Developing Citizens

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Developing Citizens

Anne C. Dailey

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  American Psychoanalytic Association. All rights reserved.
A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. – Prince v. Massachusetts

I. INTRODUCTION

The Supreme Court has known for over a half century that the survival of our constitutional polity ultimately depends on the proper cultivation of children's "hearts and minds." This idea was expressed most directly in Brown v. Board of Education, where a unanimous Supreme Court concluded that segregated schooling affects the psychological well-being of African-American schoolchildren in a way that undermines "the very foundation of good citizenship." On many other occasions as well, the Justices have formulated constitutional doctrine to foster the development of psychological skills in future citizens. Yet for all the normative force of this idea, its meaning has never been fully explained or elaborated, nor even likely understood. Courts and commentators have not paused to analyze with care the relationship between child development and democratic citizenship as an issue of any importance in constitutional law. To the contrary, over the last fifty years constitutional law has actually lost sight of the critical developmental affiliation between hearts and minds. This Article aims to reintroduce constitutional law to the importance of children's psychological development by presenting a comprehensive theoretical and empirical account of the connection between early caregiving relationships and the reasoned thinking of adult citizens.

The ideal of the autonomous individual capable of meaningful choice and informed decisionmaking is a core operative concept in modern constitutional law, central to contemporary accounts of individual liberty and democratic self-government. Yet an understanding of reason's empirical substrata—what it actually means psychologically for an individual to lead a self-defined life and to participate in the activities of democratic self-government—has yet to emerge. Easily identified are the conditions of mind excluded from reason: irrationality, emotional excess, inner compulsions, external coercions, and instinctual drives. But identifying with any specificity what reasoned thinking involves is much less clear. Certainly

3. Id.
5. For a recent elaboration of the value of democratic citizenship in constitutional law, see generally STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).
an individual's capacity for leading a self-directed life and participating in
the processes of democratic self-government entails much more than the
cognitive skills of information processing, logical analysis, and conceptual
thinking. At a minimum, a citizen must be able to identify his or her beliefs,
values, and commitments and to think and act in a manner consistent with
those choices. Because beliefs, values, and commitments are not always clear
or consistent, critical reflection has an essential role to play in the process of
reasoned thinking. Sources of emotional understanding such as empathy
and intuition also contribute to the capacity for reason, as do the mature
psychological skills of emotional regulation. The psychological skills of
citizenship so defined encompass both heart and mind: basic cognitive
abilities as well as the integrated psychological capacities for personal self-
reflection and emotional self-mastery.

It is the process of becoming a citizen in the full psychological sense of
the term—how we acquire the integrated cognitive and emotional capacities
of mature reasoned thinking—that makes understanding how children
develop so vital to the elaboration of our most deeply held constitutional
ideals. Research on children's psychological development provides a starting
point for conceptualizing the maturational trajectory from infancy to adult
citizenship. This developmental research teaches that the emotional and
cognitive skills of reasoned thinking are not necessary, self-executing, and
inevitable attributes of human existence, but rather begin to develop in the
context of the early caregiving relationship. While the early caregiving
relationship is not the only context relevant to the development of reasoned
thinking, it is arguably the most important. Being the first, it establishes a
template for the influence of later relationships, including teachers, friends,
spouses, partners, and children, across the span of the individual's life. And
being affect-driven, it gives rise to a psychological world in which emotion
and cognition cannot be separated. Feeling is thinking in the earliest
months of life. Developmental research shows us in what way early family
relationships are the source of our most emotionally charged attachments
and commitments as well as our capacity for integrating and managing our
deeply felt passions and prejudices.

The implications of developmental research for constitutional law are
simply stated: When sufficiently responsive to a young child's needs, early
caregiving relationships help to cultivate the cognitive and emotional
processes that are the foundation for adult citizenship. Developmental
research does more than simply confirm the common sense proposition that
well-functioning families are good for children and therefore good for
society. The field helps us to identify with specificity the caregiving
conditions most likely to foster the cognitive and emotional skills required of
democratic citizens. Developmental researchers cannot identify with any
degree of precision the point at which the quality of childrearing falls below
the threshold required for the normal processes of psychological
development to unfold. Nor can developmental psychology explain why some children who lack good-enough caregiving nevertheless grow up to become psychologically robust adults. What developmental psychology does provide is empirical information showing that good-enough caregiving, in the aggregate and over time, makes an essential early contribution to the development of those psychological capacities that are necessary to the maintenance and flourishing of our modern democratic polity.

