

CHILDREN'S DEVELOPMENTAL VULNERABILITY AND THE ROBERTS COURT'S CHILD-PROTECTIVE JURISPRUDENCE: AN EMERGING TREND?

Deana Pollard Sacks*

I. INTRODUCTION

To date, the Roberts Court has rendered three opinions that utilize empirical data to protect children.¹ These decisions are based on social science research and “common sense” concerning children’s physical and psychological vulnerability to harmful influences, undeveloped moral character, and general tendency to make poor choices.² Two opinions involved regulation of speech that may influence children to engage in harmful speech or conduct,³ and one opinion found that a harsh criminal penalty imposed upon a juvenile violated his Eighth Amendment rights.⁴ These opinions could indicate that the Roberts Court will continue to protect children from harmful media influences and

* © 2011, Deana Pollard Sacks. All rights reserved. Professor of Law, Texas Southern University. LL.M., University of California, 1999; J.D., University of Southern California, 1989; B.A., University of Washington, 1986. The Author is an advisory board member of End Physical Punishment of Children, USA (EPOCH-USA), and Parents and Teachers Against Violence in Education (PTAVE). The Author is grateful to Russell Weaver and the participants of the 2010 Constitutional Law Discussion Forum at the University of Louisville’s Louis D. Brandeis School of Law for their insightful comments on an earlier draft of this Article.

1. As used herein, “children” and “minors” refer to persons who are infants through seventeen years of age, including “adolescents,” which refers to persons ages thirteen through seventeen. Most of the brain activity research discussed herein relates to adolescents, but it has long been known that children of all ages are developmentally highly impressionable, as the Court noted in *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009). For information on children’s brain development, review *infra* notes 18–47 and accompanying text. See generally Barbara Strauch, *The Primal Teen: What the New Discoveries about the Teenage Brain Tell Us about Our Kids* (Doubleday 2003) (discussing research on children’s and adolescents’ mental processing).

2. *Graham v. Fla.*, 130 S. Ct. 2011, 2026–2027 (2010); *Fox TV Stations, Inc.*, 129 S. Ct. at 1813; *Morse v. Frederick*, 551 U.S. 393, 406–407 (2007).

3. *Fox TV Stations, Inc.*, 129 S. Ct. at 1813, 1819; *Morse*, 551 U.S. at 410.

4. *Graham*, 130 S. Ct. at 2033.

unfair penalties based on legislative fact-finding concerning children's physical and psychological immaturity and unsettled moral character.

In *Morse v. Frederick*⁵ and *FCC v. Fox Television Stations, Inc.*,⁶ the Roberts Court upheld state and federal government officials' punishment of student speech.⁷ In both cases, the government acted to shield children from potentially harmful speech that could influence them to smoke marijuana⁸ or use indecent language,⁹ respectively. In *Graham v. Florida*,¹⁰ the Court sided with the juvenile to shield him from an unduly harsh criminal sentence, considering his undeveloped character and potential for rehabilitation.¹¹ These three opinions are connected by the same basic social science research concerning children's developmental immaturity. In each decision, the Court specifically found as a fact that children "are more vulnerable . . . to negative influences"¹² and less capable of exercising good judgment; therefore, constitutional and regulatory doctrines should embrace these realities.¹³

The speech cases could be explained by the Court's purported commitment to federalism and separation of powers¹⁴ or the

5. 551 U.S. 393.

6. 129 S. Ct. 1800.

7. *See id.* at 1819 (upholding the FCC's decision that two live broadcasts were indecent); *Morse*, 551 U.S. at 409–410 (upholding a principal's decision to suspend a student for displaying a "banner [that] promoted illegal drug use").

8. *Morse*, 551 U.S. at 402.

9. *Fox TV Stations, Inc.*, 129 S. Ct. at 1813.

10. 130 S. Ct. 2011.

11. *Id.* at 2030.

12. *Id.* at 2026 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

13. *See id.* at 2033 (finding that the Eighth Amendment requires states to allow a juvenile convicted of a non-homicide crime a "meaningful opportunity to obtain release . . . [by] demonstrat[ing] that the bad acts he committed as a teenager are not representative of his true character"); *Fox TV Stations, Inc.*, 129 S. Ct. at 1813 (upholding Congress' ban of broadcasts that include indecent language because such language "is harmful to children"); *Morse*, 551 U.S. at 406–408 (confirming that school officials may regulate students' speech if it encourages drug use because illegal drugs are especially harmful to children).

