The Role of Social Science in Judicial Decision Making

by

Amy Rublin

Department of Political Science
Duke University

Date:_____

Approved:

_____
Paula D. McClain, Supervisor

_____
Peter Fish

_____
David Paletz

Thesis submitted in partial fulfillment of
the requirements for the degree of Master of Arts in the Department of
Political Science in the Graduate School
of Duke University

2011

ABSTRACT

The Role of Social Science in Judicial Decision Making

by

Amy Rublin

Department of Political Science
Duke University

Department of Political Science
Duke University

Date:_____
Approved:

_____
Paula D. McClain, Supervisor

_____
Peter Fish

_____
David Paletz

An abstract of a thesis submitted in partial
fulfillment of the requirements for the degree
of Master of Arts in the Department of
Political Science in the Graduate School
of Duke University

2011

Abstract

This thesis explores the intersection of social science and judicial decision making. It examines to what extent, and in what contexts, judges utilize social science in reaching and bolstering their rulings. The thesis delves into three areas of law that are typically not grouped together—integration, gay rights, and capital punishment—in order to see the similarities and differences in the use of empirical findings. Analyzing the language in judicial opinions from family courts, district courts, circuit courts, and the United States Supreme Court enabled the emergence of trends. The opinions revealed that inconsistency in the use of social science may stem from how a given issue is framed, the tide of public opinion on an issue, and whether social science in that realm is settled or not. Application of these principles to the gay rights context suggests that if the Supreme Court were to hear a case on gay marriage, a national consensus on the issue would be more outcome-determinative than settled social science.

Contents

List of Tables

"[T]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures…"[1]

I. Introduction

Judicial opinions are significant for their holdings, but one cannot fully grasp the significance of that holding without exploring the reasoning that led to that conclusion. To read the rule derived from a case and nothing more only tells part of the story about why a case is significant and the precedential value it may hold. Just as a holding cannot be understood in isolation, a case cannot be understood without reference to history, other cases within a given field, and the changing tides of public opinion. Judicial opinions explicate what may not be apparent from a holding and they shed light on which type of evidence tipped the scales in a given direction. When a case is decided that has considerable ramifications on the way in which the Constitution is interpreted or on ingrained societal practices, it is crucial to uncover what convinced a court.

Over the past century, there has been a marked increase in the number of social science studies brought to the attention of courts and a correlated rise in the frequency with which studies are cited in judicial opinions. Social science means the work of people from myriad fields who utilize different methods to analyze and explain social phenomena and rest their explanations on a scientific basis.[2] This scientific basis permits social scientists to "claim an 'objective' understanding of human behavior."[3] One way in which this objective understanding can be obtained is through experiments or field-based

[1] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992).
[2] These fields may include economics, sociology, political science, psychology, and psychiatry. David L. Faigman, "To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy," *Emory Law Journal* 38 (1989): 1007.
[3] Ibid., 1007-08.

data collection to test hypotheses.[4] Both quantitative and qualitative studies fall under the social science umbrella and both types appear in judicial opinions. Citations to—and discussions of—surveys, polls, experiments, textual analyses, and direct observations by social scientists weave throughout present-day case law. Opinions may entail different kinds of methodologies and findings, strongly suggesting that there are no discernible bounds on the types of social science courts will cite.[5]

The utilization of social science demonstrates that courts go beyond strict application of case law and instead consider extra-judicial factors when making their decisions. In other words, the citation of social science illustrates that judges do not decide a case only on the facts in front of them but instead take into account larger societal issues and "facts" from the world outside of law. Judges "must constantly import from disciplines around the law in order to stay up-to-date"[6] because the social context in which the law is applied is not static and evolves over the decades. Because a given case can have repercussions beyond those particular facts, it is important for judges to consider how the rule they adopt can influence society. It is therefore important to examine the interplay of social science, the courts, and societal trends in order to discern how they influence each other.

When social science is cited in judicial opinions that overturn established precedent or seemingly satisfy public demand on a given issue,[7] a number of questions

[4] Ibid., 1022.
[5] Limits may instead derive from two factors: first, from judges' determinations as to whether social science is persuasive and therefore warrants either discussion or citation in footnotes; and second, what the parties to the litigation and *amici curiae* ("friends of the court") present to the court through their briefs.
[6] Bryant G. Garth, "Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research," *Alabama Law Review* 49 (1997): 118.
[7] These two notions are not mutually exclusive. Many times public sentiment on a given issue entails a desire for reversal of discriminatory or antiquated practices condoned in precedent, such as overturning sodomy laws that *Bowers v. Hardwick*, 478 U.S. 186 (1986), found constitutional.

arise. For example, did the court cite social science to justify an opinion that was just responding to public pressures? If one believes that social science is really just a façade for an opinion that is based upon popular will, what does that imply about the court's perception of its own legitimacy and the public's perception of its authority? Does it make a difference whether a study is discussed in the text or only cited as a footnote? Are there certain areas of law where courts are more receptive to social science research and if so, why? Further, there are issues related to the litigants and other interested parties that are implicated when social science is employed in a judicial opinion. Who introduces social science evidence to the courts and how is it introduced?

This study endeavors to answer these questions through an examination of three major areas of the law where lower courts and the Supreme Court of the United States has shown both acceptance of and resistance to social science. These three realms include school integration, homosexual rights, and the death penalty. The case law suggests that if a court frames an issue as a question of equality and overturning precedent based on "new" understandings, it is more likely social science will be found persuasive and cited in an opinion. *Brown v. Board of Education of Topeka*,[8] which overturned segregation in public school education and thus overruled the "separate but equal" principle espoused in *Plessy v. Ferguson*,[9] may be construed as the paragon case in which the Supreme Court found integration acceptable due to novel understandings about the effects of segregated schooling. Conversely, if a court frames the issue as one with serious constitutional or societal implications, social science is less likely to play a decisive role. Just as *Brown v. Board of Education* found social science persuasive in

[8] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[9] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

finding in favor of integration and equality, the Supreme Court rejected social science when contemplating racial disparities in the death penalty in *McCleskey v. Kemp*.[10] By framing the issue in *McCleskey v. Kemp* as an Eighth Amendment constitutional issue, the decision of which would likely have far-reaching implications for the criminal justice system, the Court could exercise constitutional avoidance[11] and thus refuse to recognize the potential merits of social science studies.[12] It appears that the Court feared accepting social science in a case that could have applicability beyond the facts of this particular case.[13] Hence, how a court perceives the question before it can determine whether there will be favorable reception to extra-judicial factors.

Another element that plays a role in determining whether a court will be willing to take notice of empirical analyses is whether such findings are treated as legislative fact, adjudicative fact, or as a social framework.[14] In the realms of school integration, homosexual rights, and the death penalty, the Supreme Court's ruling has ramifications beyond the particular facts at issue. When social science is used to make law, it is known as legislative facts, and rulings in these three areas would certainly be lawmaking. As such, the Court must tread carefully because its espousal of a certain position is likely to effectuate large-scale societal change. For example, if the Court were to hear a case about homosexual partners' right to marry and parental rights, and *amicus curiae* briefs

[10] *McCleskey v. Kemp*, 481 U.S. 279 (1987).
[11] "The Supreme Court's use of the cannon of constitutional avoidance pre-dates the substantive judicial review established in *Marbury v. Madison*." Ernest A. Young, "Federal Courts: Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review," *Texas Law Review* 78 (2000): 1554.
[12] The Supreme Court framed the issue thusly: "This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner
McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." *McCleskey v. Kemp*, 281-82.
[13] "McCleskey's claim that these statistics [the Baldus study] are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black." Ibid., 293.
[14] These three categories will be explored further below.

were filed containing studies on the psychological effects of unmarried homosexual parents on their children—as they have been in lower court cases such as *Goodridge v. Department of Public Health* in Massachusetts[15]—how the Court decided would certainly have implications far beyond the sphere of family law.

Therefore, it may be inferred that the Supreme Court will consider the national mood or public opinion when contemplating whether to grant certiorari, what it will decide, and how it will support that conclusion. The Court will likely shy away from legislative facts unless the Court perceives the American people are receptive to or want a particular change. For example, in *Akins v. Virginia*, the Court found that the Eighth Amendment precludes the execution of a mentally retarded defendant convicted of a capital offense.[16] In support of its conclusion, the Court stated that there was a national consensus opposed to imposition of the death penalty on this class of defendants.[17] This case suggests that the Court's willingness to effectuate change in an area it labels as constitutional is contingent upon a broad consensus or notions of the necessity of protecting certain segments of society.[18] Overall, the Supreme Court is likely to gauge the demand for and imperativeness of a significant change in the law before accepting legislative facts.

This thesis proceeds in five parts. In Part II, I explore the meaning of the terms "legislative fact," "adjudicative fact," and "social frameworks." These paradigms explain how social science has been used by courts—to make law, to decide the instant case, or to construct a background in order to understand the issue between the present litigants.

---

[15] *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).
[16] *Akins v. Virginia*, 536 U.S. 304 (2002).
[17] *Akins v. Virginia*, 316, n. 21.
[18] The law has treated children and the mentally handicapped in a protective fashion.

Part III describes the case—and footnote—most cited for the notion that judges employ social science when deciding cases: *Brown v. Board of Education*. This Part also discusses the reasoning in other school integration cases, such as *Grutter v. Bollinger*, and the *amicus* briefs filed in those cases that focused the Supreme Court's attention on the scientific merits of affirmative action.[19] In Part IV, the focus is on *Lawrence v. Texas* and the arguments made for homosexual parents' rights by *amici curiae* in lower court cases. Although it is unclear whether the Supreme Court will ultimately grant certiorari in these cases, what is apparent is that the number of *amicus* briefs submitted to the Court will likely eclipse the number submitted below. Next, Part V analyzes the Court's Eighth Amendment jurisprudence. In particular, this Part endeavors to answer the question of why the Court rejected social science in *McKlesy v. Kemp* but cited survey data as persuasive in *Akins v. Virginia*. Part VI pulls these threads together and endeavors to assess the interaction of widespread movement in favor of rights or a particular law and settled social science. This Part discusses how social science research can determine whether there is a national consensus, and the Supreme Court responds to such a national consensus. Part VII briefly concludes.

[19] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

II. Legislative Fact, Adjudicative Fact, and Social Frameworks

a. History of Social Science in the Courts: From a Formalist to Realist Court

Before the 1920s, legal formalism was the dominant paradigm in American courts. Legal formalism stressed judicial interpretations of the law and did not perceive extra-judicial fact-finding as sound.[1] In the 1920s and 1930s, the legal realist movement moved to supplant the formalists' narrow reliance on precedents. The legal realists argued that social context and psychology matter and should play a role in judicial decisions.[2] According to the realists, consideration of these factors was imperative to achieve sound social policy. Members of this realist movement "were united by a belief that judges devoted too much attention to the language of prior cases and too little to understanding the social reality behind their own decisions."[3] This school had support both from outside and inside the judiciary. Psychologists such as Sigmund Freud, John Watson, and Hugo von Munsterberg asserted that psychology could be applied to issues of law facing courts, and Justices Oliver Wendell Holmes, Louis Brandeis, and Benjamin Cardozo all saw the utility of utilizing social science when making judicial decisions.[4]

[1] Michael Rustad and Thomas Koenig, "The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs," *North Carolina Law Review* 72 (1993): 91, n. 38.
[2] Christine Rebman, "The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences," *DePaul Law Review* 49 (1999): 611; Rustad and Koenig, n. 39.
[3] Rustad & Koenig, 101.
[4] Rebman, 611.

A landmark in the shift from formalism to realism is the submission of Louis Brandeis' brief for the defendant in error in the case *Muller v. Oregon* in 1908.[5] In his brief, which came to be known as the Brandeis Brief, only three pages grappled with the precedents[6] and the rest presented the Supreme Court with social science on the issue of whether a state was constitutionally permitted to regulate women's working hours even though it was unable to regulate men's working hours.[7] The Court took note of the uniqueness of Brandeis' brief, stating: "It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters…"[8] In so doing, the Court acknowledged the role of extra-judicial factors. This sent a signal to both courts and advocates that issues outside the scope of precedents could (and would) be considered; both the brief and the Court's recognition of its utility signaled a shift away from legal formalism. With Brandeis' ascension to the Supreme Court in 1916, the legal realists gathered momentum.

In 1937, the realists displaced the formalists when the New Deal Court began to cite social science studies in its opinions.[9] Due to the number of social programs passed at this time in American history, the Court was faced with the need to look beyond precedents and see the programs' focus on social justice. At a time of new programs and the Depression, one could reasonably conclude the Court lacked previous decisions that

---

[5] According to John Monahan and Laurens Walker, "Brandeis' brief in Muller v. Oregon initiated the use of social science materials in American courts." John Monahan and Laurens Walker, *Social Science in Law: Cases and Materials*, 7th ed. (New York: Thomson Reuters/Foundation Press, 2010), 8.
[6] Rustad and Koenig, n. 61.
[7] Herbert Hovenkamp, "Social Science and Segregation Before *Brown*," *Duke Law Journal* 1985 (1985): 628.
[8] *Muller v. Oregon*, 208 U.S. 412, 419 (1907).
[9] Rustad and Koenig, 108.

would provide clear guidance for resolving these issues. The Court, along with New Dealers and realists, "discounted the worth of many traditional values and expressed a preference for pragmatic experimentation."[10] The way that the Court obtained social science to cite was through *amicus curiae* ("friend of the court") briefs.[11] The intent of these briefs is to aid the Court's arrival at a just conclusion, although such briefs are not neutral and often urge justices to favor one side.[12] In the wake of 1937, groups began to file *amicus curiae* briefs with frequency; now "amicus briefs are filed in almost every case the Court accepts for review."[13]

Regardless of the vehicle used to provide social science to the courts, it is important to recognize the way in which social science is used once it comes to the courts' attention. There are three key ways in which social science is employed—as a legislative fact, adjudicative fact, and social framework. These three paths suggest that a court, particularly the Supreme Court, may utilize social science in different ways, depending on the breadth of a rule it wishes to craft. With awareness of these uses, one may see patterns across myriad areas of law.

b. Legislative and Adjudicative Facts

Kenneth Culp Davis, in a foundational work published in the Harvard Law Review in 1942, coined the terms "legislative facts" and "adjudicative facts."[14] "Legislative facts" are those that inform the legislative judgment of an agency or court

[10] Monahan and Walker, 16.
[11] "The lobbying device available for use before the Court is the brief amicus." Fowler V. Harper and Edwin D. Etherington, "Lobbyists Before the Court," *University of Pennsylvania Law Review* 101 (1953): 1172.
[12] Paul M. Collins Jr., "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation," *Law & Society Review* 38 (2004): 808
[13] Ibid., 807-08.
[14] Kenneth Culp Davis, "An Approach to Problems of Evidence in the Administrative Process," *Harvard Law Review* 55 (1942).

that is "wrestl[ing] with a question of law or policy."[15] When judges create "the common law through judicial legislation," they use legislative facts.[16] Legislative facts encompasses more than the "social and economic data which go into the determination of fundamental policies."[17] Conversely, "[w]hen an agency [or court] finds facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were—the agency [or court] is performing an adjudicative function, and the facts may conveniently be called adjudicate facts."[18] Although both types of facts may come before a court through briefs by each side, legislative facts may pertain to a variety of cases, whereas adjudicative facts concern questions only relevant to the parties before the court.[19] Simply, arguments that a law should be changed falls under the legislative facts umbrella, whereas an argument about the events in a particular case is best classified as adjudicative facts.