A developmental perspective on citizenship poses a challenge to traditional views about children and families in constitutional law. Despite the fact that political scientists and cultural anthropologists have been writing for decades about the family's important role in the political socialization of children, constitutional and family law scholars have largely avoided the subject. Feminists and family law scholars criticize the idea of the family as a private enclave separate and apart from the public sphere, but these critics shy away from identifying the existence of a distinctly public role for the family in raising future citizens. Similarly, modern constitutional scholars tend to regard family relationships as more


7. For important exceptions, see Bruce A. Ackerman, Social Justice in the Liberal State 140–54 (1980), which examines the family's role in the development of the “cognitive, linguistic, and behavioral” skills necessary for adult citizenship, and David J. Herring, The Public Family 59–65 (2003), which examines the family's “socialization function.”


9. See, e.g., Herring, supra note 7, at 59–65. Political theorists such as Jean Bethke Elshtain recognize, but do not explore, the empirical basis for the family's political role. See generally Jean Bethke Elshtain, Public Man, Private Women: Women in Social and Political Thought (1993). Susan Moller Okin and Michael Walzer explore the political status of women in the family but do not address the political socialization of children. See generally Susan Moller Okin, Justice, Gender, and the Family (1991); Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (1990). Other feminist theorists have identified the unique importance of caregiving to collective life but have tied it to an ethic of care rather than to the political socialization of children. See generally Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies (1995); Mona Harrington, Care and Equality: Inventing a New Family Politics (1999); Robin West, Caring for Justice (1999); Naomi Cahn, The Power of Caretaking, 12 Yale J.L. & Feminism 177 (2000).
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appropriately governed by the values of free choice and personal autonomy than by the norms of democratic political life. Contemporary political theorists acknowledge the role of families, schools, religious associations, neighborhoods, and other social groups in the socialization of children, but most of these theorists do not give adequate attention to what is distinct about family relationships. Families are broadly classified with other social groups without any careful analysis of the actual empirical mechanics of child development. By failing to undertake a close empirical examination of the family's contribution to children's development as citizens, constitutional and family law scholars overlook the possibility that early caregiving provides something unique in the socialization process, beyond the usual reach of civil associations in a liberal democracy. Later associations, most notably educational ones, will contribute to the development of democratic skills and values, but the foundational processes of democratic citizenship are laid down in the early caregiving years.

This Article's elaboration of the need for an empirically grounded developmental perspective in constitutional law is new, but Supreme Court attention to the issue of democratic socialization is not. Part II describes how the Supreme Court has been engaged in a quiet debate over the place of children in a democratic polity for the past half century. Much of this debate has addressed the State's proper role in inculcating democratic values and loyalties in public school children. Part II.A describes this debate as it


