Lee v. Weisman: Amateur Psychology or an Accurate Representation of Adolescent Development, How Should Courts Evaluate Psychological Evidence?

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"[I]nterior decorating is a rock hard science compared to psychology practiced by amateurs." So reads Justice Scalia's stinging dissent in Lee v. Weisman. The majority opinion in Lee, authored by Justice Kennedy, concludes that the state's use of psychological peer pressure to coerce students into participating in a graduation benediction prayer violates the Establishment Clause of the First Amendment. The majority relied upon three psychological studies that examined the effect of peer pressure on adolescent behavior to reach this conclusion. While admitting reliance on these studies, the majority gave no indication of the specific conclusions each study supported, merely stating that "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." Is Justice Scalia correct in stating that this use of psychology is amateurish, or is its use an adequate presentation of the modern, prevailing theories of adolescent psychology as the majority contends?

How is a judge to evaluate social science or psychological data to determine both its authority in describing human behavior and its relevance to the legal inquiry? Presently, courts have little guidance in determining the probative value of scientific evidence because the use of psychological

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3. Id. at 2661. Since it decided Lee in June of 1992, the Supreme Court had the opportunity to consider a Fifth Circuit case upholding the constitutionality of a graduation benediction read by a student. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 2950 (1993).
5. Lee, 112 S. Ct. at 2659.
evidence is treated as a factual inquiry.\(^6\) John Monahan and Laurens Walker, Professors of Law at the University of Virginia, argue that social science evidence should be treated as authority similar to legal precedent, and have developed a framework that provides guidance for evaluating the relevance of psychological data in the legal context.\(^7\) An examination of the psychological evidence that the Court applied in \textit{Lee} under the Monahan-Walker criteria suggests that the majority's statement regarding peer pressure is generally supported: peer pressure does have a significant impact upon adolescent social development. However, the majority's conclusion is an overly simplistic description of the psychological consensus. Some evidence suggests that by the time adolescents graduate from high school, the influence of peer pressure is declining. At this stage, adolescents are more confident in their beliefs and individuality than the majority opinion suggests. In addition, the debate within the field of psychology over the characteristics of adolescent cognitive and social development continues.\(^8\) In light of these factors, the majority's use of evidence from a discipline that is in a continuing state of discovery is questionable, especially when alternative legal arguments exist to support \textit{Lee}'s ruling that a graduation benediction violates the Establishment Clause.\(^9\)

This Note begins by examining the history of Establishment Clause jurisprudence of the Supreme Court. Then this Note will examine the majority opinion in \textit{Lee}, as well as rationales offered in the concurring opinions of Justices Blackmun and Souter, and the dissent of Justice Scalia. This Note then briefly examines the ways in which social science may be used in judicial proceedings. This Note then examines the system Monahan and Walker suggest for evaluating social authority. Finally, this Note looks at the psychological evidence used in \textit{Lee v. Weisman} within the Monahan and Walker framework and evaluates whether or not the evidence should be considered authoritative.

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7. \textit{Id.}
9. 112 S. Ct. at 2661 (Blackmun, J., concurring).
I. THE ESTABLISHMENT CLAUSE AND Lee v. Weisman

A. The Supreme Court's Establishment Clause Jurisprudence

The Supreme Court first examined the validity of state law under the Establishment Clause in 1947 in Everson v. Board of Education.10 Writing for the Court, Justice Black stated: "In the words of Thomas Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"11 Thus, the Court concluded that a state or the federal government may not pass laws that aid a specific religion, that assist all religions in general, or that give preferential treatment to one religious sect to the detriment of another.12 In addition, the federal government or a state may not "openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."13

In 1962, the Court first examined the constitutionality of prayer in public schools in Engel v. Vitale.14 The Court considered the constitutionality of a short prayer prepared by the New York State Board of Regents to be read aloud daily in public schools.15 The Court concluded that school prayer was "inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself."16 The articulated purposes of the Establishment Clause were the protection of religious privacy and the awareness that "governmentally established religions and religious persecutions go hand in hand."17

A year after the Engel decision, the Supreme Court, in Abington School Dist. v. Schempp,18 invalidated the Baltimore, Maryland public school practice of beginning the school day with a reading from the Bible or the recitation of the Lord's Prayer.19 The Schempp Court announced a test to determine whether a law regarding prayer in public schools violated the Establishment Clause.20 The Court stated that if either the purpose or the primary effect of the statute is the advancement or inhibition

11. Id. at 16.
12. Id. at 15.
13. Id. at 16. The Court gave six examples of conduct prohibited by the Establishment Clause. Id. at 15-16.
15. Id. at 423-25.
16. Id. at 433.
17. Id. at 432.
19. Id. at 222.
20. Id. at 223.
of religion, then the law goes beyond the legislature’s constitutional power. Because the Court felt that prayer and reading from the Bible advanced religion, the practices were deemed unconstitutional.

In 1971, Chief Justice Burger derived a three-part test from the Court’s previous decisions to determine whether the government action violated the Establishment Clause. In Lemon v. Kurtzman, the Court held that government action is constitutional under the Establishment Clause if three conditions are met: “First, the statute must have a “secular legislative purpose;” second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute cannot produce, ‘an excessive government entanglement with religion.’” Since 1971, the Court has regularly used the Lemon test in its Establishment Clause cases.

21. Id.
22. Id. The Court reaffirmed this test in Epperson v. Arkansas, 393 U.S. 97, 104 (1968), holding that an Arkansas statute preventing the teaching of evolution violated the Establishment Clause. The Epperson Court stated that: “[g]overnment may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.” Id. at 104.
24. Id.
25. Id. See also Walz v. Tax Comm’n, 397 U.S. 664 (1970) (addressing the third prong of the Lemon test). The origin of the third element of the Lemon test has been traced to Everson v. Board of Educ., where the Court stated that: “[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.” Everson v. Board of Educ., 330 U.S. at 16.
26. Between 1971 and 1992 the Supreme Court decided thirty-one Establishment Clause cases. Lee v. Weisman, 112 S. Ct. 2649, 2663 n.4 (1992) (Blackmun, J., concurring). In applying the Lemon test, the Court has devoted considerable attention to the question of whether a governmental action has the purpose or effect of promoting religion, or whether it has “endorsed” religion. County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989). In Wallace v. Jaffree, 472 U.S. 38 (1985), the Court concluded, “whenever the State itself speaks on a religious subject, one of the questions that we must ask is whether the government intends to convey a message of endorsement or disapproval of religion.” Id. The Court has usually spoken of “favoritism,” “endorsement,” or “preference” of religion when discussing prohibited conduct. See, e.g., Texas Monthly v. Bullock, 489 U.S. 1, 27-28 (1989) (Blackmun, J., concurring) (“government may not favor religious belief over disbelief!” or propound a “preference for the dissemination of religious ideas . . .”); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (a “preference” for specific religious beliefs constitutes an endorsement of religion); Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring) (the Establishment Clause “preclude[s] government from conveying or attempting to convey a message that religions or a particular religious belief is favored or preferred.”); Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (endorsement is closely associated with promotion); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (the government “may not . . . promote one religion or religious theory against another or even against the militant opposite”); Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concur-
In one Establishment Clause case the Supreme Court based its decision on a rationale other than the *Lemon* test principles.\(^{27}\) In *Marsh v. Chambers*,\(^ {28}\) the Court held that the practice of the Nebraska legislature of opening each day with a prayer led by a state salaried chaplain did not violate the Establishment Clause.\(^ {29}\) The Court sidestepped the *Lemon* analysis and upheld the practice on the basis of the long standing tradition of opening legislative sessions with a prayer.\(^ {30}\) The Court reasoned that a similar congressional practice continued unceasingly since the United States Congress first convened.\(^ {31}\) The Court stated that it would be inappropriate to construe the First Amendment to place greater restrictions upon the states than the federal government.\(^ {32}\) The Court stressed that the first Congress carefully considered whether this practice should be allowed.\(^ {33}\) The Court further stated, “the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government’s ‘official seal of approval on one religious view . . .’”\(^ {34}\) Finally, the *Marsh* Court concluded that members of the legislature are adults, “not readily susceptible to religious indoctrination . . . or peer pressure . . .”\(^ {35}\)