The type of fact at issue may shape whether a court finds a trial in the best interests of the parties. For example, trials are preferable when adjudicative facts are at issue; trials are less useful when legislative facts or broad factual scenarios are involved.[20] As Davis stated in an Administrative Law Treatise, "[f]acts that concern scientific truths, sociological data, and industrywide practices…are not peculiarly within the knowledge of the parties and are not of the type that generally would be aided by viewing the demeanor of witnesses, by cross-examination, and other aspects of

[15] Ibid., 402.
[16] Ibid., 402.
[17] Ibid., 407.
[18] Ibid., 402.
[19] *Broz v. Schweiker*, 677 F.2d 1351, 1357 (11th Cir. 1982) (quoting *U.S. v. Bowers*, 660 F.2d 527, 531 (5th Cir. 1981) (quoting *U.S. v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976))).
[20] *Broz v. Schweiker*, 677 F.2d 1351, 1357 (11th Cir. 1982).

adversarial factual development."[21] These principles shape which areas of law are treated more as adjudicative or legislative facts: trademarks, obscenity, and damages are treated on a case-specific level,[22] whereas in cases involving the First, Sixth, Eighth, and Fourteenth Amendments, social science is used to make law.[23] Federal appellate courts have extensively embraced the distinction between legislative and adjudicative facts,[24] thus instilling the distinct approaches to numerous realms of law.

Examples can help illustrate the contours of these concepts. In *Processed Plastic Co. v. Warner Communications, Inc.*, the Seventh Circuit treated social science as adjudicative fact.[25] At issue was whether Processed Plastic Company ("PPC") violated the Lanham Act by manufacturing a toy car that resembled a car used in the "Dukes of Hazzard" television series, which is a registered copyright of Warner Brothers.[26] To show that there was consumer confusion, "Warner Bros. introduced a survey of children between the ages of 6 to 12 in which 82% of the children identified a toy car identical to PPC's Maverick Rebel as the 'Dukes of Hazzard' car and of that number 56% of them believed it was sponsored or authorized by the 'Dukes of Hazzard' television program."[27] Although on appeal PPC challenged the utility of the survey for demonstrating the numbers of consumers who would be confused, given that the survey only gauged responses from children six to twelve years old, the Circuit Court found that the lower court did not clearly err in finding the survey findings probative on the question of

[21] Ibid.
[22] Monahan and Walker, 104.
[23] Ibid., 192. The concept of legislative facts also pertains to whether to employ balancing tests, the use of strict scrutiny, ascertaining what rises to the level of an establishment of religion, and whether a jury comprised of six people functions in a way comparable to a jury comprised of twelve people. John O. McGinnis and Charles W. Mulaney, "Judging Facts like Law," *Constitutional Commentary* 25 (2008): 75.
[24] *Broz v. Schweiker*, 677 F.2d 1351, 1357 (11th Cir. 1982)
[25] *Processed Plastic Co. v. Warner Communications, Inc.*, 675 F.2d 852 (7th Cir. 1982).
[26] Ibid., 854.
[27] Ibid., 854-55.

whether there was consumer confusion.[28] This case demonstrates how social science—here the use of survey evidence—can be used to decide a particular dispute between distinct parties.

In *United States v. Leon*, social science was used as legislative fact.[29] In that case, the issue facing the Supreme Court was whether the exclusionary rule of the Fourth Amendment "should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[30] The Court evaluated studies on the impact of the exclusionary rule on the disposition of felony arrests in an extensive footnote.[31] In another footnote, the Court cited recent studies on the cost of the exclusionary rule in order to show that the Court's past findings on the rule's costs were exaggerated.[32] Interestingly, the Court also cited the absence of social science to support the notion that the rule may not have a deterrent effect on law enforcement:

> We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. 'No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect…'[33]

What differentiates *United States v. Leon* from *Processed Plastic Co. v. Warner Communications, Inc.* is the way the social science was used. Whereas in *Leon* the Court used social science in order "to make policy determinations with respect

---

[28] Ibid., 857.
[29] *United States v. Leon*, 468 U.S. 897 (1984).
[30] Ibid., 900.
[31] Ibid., 907 n.6.
[32] Ibid., 951, n.11.
[33] Ibid., 918 (quoting *United States* v. *Janis*, 428 U.S. 433, 452, n. 22).

to existing law based on more general findings,"[34] in *Processed Plastic* the Seventh Circuit used the survey evidence to decide whether there was a Lanham Act violation in that particular case. Thus, these two cases illustrate the differences in the way social science is used in the context of legislative versus adjudicative facts.

c. Social Frameworks

Another paradigm has joined the ranks of Davis's legislative and adjudicative facts in molding how courts utilize social science—"social frameworks." Coined by Laurens Walker and John Monahan in a Virginia Law Review article published in 1987, the term mixes the uses of both adjudicative and legislative facts: "empirical information is being offered that incorporates aspects of both of the traditional uses: general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case."[35] Walker and Monahan saw that in cases of assessments of dangerousness, sexual victimization, battered women, and eyewitness identification, social science was being used in a way that diverged from the traditional legislative-adjudicative fact framework.[36] In these cases, social science research reflected legislative facts—the studies "bore on issues at trial only as those issues were particular instances of larger empirical relationships that had been uncovered."[37] Like in instances of adjudicative facts, however, studies in these cases "were introduced solely to help resolve specific factual issues disputed by the immediate

[34] Allan G. King and Syeeda S. Amin, "Social Framework Analysis as Inadmissible "Character" Evidence," *Law & Psychology Review* 32 (2008): 4.
[35] Laurens Walker and John Monahan, "Social Frameworks: A New Use of Social Science in Law," *Virginia Law Review* 73 (1987): 559.
[36] Ibid., 563.
[37] Ibid., 569.

parties to the case, issues whose resolution had no substantive significance beyond the case at hand."[38] Also like the way adjudicative facts are introduced, social science in social frameworks comes before a court through expert testimony.[39] In sum, social frameworks lay the groundwork for the decision of specific factual issues in a given case.

Dukes v. Wal-Mart, Inc. helps shed light on the way in which a social framework is utilized. In that case, six plaintiffs brought claims for sex discrimination under Title VII of the Civil Rights Act of 1964 and sought certification of a nationwide class of women who experienced the alleged discrimination in pay and promotion policies of Wal-Mart from December 26, 1998 to present.[40] In order to establish commonality, which is a requirement of Rule 23 (which prescribes what elements must exist for class certification), the plaintiffs presented evidence from sociologist Dr. William Bielby. His function was to interpret and explain facts that indicate that Wal-Mart's culture likely includes gender stereotypes. He did so by examining items ranging from deposition testimony of Wal-Mart managers to "correspondence, memos, reports, and presentations relating to personnel policy and practice" to "a large body of social science research on the impact of organizational policy and practice on workplace bias."[41]

According to Dr. Bielby, he used a social framework analysis to uncover the unique aspects of Wal-Mart's practices and policies; he concluded that these practices and policies likely made decisions on issues of pay and promotion susceptible to gender

---

[38] Ibid.
[39] Ibid., 583. According to Walker and Monahan, this method of introducing social science entails two major problems. It is both an inefficient use of time and expensive. In terms of inefficiency, "[t]he same testimony about the same research studies must be heard in case after case, whenever a framework for a given type of factual determination is sought." As for the issue of cost, because "[t]he pool of expert witnesses is limited to a small group of basic researchers in each topical area and these researchers must be transported and paid to repeat their testimony in each new case," the introduction of a framework may be precluded by monetary considerations. Ibid., 583-584.
[40] *Dukes v. Wal-Mart Stores*, 603 F.3d 571 (9th Cir. 2010).
[41] Ibid., 6188.

bias.[42] The district court found, and the Ninth Circuit agreed, that Dr. Bielby's analysis could be utilized to support the commonality requirement. Demonstrating consistency with other courts, the Ninth Circuit stated that "courts have long accepted…that properly analyzed social science data, like that offered by Dr. Bielby, may support a plaintiff's assertions that a claim is proper for class resolution."[43] By looking at larger issues, such as bias in the workplace, this expert endeavored to help solve the specific factual issue facing these parties, thus demonstrating the utility of social frameworks.

The history of social science in law reveals both greater acceptance and increased use in myriad ways. How a court, or the Supreme Court in particular, handles social science may depend not only on the issue before the court but also whether it wants to craft a broad rule or use social science to decide just the instant case. Social science may be brought into a case by judges to support a given line of reasoning or decision and it may be before a court because a party wants to lend credibility to its arguments and cast doubt on those of the opponent.

The three areas of law at the heart of this study—school segregation, homosexual rights, and the death penalty—makes plain that the Supreme Court's approach to social science may vary even within a given realm. By examining the jurisprudence, inferences can be made about whether judicial opinions cite social science as a way to legitimize the thrust of popular opinion. The question that weaves through an analysis of the subsequent Parts is: what is driving the Court and how does that mold how social science is (or is not) employed in a given opinion? The next Part, in its discussion of integration

[42] Ibid., 6189.
[43] Ibid., 6191.

cases, illustrates that social science may be employed in order to demonstrate new understandings and question prior, antiquated decisions.

III. *Brown v. Board of Education* Footnote 11 and School Integration

Brown v. Board of Education footnote 11 is considered by many to be the paragon of judicial acceptance of social science.[1] In that momentous case, the Supreme Court was faced with whether to overturn the "separate but equal" doctrine of *Plessy v. Ferguson*[2] in the context of public education. Cases from Kansas, South Carolina, Virginia, and Delaware were consolidated for consideration of the common legal question of whether segregation in the public schools deprived the plaintiffs of equal protection under the Fourteenth Amendment's Equal Protection Clause.[3] In Chief Justice Warren's opinion, the Court stressed three key factors: "the Court's inability to discern the intended historical scope of the Fourteenth Amendment; the development of public education since the adoption of the Amendment; and the harmful social and psychological impact of racial segregation on black schoolchildren."[4] On the first issue, the Court found little in the Amendment's history on its intended impact on public education.[5] With regard to the importance of public education, the Court asserted that education is a crucial means through which children learn cultural values, prepare for future professional training, and adjust to life in a given society.[6] As such, an opportunity to obtain an education from the

[1] John Monahan et al., "Contextual Evidence of Gender Discrimination: The Ascendance of 'Social Frameworks,'" *Virginia Law Review* 94 (2008): 1720-21 ("Judicial acceptance of social science research as a form a legislative fact was most famously embodied in Brown v. Board of Education.").
[2] *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (stating that the problem with Homer Plessy's argument is "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.")
[3] *Brown v. Board of Education*, 347 U.S. 483, 487 (1954).
[4] Sanjay Mody, "*Brown* Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy," *Stanford Law Review* 54 (2002): 796.
[5] *Brown v. Board of Education*, 347 U.S. at 490
[6] Ibid., 493.

state "is a right which must be made available to all on equal terms."[7] The Court therefore held that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors [are]…equal, deprive[s] the children of the minority group of equal educational opportunities."[8]

Unlike in *Plessy v. Ferguson*, where the Court found that separation does not connote inferiority, the *Brown* Court asserted that separation of children on the basis of race instills "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[9] The Court bolstered this assertion with "psychological knowledge" that was unavailable at the time of the *Plessy* decision; this "knowledge" took the form of the famous footnote 11.[10] In that footnote, Chief Justice Warren listed seven sociological and psychological studies that purported to establish that racial segregation adversely affected black children. Following the decision, the "conventional narrative" that the *Brown* outcome was based on social science took root.[11]

Footnote 11 was put to the test nearly a decade later in the Georgia case of *Stell v. Savannah-Chatham County Board of Education*.[12] In that case, a class of black students brought an action to enjoin the Board of Education in Savannah-Chatham County from operating a biracial school system.[13] These plaintiffs argued that "admission to the various public schools of Savannah-Chatham County is determined solely upon the basis

[7] Ibid.
[8] Ibid.
[9] Ibid., 494.
[10] Ibid., 494-95.
[11] Mody, 803.
[12] *Stell v. Savannah-Chatham County Board of Education*, 220 F. Supp. 667 (S.D. Ga. 1963).
[13] Ibid., 667.

of race and color and that plaintiffs are irreparably injured thereby."[14] On the side of the defendant school board, some white students joined the suit as intervenors, arguing that the separation of races in public schools was not based solely on race but was instead based upon "racial traits of educational significance as to which racial identity was only a convenient index."[15] Contrary to the plaintiffs, the defendants argued that educational opportunities would be hampered and psychological harm would result if students of different races were mixed in a given class.

At trial, the defendants called numerous established social scientists to testify, such as Dr. Ernest van den Haag, a lecturer on sociology and social philosophy at the New School for Social Research,[16] Dr. R. T. Osborne, Professor of Psychology at the University of Georgia,[17] and Dr. Henry E. Garrett, Emeritus Professor of Psychology at Columbia University.[18] These authorities produced evidence on the issues of group identification, differences in student capacity evident in test results, and differences in learning rates between white and black children. The plaintiffs did not contest the credentials and knowledge of these witnesses.