11. See Amy Gutmann, Democratic Education 14–16 (1987); Alasdair MacIntyre, After Virtue: A Study in Moral Theory 220 (2d ed. 1984); Michael J. Sandel, Liberalism and the Limits of Justice 179 (1982). More recently, some scholars have advanced the view that the decline of the traditional two-parent family undermines the development of democratic virtues in children, such as tolerance, respect, and independence, but without any solid empirical developmental support for that causal claim. See Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society 35 (Mary Ann Glendon & David Blankenhorn eds., 1995). William Galston has relied on social science data supporting the family's role in fostering children's well-being, see William Galston, Causes of Declining Well-Being Among U.S. Children, in Sex, Preference, and Family 290, 300 (David M. Estlund & Martha C. Nussbaum eds., 1997), although his conclusion that "the best anti-poverty program for children is a stable, intact [two-parent] family" is rejected here. See infra IV.B; see also Martha Albertson Fineman, The Family in Civil Society, 75 CHI.-KENT L. REV. 531, 532–33 (2000) (arguing that an emphasis on the two-parent family "operates to eclipse concern with social and economic forces that are truly destructive of families regardless of their form"); Iris Marion Young, Mothers, Citizenship, and Independence: A Critique of Pure Family Values, 105 ETHICS 535, 545 (1995). David Popenoe draws on developmental research to argue that traditional two-parent families are essential for instilling the skills of democratic citizenship. See David Popenoe, The Roots of Declining Social Virtue: Family, Community, and the Need for a "Natural Communities Policy," in Seedbeds of Virtue, supra, at 71. Popenoe's application of developmental research in support of two-parent families, rather than good-enough caregiving in whatever form it takes, has little empirical support or normative appeal. See infra Part IV.B.
emerged in the foundational cases of *Meyer v. Nebraska*,\(^\text{12}\) *Pierce v. Society of Sisters*,\(^\text{15}\) *West Virginia State Board of Education v. Barnette*,\(^\text{14}\) *Prince v. Massachusetts*,\(^\text{15}\) and *Brown v. Board of Education*,\(^\text{16}\) and explores the developmental themes that tie these cases together into a distinct tradition. Part II.B takes note of the important turn toward empirical research in *Brown* and the ensuing controversy over the application of developmental research in constitutional decisionmaking. In Part II.C, this Article explains how an empirical developmental perspective provides a much needed revision of two fundamental assumptions relating to the political socialization of children: that reason and emotion are distinct realms of psychological experience and that schools are the primary venue for the development of the skills of democratic citizenship. An account of the importance of early caregiving to the development of democratic citizens provides a necessary reworking of these two assumptions relating to the democratic socialization of children in constitutional law.

Part III presents empirical research on the role of early caregiving in the formation of the mental processes leading to the mature capacity for individual reason. One of the most important factors in the development of these early mental processes is the internalization of the relationship with a "good-enough caregiver," one who is able to provide an emotionally attuned and responsive environment for the child. The developmental research on good-enough caregiving presented in this Part comes from a number of subfields within the discipline of psychology, including neuroscientific, cognitive, and social psychologies, but the primary framework derives from the field of psychoanalytic developmental psychology. Psychoanalytic developmental psychology provides a comprehensive picture of how the early caregiving relationship interacts with the child's innate constitution to create a differentiated self possessing the basic mental capacities necessary for reasoned thinking. This Part explores how this dynamic interaction between biology and caregiving gives birth to the child's psychological world and eventually the capacity for leading an independent, self-directed, and politically meaningful life. The importance of the social environment to the early caregiving relationship, and the connection between early caregiving and a democratic citizenry's vulnerability to societal regression at times of political crisis, are the subject of Part III as well.

Part IV applies the developmental research described above to an area of law that provides an ideal testing ground because it occupies a constitutional terrain closest, in certain respects, to developmental issues.

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12. 262 U.S. 390 (1923).
This is the field of constitutional family law, a subject whose jurisprudential span covers a range of doctrines, principally in the areas of privacy, equality, and federalism. The fundamental principles of the developmental approach—its empirical perspective, its focus on the relationship between early caregiving and adult reasoned thinking, and its commitment to securing the social preconditions to national citizenship—offer a substantial reworking and integration of constitutional family law. As this Part explains, a developmental approach refashions the doctrine of parental rights under the Due Process Clause of the Fourteenth Amendment to encompass constitutional protection for caregiving relationships. A focus on development also supports congressional power to foster family caregiving while at the same time setting limits on congressional authority over the moral dimensions of family life. Finally, a developmental perspective supports a circumscribed sphere of state sovereignty in matters relating to children’s welfare as a means of diffusing the national government’s power to mold developing citizens in its own image.