**B. Lee v. Weisman**

In June of 1989, Deborah Weisman graduated from Nathan Bishop Middle School in Providence, Rhode Island, a public school.\(^ {36}\) At the time she was 14 years old.\(^ {37}\) The policy of the Superintendent of Schools allowed principals to invite clergy to give invocations and benedictions at high school and middle school graduations.\(^ {38}\) The principal of Nathan Bishop Middle School invited Rabbi Leslie Gutterman to conduct the invocation for Ms. Weisman’s graduation. The principal gave Rabbi Gutterman a handbook entitled “Guidelines for Civic Occasions,” which


\(^{28}\) Id.

\(^{29}\) Id. at 784.

\(^{30}\) Id. at 795.

\(^{31}\) Id. at 786-92.

\(^{32}\) *Marsh*, 463 U.S. at 792.

\(^{33}\) Id. at 790-91.

\(^{34}\) Id. at 792.

\(^{35}\) Id. (emphasis added).


\(^{37}\) Id.

\(^{38}\) Id.
stated that the prayers should be nonsectarian and sensitive to other religious beliefs.\textsuperscript{39} The principal also personally advised Rabbi Gutterman that the prayers should be nonsectarian.\textsuperscript{40}

Ms. Weisman and her father, Daniel Weisman, sought a temporary restraining order to prevent the inclusion of either an invocation or benediction in the graduation ceremony.\textsuperscript{41} The district court denied the motion because it lacked adequate time to consider it.\textsuperscript{42} After the ceremony, Daniel Weisman sought to permanently enjoin the school from including prayers in future graduation ceremonies.\textsuperscript{43} The district court granted the injunction,\textsuperscript{44} and was affirmed by the Court of Appeals for the First Circuit.\textsuperscript{45} The school board appealed, and the Supreme Court granted certiorari.\textsuperscript{46}

Justice Kennedy, writing for the majority, held that public high school and middle school graduation prayers are unconstitutional.\textsuperscript{47} Without reconsidering the Court's prior holdings, Justice Kennedy concluded that: "it is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith or tends to do so.'"\textsuperscript{48} After addressing the liberty interests protected by the Establishment Clause, Justice Kennedy stated

\textsuperscript{39} Id.
\textsuperscript{40} Lee, 112 S. Ct. at 2649.
\textsuperscript{41} Id. at 2654.
\textsuperscript{42} Id.
\textsuperscript{44} Id. at 73. Applying the Lemon test, the district court concluded that invocations and benedictions at graduation ceremonies, even those which are nonsectarian, identify government power with religious practice in general, thereby endorsing religion. The district court concluded that this violates the second prong of the Lemon test. \textit{Id.} The district court disagreed with the Sixth Circuit's decision in, \textit{Stein v. Plainwell Community Sch.}, 822 F.2d 1406 (6th Cir. 1987), which held that benedictions at public school graduations are not \textit{per se} unconstitutional, and concluded that the \textit{Marsh} decision could not be extended to graduation ceremonies at public schools. \textit{Weisman v. Lee}, 728 F. Supp. 68, 74 (D.R.I. 1990).
\textsuperscript{45} The Court of Appeals for the First Circuit affirmed the district court's decision and adopted it without alteration. \textit{Weisman v. Lee}, 908 F.2d 1090 (1st Cir. 1990).
\textsuperscript{48} Id. at 2655 (brackets in original) (citations omitted). The majority opinion's emphasis on the coercive element present in the graduation ceremony is not surprising given the fact that Justice Kennedy is the author. In his dissent in \textit{County of Allegheny v. ACLU, Greater Pittsburgh Chapter}, 492 U.S. 573 (1989), Justice Kennedy stated:

\textit{Our [Establishment Clause] cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct
that in the context of elementary and secondary schools there are additional important concerns, such as "protect[ing] freedom of conscience from subtle coercive pressure." 49

The Court then addressed the possible presence of "subtle coercive pressure" in the graduation ceremony attended by Deborah Weisman. The Court concluded that the school's supervision of the ceremony exerted pressure upon the students to consent to the religious exercise by forcing them to stand or remain silent. 50 According to the majority, the indirect pressure on the students exerted by the school board's control and the presence of peers is as "real as any overt compulsion." 51 The majority asserted that the Establishment Clause prohibits schools from making adolescents forego participation in a high school graduation ceremony in order to remain free from religious indoctrination. 52

The Court then argued that a student's choice in such a situation is not entirely free. 53 The Court cited three psychological studies to support the assertions that adolescents are "susceptible to pressure from their peers towards conformity" and "the influence [of peers] is strongest in matters of social convention." 54 The Court concluded that "[t]o recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure

benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith or tends to do so."

Id. at 659. Justice Kennedy further stressed the importance of the coercive element, stating:

The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object .... But coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case .... Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.

Id. at 660-62. Justice Kennedy's questioning during oral arguments in Lee also emphasized the importance of the coercive element. Justice Kennedy is quoted as stating to Charles J. Cooper, attorney for the petitioners, "In our culture, graduation is a key event in a young persons's life .... I find it very difficult to accept the proposition that it is not a substantial imposition on a young graduate to say that you have your choice: either hear this prayer or absent yourself from graduation." 55

49. Lee, 112 S. Ct. at 2658.
50. Id.
51. Id. at 2659-60.
52. Id. at 2660.
53. Id.
to enforce orthodoxy than it may use more direct means.” On these grounds, the majority upheld the permanent injunction barring prayers at middle and high school graduation ceremonies.

The Court refuted petitioner’s arguments in favor of the prayers. The Court concluded that the stipulation that graduation attendance was voluntary was “formalistic in the extreme.” The Court also rejected the contention that the *Marsh* rationale was applicable to a graduation benediction. The Court drew three distinctions between *Marsh* and the present case: (1) unlike students, legislators are able to enter and leave as they please during the prayers; (2) the effect and influence of the formal graduation exercise are greater than the opening prayer of a legislative session; and (3) school officials exert a significant degree of control over the graduation ceremony. The majority observed that in the context of a state supervised graduation, “the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit.”