14. *See Fox TV Stations, Inc.*, 129 S. Ct. at 1813–1814 (stating "Congress has made the determination that indecent material is harmful to children[] and has left enforcement of the ban to the [Federal Communications] Commission" and the Commission's "predictive judgment . . . that a *per se* exemption for fleeting expletives" would encourage an increase in the use of fleeting expletives "makes entire sense" and "merits deference"); *see e.g.* Robin Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 Admin. L. Rev. 69, 122, 127 (2010) (arguing that the Roberts Court is generally deferential to the other two branches of the federal government and to state governments based on the Court's commitment to separation of powers and federalism); David G. Savage, *About*

longstanding deference conferred upon local officials in the educational setting.¹⁵ The cruel-and-unusual-punishment case, however, invalidated a state law,¹⁶ which indicates that maybe there is another theme that ties these three cases together. Perhaps it is the social science data itself that forms the basis for the Court's decisions in these three cases and animates the Roberts Court. If a trend is emerging based on social science research that confirms enormous physical and psychological differences between children and adults, the Roberts Court could usher in a new era of children's constitutional jurisprudence grounded in legislative fact-finding. This Article analyzes the possibility that the Roberts Court's opinions could foretell an emerging trend toward child protectionism. Part II of this Article will briefly summarize the nature of the scientific research concerning children's developmental vulnerability, and Part III will then discuss the Roberts Court's child-protective opinions to date, with some notes concerning the Court's forthcoming decision in *Schwarzenegger v. Entertainment Merchants Assn.*¹⁷ where relevant.

II. THE SOCIAL SCIENCE RESEARCH: A BRIEF OVERVIEW

In 2003, *New York Times* medical and science health editor Barbara Strauch brought public awareness to the latest discoveries regarding adolescent brain function and why adolescents are so vulnerable to negative influences and poor choices by publishing her book, *The Primal Teen*.¹⁸ The research compiled by Strauch compels the conclusion that children's and adolescents' mental processes are quite different from adults' mental processes and, accordingly, children and adolescents should be treated differently. Longstanding assumptions that adolescents in particular can be impulsive and unpredictable due to developmental phases

Face, 94 ABA J. 21, 21 (2008) (arguing that the Roberts Court defers to the legislative branch by rejecting facial challenges to legislation).

15. See *Morse*, 551 U.S. at 403–406, 410 (warranting deference to a principal's “on the spot” decision to punish what she deemed to be inappropriate student speech because students' speech rights in public schools are more limited than their speech rights in other contexts).

16. See *Graham*, 130 S. Ct. at 2034 (requiring all states to provide “some realistic opportunity to obtain release” for juvenile offenders convicted of non-homicide offenses).

17. *Schwarzenegger v. EMA*, No. 08-1448 (U.S. filed May 19, 2009).

18. Strauch, *supra* n. 1.

were rendered tangible approximately a decade ago, when magnetic resonance imaging (MRI) technology allowed scientists to view adolescents' brain development.¹⁹ MRI images of adolescents' brains made clear that they undergo enormous changes in areas of the brain that shape the adolescent's world-view, morality, and judgment: "[T]he adolescent brain undergoes a massive remodeling of its basic structure, in areas that affect everything from logic and language to impulses and intuition."²⁰ The frontal lobes, in particular, the brain's so-called "chief executive," are among the last areas to reach a stable, grown-up state and may not be fully developed "until well past age twenty."²¹ The adolescent brain undergoes critical cognitive transformations and is "wildly exuberant and receptive" to influence, which means that adolescents are much more susceptible to fundamental and lasting damage from negative environmental influences than parents or educators previously understood.²² Adolescence "may be one of the worst times to expose a brain to drugs and alcohol or even a steady dose of violent video games" as "many things can go wrong."²³ Indeed empathy, which is critical to moral actualization, is quite undeveloped until the teenage years.²⁴

Additional recent research confirms that children and adolescents are very impressionable and vulnerable to environmental influences due to their developmental patterns of brain activity.²⁵ In particular, numerous new studies demonstrate that the enormous activity in adolescents' prefrontal cortices—the areas responsible for moral development, judgment, and executive function—gives rise to rapid changes in brain patterns during adolescence.²⁶ Adolescent brain activity includes rapid formation

19. Doctor Jay Giedd, a neuroscientist at the National Institutes of Health, has been researching adolescent brain function using MRI technology for the last ten years. *Id.* at 11–13.