The district court then faced the plaintiffs' argument that "segregation itself injures negro children in the school system" and therefore tried to ascertain the bounds of the *Brown* decision.[19] The instant court found that the question at the heart of *Brown*—whether segregation on the basis of race deprives black schoolchildren of equal educational opportunities—was a question of fact rather than a question of law.[20] The

[14] Ibid.
[15] Ibid., 668.
[16] Ibid., 673.
[17] Ibid., 668.
[18] Ibid., 672.
[19] Ibid., 676.
[20] Ibid., 678.

court found that the studies cited by the Supreme Court in footnote 11 were less persuasive than the evidence presented in the *Stell* case. In the words of the Southern District of Georgia District Court: "The Court accordingly accepts the evidence given in the present case as having somewhat stronger indicia of truth than that on which the findings of potential injury were made in Brown."[21] As a result, the court perceived *Brown* as inapplicable to the case and dismissed the plaintiffs' complaint.

On appeal, the Fifth Circuit reversed the district court's decision and held that *Brown* was not limited to the particular facts facing the Supreme Court.[22] Lower district courts are bound by Supreme Court opinions due to principles undergirding the federal court system, whether or not such courts think that the Supreme Court made an erroneous decision on issues of fact or law. The broad rule derived from *Brown* is that "separate but equal schools for the races were inherently unequal"[23] and the lower court should have followed that rule, regardless of what it perceived as persuasive contrary evidence.

In this way, the Fifth Circuit established that the conclusion of *Brown*, supported by footnote 11, was controlling. Social science was used to make law in footnote 11, thus exemplifying the principle of legislative fact. Findings of fact are not treated as precedent, whereas findings of law have a *stare decisis* effect on other courts. Hence, the Fifth Circuit's opinion strongly suggests that when there is a legal conclusion that is meant to bind other courts, if that conclusion is based on social science (or finds its support in social science), then the underlying social science ascends to a level of importance on par with precedent. In other words, the cited studies "become de facto

[21] Ibid., 680.
[22] *Stell v. Savannah-Chatham County Board of Education*, 333 F.2d 55 (5th Cir. 1964).
[23] Ibid., 61.

conclusions of law which are not disputable."[24] It is as if the string of social science studies is on par with a string of case law on a given issue. The Court's citation of studies in footnote 11 had two major effects. First, it sent a message to future litigants and *amici curiae* that social science can be used to provide credibility to a suggested conclusion of law. As a result, it may be in a litigant's best interest to show scientific support for a given claim. The second major effect, particularly in light of the Fifth Circuit's decision in *Stell*, is that a question of fact, supported by social science, may be recast as a question of law and therefore become unassailable. Therefore, it can be inferred that when the Supreme Court adopts a rule of law based on empirical support and it assumes the force of precedent, the Court must consider the implications of that rule on future cases.

In the area of race and schooling, in particular affirmative action, the use of social science continues to factor into decisions. A pair of cases on affirmative action—*Grutter v. Bollinger*[25] and *Gratz v. Bollinger*[26]—illustrate the role of *amici* in bringing evidence before the courts and just how many *amici* endeavor to add credibility to their assertions with social science. In *Grutter*, the Supreme Court was faced with the question of whether the use of race by the University of Michigan Law School in its admissions process was unlawful.[27] The challenge to the Law School's policy came from a white Michigan resident who argued that she was denied admission because the policy favored applicants from other racial groups.[28] Respondent Law School asserted that race as a

[24] Gail S. Perry and Gary B. Melton, "Precedential Value of Judicial Notice of Social Facts: *Parham* As An Example," *Journal of Family Law* 22 (1984): 667.
[25] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[26] *Gratz v. Bollinger*, 539 U.S. 244 (2003).
[27] *Grutter*, 311.
[28] Ibid., 316-317.

factor in admissions is intended to obtain the goal of a diverse student body, which has educational benefits.[29] The Supreme Court found that it was important to defer to the Law School's judgment that the racial diversity sought "is essential to its educational mission."[30] Hence, the use of race in admissions decisions did not violate the Equal Protection Clause of the Fourteenth Amendment.

The notion that diversity can translate into educational gains was supported by *amici*. The Supreme Court stated: "In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"[31] The Court proceeded to list the benefits derived from diversity, the government's aims to ensure public institutions are available to all, and the significance of diversity in a top law school like the University of Michigan.[32] For support, the Court cited briefs from *amici* such as General Motors, the United States, and the Association of American Law Schools.[33] This is just a microcosm of the 107 briefs filed in *Grutter* and *Gratz*.[34] Other organizations who filed briefs in these affirmative action cases included the American Psychological Association, the Center for Equal Opportunity, the American Sociological Association, the American Educational Research Association, and the Anti-Defamation League. In this case, the

---

[29] Ibid., 326.
[30] Ibid., 328.
[31] Ibid., 330 (quoting the amicus brief filed by the American Educational Research Association et al.).
[32] Ibid., 330-333.
[33] Ibid.
[34] *Gratz* was closely related to *Grutter*. At issue in *Gratz* was also affirmative action at the University of Michigan. The Court, in a 6-3 decision, "rejected a formalistic point-system plan used by the University of Michigan to admit undergraduates." Duke University School of Law, "An Ode to Justice Lewis F. Powell, Jr.: The Supreme Court Approves The Consideration of Race as a Factor in Admissions by Public Institutions of Higher Education," *Law.duke.edu*, http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/gravbol.html (accessed February 27, 2011).

Court's citation of briefs filed by parties outside of the instant case suggests that those briefs had a strong influence on the outcome of the case. Like *Brown* footnote 11, the social science studies were cited to support the result, a result which helped define the contours of Equal Protection in the race/education context. Here, it is apparent that social science was used to bolster a finding of legislative fact.

In the area of the Fourteenth Amendment, *Brown*, *Stell*, and *Grutter* demonstrate that social science plays a significant role in judicial opinions. In addition, *amici* have, since *Brown* footnote 11, increasingly proffered studies and evidence to encourage the Court's decision making in a particular way. The question remains, however, of whether the Court would have found a particular rule or in favor of one side in the absence of the social science. Stated differently, was the social science in these cases merely used to legitimize views stemming from other sources, such as a justice's perception that "separate but equal" was antiquated, or did the Court rely on the social science when deciding its holding? This is an inquiry that recurs in other areas of law as well, such as homosexual rights and capital punishment.

IV. The Trajectory of Gay Rights after *Lawrence v. Texas*

The Supreme Court decision in *Lawrence v. Texas* is considered by many in the homosexual community as "our *Brown*."[1] In other words, *Lawrence* is considered a landmark decision that "would usher in a civil rights revolution for gay men and lesbians in a fashion equivalent to the civil rights movement inaugurated by *Brown*."[2] Both cases fall under the umbrella of Fourteenth Amendment Equal Protection Clause jurisprudence. *Lawrence*, like *Brown*, reversed the case that sanctioned unfairness and held the group back in the public sphere. As mentioned above, *Brown* overturned the principle of "separate but equal" enshrined in *Plessy v. Ferguson*. *Lawrence* overruled *Bowers v. Hardwick*, a case decided in 1986 that held that the right to privacy did not extend to private, consensual homosexual sex.[3] The reasoning in both *Lawrence* and *Brown* included discussions of changed understandings over the years from the time of *Bowers* and *Plessy*, respectively. Also like *Brown*, *Lawrence* opened the door to other judicial challenges in the quest for equality, such as gay marriage[4] and parenting rights.[5] Another way in which these cases are similar is their reference to, or even reliance upon, extrajudicial factors. In *Brown* footnote 11, the Court listed the seven studies that

---

[1] Katherine M. Franke, "Sexuality and Marriage: The Politics of Same-Sex Marriage Politics," *Columbia Journal of Gender & Law* 15 (2006): 237.
[2] Ibid.
[3] *Bowers v. Hardwick*, 478 U.S. 186 (1986).
[4] For example, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), which "case was the first unqualified court victory in a marriage equality case, and it catapulted [sic] the battle for marriage equality and LGBT civil rights forward." Lambda Legal, "Goodridge v. Department of Public Health, *Lambdalegal.org*, http://www.lambdalegal.org/in-court/cases/goodridge-v-department-of-public-health.html (accessed February 25, 2011).
Lambda Legal, "Status of Same-Sex Relationships Nationwide," February 2, 2011, http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html (accessed March 1, 2011).
[5] *In re Adoption of Caitlin*, 622 N.Y.S.2d 835 (1994) (finding a second parent adoption by females in a same-sex relationship was in the best interest of the children).

supported its conclusion, whereas in *Lawrence*, the Court exhibited its reliance upon three *amici curiae* briefs—those filed by the American Civil Liberties Union, the Cato Institute, and an alliance of history professors—by citing to the briefs throughout the majority opinion.

In the *Lawrence* decision, the question facing the Court was "the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct."[6] Due to a report about weapons, police officers in Houston, Texas, entered the apartment of John Geddes Lawrence, and witnessed Lawrence and another man engaged in sexual activity. The men were arrested and charged under a Texas statute that criminalized "deviate sexual intercourse with another individual of the same sex."[7] The Supreme Court, in the majority opinion written by Justice Kennedy, first explored the principles underlying the *Bowers* decision. The Court, supported by *amicus* briefs, refuted the perception of history upon which *Bowers* relied: "In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*."[8] After discussing history, a case decided in the European Court of Human Rights, cases decided by the Supreme Court in the wake of *Bowers* that cast doubt on its foundation, and criticisms of the decision in the United States, the *Lawrence* Court overruled *Bowers*.[9] Hence, the Texas law violated the principle of equal protection guaranteed under the Fourteenth Amendment.

---

[6] *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).
[7] Ibid., 563 (quoting Texas Penal Code Section 21.06(a) (2003)) (internal quotation marks omitted).
[8] Ibid., 567-68.
[9] "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." Ibid., 578.

Although *Lawrence* does not contain a footnote comparable to footnote 11, its citation of these three *amicus* briefs demonstrates its willingness to look beyond the instant facts and precedent. The facts proffered by *amici*[10] bolstered the Court's discussion of history, which was a key component in the reasoning for why *Bowers* could—and should—be overruled. By casting the discussion in terms of a misunderstanding of history, the Court avoided delving into social science, in particular the issues in the American Psychological Association ("APA") *amicus* brief about the scientific "finding" that homosexuality is not a mental disorder and the fitness of homosexuals to be parents.[11] It could be that the Court just accepted the former and did not want to, in the case of the latter, widen the opinion to explore potential social issues likely to flow from the decision. Hence, although the Court crafted a broad rule about equal protection, it narrowed its discussion to correcting historical errors.

In light of the *Lawrence* decision and its advocacy of equal protection regardless of sexual orientation, challenges came to lower courts on the issues of gay parenting and gay marriage. Those cases employ social science to a tremendous degree. For example, in *In re Adoption of Caitlin*, the Family Court of New York, Monroe County, was faced with "petitions for second parent adoptions by the lesbian life partners of biological mothers."[12] In the two cases at issue, both couples were in long-term committed relationships spanning a number of years and reproduced using artificial insemination.[13] The court began its analysis by stating that most states' laws do not explicitly speak to

[10] 33 amicus briefs were filed. For list of *amicus* briefs: Supreme Court of the United States, "Docket for 02-102," *Supremecourt.gov*, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/02-102.htm (accessed February 3, 2011).
[11] American Psychological Association, "Brief for Amici Curiae in Support of Petitioners," *APA.org*, http://www.apa.org/about/offices/ogc/amicus/lawrence.pdf (accessed February 3, 2011).
[12] *In re Adoption of Caitlin*, 622 N.Y.S.2d 835 (1994).
[13] Ibid., 836.

same sex adoptions, only two states expressly bar them, and lower courts in twelve states have sanctioned such adoptions.[14] Using the best interests of the child standard, courts in both New York—*Matter of Evan*[15]—and Vermont—*Adoptions of B.LV.B. & E.L.V.B.*[16]—found that adoption was in a child's best interests and in line with public policy.[17] In light of those cases, the New York court in the instant case redefined the issue from whether "it is in the best interest of children to have two mothers, as opposed to a single mother or a mother and a father" and instead defined it as "whether, given the realities of the relationships between the children and the petitioners and between the petitioners and the biological mothers, would the children herein be better or worse off if the adoptions were approved?"[18]

Despite the fact that children, through adoption, acquire numerous rights, such as the right of parental visitation should the parents decide to separate, there could be opposition to adoption "if it could be shown that upbringing by same sex parents negatively impacted the children involved."[19] The court determined that this argument was moot, given the numerous studies that found that upbringing by homosexual parents had no adverse impact on children. To support this assertion, the court cited research that disproved the notion that upbringing by homosexual parents will cause their children to grow up homosexual.[20] The court referenced cases in New York, Ohio, and Massachusetts that had also cited these studies, studies that uniformly showed that sexual orientation occurs randomly and is no more likely to occur among children raised by

[14] Ibid., 838.
[15] *Matter of Evan*, 153 Misc 2d 844 (Sur Ct, NY County 1992).
[16] *Adoptions of B.LV.B. & E.L.V.B.*, 160 Vt 368 (1993).
[17] *In re Adoption of Caitlin*, 838-39.
[18] Ibid., 839.
[19] Ibid., 840.
[20] Ibid.

homosexual parents.[21] The court also noted studies that showed that children who come from homosexual households are not ridiculed with greater frequency than children from other types of households.[22] In conclusion, the court granted the adoptions "because it was in the children's best interests to do so" and "[t]he court is less concerned for the welfare of these adoptive children than for many of the children of heterosexual parents who find themselves before the court."[23]

The *In re Adoption of Caitlin* decision evidences a trend throughout child custody cases involving homosexual parents: citations to social science. By citing other court cases that discuss social science,[24] the Family Court of New York validated the findings that children of homosexual couples are not disadvantaged in any way due to the sexual orientation of their parents. The court also aligned itself with the *Brown* footnote 11 precedent of looking to extrajudicial factors to reach a decision that impacts equal rights. *In re Adoption of Caitlin* is therefore representative of the custody realm specifically and the post-*Lawrence* landscape generally. This assertion is supported by empirical evidence published the same year of *In re Adoption of Caitlin*. In her 1994 Wayne Law Review article, Patricia J. Falk "identified all available legal opinions involving gay individuals in four substantive areas—child custody and visitation (CC), employment discrimination (ED), first amendment (FA), and criminal sodomy (CD)—which were decided through 1987."[25] Using quantitative and qualitative analysis, Falk made two key findings. First, "one-third of the studied gay rights cases contained one or more citations

[21] Ibid. (discussing the studies in *Matter of Evan*, 153 Misc 2d 844 (Sur Ct, NY County 1992); *Conkel v. Conkel*, 31 Ohio App 3d 169 (Ohio App 1987); *Bezio v. Patenaude*, 381 Mass. 563, 578 (1980))
[22] Ibid., 841.
[23] Ibid.
[24] Cited cases included *Matter of Evan*, 153 Misc 2d 844 (Sur Ct, NY County 1992) and *Conkel v. Conkel*, 31 Ohio App 3d 169 (Ohio App 1987).
[25] Patricia J. Falk, "The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts," *Wayne Law Review* 41 (1994): 9-10.

or references to social science"; and second, "the use of social science in legal opinions involving gay individuals did not vary significantly in terms of the substantive area. Thus, the relatively high rate of citation was maintained across case contexts."[26] This study bolsters the notion that in custody cases involving two homosexual parents, the reasoning of *In re Adoption of Caitlin* is not anomalous.