The Court, however, could have decided this case on more traditional rationale. In a concurring opinion, Justice Blackmun concluded that the graduation prayers were unconstitutional based on a specific application of the *Lemon* test. Justice Souter also concurred in the judgement, but relied on an in-depth historical exposition on the development of the Establishment Clause in concluding that the clause prohibits state support of religion in general, and not only state endorsement of a specific sect.

55. *Lee*, 112 S.Ct. at 2659.
56. *Id.* at 2654, 2661.
57. *Id.*
59. *Id.*
60. *Id.* at 2663-67. Justice Blackmun first went through a historical analysis of the Supreme Court’s Establishment Clause jurisprudence. He stated the issue: the question then is whether the government has “placed its official stamp of approval” on the prayer. As the Court ably demonstrates, when the government “composes official prayers,” selects the member of the clergy to deliver the prayer, has the prayer delivered at a public school event that is planned, supervised and given by school officials, and pressures students to attend and participate in the prayer, there can be no doubt that the government is advancing and promoting religion.

61. *Id.* at 2664-66 (Blackmun, J., concurring) (citations omitted). Justice Blackmun concluded that the graduation prayer in *Lee* violated the second prong of the *Lemon* test, by promoting and advancing religion. *Id.*

62. *Id.* at 2667. Justice Souter examined the historical development of the Establishment Clause as it passed through its stages; from Madison’s initial proposal through the
Justice Scalia dissented, arguing that graduation prayers similar to those given by Rabbi Gutterman have been readily accepted throughout the history of the nation. Justice Scalia strongly criticized the majority’s use of psychological data, stating that, “[t]he deeper flaw in the Court’s opinion does not lie in its wrong answer to the question whether there was state-induced ‘peer-pressure’ coercion; it lies, rather, in the Court’s making violation of the Establishment Clause hinge on such a precious question.”

II. Social Science Evidence

The Supreme Court first used social science evidence in Muller v. Oregon in 1908. Despite some criticism, this evidentiary practice is generally accepted by the Supreme Court justices.

Typically, courts treat the examination of social science data as a factual inquiry. At the beginning of the twentieth century, the classicalist drafts of the congressional committees and finally its adopted form. Justice Souter observed of the Clause’s language, “Implicit in their choice is the distinction between preferential and nonpreferential establishments, which the weight of evidence suggests the Framers appreciated.” Id. at 2671. “If the Framers had wished, for some reason, to use the indefinite term to achieve a narrow meaning for the Clause, they could far more aptly have placed it before the word ‘religion.’” Id. at 2670. Justice Souter concludes that the Framers intended the Establishment Clause to prohibit both preferential and nonpreferential establishments, policies which encourage the growth of particular sects as well as religion in general. Id. at 2669-76.

63. Id. at 2683.
64. 208 U.S. 412 (1908).
65. At the time Lee was decided, at least seven of the nine Justices of the Supreme Court had either authored or joined decisions which used social scientific research. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791, 2826-29 (1992) (O’Connor, Kennedy & Souter, JJ.) (citing psychological evidence of the battered women’s syndrome to support the conclusion that fear of psychological and physical abuse creates an unduly burdensome statutory framework that forces women to notify their husbands of the intention to have an abortion); United States v. Leon, 468 U.S. 897, 907 n.6 (1984) (White, J.) (citing sociological field research as partial support for an exception to the Fourth Amendment exclusionary rule based upon “good faith”); Barefoot v. Estelle, 463 U.S. 880, 921 n.12 (1983) (Blackmun, J.) (using psychological and psychiatric evidence to support the argument that a state statute justifying capital punishment to prevent continuing violence is unconstitutional); Florida v. Royer, 460 U.S. 491, 519, 525 n.6 (1983) (Rehnquist & O’Connor, JJ., dissenting) (citing sociological surveys supporting the use of a “drug courier profile” in establishing reasonable suspicion for searches); Mississippi Univer. for Women v. Hogan, 458 U.S. 718, 727-31 (1982) (O’Connor, J.) (citing sociological evidence in arguing that a state statute excluding males from enrolling in a state-supported nursing school violates the Equal Protection Clause).
66. Monahan & Walker, supra note 6, at 479-82.
distinction between law and fact dominated.\footnote{67} James Bradley Thayer provided an authoritative description of the rigid distinction between law and fact: questions of law include only the process of choosing among competing rules, while all other questions are defined as questions of fact.\footnote{68} Louis Brandeis used this distinction when preparing a brief heavily relying on sociological evidence for the Court in \textit{Muller}.\footnote{69} By the nineteen thirties, most courts accepted the practice of treating social science evidence as fact.\footnote{70}

A question remained, however, regarding judicial notice of social science facts: if social science evidence is factual evidence, how could any court use social science without first holding an adversarial hearing as required by classical jurisprudence and traditional notions of due process?\footnote{71} In 1942, Kenneth Culp Davis advocated a shift away from the rigid nature of formalistic classicalism's notion of jurisprudence.\footnote{72} Davis proposed a distinction between adjudicative facts and legislative facts.\footnote{73} Davis asserted that adjudicative facts are facts specifically pertaining to the case before the court, while legislative facts are facts used in deciding questions of policy and law.\footnote{74} Davis reasoned that courts should have greater freedom to consider relevant facts when forming a rule of law than when examining the particular adjudicative facts of a specific case.\footnote{75} Davis' distinction between legislative and adjudicative facts became widely accepted by American courts, and was incorporated into the Federal Rules of Evidence.\footnote{76} Thereafter, social science evidence has consist-

\footnotetext{67}{Id. at 479.}  
\footnotetext{68}{JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 182-262 (1898).}  
\footnotetext{69}{See WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 209-10 (1987).}  
\footnotetext{70}{Monahan & Walker, supra note 6, at 481.}  
\footnotetext{71}{Id. at 481-82.}  
\footnotetext{72}{Kenneth C. Davis, An Approach to Problems in Evidence in the Administrative Process, 44 HARV. L. REV. 364, 424 (1942); see also FED. R. EVID. 201(a) advisory committee's note.}  
\footnotetext{73}{Id. at 425.}  
\footnotetext{74}{Id. at 424.}  
\footnotetext{75}{Regarding legislative facts, Davis states: My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are "clearly \ldots within the domain of indisputable." Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.}  
\footnotetext{76}{Kenneth C. Davis, A System of Judicial Notice Based on Fairness and Convenience, in PERSPECTIVES OF LAW 68, 83 (Roscoe Pound et al. eds., 1964).}
Critics of the judicial use of social science evidence as legislative fact argue that systematic guidance is lacking as to how the evidence should be treated and evaluated. No guidance is given as to whether the facts should be submitted by brief or by expert testimony. Professors Monahan and Walker state that, "the distinction between legislative and adjudicative fact leaves courts perplexed as to how they should obtain evidence require the fact to be generally undisputed. FED. R. EVID. 201(b). In addition, the advisory committee to the Federal Rules of Evidence stated that judicial access to legislative facts should be the same as suggested by Professor Morgan regarding facts in domestic law.

In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either parties or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present . . . [T]he parties do no more than to assist; they control no part of the process.