20. *Id.* at 13.

21. *Id.* at 16.

22. *Id.* at 17.

23. *Id.* at 21 (quoting Harry Chugani in part).

24. *Id.* at 8.

25. See generally Strauch, *supra* n. 1 (discussing new discoveries regarding research on children's and adolescents' mental processing).

26. See e.g. Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *Annals N.Y. Acad. Sci.* 77, 82–83 (2004) (discussing how teenagers' brains are forming connections and pruning, and a teenager's experiences may have a powerful effect on the structure of his or her brain); Tomáš Paus, *Mapping Brain Maturation and Cognitive Development during Adolescence*, 9 *Trends Cognitive Sci.* 60, 64 (2005) (stating that

of neural connections that influence adolescents' perception of the world and appropriate social conduct.²⁷ In addition, a "pruning" process discards weak or undeveloped associations in favor of associations that have been reinforced based on adolescents' experiences during this critical period of brain reorganization.²⁸ Whatever data is fed into adolescents' brains is likely to have a much greater effect on their ultimate character, impulse control, value system, and worldview than similarly situated adults.²⁹ As the National Institutes of Health neuroscientist Jay Giedd put it, "If [the] teenage brain is still changing so much, we have to think about what kinds of experiences we want that growing brain to have."³⁰

Children's and adolescents' vulnerability to environmental influences may be explained by the process through which humans learn. Humans are programmed to imitate³¹ and are especially primed to do so during childhood and adolescence—a time when the brain is undergoing massive reconstruction in order to solidify self-images and perceptions of society and appropriate social behavior.³² As explained by University of California, Los Angeles neurologist John Mazziotta, "People don't realize that the brain is really an inhibition machine. . . . We're creatures of imitation, that's how we learn."³³ Thus, explains Mazziotta, people must learn to inhibit inappropriate actions, including imi-

"during adolescence, brain maturation continues in the fronto-parietal systems and within the superior temporal sulcus," and "high demands are placed . . . on [both] the executive systems . . . [and] the interplay between cognitive and emotion-related processes"). For a more thorough exposition of the empirical research concerning children's and adolescents' developmental vulnerability, see Deana Pollard Sacks, *California's Interest in Schwarzenegger v. Entertainment Merchants Association* 5–15 (forthcoming 2011) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739994) [hereinafter Pollard Sacks, *California's Interest*].

27. See Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 *J. Child Psychol. & Psych.* 296, 301–302 (2006) (discussing that executive function skills such as "inhibitory control . . . , processing speed . . . , working memory[,] and [decisionmaking] . . . continue[] to develop during adolescence," and, as a result, "what is perceived as important in the social world . . . changes and leaves its imprint on the pruning process").

28. Giedd, *supra* n. 26, at 81–82.

29. *Id.*

30. Strauch, *supra* n. 1, at 21 (quoting Jay Giedd).

31. *Id.* at 31.

32. Blakemore & Choudhury, *supra* n. 27, at 302.

33. Strauch, *supra* n. 1, at 31 (quoting John Mazziotta).

tation, such that brain development is fundamentally about “progressive inhibition.”³⁴

This research is consistent with widely accepted tenets of cognitive learning theory. Cognitive learning theory is based on the idea that as people accumulate experiences and data is fed into their brains, they develop assumptions based on expectations derived from the experiences, also known as cognitive associations, to analyze the environment efficiently.³⁵ Cognitive associations that are reinforced through repetition become implicit over time, meaning that they affect judgment and behavior beyond conscious awareness.³⁶ Cognitive associations, once entrenched, are very resistant to change.³⁷ Because adolescents are in a phase of mental metamorphosis, they are acutely vulnerable to experiences and influences that affect their cognitive associations, and in turn, their attitude, judgment, and behavior.³⁸ That is, their brains have not formed stable associations and are amenable to alterations in brain “wiring.”³⁹

The brain “wiring” concept, known as “Hebb’s Law,” was articulated in the 1940s and described by the phrase: “neurons that fire together wire together.”⁴⁰ This concept forms a fundamental tenet of cognitive learning theory. Some very recent brain-scan research made possible by MRI and other technology appears to validate Hebb’s Law, and it may even explain video game “addiction.”⁴¹ For example, brain-scan research indicates

34. *Id.* at 32 (quoting John Mazziotta).