Studies about children with homosexual parents have relevance beyond the custody context. Cases about gay marriage also entail discussions about the impact of marriage (or lack of marriage) on the children of same-sex couples. For example, in the seminal gay marriage case *Goodridge v. Department of Public Health*,[27] the Massachusetts Supreme Judicial Court found that a state law that limited marriage to a man and a woman violated the state constitution's equality provision. In so deciding, the four member majority cited studies that demonstrated that households with same-sex parents did not disadvantage or adversely affect children[28] and asserted that denying these parents the right to marry may have a negative impact on those children.[29] In this way, the question was not whether being raised by homosexual parents is harmful but was instead whether being raised by homosexual parents who the state prevents from marrying is harmful. Thus, studies that courts like the Family Court of New York would recognize as persuasive in *In re Adoption of Caitlin* in deciding whether to permit a

[26] Ibid., 16.
[27] *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003).
[28] Ibid., 339, n. 30.
[29] Ibid., 348 ("the State's refusal to accord legal recognition to unions of same-sex couples has had the effect of creating a system in which children of same-sex couples are unable to partake of legal protections and social benefits taken for granted by children in families whose parents are of the opposite sex. The continued maintenance of this caste-like system is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on 'the best interests of the child.'").

second parent adoption may be considered influential in deciding whether to allow gay marriage.

The plaintiffs in *Goodridge* were fourteen people who desired "marry[ing] his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children."[30] They filed suit against the Department of Public Health, which oversees the issuance of marriage licenses, claiming that the denial of marriage licenses to same-sex couples violated Massachusetts law.[31] In its discussion, the court stated that children are deprived of benefits from the state and security because their parents are precluded from marriage; by disallowing marriage, children raised by same-sex couples are on different footing than children raised by married heterosexual couples.[32]

The court refuted the notion that the State's interest in marriage meant that only the Legislature could dictate what marriage means and who can participate in that institution.[33] In a supporting footnote, the court asserted that the Legislature likely knows of the studies on the issue of same-sex parenting and its impact on children "and has drawn the conclusion that a child's best interest is not harmed by being raised and nurtured by same-sex parents."[34] The majority dismissed the focus by the dissent on divergence in study results. Hence, although it is appropriate to defer "to the Legislature to decide social and policy issues…it is the traditional and settled role of courts to decide constitutional issues."[35] This Massachusetts court concluded that "construe[ing] civil

[30] Ibid., 314.
[31] Ibid., 315-16.
[32] Ibid., 334-36.
[33] Ibid., 338-39.
[34] Ibid., 339, n. 30.
[35] Ibid., 339.

marriage to mean the voluntary union of two persons as spouses…advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources."[36] This ruling reflects the intertwined nature of notions about child rearing and marriage. In fact, one could reasonably argue that favorable conclusions about homosexuals in the former—thanks to social science studies[37]—shapes the advancement of rights in the latter context.

The *Goodridge* decision is significant for numerous reasons. First, it condoned same-sex marriage, thus picking up where *Lawrence* left off in its recognition of "the central role that decisions whether to marry or have children bear in shaping one's identity."[38] Second, it asserts the validity of studies on the issue of same-sex parenting. Yet the divide between the majority and dissent on the issue of the credibility of these findings evidences that "[t]he role that social science plays in the same-sex marriage debate is currently a contested issue that will likely impact future same-sex marriage cases."[39] Third, consistent with the increased prevalence of *amicus* briefs since the

[36] Ibid., 343.
[37] The validity of the social science is a point of contention between the majority and dissent. Although the majority found these studies persuasive, the dissent stated that "[c]onspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results." Ibid., 358. For the dissent, there has not been enough long-term observation of children raised by same-sex couples, so even if there is not "bias or political agenda behind the various studies of children raised by same-sex couples," it would be reasonable for the Legislature, "as the creator of the institution of civil marriage," to desire more concrete evidence "before making a fundamental alteration to that institution." Ibid., 359.
[38] Ibid., 313. Civil marriage between homosexuals "is a question the United States Supreme Court left open as a matter of Federal law in *Lawrence*, where it was not an issue." Ibid., 313 (internal citation omitted).
[39] Vanessa A. Lavely, "The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases," *UCLA Law Review* 55 (2007): 280, n. 245 (citing Stephen A. Newman, "The Use and Abuse of Social Science in the Same-Sex Marriage Debate," *New York Law School Law Review* 49 (2004)).

Brandeis brief,[40] the Supreme Judicial Court of Massachusetts witnessed the filing of numerous briefs by *amici curiae*.[41] Fourth, on a macro level, the case is noteworthy because it explores the huge shift in social science and public attitudes from the days when homosexuality was considered a mental illness. Thus, *Goodridge* may be labeled the paragon case of social science in the gay rights realm—not only was it used to justify a result, but that result was a movement towards equal rights. The landscape is best summarized by the *Goodridge* dissent:

> The advancement of the rights, privileges, and protections afforded to homosexual members of our community in the last three decades has been significant, and there is no reason to believe that that evolution will not continue. Changes of attitude in the civic, social, and professional communities have been even more profound. Thirty years ago, The Diagnostic and Statistical Manual, the seminal handbook of the American Psychiatric Association, still listed homosexuality as a mental disorder. Today, the Massachusetts Psychiatric Society, the American Psychoanalytic Association, and many other psychiatric, psychological, and social science organizations have joined in an amicus brief on behalf of the plaintiffs' cause. A body of experience and evidence has provided the basis for change, and that body continues to mount.[42]

Falk, nearly a decade prior to the *Goodridge* decision, posited that courts use social science in gay rights cases to accomplish four key goals. It is fair to assert that

---

[40] Falk asserts that one of the reasons that there is a high prevalence of social science in gay rights cases is that the current legal landscape is one "in which the citation of social science has become more routine." "The Prevalence of Social Science in Gay Rights Cases," 21.

[41] For example, *amicus briefs* were filed by The Massachusetts Psychiatric Society, the National Association for Research and Therapy of Homosexuality, Inc., and the Catholic Action League of Massachusetts. One scholar has argued that social science is frequently cited by courts when faced with gay rights cases because "two distinct types of organizational amici: gay and civil rights groups and scientific associations, such as the American Psychological Association" supplement the arguments of the litigants. Falk, 21-22. In other words, because there is more information before the courts, it is more likely than not that courts will incorporate that evidence into their opinions. In *Goodridge*, both types of organizations Falk delineates submitted amicus briefs. Interestingly, the majority's references to *amici* were to *refute* the arguments of *amici* advocating against gay marriage ("The department suggests additional rationales for prohibiting same-sex couples from marrying, which are developed by some amici. It argues that broadening civil marriage to include same-sex couples will trivialize or destroy the institution of marriage as it has historically been fashioned." *Goodridge*, 337. "We also reject the argument suggested by the department, and elaborated by some amici, that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict." *Goodridge*, 340).

[42] *Goodridge*, 394

each of these four aims is apparent in the *Goodridge* opinion. One aim is to inform different audiences about homosexuality.[43] Through education, a given court's aim is to convince these audiences that decisions reached are valid.[44] Second, courts employ social science in order to refute ingrained stereotypes or myths about homosexuality.[45] Third, courts use "the authoritative appeal of 'science,' in the guise of social science citations, as a means of desentizing or even sanitizing, the troubling moral and political issues associated with homosexuality."[46] Fourth, social science is a way to disguise "decisions reached on other policy grounds, thereby shifting responsibility for difficult decision making."[47]

Goodridge illustrates how these goals are interrelated and are not mutually exclusive. By citing social science studies on the issue of homosexuals' fitness as parents, the Supreme Judicial Court of Massachusetts was sending a message that homosexuals and heterosexuals make equally good parents. In so doing, the court also accomplished the second goal, because the studies debunk the idea that children raised by a same-sex couple would be adversely affected. As for quelling concerns about homosexuality, the court referenced arguments made by *amici*: "Several amici suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral."[48] To this the court responded that: "The absence of any reasonable relationship between…an absolute disqualification of same-sex couples who wish to enter into civil marriage and…protection of public health, safety, or general

[43] Falk, 30.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] *Goodridge*, 341.

welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual."[49] In this way, the Massachusetts court pointed to the *absence* of proof as support for its decision to equalize marriage. As for the fourth aim, using social science as a façade for a decision reached on other grounds, it is nearly impossible to know—in the absence of personal papers or memoirs—whether that is the case.[50]

It remains to be seen whether the *Goodridge* decision and its reasoning will influence other courts in the way that *Brown* and its progeny, handed down from the Supreme Court, influenced courts throughout the country. This is not merely a question of superiority of the Supreme Court vis-à-vis state courts, but is a question of whether social science will be treated like precedent similar to the way *Stell* treated *Brown* footnote 11. Stated differently, will studies on gay parenting—which influence other determinations, such as marriage—rise to the level of precedent that must or should be followed by other courts, even those in other states? Or will battles over the legitimacy of those studies override efforts by homosexual litigants to obtain equal footing as heterosexuals on issues of parenting and marriage?

If a decision must come from the Supreme Court in order to change the landscape as *Brown* did, the question arises about the likelihood the Court would either hear a case

---

[49] Ibid.

[50] Justice Oliver Wendell Holmes posited that there are "two entirely different modes of reaching and justifying legal conclusions: One mode was adopted for purposes of public presentation, while the other operated behind the scenes as the real determiner of decisions." Steven D. Smith, "Believing Like a Lawyer," *Boston College Law Review* 40 (1999): 1081. Hence, a judge may decide based on his or her own principles of justice that a certain result should be reached but may cite social science in the reasoning for that result. This may be done to add an objective gloss to an entirely subjective stance, or it may be done to add gravity to a personal opinion. If judges are supposed to be objective arbiters, then judges may try to find ways to mitigate the appearance of personal biases as driving an opinion. Hence, it may be impossible to know whether a judge cites social science because he or she truly believes it to be persuasive or whether the citation is done to conceal the significant role of personal motivations.

on these issues or use expansive enough language in a different opinion to touch these issues. It may be that more equal rights are obtained through the states and it is better for advocates to focus their efforts on that level. As the *Goodridge* court stated, quoting from *Arizona v. Evans*: "Fundamental to the vigor of our Federal System of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."[51] It could be that until there is a fundamental shift in the people's attitudes, such that there will be acceptance of a decision across a large segment of society, the Supreme Court will refrain from passing judgment. As Justice Scalia said in the Eighth Amendment case *Stanford v. Kentucky,* the reasoning of which is certainly pertinent here, the people who should hear arguments about teenagers facing the death penalty are members of the American public: "It is they, not we, who must be persuaded…our job is to *identify* the 'evolving standards of decency'; to determine, not what they *should* be, but what they *are*. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism."[52]

The divide between the case law in the Fourteenth Amendment context illustrates the uses of and limits on social science. The next Part, which explores Eighth Amendment jurisprudence, enables insight into the role of social science in this third realm. Unlike the aforementioned gay rights cases (with the exception of *Lawrence*), which are decisions on the state or county levels, the Supreme Court decided the cases that follow. Thus, acceptance of social science by the Court in this context can assume the stature of binding precedent like *Brown* footnote 11. Two key questions that come

[51] Ibid., 328 (quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995)) (internal quotation marks omitted)).
[52] *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (quoted in Falk, 69).

into sharp focus, particularly in light of the integration and gay rights cases are: first, why is social science in the death penalty arena treated differently from its treatment in the integration context; and second, what accounts for the Court's inconsistent treatment of social science even within the capital punishment realm?

V. Capital Punishment: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[1]

Recently, social science has been used to ascertain the meaning of key terms in the Eighth Amendment such as "cruel" and "unusual."[2] Whereas the former is implicated in cases that consider the deterrent abilities of the death penalty, the latter is involved in cases where a party claims that the death penalty is imposed in a discriminatory way.[3] In addition to the Cruel and Unusual Punishment Clause, the Supreme Court of the United States has also contemplated the meaning of "excessive" sanction and whether imposing death upon particular classes of defendants amounts to an excessive punishment.[4] In endeavoring to ascertain the meaning of each of these words, the Court has utilized social science. Not only have dissenters argued for the untrustworthiness of studies relied upon by the majority (like the *Goodridge* dissent[5]), but they have put forth other empirical findings to bolster their arguments. In addition to this trend in the judicial opinions, the jurisprudence indicates that the Court will not deem a certain class punishable by the death penalty unless there is a national consensus. In this way, the Court will utilize social science to make law, and thus employ legislative facts, but only to the extent that the public condones.

[1] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[2] The text of the Eighth Amendment is: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Constitution, amend. 8.
[3] Monahan and Walker, "Social Science in Law," 315.
[4] Ibid.
[5] See footnote 128.