Morgan, Judicial Notice, 57 HARV. L. REV. 269, 270-71 (1944), reprinted in FED. R. EVID. 201(a) advisory committee's note.


77. Monahan & Walker, supra note 6, at 483-84, 487 n.35. But cf. Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (holding that school segregation violated the Equal Protection Clause by psychologically injuring African-American students, and referring to social scientific evidence as "modern authority," rather than fact). Id. at 494. The Brown Court listed the studies in a footnote much as a list of cases would have been inserted to support the proposition. Id. at 494 n.11. The Court's reference was roundly criticized. See, e.g., Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 33 (1959); Edmund Cahn, Jurisprudence, 30 N.Y.U. L. REV. 150, 157-58 (1955).

78. Monahan & Walker, supra note 6, at 485-488.

79. FED. R. EVID. 201(a) advisory committee's note (indicating that there is no rule dealing with judicial notice of legislative facts). "The most serious problem with Rule 201 may be its total failure to address legislative facts." Stephen A Saltzburg & Michael M. Martin, Federal Rules of Evidence Manual 43 (3d ed. 1982). See also Kenneth C. Davis, Facts in Lawmaking, 80 COLUM. L. REV. 931 (1980) (observing that when a judge takes judicial notice of legislative facts, opposing counsel has no opportunity to respond to the assertions). Davis proposes giving the opposing counsel notice of the court's intention to take judicial cognizance of certain facts and allowing counsel to present contrary evidence. However, no cross-examination would be allowed. Id. at 935.
social research, the distinction provides no direction at all concerning either how courts should evaluate the information they do obtain or how they should treat prior judicial consideration of that material.\(^8\) Nevertheless, one suggested justification, albeit a cynical one, is convenience.\(^8\) "Tribunals make factual assumptions because it is convenient to do so."\(^8\)

Professors Monahan and Walker argue that social science research is more appropriately treated as authority than fact when forming a rule of law.\(^8\) They support this assertion by comparing the qualities inherent to both social science and the law. One quality shared by law and social science is in generality.\(^8\) Both law and science are general because they are both concerned with normative principles of human behavior, with how humans normally act and how they should act.\(^8\) Law and social science research are also similar because they both address future human conduct as well as present behavior.\(^8\) Psychological and social science research maintains its generality when used to form a rule of law, because the psychological evidence is concerned with the larger realm of human

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81. *Id.* at 487.
82. Davis, *supra* note 75, at 93.
83. *Id.* at 489-91.
84. Legal precedent is generally based on the circumstances of the case decided. Yet legal precedent often sweeps farther than the particular circumstances of the original dispute. "It is this attribute of generality that is described as the 'precedential effect' or authoritative nature of a court decision." *Id.* at 491. See generally R. Cross, *Precedent in English Law* (1961) (describing the role of precedent, and how it is applied in English common law).

Although it may make specific empirical findings, social science research as a rule is not so concerned with how specific individuals behave, but with how individuals and social groups behave. Social sciences merely generalizes and describes human behavior after studying a specific social group. The goal of such research is to understand human behavioral norms. "Because of this generality, the conclusions of empirical research are sometimes metaphorically described as scientific laws." Monahan & Walker, *supra* note 6, at 490.

86. Professors Monahan and Walker state:
Scientific findings are evaluated in part by their heuristic value - by their ability to order and make understandable new phenomena. Likewise, a court decision comes to be accorded the status of precedent when it is found to embody a principle that assists in the resolution of a subsequent conflict. In both cases, the risk of strategic bias is reduced, since investigators or judges could not have anticipated all the applications that would be found for their work in the future. The general applicability of both common-law precedent and much of social research is augmented by the fact that, at the time the research is conducted or the decision is rendered, the ultimate implications can be only dimly foreseen, if foreseen at all. *Id.* at 491.
behavior—future and present—and not with a purely limited social phenomenon.  

III. THE MONAHAN AND WALKER FACTORS

Professors Monahan and Walker suggest a framework to examine the authoritative weight of social science evidence. In order to consider social science evidence as authority the following must be true: (1) the evidence must have survived the critical review of the scientific community; (2) valid research methods must have been used; (3) the evidence must be generalizable (applicable) to the case at issue; and (4) the evidence must be supported by a body of other research.

A. Critical Review

According to Monahan and Walker, a study has survived the critical review of the scientific community when there has been an opportunity for other scientists to review the findings of the research. This review often occurs prior to the publication of the research. Before the research is published in a refereed journal, several scientists review the findings for scientific merit to screen out assertions which are unsupported by empirical data. Other methods by which research may be

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87. Id.
88. Id. at 499.
89. See infra notes 105-09 and accompanying text. Generalizability in its simplest sense connotes the applicability of the research to the context in which the scientific research is to be understood and applied. It connotes some parallel applicability. Monahan & Walker, supra note 6, at 505-07. For example, for the research cited to in Lee to be generalizable, the research must be broad enough to be applied accurately in the social context of a graduation ceremony. It must take into account the very stimuli and factors which the adolescents will be experiencing in the graduation environment. For simplicity, this concept will hereinafter be referred to as “applicability” or “applicable” and not “generalizability.”
90. Monahan and Walker, supra note 6, at 499.
91. These subheadings parallel the framework suggested by Professors Monahan and Walker. Id.
92. Id. at 499-500.
93. Id. at 500.
94. Monahan and Walker, supra note 6, at 500-05.
95. Id. Regarding the weight of research published in a refereed journal, Monahan and Walker state:

Upon seeing a report in a refereed journal, for example, a social scientist, without reading the study, will at least know that several disinterested social scientists, chosen largely for their own scientific accomplishments, have reviewed the research and found it worthy of publication.

Id. at 500.
reviewed include comprehensive evaluations by federal agencies that fund the research, critical reviews in scholarly journals, and literature reviews that examine and summarize scientific findings on a specific subject. Organizations such as the National Academy of Sciences often appoint panels to produce an evaluation of current research. The more extensive a review the research has received, the greater weight it should be accorded.

B. Valid Research Methods

Social science research must be the product of a valid research method to be considered authoritative. Four commonly used methods in social science research are case studies, correlational designs, quasi-experiments, and true experiments. Case studies are generally considered the most unreliable research method because they involve studies of specific occurrences, and their in-depth analyses provide little substantive description of the general population. Correlational designs attempt to use statistical analysis to establish the cause and effect relationship between two factors, such as a study of the correlation between smoking and lung cancer. A quasi-experiment is a research experiment in which assignments are not given randomly. An example of this research method is the time series experiment, wherein a certain factor is measured at specific time intervals. The true experiment randomly assigns participants to the conditions being studied. True experiments

