers.<sup>150</sup> Apparently, even if the majority had given the particular research introduced in this case a more respectful and proper review, it would have made little difference. At the end of his critique of the social science data, Justice Rehnquist said:

[W]e will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces somewhat more "conviction-prone" than "non-death-qualified" juries. We hold, nonetheless that the Constitution does not prohibit the States from "death-qualifying" juries in capital cases.<sup>151</sup>

Justice Rehnquist's analysis completely ignores the cumulative nature of science, and instead appears to require that each study perfectly replicate the death-qualified jury. This is contrary to the way data are considered in the social sciences, or any science, where converging evidence from a variety of sources and types of studies, all yielding the same result, actually strengthens the point being made. In fact, the use of diverse subjects, stimulus materials (e.g., audiotapes, written transcripts, videotapes), and empirical methodologies has produced stable and converging findings over three decades, lending considerable validity to the finding that death-qualified juries, compared to normal criminal juries, are less than neutral with respect to guilt, less representative, and ineffective.<sup>152</sup> To social scientists the majority opinion, to say the least, is disheartening and will be a significant disincentive for future research on this topic.<sup>153</sup>

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146. *Id.* at 169.

147. Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 L. & Human Beh. 121 (1984).

148. *Lockhart*, 476 US at 170 n 7 (Marshall dissenting).

149. *Id.* at 171.

150. *Id.*

151. *Id.* at 173.

152. See Monahan and Walker, *Social Science* at 31-65, 226-46 (cited in note 2).

153. "After *McCree*, then, there is little likelihood that additional research on death qualification will influence the development of the law. Social scientists who hope to see

The detail of the majority's critique is particularly ironic given the Court's views in *Craig v Boren*.<sup>154</sup> There, the Court was asked to enjoin enforcement of a state statute differentially prohibiting the sale of beer to males and females. Women between the ages of eighteen and twenty years could buy the beverage, but men of the same age could not.<sup>155</sup> The State offered statistical evidence showing, in part, that the arrest rate for drunk driving by males age eighteen through twenty substantially exceeded arrests of females for the same age range.<sup>156</sup> However, the majority rejected those findings and declared that the statute unconstitutionally denied males equal protection, noting that "[i]t is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique."<sup>157</sup> But the outcome illustrates our point that constitutional history, values, and precedent—more traditional bases for decisionmaking—will outweigh empirical considerations, particularly when constitutional norms persuade the courts that such norms are in conflict with the data.<sup>158</sup>

Finally, perhaps the most instructive series of decisions is the jury size cases. Those cases exemplify almost all of the points we have made in this critique—the tendency of the Court to discard data when more traditional and legally acceptable bases for decisionmaking are available, its consistent misuse of data, and its disparagement of data it dislikes.

In the early 1970s, despite an unbroken 600-year history of trials before juries of twelve, the Court held that six-person juries in criminal<sup>159</sup> and civil<sup>160</sup> trials did not violate the fundamental right to a jury trial. In both opinions, the Court cited what it considered "convincing empirical evidence"<sup>161</sup> to prove that this drastic reduction in jury size would not affect the outcome of the trial.<sup>162</sup> Those decisions were roundly criticized by social

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their research used in litigation and cited in legal opinions would be well advised to work in another area." William C. Thompson, *Death Qualification after Wainwright v. Witt and Lockhart v. McCree*, 13 L & Human Beh 185, 205 (1989). See also Tanford, 66 Ind L J at 147 (cited in note 2):

The Court's opinion in *Lockhart* suggests that most Justices are hostile towards social psychology, do not understand it, believe that empirical research on juror behavior is no more reliable than intuition and anecdotal evidence, and ultimately believe that the science of psychology has little or no place in the jurisprudence of trial procedure.

154. 429 US 190 (1976).

155. *Id.* at 192.

156. *Id.* at 200.

157. *Id.* at 204.

158. "[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id.*

159. *Williams v Florida*, 399 US 78 (1970).

160. *Colgrove v Battin*, 413 US 149 (1973).

161. *Id.* at 159 n 15.

162. The Court in *Williams* stated: "What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries." *Williams*, 399 US at 101. Note that, unlike *Lockhart*,

scientists for the Court's failure to recognize that the studies cited did not support its proposition and, more seriously, were either not empirical studies at all or were so flawed as to be worthless.<sup>163</sup>

The naivete and ignorance of the Supreme Court prompted social psychologists to engage in more methodologically sound and genuine tests of the differences, if any, between six-person and twelve-person juries. In 1978, their efforts were apparently rewarded when the Court in *Ballew v Georgia*<sup>164</sup> unanimously agreed that criminal trials before five-person juries were unconstitutional. Justice Blackmun announced the judgment of the Court and his decision relied heavily on the work of those social psychologists who had labored so hard to disprove the "empirical" foundations of the prior cases. Their work, he said, supported the conclusion that fewer than six-person panels substantially and negatively altered the jury process.<sup>165</sup> Although Justice Blackmun's opinion was heralded by experimental psychologists as indicative of a resurgence of interest by the Supreme Court in the work of social scientists,<sup>166</sup> that optimistic appraisal must be tempered by the fact that only one of remaining eight Justices joined that opinion. Justice Powell, in a concurring opinion joined by Chief Justice Burger and Justice Rehnquist, acerbically noted his "reservations as to the wisdom—as well as the necessity—of Mr. Justice Blackmun's heavy reliance on numerology derived from statistical studies."<sup>167</sup>

## V. Conclusion

*Lee v Weisman*<sup>168</sup> is but another example of the "puzzling disjunction"<sup>169</sup> between the world depicted through the lens of empirical

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the majority was not bothered by the fact that the studies it cited were not directly on point, because, for example, they used juries in criminal cases.