In the realm of deterrence, two cases from the 1970s—*Furman v. Georgia*, which was decided in 1972,[6] and *Gregg v. Georgia*, which was decided in 1976[7]—warrant analysis because they demonstrate reliance on social science in ascertaining whether the death penalty has a deterrent effect. In *Furman*, the issue facing the Court was whether imposing the death penalty under Georgia and Texas statutes amounted to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[8] According to the statutes at issue, a judge or jury had the discretion to decide whether death or a lighter punishment should be imposed.[9] As administered, the Court found the death penalty unconstitutional.[10]

Justice Marshall, in his concurring opinion, bolstered this holding with support from social science.[11] He cited Thorsten Sellin, a leading figure in the field of capital punishment, who argued that the death penalty is unable to deter murderers, but pointed out three main flaws with his evidence.[12] Problems aside, Justice Marshall recognized the validity of Sellin's findings: "He compares states that have similar characteristics and finds that irrespective of their position on capital punishment, they have similar murder rates."[13] Justice Marshall continued, citing myriad studies in footnotes: "Statistics also show that the deterrent effect of capital punishment is no greater in those communities

---

[6] *Furman v. Georgia*, 408 U.S. 238 (1972)
[7] *Gregg v. Georgia*, 428 U.S. 153 (1976)
[8] *Furman*, 239-40.
[9] "We deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12." Ibid., 253.
[10] Ibid., 239-40.
[11] His utilization of social science is recognized by Justice Brennan's concurrence: "as my Brother MARSHALL establishes, the available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment." Ibid., 301.
[12] Ibid., 349-50.
[13] Ibid., 350. Finding these findings credible aligned Justice Marshall with the United Nations and Great Britain, both of which recognize Sellin's statistics' validity. Ibid.

where executions take place than in other communities. In fact, there is some evidence that imposition of capital punishment may actually encourage crime, rather than deter it."[14] In addition, other studies demonstrate that police are not safer in communities with the death penalty than those without it[15] and "a substantial body of data" suggests that the impact of the death penalty on homicide rates in prison is negligible.[16] In concluding his discussion of the deterrent impact of the death penalty and arguing that capital punishment cannot be justified on the basis of deterrence, Justice Marshall asserted: "Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society."[17]

Although the dissent did not discount the potential validity of these studies, Chief Justice Burger's dissent stressed the debate among scholars. With an "empirical stalemate," the burden shifted to states to prove that the death penalty is better than life imprisonment at deterring perpetrators.[18] The problem with this burden-shifting is that it precludes deciding "an unresolved factual question" and it is just "an illusory solution."[19] These assertions, although not the crux of the dissent, illustrate a faith in the eventual resolution to the chasm between the studies on each side. In labeling the question one that is factual, the Chief Justice suggested that it is only a matter of time until the one true answer emerges. Until that time, however, legislatures—rather than judges—should take

[14] Ibid., 351 (internal citations omitted).
[15] Ibid., 351-52.
[16] Ibid., 352.
[17] Ibid., 353.
[18] Ibid., 395.
[19] Ibid., 396.

"the opportunity to make a more penetrating study of these claims with the familiar and effective tools available to them as they are not to us."[20]

In the period after *Furman* and before *Gregg v. Georgia*, thirty-five state legislatures enacted new capital punishment statutes in order to address the *Furman* Court's concerns with standard-less impositions of the death penalty.[21] The specific question facing the *Gregg* Court was whether Georgia could impose the death penalty on a defendant under its new, post-*Furman* statute.[22] The general question was whether capital punishment was "so totally without penological justification that it results in the gratuitous infliction of suffering."[23] In light of the latter question, the Court stated that while the issue of the death penalty as a deterrent was the focus of considerable debate,[24] as to whether capital punishment "function[s] as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view."[25] In sum, although "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures," "the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."[26] For the *Gregg* plurality, it appears as if the presence of evidence in favor of deterrence, even if in equipoise with studies to the contrary, suffices to establish the utility of the death penalty and its constitutionality.

As in *Furman*, Justice Marshall wrote separately in *Gregg* and in his *Gregg* dissent, he once again expressed his stance—based on the studies reviewed in *Furman*—

[20] Ibid., 405.
[21] *Gregg*, 179-80.
[22] Ibid., 207.
[23] Ibid., 183.
[24] To illustrate this debate, the Court cited a sample of these studies in a footnote on 185.
[25] Ibid., 185 (internal citation omitted).
[26] Ibid., 186-87.

that the notion of deterrence cannot suffice to justify capital punishment. Not only did Justice Marshall again posit that the evidence relied upon in *Furman* was solid, but he also endeavored to discredit a study at the crux of the Solicitor General's *amicus* brief. That study, by Isaac Ehrlich, conducted in the year after the *Furman* decision, was "the first scientific study to suggest that the death penalty may have a deterrent effect."[27] Beyond citing the numerous studies critiquing Ehrlich's findings, Justice Marshall found flaws in the methodology, the time period studied, and conclusions drawn.[28] This dissent once again underlines the role of *amicus* briefs in judicial opinions and demonstrates that critiques of arguments in favor of capital punishment can be the basis for finding against the constitutionality of the death penalty. In other words, one may see a parallel between Justice Marshall's dissent and *Goodridge* in that both instances find meaning in the absence of social science proof.

Both *Furman* and *Gregg* illustrate the principle set forth in *Trop v. Dulles*: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[29] The *Gregg* Court, citing the dissents of Chief Justice Burger and Justice Powell in *Furman*, described how legislatures are the body tasked with responding to the public's values, particularly when punishments are at issue.[30] If the judiciary, rather than the legislatures, decides a punishment is barred by the Eighth Amendment, that precludes the public from demonstrating their preferences through the standard democratic avenues.[31] Hence, "a punishment selected by a democratically elected legislature" will be presumed valid unless the penalty specified is "cruelly

[27] Ibid., 234.
[28] Ibid., 234-36.
[29] *Trop v. Dulles*, 356 U.S. 86, 101 (1958)
[30] *Gregg*, 175-76.
[31] Ibid., 176.

inhumane or disproportionate to the crime involved."[32] Justice Marshall's concurrence in *Furman* best encapsulates the import of public opinion: if the public abhorred a punishment, even if it were not excessive and had a valid legislative rationale, that repugnance could invalidate that punishment and "equate a modern punishment with those barred since the adoption of the Eighth Amendment."[33] Although "[t]here are no prior cases in this Court striking down a penalty on this ground…the very notion of changing values requires that we recognize its existence."[34]

The issue of public opinion vis-à-vis certain classes of defendants appears in the context of imposing death on mentally retarded defendants and offenders who were under eighteen years of age when they committed certain crimes.[35] The question is whether these executions amount to an "excessive" sanction. For example, in *Atkins v. Virginia*, the issue facing the Supreme Court was whether executions of mentally retarded criminals amounts to cruel and unusual punishment in violation of the Eighth Amendment.[36] To begin its opinion, the Court set forth the rule that the sure way to reliably ascertain the moral compass of the populace is to look at laws enacted by legislatures across the country.[37] In tracing the national consensus, the Court discussed the landscape following its decision in *Penry v. Lynaugh*,[38] which demonstrated that numerous legislatures banned the execution of mentally retarded defendants and even

[32] Ibid., 175.
[33] *Furman*, 332.
[34] Ibid.
[35] Three years after *Atkins*, the Supreme Court employed social science and utilized an analysis similar to *Atkins* in the case of *Roper v. Simmons*, 543 U.S. 551 (2005). The Court held that the execution of offenders who were under eighteen years of age when they committed their crimes would violate the Eighth and Fourteenth Amendments.
[36] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[37] Ibid., 312.
[38] *Penry v. Lynaugh*, 492 U.S. 302 (1989) (finding that imposing the death penalty on the mentally retarded was not unconstitutional)

states that deemed it legal rarely carried out these executions.[39] These laws, taken together, amount to a consensus, one that "reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty."[40] In sum, because executing mentally retarded criminals would not further either the deterrent or retributive purposes behind the death penalty, and the fact that the national consensus is opposed to this punishment for this class of people, the imposition of death on this mentally retarded defendant by the state of Virginia would amount to an excessive sanction.

Two elements of the *Atkins* opinion are worth analyzing. The first is general to the Eighth Amendment case law and the second is specific to this case. First, the survey of legislation across the states is intriguing because it demonstrates that the Court's jurisprudence may shift with the tides of public opinion. In this way, the Court appears as a reactionary body by making law that is already the case in numerous states. Rather than being proactive, the Court simply ratified the shift in legislatures. Notably, this contrasts with the thrust of the jurisprudence in the integration cases under the Fourteenth Amendment umbrella. Whereas here public opinion is significant, if not outcome determinative, in the context of integration cases, discussions of laws across the country do not play a large role (if any role at all).

The second aspect of *Atkins* that is striking is the dearth of social science cited. Although social science on the blameworthiness of mentally retarded defendants weaves throughout the *Penry* decision, no such studies are cited in *Atkins*. Further, in contrast to the discussions of studies on the issue of deterrence in *Furman* and *Gregg*, the mention of

[39] *Atkins*, 314-16.
[40] Ibid., 317.

deterrence in *Atkins* lacked any footnotes to, or analysis of, studies. According to James R. Acker, who undertook an empirical study of capital punishment decisions spanning 1986 to 1989, a shift occurred from the period of the mid-1960s through the early 1980s to the 1986-89 phase.[41] Whereas in the former, "the justices most frequently cited social science evidence to discuss the deterrent efficacy of capital punishment (27.2% of social science citations) (e.g., *Furman v. Georgia* 1972; *Gregg v. Georgia* 1976)," in the cases decided between 1986 and 1989, deterrence and incapacitation fell by the wayside, "as if earlier decisions had established empirical 'precedent' that would not be reexamined."[42] *Atkins* was decided in 2002, hence the notion of social science "precedent," which was already ingrained in the 1980s, was probably even more entrenched in 2002. As such, studies on the issues of mentally retarded defendants and deterrence—like the social science in *Brown* footnote 11—assumed the force of binding Supreme Court precedent.

In that 1986-89 period, the issue that rose to the fore was discrimination on the basis of race in applying the death penalty.[43] Acker found that 32.6% of citations to social science were focused on this issue.[44] The paradigm case on the issue of social science utilized to show racial discrimination in the imposition of the death penalty is *McCleskey v. Kemp*, decided in 1987.[45] Like the aforementioned cases that entailed "social fact issues which made empirical evidence directly relevant or even essential to the justices' case decisions," *McCleskey* also evidenced the pertinence of social science to a case in which empirical and legal issues were enmeshed.[46] Whereas the "cruelty"

---

[41] James R. Acker, "A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989," *Law & Society Review* 27 (1983).
[42] Ibid., 71.
[43] Ibid.
[44] Ibid.
[45] *McCleskey*, 481 U.S. 279 (1987).
[46] Acker, 70.

element of the Eighth Amendment implicated discussions of deterrence (*Furman*) and "excessive" invoked analyses of different classes of offenders (*Atkins*), the key element of the Eighth Amendment in discrimination cases is the word "unusual."[47] Interestingly, although the Supreme Court found the statistics proffered in *McCleskey*—murderers of white people are disproportionately sentenced to death compared to murderers of black people—credible, the Court found in favor of the State of Georgia.[48]

In *McCleskey*, the issue before the Court was "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment."[49] McCleskey, a black man, was convicted for the murder of a white police officer and was sentenced to death.[50] In his petition for a writ of habeas corpus, filed in the Federal District Court for the Northern District of Georgia, McCleskey argued that the capital sentencing process in Georgia is conducted in a way that discriminates on the basis of race.[51] To substantiate this assertion, he presented the Baldus study,[52] a sophisticated statistical report "that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant."[53]

In Justice Powell's majority opinion, he began by stating the principle that when a defendant claims a Fourteenth Amendment equal protection violation, that defendant has

---

[47] "The 'unusual' prong of the Eighth Amendment has been the focus of arguments that the death penalty is invoked with disproportionate frequency on defendants whose victims have been white." Monahan and Walker, "Social Science in Law," 323.
[48] Randall L. Kennedy, "*McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court," *Harvard Law Review* 101 (1988): 1388.
[49] *McCleskey*, 282-83.
[50] Ibid., 284-85.
[51] Ibid., 286.
[52] This study was done by Professors David C. Baldus, Charles Pulaski, and George Woodworth. Ibid.
[53] Ibid.

the burden of showing that purposeful discrimination exists.[54] Therefore, in this case, McCleskey would have to prove that "decisionmakers in *his* case acted with discriminatory purpose." Instead of demonstrating discrimination in his particular case, however, he relied on the Baldus study, which would apply "to all capital cases in Georgia, at least where the victim was white and the defendant is black."[55] Not only would accepting the general findings of the study in this context compel a certain outcome without consideration of the facts of a specific case,[56] but such acceptance could undermine the State's entire criminal justice system, which depends on case-by-case discretion.[57]

As for the claim that the Baldus study proved that capital punishment in Georgia violates the Eighth Amendment and McCleskey's argument that his sentence was inconsistent with the sentences imposed in other murder cases, the Court declined to find that there is "an unacceptable risk of racial prejudice influencing capital sentencing decisions."[58] Even though the Baldus study suggested that there is a discrepancy that correlates with race, "disparities in sentencing are an inevitable part of our criminal justice system."[59] Yet these discrepancies do not clearly amount to a major system-wide flaw that casts doubt on the criminal justice system as a whole. Moreover, there are built-

[54] Ibid., 292.
[55] Ibid., 293.
[56] Ibid.
[57] Ibid., 297. Justice Powell stated: "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." Ibid. Moreover, the Baldus study could not show that the State of Georgia continued to impose the death penalty because of its racial impact: "As legislatures necessarily have wide discretion in the choice of criminal laws and penalties, and as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment…we will not infer a discriminatory purpose on the part of the State of Georgia." Ibid., 298-99 (internal citations omitted).
[58] Ibid., 309.
[59] Ibid., 312.

in protections for defendants, including safeguards intended to mitigate racial bias.[60] Therefore, the Court held that "the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."[61]

Moreover, two other factors compelled the outcome against McCleskey in this case. First was the fact that if one were to extrapolate from McCleskey's claim about racial bias, "we could soon be faced with similar claims as to other types of penalty."[62] The Court followed this statement with a footnote to studies about the issues of racial disparities in terms of prison sentences.[63] Further, the concept of discrimination on the basis of race could be extended to claims by other minority groups or assertions that disparities exist because of gender.[64] This would turn into a slippery slope, because there could be claims rooted in "statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges."[65] Simply, there would be no limit to the type of claim someone could bring if there were any discernable statistical differences.