96. Id. at 501.
97. Id.
98. Monahan and Walker, supra note 6, at 501.
99. Id.
100. Id. at 503-04.
101. Case studies are common in biographies and journalism. Id. at 504.
102. Correlational studies have been frequently used in employment discrimination cases to determine whether higher scores on employment tests actually relate to job performance. Id. Such studies are also used in death penalty cases to assess the defined effect of the death penalty. See, Gregg v. Georgia, 428 U.S. 153, 183-87 (1967); Furman v. Georgia, 408 U.S. 238, 345-54 (1972) (Marshall, J. concurring) (citing a correlational study examining the effect of the death penalty on the murder rate); See generally, D. Barnes, STATISTICS AS PROOF 231-91 (1983).
103. Monahan & Walker, supra note 6, at 504.
104. A test using this method would, for example, conduct an analysis of breathalyzer use and the rate of accidents at specific time intervals in order to determine the effect of the crackdown on the rate of traffic accidents. See Ross, Law, Science and Accidents: The British Road Safety Act of 1967, 2 J. LEGAL STUD. 1, 20-35 (1973).
105. Random assignments in true experiments are important because they assure to the extent possible that the findings are a result of the studied condition and not other already existing conditions or differences between groups. See, e.g., Donald T. Campbell and
are considered the most valuable research method because they minimize conditions that may undermine research validity.\textsuperscript{106}

C. Applicable Findings

Social science research is more authoritative when the research conditions are sufficiently applicable and parallel to the situation to which the study results must subsequently be applied.\textsuperscript{107} According to Monahan and Walker, in order to assess applicability of a study to a specific situation three elements of the study must be examined: the applicability of the study to the persons, settings, and time.\textsuperscript{108} A study is considered to be applicable between persons if there is sufficient similarity between the persons in the study and the persons to which the findings are applied.\textsuperscript{109} A study is considered to be applicable between settings where there is a sufficient similarity between the research setting and the setting to which the findings are to be applied.\textsuperscript{110} A study is considered applicable across time where enough time has not passed to render the findings


\textsuperscript{107} Some situations which may compromise research validity are selection bias, history, and maturation. Selection bias occurs where the causal link between the attributes studied may be due to a factor other than the theory sought to be validated. “A research project that assessed the effects of a new pre-trial conference procedure by comparing the settlement rate in ten courts that volunteered for the new procedure with the settlement rate in ten courts that did not volunteer could be criticized for selection bias.” Monahan and Walker, supra note 6, at 503. History is anything that occurs during the research which might bias or skew the findings. \textit{Id.} Maturation can affect long term studies, where the results could be a factor of the subjects growing older and not due to the element being studied. \textit{Id.}

A true experiment is preferable because it controls all the extraneous variables present in the study, allowing the researcher to attribute the observed effects to the independent variable. \textit{See, Larry B. Christensen, Experimental Methodology} (1988). True experiments control both the independent and extraneous variables. In the context of studies examining peer pressure, the researcher may control the direction of the peer pressure in the study by wording survey questions differently. \textit{See infra} notes 122-27, 149-57, 178-82 and accompanying text. Extraneous variables may be controlled by eliminating them, maintaining the variables at a constant level, by balancing the conditions so they effect the control group and study group equally, by counterbalancing (allowing the condition to be experienced an equal number of times for both groups) or by randomizing the effect of the variables and allowing the law of averages to factor in. The studies utilized in \textit{Lee} used the last approach. F. J. McGuigan, Experimental Psychology: Methods of Research 74 (6th ed. 1993).

\textsuperscript{108} Id. at 506-07.

\textsuperscript{109} Id. at 506.

\textsuperscript{110} Id. at 507.
D. Supported by Other Research

The more often researchers replicate the findings of a specific research study, the greater the likelihood that the study adequately represents human behavior, and thus the more weight the study should be accorded. While this factor in determining authoritiveness is the most easily understood, it is the most important.

IV. Lee v. Weisman: The Psychological Evidence

The majority in Lee used three psychological studies to support the propositions that teenagers are susceptible to peer pressure and that peer pressure influences students in middle and high schools to the extent that their choice cannot be considered free. These studies were: Clay V. Brittain, Adolescent Choices and Parent-Peer Cross-Pressures; Donna Rae Clasen & B. Bradford Brown, The Multidimensionality of Peer Pressure in Adolescence; and B. Bradford Brown, et al., Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self Reported Behavior Among Adolescents.

In order to determine if these studies support the conclusion in Lee, this Note will examine each of these studies under the Monahan and Walker framework. First, this Note will explain the general conclusions found by each particular study. Then this Note will examine whether: (1) the study has survived the critical review of the scientific community; (2) the research method of the study is adequate; (3) the study is applicable to the situation in Lee; (4) the research has been supported by findings of other scientific inquiries.

A. Adolescent Choices and Parent-Peer Cross Pressures

This study (hereinafter “Cross-Pressure”) examined situations in which adolescents were subjected to conflicting peer and parental pressures. It

111. Id.
112. Id. at 508.
113. See supra, note 4 and accompanying text.
attempted to discern the extent to which the teenager's choices were influenced by the particular situation involved.\textsuperscript{117} The Cross-Pressure study found that the responses of adolescents placed under conflicting peer-parent pressures was a function of the content of the alternatives.\textsuperscript{118} Brittain concluded that "[p]eer-conformity in adolescence, rather than being diffuse, tends to vary systematically across situations."\textsuperscript{119} Brittain drew four specific conclusions from the evidence. First, adolescents perceive both parents and peers to be adequate guides within different contexts.\textsuperscript{120} Adolescents are more likely to choose the alternative suggested by a peer when the content of the alternatives relates to peer society,\textsuperscript{121} but are more likely to choose the alternative suggested by a parent when the content of the alternatives pertains to society at large.\textsuperscript{122} In the latter situation, parents are viewed by adolescents as the more appropriate and competent guides.\textsuperscript{123} Second, adolescents are concerned with appearing different from their peers, particularly in areas of social convention such as clothing appearance and dating.\textsuperscript{124} Third, adolescents are concerned with being separated from their friends.\textsuperscript{125} Fourth, the choices ultimately made by the adolescent reflect which group she relates to in a given situation, her parents or her peers.\textsuperscript{126}

This study has survived the critical review of the psychological community. It was published in the \textit{American Sociological Review}, a refereed journal for the American Sociological Association. The study has also been readily cited by other researchers.\textsuperscript{127}

The research method used in the Cross-Pressure study was adequate because it utilized a random sampling of adolescent high school students across several locations using multiple tests. The only non-random factor was that the subjects were all female. The subjects were 280 girls from Alabama and Georgia.\textsuperscript{128} These subjects were drawn from an urban high school, a high school located in a small city, and three small rural high.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{117} Brittain, \textit{supra} note 4, at 389-90.
\item \textsuperscript{118} \textit{Id}.
\item \textsuperscript{119} \textit{Id} at 389.
\item \textsuperscript{120} \textit{Id}.
\item \textsuperscript{121} \textit{Id} at 390-91.
\item \textsuperscript{122} \textit{Id}.
\item \textsuperscript{123} \textit{Id}.
\item \textsuperscript{124} \textit{Id} at 389.
\item \textsuperscript{125} \textit{Id}.
\item \textsuperscript{126} \textit{Id}.
\item \textsuperscript{127} Clasen & Brown, \textit{supra} note 4, at 453.
\item \textsuperscript{128} Brittain, \textit{supra} note 4, at 387.
\item \textsuperscript{129} \textit{Id}.
\end{itemize}
Fifty-eight control subjects were drawn from a high school in a small town and a rural high school. The subjects were tested on two separate occasions with two different survey forms describing in detail situations involving parent and peer conflict over decisions. The survey form asked twelve questions involving various social situations where students were given the option of choosing parental or peer advice. The subjects had to decide between the two alternatives presented.