A final caveat is in order. While there is some overlap with developmental psychopathology, the developmental approach taken here does not define citizenship in terms of mental health. To the contrary, the focus is on broadening access to the rights and duties of democratic citizenship, particularly for impoverished children. It must be noted that one of the main accomplishments of modern constitutional law has been the elimination of barriers to full citizenship based on assumptions about a particular group’s incapacity for reason. The political disenfranchisement of African-Americans, women, the poor, and non-English speaking immigrants was justified at different times on the ground that these groups lacked the capacity for reason, and the eradication of such barriers to citizenship reflects the ascendancy of an evolving, more inclusive ideal of membership in the democratic polity. Yet the universal ideal of reason should not become a barrier to probing the complex social, cultural, and economic factors that affect the individual’s capacity for acquiring the psychological skills needed for leading a self-directed, politically engaged life. The ideal of individual reason, standing alone, runs the risk of weakening democratic values and institutions in the long run by neglecting the important social and familial preconditions to adult citizenship. The developmental approach presented in this Article looks beyond formal barriers to citizenship, such as segregated schools and poll taxes, to address the less visible, but no less formidable, internal barriers to children’s future membership in the democratic polity.  

17. This endeavor does not seek to make constitutional interpretation an empirical enterprise. Rather the aim is to harness developmental research in an effort to promote and realize our deepest constitutional norms. In this regard, the project has historical roots. See
II. THE DEVELOPMENTAL TRADITION IN CONSTITUTIONAL LAW

Developmental ideas have been an important but largely unacknowledged part of constitutional decisionmaking for almost a century. This Part first considers the role of developmental ideas in a series of early Supreme Court cases addressing the State’s interest in the political socialization of children. The developmental tradition in constitutional law began with a debate about the proper role of government in cultivating democratic skills and values in young children, primarily in the context of public education. This early series of cases culminated in 1954 with the Supreme Court’s application of empirical developmental research in *Brown v. Board of Education*.\(^ {18}\) In the aftermath of *Brown*, a controversy erupted over the question whether constitutional law, given its unique design and purpose, is fundamentally incompatible with the application of empirical developmental research. This Part explains why the answer to this question is unequivocally no: why, in other words, constitutional law needs developmental research to modify prevailing common-sense assumptions about the democratic socialization of children.

A. THE FOUNDATIONAL CASES: MEYER, PIERCE, BARNETTE, PRINCE, BROWN, AND THE EMERGING CONSTITUTIONAL INTEREST IN THE POLITICAL SOCIALIZATION OF CHILDREN

Over the course of the twentieth century, the Supreme Court grappled with developmental issues in several of its major cases defining constitutional liberties under the Due Process, Free Speech, and Freedom of Religion Clauses. In a pair of cases decided in the 1920s, the Court struck down state education laws based, in part, on assumptions about the political socialization of children in a democratic society. In the first of these cases, *Meyer v. Nebraska*,\(^ {19}\) the Supreme Court considered a challenge to a state law forbidding the teaching of any modern language other than English to primary school children.\(^ {20}\) The Court quoted the Nebraska Supreme Court’s statement on the purposes of the statute:

The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be *inimical to our own safety*. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother

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\(^ {19}\) 187 N.W. 100 (Neb. 1922).
\(^ {20}\) 262 U.S. 390 (1923).
tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.\textsuperscript{21}

While acknowledging that "the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally," the Court nevertheless held that the statute was an unconstitutional intrusion, "in time of peace and domestic tranquility," into the parents' right to control their children's education under the Fourteenth Amendment.\textsuperscript{22} In considering the State's interest in inculcating democratic values, the Court noted: "The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration."\textsuperscript{23}

Yet the Court held that "[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed."\textsuperscript{24} Moreover, the Court concluded, "[i]t is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child."\textsuperscript{25} The parental right recognized in \textit{Meyer} rested on the view that early language acquisition was not essential, in ordinary times, for the development of democratic "ideas and sentiments" in children.\textsuperscript{26}

Developmental concerns were also apparent in the second of the two cases, \textit{Pierce v. Society of Sisters}.\textsuperscript{27} This case involved the constitutionality of Oregon's Compulsory Education Act, a law that required children to attend public school through the eighth grade. Relying on \textit{Meyer}, the Court held that the Oregon statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."\textsuperscript{28} In a well-known passage, the Court explained:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from

\begin{itemize}
\item \textsuperscript{21} \textit{Id.} at 397-98 (quoting \textit{Meyer}, 187 N.W. at 102).
\item \textsuperscript{22} \textit{Id.} at 401-02.
\item \textsuperscript{23} \textit{Id.} at 402.
\item \textsuperscript{24} \textit{Id.} at 403.
\item \textsuperscript{25} \textit{Meyer}, 262 U.S. at 403.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} 268 U.S. 510 (1925).
\item \textsuperscript{28} \textit{Id.} at 534-35.
\end{itemize}
public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.  