The second other major element that counseled against finding in favor of McCleskey is the notion that legislatures, rather than courts, are in the best position to ascertain appropriate punishments for certain crimes.[66] Justice Powell cited Chief Justice Burger's dissent in *Furman* for the principle that legislatures respond to the will of the people and cited *Gregg* for the idea that legislatures are best able to ascertain the merits

[60] Ibid., 313.
[61] Ibid.
[62] Ibid., 316.
[63] Ibid., 319, n. 38.
[64] Ibid., 316-17.
[65] Ibid., 317.
[66] Ibid., 319.

of statistical studies and their applicability to local conditions.[67] Because capital punishment is the law in over two-thirds of American states and McCleskey's challenge has broad applicability—"the validity of capital punishment in our multiracial society"—the Court refrained from handing down a rule that would sweep wider than the narrow question before it.[68]

According to Acker, by rejecting McCleskey's arguments, the Court "effectively foreclose[d] any future federal constitutional challenges to the administration of capital punishment based on broad-scale empirical studies that reflect arbitrariness or invidious discrimination in the application of death penalty statutes."[69] Similarly, Baldus believes that the Court "establish[ed] burdens of proof for the use of statistical evidence to establish discrimination in death penalty cases that were impossible to meet."[70] These conclusions, in conjunction with an analysis of the Court's reasoning, suggest that the Court saw that the public approved of the death penalty and the majority feared that deciding in favor of this defendant would uproot that system. Stated differently, the Court seemed to fear that resting its opinion on the validity of the Baldus study would permit one study—which focused on the race of the *victim* rather than the race of the *defendant*—to drastically change the Eighth Amendment landscape.[71] In this way, the majority framed the inquiry in terms of public support for the death penalty generally,

---

[67] Ibid., *Furman*, 383 (Burger, C.J., dissenting); *Gregg*, 186.
[68] *McCleskey*, 319. As David C. Baldus states, this outcome makes sense because finding in favor of McCleskey "could threaten the legitimacy of death sentencing in Georgia and possibly beyond. At the very least, such a ruling would complicate its administration." David C. Baldus, "Keynote Address: The Death Penalty Dialogue Between Law and Social Science," *Indiana Law Journal* 70 (1995): 1039.
[69] Acker, 76, n. 8.
[70] Baldus, 1040.
[71] As David C. Baldus, George Woodworth, and Charles A. Pulaski, Jr. state: "the principal basis of *McCleskey's* discrimination claims was not evidence of discrimination against black defendants, but rather against defendants whose victims were white. This difference constitutes another deviation from the typical civil rights model in which the claimants suffered adverse treatment or denial of benefits on the basis of their gender or race, factors over which they had no control." Excerpted in Monahan and Walker, "Social Science in Law," 331).

rather than public support for disproportionate racial impact in the realm of criminal justice.

Like in the integration context, the Supreme Court has utilized social science as legislative facts to make law in the Eighth Amendment realm. Similar to *Brown* footnote 11, social science in *McCleskey* assumed the force of precedent, although in the former opinion the Court signaled a receptivity to claims on Equal Protection grounds, whereas in the latter the Court established a high hurdle for plaintiffs to clear. In both, the rule adopted had far-reaching implications: integration in schooling and preservation of the practices in jurisdictions that impose the death penalty. Unlike the integration cases that employ empirical studies, in capital punishment cases the Court insists on deference to legislatures. Deference to the legislature does two things: first, it helps shift the responsibility for capital punishment decisions to the states and second, it underlines the aforementioned reactionary nature of the Court in this area of law. In light of some of these similarities and differences in Supreme Court jurisprudence, one may try to make predictions about how the jurisprudence in the gay rights context will evolve. It is also possible to draw some conclusions about what accounts for these parallels and variations.

VI. The Interaction of Public Opinion and Social Science

The three areas of law examined above demonstrate that judges, assisted by studies brought forth by *amici*, may consider and be swayed by extrajudicial facts.[1] Although some of the aforementioned opinions grappled with findings in the text and other cases merely cited studies as support for a given assertion, the thread that weaves through these cases is the role of social science. These cases also demonstrate that having empirical findings on a given side is not enough to ensure victory in a given case. The real challenge may arise if the opposing party can show a division in findings or can poke enough holes in proffered evidence. Hence, it is not merely the number of studies that support a given proposition that matter, but it is also the cohesiveness of findings and sound methodology in those studies that make a difference. Moreover, sometimes courts acknowledge the existence and potential significance of empirical outcomes, but prefer to push interpretation upon legislatures on the basis that legislatures are said to have superior tools for comprehending studies. As Justice Scalia stated in his *Roper v. Simmons* dissent: "Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one."[2]

There is also no mistaking the references, in the judicial opinions, to public sentiment and laws in myriad jurisdictions. Particularly in the Eighth Amendment context, it appears that the Supreme Court evaluates national opinion, as reflected in laws

[1] "[A]micus briefs provide the Court with information regarding the number of potentially affected parties, these parties' optimal dispositions, and social scientific, political, and legal arguments that often buttress those arguments submitted by the parties to litigation." Collins, 810.
[2] Roper v. Simmons, 543 U.S. 551, 618 (2005).

across the country, as on par with social science findings in terms of importance. Somewhat intertwined with the notion of public opinion is the citation by courts to the identities and contributions of *amici*. As political science professor Paul M. Collins Jr. observes, the Supreme Court has witnessed a marked increase in the number of *amicus* briefs filed and a jump in the number of parties cosigning those briefs.[3] If a large number of parties cosign a brief in support of one side, that "may serve as a crude barometer of public opinion on an issue."[4] He points to two explanations for why the number of cosigners helps reflect public opinion. First, because "amicus briefs are aimed at specific cases and issues before the Court," the justices are better able to ascertain public sentiment on a certain topic than if they just looked at opinion polls.[5] Second, because interest groups file *amicus* briefs, "the number of groups cosigning such briefs may serve as a reliable indicator to the justices as to the number of potentially affected individuals."[6] Hence, the inextricably intertwined nature of social science, *amici*, and public opinion come to light when examining the judicial opinions in these three areas of law.

Drawing together the aforementioned case law and the principles derived from those judicial opinions, one may try to make predictions about the future of certain realms of law. Because it may be nearly impossible to know whether a judge cites social science merely to ratify an opinion derived from other grounds, such as ideology or external political pressure, it is important to base predictions on more ascertainable

[3] Collins, 811.
[4] Ibid., 812.
[5] Ibid., 813.
[6] Ibid.

factors.[7] Two factors that appear to have a significant impact on case outcomes may be labeled "entrenched social science" and "widespread movement across jurisdictions."

"Entrenched social science" enshrines the notion that in some areas of law, studies have been conducted over a long period of time and their findings appear settled. If the Supreme Court's jurisprudence evidences a discussion of social science and later cases accept those ideas but do not cite to studies, their findings may be deemed settled and on par with precedent. An example of this would be the evolution in the Court's discussions of deterrence in the Eighth Amendment context or post-*Brown* treatment of the merits of school integration. The opposite would be in the area of homosexual rights, as the dissent in *Goodridge* stressed. One law professor who has written several articles on the issue of social science studies on the issue of children raised by homosexual parents labels the social science in this area as "very immature, biased, and unreliable."[8] She asserts: "The day will come when thorough, serious, longitudinal research will be available…Because lesibgay parenting generally and adoption in particular is a rather new phenomenon (in significant numbers), one can expect that it will be many years before broad-based, reliable, empirical research about lesbigay parenting is available."[9] The difficulty in the area of entrenched versus unsettled social science is the fact that one judge may see a wide variety in conclusions reached by social scientists as evidence of dispute. Conversely, another judge may perceive uniformity among a number of studies

[7] Even counting the frequency with which courts cite social science evidence may not be a good indicator of persuasiveness. One commentator explicates: "On the one hand, counting citations might *over*-represent the impact of social science on the Court's decision-making process because '[c]itations may be mere makeweight or post hoc rationalizations for views originating from other, unexpressed sources.' On the other hand, counting citations might *under*-represent the impact of social science on the decision-making process because judges may be reluctant to cite certain authority even though it influences their reasoning." Mody, 809.
[8] Lynn D. Wardle, "Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners," *Arkansas Law Review* 63 (2010): 88-89.
[9] Ibid., 89.

within a given area as evidence of settled social science.[10] Hence, entrenched social science is from the perspective of a future court or litigant—would that court or individual, examining prior case law, perceive social science in a given area as on par with precedent?

"Widespread movement across jurisdictions" reflects the fact that the Supreme Court ascertains trends across the states in order to determine whether a national rule is necessary and what public opinion is on a given issue. In *Brown*, for example, the Court consolidated cases from Kansas, South Carolina, Virginia, and Delaware, bringing them together due to their "common legal question."[11] This mix of cases demonstrated that issues of segregation in schooling was not confined to a particular region and a national response was needed. In the Eighth Amendment context, the Court has been explicit about the imperativeness of ascertaining the number of states that have certain laws, such as the prohibition on the execution of mentally retarded defendants. As Kermit Roosevelt III, a professor at the University of Pennsylvania Law School states:

> The Court usually prefers to wait for clear indications, in state laws or judicial decisions, that the national consensus is in place. In 1967, when it struck down state bans on interracial marriage in Loving v. Virginia, only 17 states still had them. In 2003, when it overturned same-sex sodomy bans in Lawrence v. Texas, they existed in 13 states.[12]

---

[10] For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), "the Supreme Court addressed challenges to public school programs that sought to enhance equal educational opportunity by increasing student racial and ethnic diversity." Michael Heise, "Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures," *Seattle University Law Review* 31 (2008): 863. In that case, the Justice Thomas concurrence demonstrated that he saw the social science as inclusive because of the "wide array of conclusions found in the research literature." Ibid., 881. On the other hand, however, in Justice Breyer's dissent, he "set out to leverage the same social science uncertainty in a manner that favored the Seattle School District's decision to use student race in school admissions…Breyer characterized the research support for the assertion as 'well established.'" Ibid., 882.

[11] *Brown v. Board of Education*, 486.

[12] Kermit Roosevelt III, "Obama's DOMA shift: Why public embrace of gay marriage – and gays – is now certain," *The Christian Science Monitor*, February 25, 2011, http://www.csmonitor.com/Commentary/Opinion/2011/0225/Obama-s-DOMA-shift-Why-public-embrace-of-gay-marriage-and-gays-is-now-certain (accessed March 1, 2011).

Therefore, it appears that the point at which the Court ascertains there is a national consensus on a given issue (or at which a uniform rule is warranted) is critical.

Putting these two factors together and assessing the outcomes of the aforementioned cases results in the following table, which can help classify the case law and can help predictions:

Table 1: Likelihood of Deviation from the Status Quo

	Entrenched Social Science	Unsettled Social Science
Widespread Movement Across Jurisdictions	Law Likely to be Changed	?
Non-Widespread Movement	?	Law Unlikely to be Changed

The table demonstrates that when there is popular sentiment behind a given change or law, and the social science on that issue does not evidence conflicting principles, the Court will be amenable to changing the law. This means treating social science as legislative fact and pronouncing a rule applicable beyond the particular litigants. An example of this box would be *Atkins*, where the Court perceived a national consensus and treated prior findings on the issue of deterrence as binding. Another case that could fall into this box would be *Grutter*, in which the Court addressed a question of "national importance": "Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[13] On the issue of social science, the Court stated that numerous expert studies and reports demonstrate the "educational benefits that flow from student body

[13] *Grutter*, 322.

diversity."[14] In both of these cases, the Court's rulings amounted to pronouncements with broad, national applicability.

On the other hand, however, if a given law has only been adopted by a handful of legislatures and social science is evolving, it is unlikely the Court will be willing to upset the status quo. For example, in *McCleskey* the Supreme Court cited the widespread acceptance of capital punishment in order to show that legislatures, faced with statistical analyses, nevertheless consistently support this form of punishment. If only a handful of states had death penalty statutes, perhaps the Court would have seen acceptance of McCleskey's arguments as less likely to dismantle the entire criminal justice system. Social science as unsettled or evolving may pertain to the Baldus city relied upon by McCleskey, which was found credible but not indicative of larger trends of empirical proof on this issue or totally ironclad.[15]

Another example of this non-widespread movement/ unsettled social science mix is in the area of adoption by homosexual couples (and the related issue of gay marriage). As the *Goodridge* dissent stated, the impact of same-sex marriage on children is an issue that remains unresolved by social scientists. Although undeterred by the fact that it was the first state to permit gay marriage,[16] the number of states that have not followed Massachusetts would certainly be a cause for concern if the issue came before the Supreme Court. Currently, only seven jurisdictions have marriage equality.[17] According

[14] Ibid., 330.
[15] "Even assuming the statistical validity of the Baldus study as a whole, the weight to be given the results gleaned from this small sample is limited." *McCleskey*, 295, n. 15.
[16] CNN, "Same-sex couples ready to make history in Massachusetts," *CNN.com*, May 17, 2004, http://articles.cnn.com/2004-05-17/justice/mass.gay.marriage_1_lesbian-couples-marriage-law-federal-constitutional-amendment?_s=PM:LAW (accessed March 1, 2011).
[17] Lambda Legal, "Status of Same-Sex Relationships Nationwide," *Lambdalegal.org*, February 2, 2011, http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html (accessed

to Lambda Legal, there is also a divide amongst jurisdictions on the issue of second-parent adoption: "About half of all states permit second-parent adoptions by the unmarried partner of an existing legal parent, while in a handful of states courts have ruled these adoptions not permissible under state laws."[18]

There are two blank boxes in the table that warrant discussion, particularly in trying to ascertain the table's predictive ability for gay rights cases: non-widespread movement/ entrenched social science and widespread movement/ unsettled social science. This quandary is especially perplexing depending on the way in which the issue is framed and how the evidence is perceived. A case about gay rights, for example, may evidence both non-widespread movement and unsettled social science. In terms of the former, a majority of states refuse to accept either second-parent adoptions or gay marriage. It is also difficult, given the claims that social science in the area of long-term impact of gay parenting on children is "very immature, biased, and unreliable."[19] Others have described the research on the differences between homosexual and heterosexual parenting as follows:

> The vast majority (if not all) of the research concluded to date which purportedly demonstrates "no differences" between homosexual and other parenting (as well as their outcomes for children) suffer from significant methodological flaws - including the absence of control and comparison groups, study designs that preclude reasoned analysis of the proffered "no differences" hypothesis, and various errors in sampling (including small sample size and heavy reliance on subjective and self-interested reports by study participants).[20]

March 1, 2011). In addition, six states have arrangements that entail the benefits and responsibilities of marriage but are labeled as domestic partnership or civil union. Ibid.

[18] Lambda Legal, "Adoption and Parenting," *Lambdalegal.org*, http://www.lambdalegal.org/issues/adoption-parenting/ (accessed March 1, 2011).

[19] Wardle, 88-89.

[20] Richard G. Wilkins, Trent Christensen and Eric Selden, "Adult Sexual Desire and the Best Interests of the Child," *St. Thomas Law Review* 18 (2005): 580.

In the instance of non-widespread movement and unsettled social science, the table provides that the Court would be resistant to changing the law.