Although the Cross-Pressure study has survived the critical review process and the research methods appear to be valid, there is some doubt about its applicability to Lee. Because the study used only female subjects, it may not be applicable across persons. Other research indicates that the effect of peer pressure may vary between the sexes. The evidence may not be applicable to the specific issue presented in Lee v. Weisman: whether the school sponsorship of a graduation prayer combined with peer pressure coerced students into participating in a religious exercise. While the Cross-Pressure study demonstrates that peer pressure is a dynamic force, it does not necessarily support the Court's conclusion that peer pressure is coercive under the circumstances of the case. Whether or not it is advisable to dissent from a public display of religious belief may be considered a question concerning society at large, not specifically the peer society, and the Cross-Pressure study suggests that under these circumstances the adolescent might be more likely to defer to parental guidance.

The study presents no evidence to support the conclusion that the adolescent would be more likely to perceive the situation in Lee as implicating peer society more than society in general.

Even though the Cross-Pressure study was published thirty years ago, time does not appear to limit its applicability, because the Cross-Pressure study...
study is supported by other research. Subsequent research supports the finding that adolescents are more likely to seek advice from peers regarding the social norms of the peer group, such as clothing and dating, and to seek parental advice regarding issues of society at large. 139 "The main trend during the adolescent years... is toward a more thorough internalization of parental values, even though there may be considerable hassling about particular points." 140

B. The Multidimensionality of Peer Pressure in Adolescence

The Clasen and Brown Multidimensionality study concludes that peer pressure is a significantly less monolithic force than earlier studies suggested. 141 The study found that peer pressure tends to vary in intensity and direction across the grade levels, and among peer groups and locales. 142 Pressure to involve oneself with peers is relatively strong throughout adolescence. 143 There is some correlation between the various adolescent social groups with which peers identify themselves, and the nature of the pressure. For example, there are different pressure levels to misbehave among "jock/popular" groups compared to "druggy/toughs." 144 The Multidimensionality study further concluded that as adolescents mature, pressure to conform to peer norms generally decreased. However, pressure to conform decreased less across grades with rural adolescents than among urban adolescents. 145 The study also reported that

140. Hamachek, supra note 139, at 32. B. Bradford Brown states:

Studies of real or hypothetical situations in which parents and peers offered conflicting advice indicated that teenagers do not routinely acquiesce to peer pressure. In fact they are more likely to follow adults' [sic] than peers' [sic] advice in matters affecting their long-term future (for example, college choices or career planning), and they actually rely on their own judgement more often than that of either peers or parents.

Peer Cultures, supra note 139, at 174.
141. Clasen & Brown, supra note 4, at 464.
142. Id. at 464.
143. Id.
144. Id. 464.
145. Id. at 463.
Despite a modest gender variation, if any, there were no variations across groups as to the level of peer involvement and conformity pressures. All social groups tend to have the same levels of peer pressure to identify with the social group norms, even though the content of the pressure was different among the various social groups.

Peer pressure towards misconduct is generally weak, and adolescents were found to be as likely to report that their friends discouraged misconduct as they were to report that their peers encouraged misconduct. However, the pressure to commit misconduct surprisingly rises as peers mature. Clasen and Brown suggest that this may be attributed to increasing identification by adolescents with adult norms. Such activity may very well be perceived as adult behavior by adolescents.

The Multidimensionality study has also survived critical review by the psychological community. The study was published in the *Journal of Youth and Adolescence*, a refereed journal, and was also presented at a biennial meeting of the Society for Research in Child Development in April of 1985.

The subjects of this experiment were drawn from a sample of 689 students in grades seven through twelve in two midwestern communities. Nearly half of the subjects were drawn from a small semi-rural city, and the rest were drawn from an urban area. The subjects were identified by their peers as belonging to particular major peer group. The groups were classified as “jock/populars”, “druggy/toughs” or “loners.” Students were randomly selected from each crowd in equal numbers of males and females, and eighty-seven percent of those selected completed the questionnaire. The questionnaire was administered in a group setting, and measurements of perceived peer pressure and socioeconomic status were taken. The students rated on a seven point scale the rela-

146. *Id.*
147. *Id.* at 464.
148. *Id.* at 461.
149. *Id.* at 465.
150. *Id.*
151. *Id.* at 465.
152. *Id.* at 450.
154. *Id.* at 454.
155. *Id.*
156. *Id.* at 455.
157. *Id.* at 456.
158. *Id.* at 457-58.
159. *Id.*
tive strength of the perceived pressures in certain situations.\(^{160}\)

The findings of the Multidimensionality study are applicable to the situation in *Lee v. Weisman*. The study is applicable across persons because in the Multidimensionality study all peer groups and factors were taken into account: grades, gender, socioeconomic status, and locale.\(^{161}\) The study is also applicable across settings, because it analyzed pressure in a variety of situations, including social ones: the predominant setting of the conflict in *Lee*.\(^{162}\) The Multidimensionality Study is applicable across time because the study was completed only nine years ago.

The study’s findings have also been supported by additional research. Other studies indicate that peer pressure is closely affected by age and other variables.\(^{163}\) These studies observe that peer pressure to conform diminishes between ages fifteen to seventeen. Regarding the relationship between conformity and age, two commentators note:

> By the post-adolescent and early adulthood stages, the individual has learned that there are both situations which call for conformity and those which call for individual action. Thus, he becomes more confident about his own judgments despite the disagreement of a unanimous majority. However, since the individual in this post-adolescent and young adult stage has experienced socialization, and since he has at some earlier time experienced the penalties of nonconformity, he does not attain the degree of individuality of judgment that is evident in the pre-socialization stage.\(^{164}\)

The Multidimensionality study indicates that adolescent pressure to conform diminishes with age. Applying the study to the majority’s conclusions in *Lee v. Weisman*, it is arguable that by the time of graduation

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\(^{160}\) Clasen & Brown, *supra* note 4, at 454-56. The invitation to participate and the questionnaire procedure were arranged in a manner to prevent the adolescents from associating between the two. *Id.* at 451.

\(^{161}\) *Id.* at 454-56.

\(^{162}\) *Id.* at 457. *See Lee*, 112 S. Ct. at 2653-54.

\(^{163}\) *See Psychology of Adolescence, supra* note 135, at 206-07 (discussing variables which affect pressure to conform such as age, social class, and gender); John C. Coleman, *Friendship and the Peer Group in Adolescence*, in *HANDBOOK OF ADOLESCENT PSYCHOLOGY* 408, 422 (Joseph Adelson ed., 1980). An earlier study found a similar result. *See Phillip R. Costanzo & Marvin E. Shaw, Conformity as a Function of Age Level, 37 Child Dev. 967-75 (1966).*

students are much more independent, self-cognizant, and subject to less pressure to conform. The majority makes no mention of this possibility, even though the injunction also barred prayer at high school graduation.\textsuperscript{165} If anything, the Multidimensionality study demonstrates that peer pressure is more complex than originally thought.