35. See e.g. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161 (1995) (explaining cognitive learning theory and how cognitive bias originates); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *Duke L.J.* 345 (2007) (explaining implicit bias and its effects within the justice system); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 *Wash. L. Rev.* 913 (1999) [hereinafter Pollard, *Unconscious Bias*] (explaining the origins of stereotypes and unconscious bias and how unconscious bias might be reversed despite resistance to such reversal).

36. Pollard, *Unconscious Bias*, *supra* n. 35, at 919–920.

37. *Id.* at 920, 947–948.

38. Pollard Sacks, *California’s Interest*, *supra* n. 26, at 7–9.

39. *Id.* at 9.

40. *Id.* See e.g. Roger Dooley, *Neuromarketing, Neurons that Fire Together Wire Together* <http://www.neurosciencemarketing.com/blog/articles/neurons-fire-together.htm> (May 6, 2010); Janet Wiles, Simon Dennis & Rachael Gibson, *The Hebbian Network: The Distributed Representation of Facts*, <http://archive.itee.uq.edu.au/~cogs2010/cmc/chapters/Hebbian/> (accessed Mar. 29, 2011) (explaining Hebb’s Law in mathematical terms).

41. See Doug Hyun Han, Nicolas Bolo, Melissa A. Daniels, Lynn Arenella, In Kyoon

that brain pattern activity among normal children can be “re-wired” to mimic brain pattern activity of aggressive, socially dysfunctional children through excessively playing violent video games, suggesting that repetitive violent responses in gaming to win points can produce brain wiring that associates violence with normal behavior and even positive feelings.⁴² Cognitively speaking, repeated play of violent video games disinhibits violent behavior generally, a result recognized by leading experts on the effects of violent media on children.⁴³ As an adult, the brain is fully developed, cognitive associations are entrenched, and brain wiring is stable and resistant to change.⁴⁴ To the contrary, children—adolescents in particular—are rapidly forming cognitive associations based on their experiences and environmental influences; therefore, they are quite vulnerable to cognitive changes that can affect their assumptions, attitudes, and behaviors long-term.⁴⁵

Lyoo & Perry F. Renshaw, *Brain Activity and Desire for Internet Video Game Play*, 52 *Comprehensive Psych.* 88 (2011) (describing a study conducted on adult males finding that video game play stimulates the same area of the brain stimulated by addiction and pathological gambling); Doug Hyun Han, Jun Won Hwang & Perry F. Renshaw, *Bupropion Sustained Release Treatment Decreases Craving for Video Games and Cue-Induced Brain Activity in Patients with Internet Video Game Addiction*, 18 *Experimental & Clinical Psychopharmacology* 297 (2010) (detailing a study that found individuals deemed to be addicted to Internet video games could be treated with bupropion, a medication often used to treat patients with substance abuse); Pollard Sacks, *California's Interest*, supra n. 26, at 7–12 (discussing recent brain-scan research utilizing MRI technology that has resulted in breakthroughs in understanding adolescent brain development). For information concerning violent video game producers' failure to self-regulate and the use of aggressive marketing strategies used to target children and young adolescents for the most violent, “M” rated, video games, see Deana Pollard Sacks, *Negligent Speech Torts* 8–9 (forthcoming 2011) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656114) [hereinafter Pollard Sacks, *Speech Torts*].

42. Anna Illner & Sylvester Chuang, *Functional Brain Imaging: Evaluation of the Effects of Violent Media Exposure*, 8 *J. Paediatrics & Child Health* 283, 283–284 (2003); Marcus Yam, DailyTech Blog, *Study: Violent Video Games Affect Brains*, <http://www.dailytech.com/article.aspx?newsid=5123> (Dec. 1, 2006, 5:17 a.m. ET); see Pollard Sacks, *California's Interest*, supra n. 26, at 10 (discussing unpublished research indicating positive feelings about violence among “high-gamers” but not “low-gamers”).

43. See Pollard Sacks, *California's Interest*, supra n. 26, at 10–15 (discussing research conducted by the world's leading violent-media-effects experts, which found that consumption of violence among children, and violent video games in particular, causes children to behave more aggressively, and also criticizing the credentials (or lack thereof) of proclaimed experts who challenge these findings).