But what happens if the issue were framed as non-widespread movement/ entrenched social science? As stated above, non-widespread movement could be established by the fact that a small fraction of states condone gay marriage. In addition, some states explicitly refuse to recognize adoption by same-sex couples. Moreover, "in the last several years ballot measures have been proposed in sixteen states to prohibit gays and lesbians from adopting children."[21]

As for the issue of entrenched social science, as of 2008, social scientists conducted more than fifty studies on the issue of the impact of same-sex parenting on children.[22] Many of these findings indicated that same-sex parenting does not negatively affect children.[23] As Professor of Law Richard E. Redding describes:

> Indeed, leading professional organizations including the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the American Academy of Family Physicians, the American Academy of Pediatrics, the American Psychoanalytic Association, and the National Association of Social Workers, and most recently, the American Medical Association, regard the findings as sufficiently compelling to warrant statements against policies that disadvantage lesbians and gays in child custody, adoption, and foster care proceedings.[24]

From this landscape, a court could find that there is a consensus in the social science findings and among experts in the field.

One could also perceive a gay rights case in terms of widespread movement/ unsettled social science. For widespread movement, it would be imperative for the Court

---

[21] Richard E. Redding, "It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust," *Duke Journal of Gender Law & Policy* 15 (2008): 128-29.
[22] Ibid., 135.
[23] Ibid.
[24] Ibid., 136.

to look at the number of states that recognize varieties of same-sex partnerships rather than the number of states that permit gay marriage. In this way, the Court could aggregate the seven jurisdictions with marriage equality,[25] the six states that provide the responsibilities and benefits of marriage but label that arrangement as either a civil union or domestic partnership,[26] the five "states that give some or many protections with statewide non-marriage laws such as domestic partnership, reciprocal beneficiary or other laws,"[27] and the five states that provide state employees with limited domestic partnership benefits.[28] Together, that equals twenty-three states. In addition, it appears that recognition of same-sex partnerships in any form is a growing trend, from Massachusetts's groundbreaking recognition of same-sex marriage in *Goodridge* to Illinois's Civil Union Law, which becomes effective June 1, 2011.[29]

According to Justice Stevens' majority opinion in *Atkins*, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[30] He also, in a footnote, cited the *amicus curiae* briefs that show organizational and religious opposition to the execution of mentally retarded offenders and polling data of Americans in order to show the "broader social and professional consensus" against the practice.[31] If the fact that "close to twenty states had enacted legislation exempting the mentally retarded from the death penalty while maintaining it as a legitimate form of

[25] These seven states include California, Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, and Vermont. For California, it is worth noting that the "estimated 18,000 same-sex couples who married in 2008 remain married but marriage [is] limited to different-sex couples after November 5, 2008 by Proposition 8." "Status of Same-Sex Relationships Nationwide."
[26] These six states include California, Nevada, New Jersey, Oregon, Washington, and Illinois. Ibid.
[27] These five states include Colorado, Hawaii, Maine, Maryland, and Wisconsin. Ibid.
[28] This list does not include states listed above that give broader protections. These five states include Alaska, Arizona, Montana, Rhode Island, and New Mexico. Ibid.
[29] Ibid.
[30] *Atkins*, 315.
[31] *Atkins*, 316, n. 21.

punishment"[32] was indicative of a national consensus, then it is fair to extrapolate that the recognition by twenty-three states of same-sex partnerships would indicate a national—or at least growing—consensus. Furthermore, to mirror Justice Stevens' reasoning, one may look at national opinion polls of the American public on the issue of gay rights. According to the Pew Research Center, in two studies that polled over 6,000 adults in 2010, 42% of Americans favored same-sex marriage and 48% of Americans opposed it.[33] Notably, this 2010 finding was the first time in the fifteen years of polling by the Pew Research Center that less than half of Americans disfavored same-sex marriage.[34] "It was also a jump in support from 2009, when 37% favored allowing gays and lesbians to marry legally. The rising support for gay marriage is broad-based, occurring across many demographic, political and religious groups."[35]

By analogizing the gay rights scenario and the reasoning undergirding *Atkins* on the issue of a national consensus, in addition to expanding the scope from allowing gay marriage to include other permutations of acceptance, one may conclude that the widespread movement factor is met. On the issue of unsettled social science, scholars point to numerous flaws with the studies purporting to show that children raised by homosexual parents show no adverse consequences resulting from that parenting. In addition to "Professor Lynn Wardle, the best-known and most prolific legal scholar opposing lesbigay marriage and parenting rights,"[36] numerous others have argued that "the specific effect of homosexual parenting on child development remains an open

[32] Helen Shin, "Is the Death of the Death Penalty Near? The Impact of *Atkins* and *Roper* on the Future of Capital Punishment for Mentally Ill Defendants," *Fordham Law Review* 76 (2007): 494, n.230.
[33] Pew Research Center for the People & the Press, "42% - More Americans Supporting Gay Marriage," *Pewresearch.org*, http://pewresearch.org/databank/dailynumber/?NumberID=1202 (accessed March 1, 2011).
[34] Ibid.
[35] Ibid.
[36] Redding, 160.

question."[37] Commentators argue there is bias in terms of subject selection, because studies "generally report on a small group of research subjects which are not randomly selected and which do not constitute a scientifically representative sample of homosexual parents and their children."[38] They also cite flaws in methodology, as "studies have failed to incorporate theoretically appropriate comparison groups and/or have failed to include the necessary, adequate control group of homosexual parenting for statistical comparison, which could give comparative meaning to the findings of the studies."[39] According to eight published articles on the issue of differences in parenting, methodological shortcomings render studies finding "no-differences" undependable.[40] Overall, then, one could conclude that there is unsettled social science on the issue of parenting, an issue that is closely related to gay marriage.[41]

So what predictions can be made about these two uncertain boxes of non-widespread movement/ entrenched social science and widespread movement/ unsettled social science, particularly as applied to the gay rights context? A fair conclusion is that the Supreme Court, without perceiving a widespread movement, will refrain from passing judgment and handing down a far-reaching rule on the issue of gay rights generally and gay marriage specifically. Hence, the widespread movement/ unsettled social science mix is the one more likely to result in a change in the law. There are two reasons why

---

[37] George Rekers and Mark Kilgus, "Studies of Homosexual Parenting: A Critical Review," *Regent University Law Review* 14 (2001/2002): 382.
[38] Ibid.
[39] Ibid., 347. *See also* George A. Rekers, "An Empirically-Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by any Person Residing in a Household that Includes a Homosexually-Behaving Member," *St. Thomas Law Review* 18 (2005): 325-424 (arguing that the social science cited to support the idea that there are no differences between parenting by heterosexuals and homosexuals is flawed in myriad ways).
[40] Redding, 138.
[41] The *Goodridge* court focused on the intertwined nature of parenting and marriage. In addition, if a couple who had children together wanted to get married, that marriage would certainly impact family dynamics. William Meezan and Jonathan Rauch, "Gay Marriage, Same-Sex Parenting, and America's Children," *Future of Children* 15 (2005): 107.

justices may follow public opinion or at least take it into account: first, because justices may fear the potential override, alteration, or lack of enforcement of their decision by the other branches of government.[42] Sometimes Congress will respond to a Supreme Court opinion with legislation that directly attacks that opinion and changes its potential enforcement.[43] Recently, both Congress and the executive branch spoke publicly about their consideration of action to counteract the 2010 Supreme Court opinion in *Citizens United v. Federal Election Commission*.[44] As Kevin T. McGuire and James A. Stimson state: "while the Court is certainly not electorally accountable, those responsible for putting its rulings into effect frequently are. For that reason, strategic justices must gauge the prevailing winds that drive reelection-minded politicians and make decisions accordingly."[45] It is quite reasonable to believe that justices, in light of the potential ramifications from the other branches of government, will carefully contemplate the national mood on a given issue.

The second reason why justices may care about public opinion is institutional legitimacy.[46] Because the Court has "neither the purse nor the sword, the justices must rely on the goodwill of the citizenry to follow its decisions…Should the justices ignore the views of the public, it is likely that the Court will lose some of its institutional

---

[42] Collins, 812.
[43] See, for example, *City of Boerne v. Flores*, 521 U.S. 507 (1997), in which the Supreme Court found that a Congressional statute—enacted in response to *Employment Division v. Smith*, 494 U.S. 872 (1990) — exceeded the scope of Congress' powers.
[44] *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010). The Huffington Post, "Constitutional Amendment Considered in Response to Supreme Court Decision on Campaign Finance," *Huffingtonpost.com*, January 22, 2010, http://www.huffingtonpost.com/2010/01/21/constitutional-amendment_n_431760.html (accessed March 2, 2011). The Huffington Post, "Supreme Court Rolls Back Campaign Finance Restrictions," *Huffingtonpost.com*, March 23, 2010, http://www.huffingtonpost.com/2010/01/21/supreme-court-rolls-back_n_431227.html (accessed March 2, 2011).
[45] Kevin T. McGuire and James A. Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences," *Journal of Politics* 66 (2004): 1019.
[46] Collins, 813.

legitimacy and support."[47] If the Court diverges too far from public opinion, the populace may not respect and follow its decisions. Hence, "[t]he Supreme Court can increase public acceptance of otherwise unpopular rulings, but in doing so the Court threatens its own institutional foundation."[48] On the other hand, "[t]he Court's institutional standing may enhance the legitimacy of specific rulings."[49] Thus, credibility of an institution, such as the Court, and policy legitimacy (or policy effectiveness) are intertwined and perhaps mutually reinforcing.[50]

As the integration and death penalty cases show, public opinion and the perception of the necessity of a nation-wide rule are crucial elements in Supreme Court jurisprudence. In the landmark gay rights case, *Lawrence*, the Court stressed changes throughout history and the decreasing number of states that enforce their laws against homosexual activity.[51] Thus, whether in the Fourteenth or Eighth Amendment context, there is no mistaking the consideration of national trends—trends that reflect popular opinion. It makes sense for the Court to take and pass judgment on those cases that have nationwide import, given that the Court can only practically hear a fraction of the cases for which litigants petition for certiorari. "Each year, the Court accepts between 100 and 150 of the some 7,000 cases it is asked to hear for argument."[52] Moreover, by siding with the wave of legislation granting rights, the Court need not value certain forces more highly than others. As Justice Frankfurter explicated in *Gregg*: "History teaches that the

---

[47] Ibid.
[48] Jeffrey Mondak, "Institutional Legitimacy, Policy Legitimacy, and the Supreme Court," *American Politics Quarterly* 20 (1992): 458.
[49] Ibid.
[50] Mondak, 457–77.
[51] *Lawrence*, 573.
[52] Administrative Office of the United States Courts, "Understanding Federal and State Courts," *Uscourts.gov*, http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx (accessed March 2, 2011).

independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."[53] Deferring to the public at large and looking for widespread movement is logical due to the case law, docket limitations, and the fact that it helps the Court stay above fads. If the Court so desired, if faced with a gay rights case, it could follow Justice Stevens' reasoning in *Atkins* and could easily see a growing national consensus in favor of gay rights, based on the number of states that recognize same-sex partnerships and national polling data.

It is more important for gay rights cases to demonstrate widespread movement than settled social science due to the issues of precedent and concerns about social science validity. When cases present constitutional issues, those are the cases that "tend to elicit greater citation of secondary authorities in general than do nonconstiutitonal cases," and justices accordingly "appear to make heightened use of social science evidence when addressing constitutional issues."[54] As demonstrated above in terms of *Brown* footnote 11 and deterrence in the capital punishment area, citations of social science can amount to precedent and may bind future decisions.[55] Because studies may be invalidated by further inquiry,[56] the Court may fear relying too heavily on social science due to its impact beyond the case at issue. In other words, uncertain social

---

[53] *Gregg*, 175 (Frankfurter, J., concurring in affirmance of judgment) (quoting *Dennis v. United States*, 341 U.S. 494, 525 (1951)).
[54] James R. Acker, "Thirty Years of Social Science in Supreme Court Criminal Cases," *Law & Policy* 12 (1990): 5.
[55] "Courts treat prior decisions on the probative value of social science evidence as if they were decisions on questions of law, with the force of precedent. They do so, however, without enunciating what aspect of social science evidence is to be treated like law, and without providing a rationale for such treatment." Laurens Walker and John Monahan, "Social Facts: Scientific Methodology as Legal Precedent," *California Law Review* 76 (1988): 885.
[56] Paul S. Appelbaum, "The Empirical Jurisprudence of the United States Supreme Court," American Journal of Law & Medicine 13 (1987): 347.

science may push the Court away from legislative facts. If the Court is concerned about its credibility, basing a decision—particularly one with a broad reach—on social science findings later revealed to be inaccurate would certainly undermine its legitimacy. Dozens of *amicus* briefs, many of which would proffer empirical findings for the Court's consideration, would likely accompany a case on gay rights.[57] But as discussed at length above, the unsettled nature of the social science would quickly come to light through the *amicus* briefs on both sides of the issue. The Court could easily harp on the division among the findings, as the *Goodridge* dissent did, and that discord, exacerbated by a fear of depending on potentially unfounded studies, plus the malleability of statistical evidence,[58] could deter the justices from rendering a decision to change the law.

In sum, the widespread movement/ unsettled social science mix is more likely the combination that will result in a change in the law in the gay rights realm. In this area, a growing national consensus is likely to be more persuasive to the Court than social science findings. This is particularly so given the controversy surrounding the validity of such results and the Court's receptivity to public opinion, as shown in the case law.

---

[57] Given that thirty-three amicus briefs were filed in *Lawrence v. Texas*, one may reasonably assume that the import of an issue like gay marriage and the increasing prevalence of amicus briefs would certainly result in a deluge of such briefs. Kelly J. Lynch, "Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs," *Journal of Law & Politics* 20 (2004): 33-34 (citing the number of amicus briefs filed in *Lawrence*). As Falk states, more social science is before courts due to "the cumulative impact of efforts by three separate contingents-individual litigants, gay and civil rights groups, and scientific and professional organizations." Falk, 53. Further, "empirical research has shown that amicus briefs use more social science than the parties' briefs and also that much of the social science cited by courts has come from the amici rather than the parties." Falk, 61.

[58] Richard E. Redding and N. Dickon Reppucci argue: "the legal profession tends to be somewhat skeptical about the validity, reliability, or relevance of social science and statistical evidence, finding it to be infinitely malleable and susceptible to varying interpretations." Redding and Reppucci, "Effects of Lawyers' Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making," *Law and Human Behavior* 23 (1999): 50.