\section*{C. Perceptions of Peer Pressure, Peer Conformity, Dispositions and Self Reported Behavior}

The third and most complicated study used by the \textit{Lee} Court was the \textit{Brown, Clasen & Eicher} Perceptions study.\textsuperscript{166} This study examined the relationship between adolescent willingness to conform to peer pressure, perceived peer pressure, and reported behavior in terms of peer involvement and misconduct.\textsuperscript{167}

The Perceptions study found that adolescents are more willing to conform in instances that are not antisocial,\textsuperscript{168} and this willingness to conform increases with age until age fifteen and decreases thereafter.\textsuperscript{169} The study also found that females are less willing to succumb to the pressure to engage in antisocial behavior than males.\textsuperscript{170} The peer pressure perceived by the adolescents is generally against misconduct, and adolescents perceived more pressure towards peer involvement.\textsuperscript{171} This perceived peer pressure to be socially involved also peaked at the age fifteen, although the trend was weak compared with the trend observed with willingness to conform.\textsuperscript{172} In addition, the Perceptions study found that pressures towards misconduct increase with age, while perceived antisocial peer pressures show no similar trend.\textsuperscript{173}

Interactions between perceived peer pressure, willingness to conform, and self-reported behavior are more complex. For example, the study found that the stronger the perceived peer pressure is against misconduct, the more adolescents abstained from such conduct.\textsuperscript{174} However, the study found that this trend could work in reverse.\textsuperscript{175} Some teens are

\begin{thebibliography}{99}
\bibitem{165} \textit{Lee}, 112 S. Ct. at 2651, 2654; see \textit{supra} note 161 and accompanying text.
\bibitem{166} \textit{Perceptions}, \textit{supra} note 4, at 528-29.
\bibitem{167} \textit{Id.}
\bibitem{168} \textit{Id.} at 521.
\bibitem{169} \textit{Id.} at 528-29.
\bibitem{170} \textit{Perceptions}, \textit{supra} note 4, at 528-29.
\bibitem{171} \textit{Id.} at 527.
\bibitem{172} \textit{Id.}
\bibitem{173} \textit{Id.} at 529.
\bibitem{174} \textit{Perceptions}, \textit{supra} note 4, at 529.
\bibitem{175} \textit{Id.}
\end{thebibliography}
more likely to misbehave when they perceive peer pressure to do so, especially the adolescents who are willing to conform to antisocial behavior.\footnote{176} Nonetheless, the Perceptions study concludes that peer pressure is more "prosocial" than antisocial.\footnote{177} Finally, the study suggests that willingness to conform and perceived peer pressure are both independent and interactive sources of influence on adolescent behavior.\footnote{178} "Perceived pressures and conformity dispositions do not appear to follow the same developmental trajectory across adolescence, nor do they appear equally salient in different facets of teenagers' lives or among adolescents in different communities."\footnote{179}

The Perceptions study has survived critical review by the psychological community. The study was published in a refereed journal, 	extit{Developmental Psychology}, and was presented at the biennial meeting of the Society for Research in Child Development.\footnote{180}

The experiment was composed of a sample of 1,027 students drawn from one middle school and one high school in two midwestern communities.\footnote{181} One community was a small city with 9,500 residents, while the other was an urban center with a population of 200,000 residents.\footnote{182} Subjects were selected by a random stratifying procedure, which classified the subjects by grade, gender, and peer group affiliation.\footnote{183} The test drew up on three sets of scores: willingness to conform to peers, perceived peer pressures, and self-reported behavior. The first score measured the strength of the subject's willingness to conform.\footnote{184} The second score assessed the strength of perceived pressure.\footnote{185} Self-reported behavior was measured by asking the subjects how many times within the past month they had participated in certain behavior.\footnote{186} Two different forms of the questionnaire were administered to the subjects, who were tested in class-

\footnote{176} Id.
\footnote{177} Id.
\footnote{178} Id.
\footnote{179} Perceptions, supra note 4, at 529.
\footnote{180} Id. at 521.
\footnote{181} Id.
\footnote{182} Id. at 522.
\footnote{183} Perceptions, supra note 4, at 522-23.
\footnote{184} Id. Responses were made on a six point scale, ranging from absolutely sure of conformity, not sure, to absolutely sure of nonconformity.
\footnote{185} Id. Responses to this inquiry were based on a seven point scale, \textit{e.g.}, some, a lot, or a little.
\footnote{186} Id. at 522. Self-reported behavior was assessed on a five point scale, \textit{e.g.}, never, once or twice, three or four times, etc.
rooms with various grade levels present.\textsuperscript{187} The questionnaires were administered in two separate occasions.\textsuperscript{188}

The Perceptions study is applicable to the factual setting of \textit{Lee v. Weisman}. Like the Multidimensional study, this study is applicable to the adolescents participating in the graduation ceremony because the study is demographically broad and it analyzes the conduct of students in a large social gathering.\textsuperscript{189} Applicability across time also is not a problem because the study was completed in 1986.\textsuperscript{190}

The Perceptions study has generally been supported by other studies which show that the variation in age of peer willingness to conform is less marked in perceived peer pressure, which was found to increase until age fifteen and then decline sharply.\textsuperscript{191} The conclusion that adolescents, at least early in their adolescence, are more willing to accede to peer pressure for positive socialization as opposed to antisocial behavior is supported by earlier research.\textsuperscript{192} However, the finding that males are more willing to follow peers in antisocial behavior than females remains controversial.\textsuperscript{193} In addition, the correlation between perceived peer pressure and conformity dispositions is generally not uniform or constant across groups, individuals, and communities. Rather, the relationship between perceived pressure and conformity dispositions varies significantly among groups and individuals.\textsuperscript{194}

\textbf{D. Summary of Findings and Support for \textit{Lee v. Weisman}}

It is apparent from the three studies cited by the Court in \textit{Lee} that peer pressure is more complex than originally anticipated.\textsuperscript{195} It is not mono-

\begin{itemize}
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} \textit{Id.} The second questionnaire was slightly shorter.
\item \textsuperscript{189} \textit{Id.} This study included subjects of both genders and of different socioeconomic background, locality, and age. \textit{Id.} at 522. Thus, all the possible types of individuals present in the graduation invocation in \textit{Lee} were represented. \textit{Lee}, 112 S. Ct. at 2654. This is unlike the Cross-Pressure study, in which the generalizability was limited by the use of only female subjects in the study. \textit{See supra} note 128 and accompanying text. \textit{Perceptions, supra} note 4, at 523.
\item \textsuperscript{190} \textit{Perceptions, supra} note 4, at 521.
\item \textsuperscript{191} \textit{Id.} See also T. J. Brendt, \textit{Developmental Changes in Conformity to Peers and Parents}, 15 Dev. Psychol. 608, 615-16 (1979) (finding that peer conformity increased and then decreased, but that the largest variations occurred in the realm of antisocial peer conformity).
\item \textsuperscript{192} Clasen & Brown, \textit{supra} note 4, at 466.
\item \textsuperscript{193} \textit{Id.} at 465-67; \textit{Psychology of Adolescence, supra} note 135, at 204.
\item \textsuperscript{194} \textit{See supra} notes 178-79 and accompanying text; \textit{Peer Cultures, supra} note 139, at 192; \textit{see} note 198 and accompanying text.
\item \textsuperscript{195} \textit{See supra} notes 164, 174-77 and accompanying text.
\end{itemize}
lithic, but rather multidimensional and dynamic. The strength of peer pressure depends to some degree on its content, prosocial, antisocial, or mischievous, and to a larger degree on other variables, such as age, gender, social group norms, and the geographic location of the subjects. Reaction to peer pressure depends somewhat on whether the issue confronted is perceived by the adolescent as a peer society issue or an issue involving society at large. In the latter situation, parental advice is more readily sought and followed. The age of the adolescent is a significant variable. Generally, adolescents experience a decrease in perceived peer pressure and willingness to conform after the age of fifteen.