44. Pollard, *Unconscious Bias*, supra n. 35, at 947–948.

45. Pollard Sacks, *California's Interest*, supra n. 26, at 7–9.

In sum, children's and adolescents' vulnerability to influences that create patterns of brain activity harmful to themselves or others renders them in need of enhanced protection from such influences because, once they reach adulthood, reversing the harm is exceedingly difficult, as cognitive associations have become entrenched and stable. It is this kind of research concerning children's brain development in areas governing morality and executive function that persuaded legislators and the Court that capital punishment of children is unconstitutional.⁴⁶ This research also validates historical assumptions about children's developmental vulnerability that animated the Court to protect children from potential harmful media influences in *Morse* and *Fox Television Stations, Inc.* This research will likely be further scrutinized in the Court's forthcoming decision in *Entertainment Merchants Assn.*⁴⁷

III. THE ROBERTS COURT'S JURISPRUDENCE BASED ON CHILDREN'S DEVELOPMENTAL VULNERABILITY

The Roberts Court has issued three decisions thus far grounded in children's and adolescents' developmental vulnerabil-

46. See *Roper*, 543 U.S. at 564–571 (concluding that capital punishment for juveniles who committed crimes while under the age of eighteen is unconstitutional because juveniles' brains and character are not fully developed, as recognized by the majority of states that prohibit capital punishment for juveniles); see also Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 Sci. Mag. 596 (2004) (describing the defense's strategy in *Roper* as emphasizing that "[t]he brain's frontal lobe, which exercises restraint over impulsive behavior, 'doesn't begin to mature until [seventeen] years of age'" (quoting Ruben Gur in part)); Mark Moran, *Adolescent Brain Development Argues against Teen Executions*, 38 Psych. News 8 (May 16, 2003) (providing Dr. David Fassler's testimony before the Nevada Assembly that the "instinctual[] part of the brain develops first" and areas such as the frontal cortex that help to control emotions develop later).

47. The Ninth Circuit found no compelling state interest to protect children's psychological or neurological well-being based on the lack of clear causation in the social science research linking children's use of violent video games with psychological and neurological harm. The Supreme Court will likely revisit the issue of what level of proof of causation is necessary before a state may act to protect children under its *parens patriae* powers. See *Video Software Dealers Assn. v. Schwarzenegger*, 556 F.3d 950, 953, 962–964 (9th Cir. 2009) (finding that the social science evidence concerning the "causal link between [children's use of] violent video games and actual psychological or neurological harm" was insufficient to support a compelling interest under strict scrutiny, but also noting that the state was not required to prove the link by "scientific certainty"); see also Pollard Sacks, *California's Interest*, *supra* n. 26, at 5 (predicting that the Supreme Court will "likely scrutinize the empirical research" linking violent video games and psychological harm before rendering a decision in *Entertainment Merchants Assn.*).

ity to negative influences and propensity to make poor choices that may harm themselves or society at large. The Roberts Court first relied on such child-protectionism principles in *Morse*, when it upheld a principal's decision to confiscate a student's banner, which the principal viewed as advocating illegal drug use, in violation of school policy at a school-sponsored event held off-campus.⁴⁸ The student was suspended from school and challenged his punishment as a violation of his First Amendment right to free speech.⁴⁹ The Court focused on the potential harm that could result from children viewing the student's banner that read, "BONG HiTS 4 JESUS," a priori, which appeared to advocate the use of marijuana.⁵⁰

Before the case reached the Supreme Court, the Ninth Circuit, relying on *Tinker v. Des Moines Independent Community School District*,⁵¹ found that the student's First Amendment rights were violated because the school did not demonstrate that the speech posed a "substantial disruption of or material interference with" the school environment.⁵² The Court reversed, explaining that *Tinker* does not set the standard of proof necessary to punish speech in schools.⁵³ That is, the government need not prove "substantial disruption" before punishing school-related speech.⁵⁴ The Court found that schools are entitled "to safeguard [students] entrusted to their care from [harmful] speech that can reasonably be regarded as encouraging illegal drug use."⁵⁵

The *Morse* Court also focused on the negative potential effect of the speech on children, which could encourage them to experiment with illegal drugs.⁵⁶ The "BONG HiTS 4 JESUS" banner

48. 551 U.S. at 409–410.

49. *Id.* at 398–399.

50. *Id.* at 397–398, 408.

51. 393 U.S. 503 (1969).

52. *Frederick v. Morse*, 439 F.3d 1114, 1124 (9th Cir. 2006) *overruled*, *Morse*, 551 U.S. 393 (quoting *Tinker*, 393 U.S. at 514).

53. *See Morse*, 551 U.S. at 404–405 (clarifying that *Tinker* had been limited in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), because the Court stated that students' First Amendment rights are not the same as adults' rights, and the "substantial disruption" analysis provided in *Tinker* "is not absolute").