VII. Conclusion

Through the examination of integration, gay rights, and capital punishment cases, one may see the import of public opinion and social science, the role of *amici* in presenting courts with extrajudicial evidence, and the way in which courts frame an issue to craft either a broad rule or tailor their holding to the parties at hand. Whereas some cases demonstrate judges grappling with the methodology and findings of studies in the body of an opinion, others illustrate how citations of studies in footnotes lend weight to a given assertion. As the case law shows, social science may be employed to accomplish myriad goals—by judges to support a given line of reasoning or decision and by litigants and *amici* to lend credibility to its arguments and cast doubt on the opponents' arguments. Social science can also be utilized to demonstrate that extant rules are antiquated and inapplicable to present-day social realities. For example, social science in *Brown* footnote 11 demonstrated that present understandings conflicted with the entrenched principles underlying segregated schooling. On a more micro level, social science may be cited to decide a dispute between two discrete litigants, such as whether a second parent adoption is appropriate in a given case.

These judicial opinions demonstrate that there are no limits on the number of individuals who incorporate social science in court cases and decisions. It is immaterial whether a given party is on the plaintiff or defense side, because both parties seek justification for the rule they hope a court will adopt. Parties and *amici* will therefore amass social science evidence both to bolster their own position and to undercut the social science included in the other side's argument. As the aforementioned discussion shows, courts often reference the *amicus* briefs that presented influential studies to the

court. Similarly, both writers for the majority and dissent incorporate social science to evidence a basis for their decisions to the parties before them, to the broader public, and to other courts that may cite the instant case as precedent. The aforementioned decisions demonstrate that sometimes judges analyze social science proffered by the other side only to cast doubt on its methodology or findings. Judges need not acknowledge or confront the social science upon which parties or other judges rely, but they may choose to do so in order to demonstrate its shortcomings. This approach is analogous to when judges argue that the other side has misconstrued precedent, because in both instances the assertion is that conclusions reached have a shaky foundation.[1]

When faced with the option of using social science as legislative fact and therefore crafting a far-reaching rule, the Supreme Court must tread carefully because future cases will likely construe supporting social science as on par with precedent. As such, the social science can become binding and there could be dangerous side effects to the future of case law or perceptions of the Court's legitimacy if the studies are found to be without merit. This potential for the future discovery of laws is acute, given that the evidence and findings of social science research are variously settled, challenged, disputed, revised, and rejected. This is because like natural science, social science "shares the positive attribute of objective understanding derived through controlled systematic inquiry, and it shares the limitation that all sciences suffer, given the great complexity of their respective subjects."[2] Understandings derived from social science

[1] The majority may level this accusation at the dissent or vice versa. Moreover, casting doubt on the other side's position does two things. First, it emphasizes why that approach is erroneous and correspondingly emphasizes why the other, perhaps opposite, stance is correct. Second, it sends a message to future litigants and courts that a particular viewpoint is weak. As such, those future litigants can tailor their arguments to either avoid or emphasize those shortcomings that are known to be favored or disfavored by particular judges.

[2] Faigman, 1025.

can evolve based on refined methodologies or new findings.[3] As one commentator observes:

> No matter how advanced social science should become, or how successfully it identifies the general laws of human behavior, substantial uncertainty will always remain a feature of the scientific enterprise. The creation of grand theories with broad predictive power has proved to be difficult even in physics, where control of variables generally is less difficult than in the social sciences and the variables of interest have been studied for a longer time.[4]

Simply because social science may evolve is not a reason to disfavor its usage by the judiciary, but a reason to pause and assess its credibility before incorporation into a judicial opinion.

There are implications of this study for people who wish to effectuate top-down change through Supreme Court rule-making. Given the importance of public opinion to judicial opinions, advocates for a given cause should ensure that legislation on the state level moves in a given direction. That way, thanks to *amicus* briefs, the Court may see the national mood on a given issue. For areas of social science that are less settled, such as same-sex parenting, researchers should endeavor to address some of the concerns raised by critics of the studies done thus far. This will be easier to accomplish as more time transpires since the first permissible same-sex parent adoptions. With increased prevalence and the passage of time, it will be easier for researchers to demonstrate whether children raised by homosexual couples are disadvantaged. For *amici*, they should consider pursuing opportunities for cosigning in order to demonstrate to courts, and the Supreme Court in particular, the number and type of parties interested in a given

[3] Faigman states: "One consequence of the law's reliance on scientists for knowledge of social facts is that the law might fluctuate with every new data set or, alternatively, change too slowly while waiting for new data to be collected." At 1040.
[4] Ibid., 1044.

decision. If there is a coalition like the religious organizations that joined together in *Atkins,* that signifies the broad support for a certain outcome.

Because these three areas of law have not been analyzed together in terms of the significance of social science in each, there is significant research that can be done based upon this foundation. One potential avenue would be an empirically-focused examination of the frequency with which often courts reject social science because it is unsettled and also cite public opinion trends in the same opinion. In that way, there could be quantitative support for the qualitative assertions made here. It could also be useful to see if the trends discussed here also pertain to the case law under the Sixth of First Amendment umbrellas. Another interesting avenue of research would be to explore how different courts that are the highest in their respective states are responding to developments in other states on the issue of gay marriage or same-sex parenting. In this way, one could see, on a state-by-state level, the way in which these opinions are going. This is significant because advocates could see where courts are more swayed by what is happening in other states and could tailor their advocacy accordingly. In addition, such a state-by-state study could help the Supreme Court see—beyond the strict numbers of how many states allow gay marriage—whether a nation-wide rule is imperative.

Since the Brandeis brief, courts have increasingly considered and incorporated social science into their opinions. From two very different areas in Fourteenth Amendment jurisprudence and Eighth Amendment case law, one may see the influence of social science. Social science research can determine whether there is a national consensus, and the Supreme Court responds to such a national consensus. Although the jurisprudence in these realms, particularly gay rights and capital punishment, is still in

flux, there is little doubt that social science findings will continue to influence their evolution.

References

Acker, James R. “A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989.” *Law & Society Review* 27 (1983): 65-88.

———. “Thirty Years of Social Science in Supreme Court Criminal Cases.” *Law & Policy* 12 (1990): 1-23.

Administrative Office of the United States Courts. “Understanding Federal and State Courts.” http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx.

Adoptions of B.LV.B. & E.L.V.B., 160 Vt 368 (1993).

Akins v. Virginia, 536 U.S. 304 (2002).

American Psychological Association. “Brief for Amici Curiae in Support of Petitioners.” http://www.apa.org/about/offices/ogc/amicus/lawrence.pdf.

Appelbaum, Paul S. “The Empirical Jurisprudence of the United States Supreme Court,” *American Journal of Law & Medicine* 13 (1987): 335-49.

Baldus, David C. “Keynote Address: The Death Penalty Dialogue Between Law and Social Science.” *Indiana Law Journal* 70 (1995): 1033-41.

Bowers v. Hardwick, 478 U.S. 186 (1986).

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Broz v. Schweiker, 677 F.2d 1351, 1357 (11th Cir. 1982).

Citizens United v. Federal Election Commission, 130 S.Ct. 876 (2010).

City of Boerne v. Flores, 521 U.S. 507 (1997).

Collins, Paul M. Jr. “Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation.” *Law & Society Review* 38 (2004): 807-32.

CNN. “Same-sex couples ready to make history in Massachusetts.” May 17, 2004. http://articles.cnn.com/2004-05-17/justice/mass.gay.marriage_1_lesbian-couples-marriage-law-federal-constitutional-amendment?_s=PM:LAW.

Davis, Kenneth Culp. “An Approach to Problems of Evidence in the Administrative Process.” *Harvard Law Review* 55 (1942): 364-425.

Dukes v. Wal-Mart Stores, 603 F.3d 571 (9th Cir. 2010).

Duke University School of Law. "An Ode to Justice Lewis F. Powell, Jr.: The Supreme Court Approves The Consideration of Race as a Factor in Admissions by Public Institutions of Higher Education." http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/gravbol.html.

Faigman, David L. "To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy." *Emory Law Journal* 38 (1989): 1005-95.

Falk, Patricia J. "The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts," *Wayne Law Review* 41 (1994): 1-69.

Franke, Katherine M. "Sexuality and Marriage: The Politics of Same-Sex Marriage Politics." *Columbia Journal of Gender & Law* 15 (2006): 236-48.

Furman v. Georgia, 408 U.S. 238 (1972).

Garth, Bryant G. "Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research." *Alabama Law Review* 49 (1997): 103-31.

Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

Gratz v. Bollinger, 539 U.S. 244 (2003).

Gregg v. Georgia, 428 U.S. 153 (1976).

Grutter v. Bollinger, 539 U.S. 306 (2003).

Harper, V., and Edwin D. Etherington. "Lobbyists Before the Court." *University of Pennsylvania Law Review* 101 (1953): 1172-77.

Hovenkamp, Herbert. "Social Science and Segregation Before *Brown*," *Duke Law Journal* 1985 (1985): 624-72.

In re Adoption of Caitlin, 622 N.Y.S.2d 835 (1994).

Kennedy, Randall L. "*McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court," *Harvard Law Review* 101 (1988): 1388 -1443.

King, Allan G., and Syeeda S. Amin. "Social Framework Analysis as Inadmissible "Character" Evidence." *Law & Psychology Review* 32 (2008): 1-30.

Lambda Legal. "Adoption and Parenting." http://www.lambdalegal.org/issues/adoption-parenting/.

Lambda Legal. "Goodridge v. Department of Public Health." http://www.lambdalegal.org/in-court/cases/goodridge-v-department-of-public-health.html.

Lambda Legal. "Status of Same-Sex Relationships Nationwide." February 2, 2011. http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html.

Lavely, Vanessa A. "The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases." *UCLA Law Review* 55 (2007): 247-91.

Lawrence v. Texas, 539 U.S. 558, 562 (2003).

Lynch, Kelly J. "Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs." *Journal of Law & Politics* 20 (2004): 33-75.

Matter of Evan, 153 Misc 2d 844 (Sur Ct, NY County 1992).

McCleskey v. Kemp, 481 U.S. 279 (1987).

McGinnis, John O., and Charles W. Mulaney. "Judging Facts like Law." *Constitutional Commentary* 25 (2008): 69-130.

McGuire, Kevin T., and James A. Stimson. "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences." *Journal of Politics* 66 (2004): 1018-35.

Meezan, William, and Jonathan Rauch. "Gay Marriage, Same-Sex Parenting, and America's Children." *Future of Children* 15 (2005): 97-115.

Mody, Sanjay. "*Brown* Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy." *Stanford Law Review* 54 (2002): 793-829.

Monahan, John, et al., "Contextual Evidence of Gender Discrimination: The Ascendance of 'Social Frameworks.'" *Virginia Law Review* 94 (2008): 1715-49.

Monahan, John, and Laurens Walker, eds. *Social Science in Law: Cases and Materials*. 7th ed. New York: Thomson Reuters/Foundation Press, 2010.

Mondak, Jeffrey. "Institutional Legitimacy, Policy Legitimacy, and the Supreme Court." *American Politics Quarterly* 20 (1992): 457–77.

Muller v. Oregon, 208 U.S. 412 (1907).

Penry v. Lynaugh, 492 U.S. 302 (1989).

Perry, Gail S., and Gary B. Melton. "Precedential Value of Judicial Notice of Social Facts: *Parham* As An Example." *Journal of Family Law* 22 (1984): 633-76.

Pew Research Center for the People & the Press. "42% - More Americans Supporting Gay Marriage." http://pewresearch.org/databank/dailynumber/?NumberID=1202.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

Plessy v. Ferguson, 163 U.S. 537 (1896).

Processed Plastic Co. v. Warner Communications, Inc., 675 F.2d 852 (7th Cir. 1982).

Rebman, Christine. "The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences." *DePaul Law Review* 49 (1999): 567-619.

Redding, Richard E. "It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust." *Duke Journal of Gender Law & Policy* 15 (2008): 127-93.

Redding, Richard E., and N. Dickon Reppucci. "Effects of Lawyers' Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making." *Law and Human Behavior* 23 (1999): 31-54.

Rekers, George A. "An Empirically-Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by any Person Residing in a Household that Includes a Homosexually-Behaving Member." *St. Thomas Law Review* 18 (2005): 325-424

Rekers, George, and Mark Kilgus. "Studies of Homosexual Parenting: A Critical Review," *Regent University Law Review* 14 (2001/2002): 343-82.

Roosevelt, Kermit III. "Obama's DOMA shift: Why public embrace of gay marriage – and gays – is now certain." *The Christian Science Monitor*, February 25, 2011. http://www.csmonitor.com/Commentary/Opinion/2011/0225/Obama-s-DOMA-shift-Why-public-embrace-of-gay-marriage-and-gays-is-now-certain.

Roper v. Simmons, 543 U.S. 551 (2005).

Rustad, Michael, and Thomas Koenig. "The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs." *North Carolina Law Review* 72 (1993): 91-162.

Shin, Helen. “Is the Death of the Death Penalty Near? The Impact of *Atkins* and *Roper* on the Future of Capital Punishment for Mentally Ill Defendants.” *Fordham Law Review* 76 (2007): 465-516.

Smith, Steven D. “Believing Like a Lawyer.” *Boston College Law Review* 40 (1999): 1041-1137.

Stanford v. Kentucky, 492 U.S. 361, 378 (1989).

Stell v. Savannah-Chatham County Board of Education, 220 F. Supp. 667 (S.D. Ga. 1963).

Stell v. Savannah-Chatham County Board of Education, 333 F.2d 55 (5th Cir. 1964).

Supreme Court of the United States. “Docket for 02-102.” http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/02-102.htm.

The Huffington Post. “Constitutional Amendment Considered in Response to Supreme Court Decision on Campaign Finance.” January 22, 2010. http://www.huffingtonpost.com/2010/01/21/constitutional-amendment_n_431760.html.

The Huffington Post. “Supreme Court Rolls Back Campaign Finance Restrictions.” March 23, 2010. http://www.huffingtonpost.com/2010/01/21/supreme-court-rolls-back_n_431227.html.

Trop v. Dulles, 356 U.S. 86, 101 (1958).

United States v. Leon, 468 U.S. 897 (1984).

Walker, Laurens, and John Monahan, “Social Facts: Scientific Methodology as Legal Precedent,” *California Law Review* 76 (1988): 877-96.

———. “Social Frameworks: A New Use of Social Science in Law.” *Virginia Law Review* 73 (1987): 559-597.

Wardle, Lynn D. “Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners.” *Arkansas Law Review* 63 (2010): 31-112.

Wilkins, Richard G., Trent Christensen, and Eric Selden. “Adult Sexual Desire and the Best Interests of the Child.” *St. Thomas Law Review* 18 (2005): 543-680.

Young, Ernest A. “Federal Courts: Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review.” *Texas Law Review* 78 (2000): 1549-1614.