163. See, for example, Michael J. Saks, *Ignorance of Science Is No Excuse*, 10 Trial 18 (Nov/Dec 1974); Hans Zeisel and Shari Seidman Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U Chi L Rev 281 (1974).

164. 435 US 223 (1978).

165. In actuality, the studies he cited show that six-person juries are substantially different than twelve-person juries. See *id* at 232 nn 10-11. Yet, the Court refused to overrule *Williams* and *Colgrove*: "While we adhere to, and reaffirm our holding in *Williams v. Florida* . . . [w]e readily admit that we do not pretend to discern a clear line between six members and five." *Id* at 239.

166. See, for example, Monahan and Loftus, *The Psychology of Law*, 33 Ann Rev Psych at 442 (cited in note 2); Elizabeth Decker Tanke and Tony J. Tanke, *Getting Off a Slippery Slope: Social Science in the Judicial Process*, 34 Am Psych 1130, 1132-33 (1979).

167. *Ballew*, 435 US at 246 (Powell concurring). As Prof. Tanford points out in Tanford, 66 Ind L J at 147 n 86 (cited in note 2), the dictionary defines numerology as a "system of occultism built around numbers." Webster's Unabridged Dictionary (2d ed 1975).

168. 112 S Ct at 2649.

169. Tanford, 66 Ind L J at 140 (cited in note 2).



social science and the world as it is perceived by the Supreme Court. The Court's consistent inconsistency in using social science research is likely to remain a puzzling mystery given its proclivity for refusing to explain its decisions in any forum external to those decisions. Any number of scholars have attempted to offer explanations for this phenomenon but there is still no consensual agreement.<sup>170</sup>

One thing is clear, however. The Justices of the Supreme Court, no matter how much social scientists complain, are the ultimate arbiters of the sources used to provide the reasoned elaboration we expect in their decisions. In this regard, social scientists need to be reminded of Professor Lempert's recounting of a Casey Stengel story. To paraphrase Professor Lempert's rendition, Stengel is reputed to have dreamt that when he was sent to Heaven upon his death he was asked by God to build a team from other famous baseball players who had also been virtuous enough to reside among the angels. He proceeded to do so, and after some practice to rebuild the now out-of-shape bodies of such "gods" from the past—Babe Ruth, Ty Cobb, Walter Johnson, and others of their ilk—he was ready to face all comers. But, as Stengel was wondering who could possibly compete with these celestial all-stars, he received a call from Satan, daring him to play a team he had assembled among the denizens of Hell. Casey immediately accepted the challenge but warned Satan that he had all the players. Satan replied, "You don't understand, I've got all the umpires."<sup>171</sup>

Social scientists play on a legal ball field. Their work is evaluated according to the rules the legal system lays down. And, it is frustrating to work in an arena where the judges are, at times, ignorant, arbitrary, fraudulent, duplicitous, confused, and unprincipled. But, it is hoped, that social scientists will continue to develop situation-specific, ecologically-valid, legally relevant, objective data that, despite resistance, will help the Supreme Court, as well as others who make social policy, to arrive at empirically justified decisions that match the real world. As *Weisman*, and the other cases we have discussed demonstrate, that world has not yet been created.

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170. See, for example, Bersoff, 37 Vill L R at 1569 (cited in note 2); Bersoff, 10 L & Human Beh at 151 (cited in note 1); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 Emory L J 1005 (1989); Craig Haney, *Psychology and Legal Change: On the Limits of a Factual Jurisprudence*, 4 L & Human Beh 147 (1980); Richard Lempert, "Between Cup and Lip": *Social Science Influences on Law and Policy*, 10 L & Pol 167 (1988); Loh, *Social Research in the Judicial Process* (cited in note 2); Gary B. Melton, *Legal Regulation of Adolescent Abortion*, 42 Am Psych 79 (1987); Gary B. Melton, *Bringing Psychology to the Legal System: Opportunities, Obstacles, and Efficacy*, 42 Am Psych 488 (1987); Monahan and Walker, *Social Science in Law* (cited in note 2); Saks and Baron, *Misuse of Applied Social Research* (cited in note 16); Tanford, 66 Ind L J at 137 (cited in note 2); Tremper, *Sanguinity and Disillusionment Where Law Meets Social Science*, 11 L & Human Beh at 267 (cited in note 2).

171. See Richard O. Lempert, *Social Science in Court: On "Eyewitness Experts" and Other Issues*, 10 L & Human Beh 167, 181 (1986) for the original version.