54. *Id.*

55. *Id.* at 397.

56. Several school boards have found that "peer pressure is perhaps 'the single most important factor leading schoolchildren to take drugs.'" *Id.* at 408 (quoting *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822, 840 (2002) (Breyer, J., concurring)). The *Morse* Court rejected the notion that the student's speech was political

could influence children to believe that using marijuana is acceptable,⁵⁷ and the banner could cognitively desensitize them from the legal or social barriers to its use in the same way that children imitate and adopt behaviors that they are exposed to generally as they search for individual identity, a system of values, and an understanding of society, culture, and appropriate behavior.⁵⁸

The Court relied on empirical evidence that drug abuse among American children is a serious problem and children are more susceptible to the negative physiological effects of drugs than adults are. The Court found that “[d]rug abuse can cause severe and permanent damage to the health and well-being of young people,” including more severe physical and psychological reactions to drugs, a greater likelihood of addiction, and poorer rates of rehabilitation once they become chemically dependent.⁵⁹ These facts supported Congress’ expansive agenda to help schools educate students about the dangers of illegal drug use,⁶⁰ and the banner at issue was “clearly . . . inconsistent with the school’s educational mission to educate students about the dangers of illegal drugs and to discourage their use.”⁶¹ The Roberts Court in *Morse* implicitly rejected the previously established concept that in order for the government to punish student speech, it must first show that the speech invites imminent, lawless action among children.⁶² That is, to the extent empirical evidence of harm to

speech, which presumably would render it “core” First Amendment speech and subject to exacting scrutiny: “Contrary to the dissent’s suggestion, . . . this is plainly not a case about political debate over the criminalization of drug use or possession.” *Id.* at 402–403.

57. *See id.* at 408 (describing that “students are more likely to use drugs when the norms in school appear to tolerate such behavior”).

58. *See infra* pt. I (discussing children’s and adolescents’ susceptibility to outside influence).

59. *Morse*, 551 U.S. at 407. The Court also noted the statistics on drug use among minors. *Id.*

60. *Id.* at 408.

61. *Id.* at 399 (quoting the school superintendent’s memorandum upholding the student’s suspension).

62. *See id.* at 409 (rejecting implicitly the need to show incitement to ban or punish speech in the school context: “Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting ‘imminent’ lawless action.”). The dissent, however, argued that “punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid.” *Id.* at 436 (Stevens, Souter & Ginsburg, JJ., dissenting). The dissent cited to the imminent incitement test from *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), “distinguishing ‘mere

children exists, it may be considered in First Amendment analysis regardless of whether it can be proven that the speech incites imminent lawless conduct. It is noteworthy that California made a similar causation argument in *Entertainment Merchants Assn.*; the state argued that even if speech is protected, if evidence suggests that it may harm children, the “First Amendment does not demand proof of a direct causal link” between the speech and the potential harm.⁶³ Additionally, governments may constitutionally draw “reasonable inferences based on substantial evidence” in setting policy regulating speech that may potentially harm children.⁶⁴

In *Fox Television Stations, Inc.*, Cher and Nicole Richie used “the F- and S-Words”⁶⁵ on broadcasts that were estimated to have been witnessed by 2.5 million children.⁶⁶ The FCC issued “Notices of Apparent Liability” to Fox for violating the FCC’s indecency policy.⁶⁷ Fox appealed, arguing that the FCC changed its policy by removing a per se exemption for the “fleeting expletives” at issue in *Fox Television Stations, Inc.*⁶⁸ Preexisting FCC policy held that expletives had to be repetitious, such as George Carlin’s “Filthy Words” monologue at issue in *FCC v. Pacifica Foundation*,⁶⁹ in order to constitute an indecent speech violation.⁷⁰ Fox argued that

advocacy’ of illegal conduct from ‘incitement to imminent lawless action.’” *Id.* Whether the majority was correct in its assessment of the dissent’s position relative to the level of harm that must be shown to allow punishment of speech, the majority implicitly rejected the need to show *Brandenburg* incitement to ban or punish speech, at least in the school context.

63. Br. of Petrs., *Schwarzenegger v. EMA*, 2010 WL 2787546 at 48 (Jul. 12, 2010) (No. 08-1448).

64. *Id.* (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994)).