The majority in Lee v. Weisman oversimplifies psychological evidence. Admittedly, adolescents are susceptible to peer pressure to conform, particularly to pressure towards socialization. However, the majority does not consider the complexity of psychology, as well as other evidence showing that adolescent individual identity may be more pronounced by the time of high school graduation, and perceived peer pressure declines in late adolescence. In fact, the majority’s reliance on social psychology alone, without examining other fields, such as cognitive psychology, prevents the Court from forming a complete picture of the developing adolescent psyche.

196. See supra note 142 and accompanying text.
197. See supra notes 137, 165, 168, 173 and accompanying text.
198. See supra notes 117-26 and accompanying text.
199. Clasen & Brown, supra note 4, at 453.
200. A great deal of psychological research has been conducted regarding the adolescent’s growing sense of identity and intellectual independence. See generally Erik Erikson, Identity, Youth and Crisis 28-30 (1968); Daniel P. Keating, Thinking Processes in Adolescence, in Handbook of Adolescent Psychology 211, 231 (Joseph Adelson ed., 1980); Jean Piaget, The Intellectual Development of the Adolescent, in Adolescence 23 (G. Caplan & S. Lebovici eds., 1969). This research into cognitive psychology could provide a more comprehensive perspective of the adolescent psychology, and thus add a great deal to the inquiry in Lee. For example, Jean Piaget, one of the first researchers to the cognitive development of adolescents, found that the thinking process of an adolescent is different “in kind and not just in degree” from that of a child. See The Constitutional Dimensions of Student Initiated Religious Activity in Public High Schools, 92 Yale L. J. 500, 508 n.42 (1983) (citing Jean Piaget, The Intellectual Development of the Adolescent, in Adolescence 23 (G. Caplan & S. Lebovici eds., 1969)). In late adolescence the sophistication of the mind is such that the student forms his own ideas, is capable of disagreeing with his peers, and begins to act independently based on his own beliefs. Jean Piaget, The Intellectual Development of the Adolescent, in Adolescence 23 (G. Caplan & S. Lebovici eds., 1969). Piaget believed that this stage, formal operational thought, is reached at or about the age of 15. Id. With the onset of formal operational thought the adolescent is capable of critical inquiry, abstract sophisticated thinking and debate, and no longer believes in the infallibility of his parents. Id. But see Daniel P. Keating, Thinking Processes in Adolescence, in Handbook of Adolescent Psychology 211, 231 (Joseph P. Adelson
Additionally, conclusive evidence of the coercive nature of the pressure is lacking.\textsuperscript{201} Is peer pressure pervasive enough to deprive the adolescent of his free will? That peer pressure is sufficiently pervasive to deprive the adolescent of his free will is not clear from the evidence. Yet, coercion is the legal basis on which the holding in \textit{Lee} rests. Indeed, there is still much debate today over the coercive effect of peer pressure.\textsuperscript{202} Many researchers are reevaluating the traditional view of peer pressure as a monolithic and negative force.\textsuperscript{203} The contemporary view is that, despite some of its negative effects, peer influence may be a supportive and positive force that helps adolescents embrace their growing identity.\textsuperscript{204}

\begin{footnotesize}
\textsuperscript{201} See \textit{Peer Cultures}, supra note 139, at 192 (quoting a study that found that “susceptibility to peer pressure and the degree of pressure adolescents actually perceived from friends accounted for less than one half of the variance in self-reported peer involvement and misconduct . . . . Even with measurement strategies that overstate peer influence, correlations with individual behavior are not overwhelming”).
\textsuperscript{202} Id.
\textsuperscript{203} B. Bradford Brown comments:
\begin{itemize}
\item A common image seems to be that of adolescents enduring a constant and rather overwhelming barrage of peer pressure to conform to group norms, with this pressure serving to impede rather than assist personal growth. Yet, given the diverse and dynamic nature of peer groups and peer cultures, this image of steady and uniformly negative pressure does not seem valid.
\end{itemize}
\textit{Id.} at 190.
\textsuperscript{204} Id. at 193-94. See also, Clasen \& Brown, supra note 4, at 465-67 (finding that adolescents perceive more pressure toward positive activities such as school achievement and peer socialization than destructive or antisocial behaviors); Paul A. Osterrieth, \textit{Adolescence: Some Psychological Aspects}, in \textit{Adolescence: Psychosocial Perspectives} 11, 18-19 (Gerald Caplan \& Serge Lebovici eds., 1969). Paul Osterrieth states:
\end{footnotesize}
Ultimately, adolescent psychology cannot adequately support the holding in *Lee*, because there are significant differences in the susceptibility to peer pressure of a ninth grader and of an eighteen year-old graduating from high school. Because the adolescent is constantly changing and maturing throughout high school, generalized statements of teen psychology are not advisable. Teenagers of different ages, family backgrounds, and gender are not all at the same level of development. Any constitutional rule based on developing theories of adolescent psychology must take this into account. Undoubtedly, further research in adolescent social and cognitive psychology is essential before a constitutional rule of law can be predicated on the basis of mere empirical findings. Perhaps it would have been more jurisprudentially sound for the majority to base its holding on Justice Blackmun's application of the *Lemon* test, or Justice Souter's exposition of the historical development and understanding of the Establishment Clause.

V. Conclusion

The use of psychological evidence in *Lee v. Weisman* displays both the strengths and weaknesses of the use of social science evidence. As this Note demonstrates, a true systematic evaluation of social science evidence's authoritative weight is taxing and requires specific expertise and guidance. With psychology there is a plethora of research concerned with what the law inevitably must address: the norms of human behavior. However, by failing to address some of the dynamic components of peer pressure supported by the studies used, the majority presents only a cursory and incomplete picture of adolescent behavior, and demonstrates an unfortunate temptation to use such research to support general assumptions and not empirical conclusions. Thus, some system must be followed, like the one suggested by Professors Monahan and Walker, to evaluate the strength of social science data.

*Scott Vaughn Carroll*

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But the seeking and the affirmation of self do not take place only in the framework of opposition to and identification with the adult, or of sulky or happy solitude. The group of peers is just as important, if not more so. Among his peers, who are bothered by the same preoccupations as he is, the young person finds at the same time a security and a stabilizing rivalry . . .

*Id.*

205. *See* note 60 and accompanying text.

206. *See* note 61 and accompanying text.