65. *Fox TV Stations, Inc.*, 129 S. Ct. at 1807. Cher had exclaimed on the 2002 Billboard Music Awards, “I’ve also had critics for the last [forty] years saying that I was on my way out every year. Right. So f*** ’em.” *Id.* at 1808 (quoting Br. of Petrs., *FCC v. Fox TV Stations, Inc.*, 2008 WL 2308909 at 9 (June 2, 2008) (No. 07-582)). Richie, co-star of the Fox reality television series “The Simple Life,” stated during the 2003 Billboard Music Awards, “Why do they even call it “The Simple Life?” Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.” *Id.* (quoting Br. of Petrs., *FCC v. Fox TV Stations, Inc.* at 9–10).

66. *Id.* at 1809.

67. *Id.* at 1808–1809.

68. *Id.* at 1810.

69. 438 U.S. 726 (1978).

70. *Fox TV Stations, Inc.*, 129 S. Ct. at 1806. The FCC’s ban on Carlin’s monologue was upheld against a constitutional challenge because indecent speech need not “appeal[] to the prurient interest.” *Id.* Rather, indecent “refers to nonconformance with accepted standards of morality,” and Carlin’s monologue was indecent because radio has a “unique-

the FCC's finding that the use of nonrepetitive expletives can constitute "indecent" speech was a change in FCC policy that was arbitrary or capricious because the FCC did not adequately justify its rejection of its existing "safe harbor for single words" approach to indecent speech.⁷¹

The Court rejected Fox's argument, finding that the FCC's change from exempting nonrepetitive use of expletives to a "context-based approach" was not arbitrary or capricious.⁷² The FCC's argument in support of its policy was that "technological advances have made it easier for broadcasters to bleep out offending words" and that the existence of a "safe harbor" for the use of nonrepetitive expletives could increase the use of offensive language.⁷³ The Court found these to be rational justifications for the FCC's change in policy.⁷⁴

Notably, in reviewing the FCC's policy change, the Court focused on the harm to children that presumably results from exposure to profane speech, as well as the large number of children exposed to the broadcasts at issue.⁷⁵ Despite recognizing the dearth of empirical evidence that children are influenced by profane speech, the Court held that the FCC need not prove the harmful effects on children to justify its policy change as rational and non-arbitrary.⁷⁶ The Court stated:

Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives *will tend to produce children who use (at least) one-word indecent expletives*. Congress has made the determination that indecent material is harmful to children[] and has left enforcement of the ban to the Com-

ly pervasive presence" that is "uniquely accessible to children." *Id.* (quoting *Pacific Found.*, 438 U.S. at 740, 748–749).

71. *Id.* at 1813–1815.

72. *Id.* at 1812.

73. *Id.* at 1808, 1813.

74. *Id.* at 1812–1813. The FCC's decision not to impose sanctions "preclude[d] any argument that it [was] arbitrarily punishing parties without [prior] notice of the potential consequences of their action." *Id.* at 1813.

75. *Id.* at 1813–1814.

76. *Id.* at 1813.

mission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.⁷⁷

California honed in on this language in support of its position in *Entertainment Merchants Assn.*, arguing that precise proof violent video games cause harm to children is unnecessary for a state to act to protect children, and that “[s]uch a study would be as unethical as it is impractical.”⁷⁸

In *Fox Television Stations, Inc.*, the Court repeatedly referred to the large number of children exposed to the profanity, indicating its concern about the breadth of the profanity’s negative influence on children and even society at large.⁷⁹ Although no First Amendment issue was presented, the Court nonetheless reiterated that “excretory and sexual material ‘surely lie at the periphery of First Amendment concern.’”⁸⁰ In sum, *Fox Television Stations, Inc.* offers two indications of how the Roberts Court may review cases involving speech that potentially harms children: (1) assumptions that children are impressionable and vulnerable to moral decay through exposure to potentially harmful speech need not necessarily be supported by empirical evidence; and (2) certain types of speech—indecenty in this case—are of low value and may not receive traditional strict scrutiny review upon a First Amendment challenge consistent with *Young v. American Mini Theatres, Inc.*⁸¹ and the secondary effects doctrine.

Presumably, *Morse* is limited to student speech in school or at school-sponsored events, and *Fox Television Stations, Inc.* is limited to review of FCC regulatory actions. It is noteworthy, however, that the Court deferred to the government in both cases, basing part of its decision on research or historical assumptions

77. *Id.* (emphasis added).

78. Br. of Petrs., *Schwarzenegger v. EMA* at 48–49. That is, to prove causation directly without confounding factors, children would have to be isolated “from all other forms of violence . . . while exposing [children] only to violent video games in order to determine whether such exposure directly causes the negative physical and psychological” effects researchers believe they cause. *Id.* Considering the research linking harm to children from playing violent video games, it would be unethical to subject them to potential harm to prove a scientific point.

79. See *Fox TV Stations, Inc.*, 129 S. Ct. at 1808–1809 (stating that “approximately 2.5 million minors witnessed each of the broadcasts,” and that the FCC “received numerous complaints from parents whose children were exposed” to the broadcasts at issue).

80. *Id.* at 1819 (quoting *Pacifica Found.*, 438 U.S. at 743 (plurality)).

81. 427 U.S. 50 (1976).

concerning children's developmental vulnerability to speech influences. These cases may indicate that the Roberts Court will consider social science research regarding children's and adolescents' brain development and, perhaps more generally, cognitive learning theory⁸² to justify limitations on speech that may harm them. The Court's forthcoming decision in *Entertainment Merchants Assn.* will provide further insight into the Court's direction in this regard.

In *Graham*, the Roberts Court extended the social science-based reasoning to find that the Eighth Amendment prohibits punishing a juvenile with a sentence of life imprisonment without the possibility of parole when the juvenile did not commit homicide.⁸³ After reviewing amicus briefs filed by the American Medical Association and the American Psychological Association, the Court found that "[n]o recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles," and that there are "fundamental differences between juvenile and adult minds" that render juveniles less morally blameworthy and more capable of rehabilitation than adults.⁸⁴ Chief Justice Roberts specifically reiterated the conclusion in *Roper* that juveniles are different from adults in three general ways: "[A] lack of maturity and an underdeveloped sense of responsibility, a heightened susceptibility to negative influences and outside pressures, and the fact that the character of a juvenile is 'more transitory' and 'less fixed' than that of an adult."⁸⁵ According to Chief Justice Roberts, these differences render juveniles "less morally culpable than adults who commit the same crimes."⁸⁶

Although *Graham* is a cruel and unusual punishment case, as opposed to a speech case, the Court relied on research concerning children's developmental vulnerability and susceptibility to negative influences that converges with the research relied upon in the speech cases discussed previously. The Court used this research

82. See *supra* pt. II for an explanation of cognitive learning theory.

83. *Graham*, 130 S. Ct. at 2034.

84. *Id.* at 2026–2027.

85. *Id.* at 2038 (Roberts, C.J., concurring) (quoting *Roper*, 543 U.S. at 569–570). Chief Justice Roberts concurred because he disagreed with the majority's adoption of a categorical rule that prohibits imposition of a life sentence without parole for a juvenile offender who did not commit homicide. *Id.* at 2036.

86. *Id.* at 2038.

to protect children from penalties that do not raise constitutional concerns when imposed on adults. The Roberts Court's reliance on social science concerning children's and adolescents' developmental vulnerability to determine constitutional and regulatory issues may indicate that the Roberts Court is moving toward a more active role in modifying constitutional and regulatory law for the purpose of protecting children. This theory envisions the Court reversing the Ninth Circuit in *Entertainment Merchants Assn.*, or, at the very least, rendering an opinion that offers some guidance on how states can justify speech regulation to protect children without offending the First Amendment.⁸⁷

IV. CONCLUSION

Recent scientific research proves that children and adolescents are indeed different creatures than adults. The Roberts Court has issued three decisions that protect children and adolescents based on scientific research or assumptions that children are fundamentally different from adults and in need of protection from negative influences and harsh penalties resulting from developmentally predictable poor choices. These decisions could foretell a new era of constitutional and regulatory jurisprudence in which the Court will defer to state action protecting children from negative media influences or protecting children from harsh penalties for their own inappropriate conduct attributable to their undeveloped character and highly influential nature. A fourth Roberts Court decision concerning children's psychological vulnerability to negative influences is forthcoming in *Entertainment Merchants Assn.* The Court's decision should shed some light on the Court's agenda relative to government protection of children based on their developmental vulnerability and how social science and legislative fact-finding will affect constitutional norms produced by the Roberts Court concerning children.

87. For an analysis of how the California sales regulation at issue in *Entertainment Merchants Assn.* actually furthers children's First Amendment rights, as opposed to infringing them, see Pollard Sacks, *California's Interest*, supra n. 26, at 16–18.