In a later case, the Court would elaborate that "[t]he duty to prepare the child for 'additional obligations'... must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." In a democratic republic, according to the Court, it is the proper role of parents rather than the State to "prepare" children for citizenship. This understanding of children's place in a democratic polity follows from the Justices' views about the vulnerability of children to state coercion and the important role that parental rights play in shielding young children from state indoctrination.

The doctrine of parental rights in constitutional law thus emerged in the early twentieth century in connection with a set of assumptions about the parents' proper role in the democratic socialization of children. It should come as no surprise that the question of control over children's education arose at this point in time. Spurred on by the changing needs of business, the movement for universal public education was at the forefront of social reform efforts, and by 1918 compulsory education laws were in existence in all the states. Progressive reformers viewed restrictions on child labor as the natural outgrowth of their belief in the importance of education to the developmental needs of children and the long-term health of the democratic polity. At his laboratory school at the University of Chicago, John Dewey and his colleagues applied their ideas about child development with the aim of instilling democratic skills and values in a greater number of citizens, particularly immigrant children. These reformers' commitment to educational reform was part of a broader progressive-era movement for democracy that rested on a belief in the importance of educating children for democratic citizenship.

29. Id. at 535.
31. Pierce, 268 U.S. at 535.
32. Id. at 534–35.
Yet parental rights bore an ambivalent relationship to the early twentieth-century goal of educating children for democracy. On the one hand, parental rights were seen as providing a necessary defense against the rise of authoritarian government. The threat of communism from abroad prompted fears about state indoctrination of young minds, as the opinions supporting parental rights in *Meyer* and *Pierce* both suggest. Parental rights defused the threat of excessive state authority, thereby fostering the development of democratic citizens free from state control. On the other hand, public efforts to shore up democratic values against the perceived threat from abroad also became more urgent. State legislation excluding aliens from working as public school teachers was passed during what Justice Blackmun described as World War I's "frantic and overreactive days." In April 1939, President Roosevelt presided over a national Conference on Children in a Democracy, the aim of which was to consider "the relationship between a successful democracy and the children who form an integral part of that democracy." On the eve of World War II, securing democracy by inculcating the ways of democratic thinking in young minds had become a national priority.

One year later, the Supreme Court squarely entered this national debate over the democratic education of children with a controversial and short-lived decision in *Minersville School District v. Gobitis*. Justice Frankfurter wrote the opinion upholding the power of a Pennsylvania school board to expel public school children for refusing to stand and salute the American flag while reciting the Pledge of Allegiance. The plaintiffs in this case were a father and his two children who, as Jehovah's Witnesses, claimed that the required ceremony violated their rights to religious freedom. A majority of the Court rejected the plaintiffs' claim, with Justice Stone alone dissenting. Frankfurter's discussion of the State's authority to "exact participation in the flag-salute ceremony" is worth considering even though a majority of the Justices would change their minds on the matter within three years. In reaching his decision upholding the school board's decision to expel the

36. See Woodhouse, *supra* note 33, at 1091 (discussing the opinion of Justice McReynolds in *Meyers v. Nebraska*, 262 U.S. 390 (1923)).

37. See *id*. at 1078.


39. Franklin D. Roosevelt, Address by the President of the United States (Apr. 26, 1939), in *CONFERENCE ON CHILDREN IN A DEMOCRACY, PAPERS AND DISCUSSIONS AT THE INITIAL SESSION* (1939).


41. *id*. at 591.

42. *id*. at 591–92.

43. *id*. at 592.

44. *id*.
Gobitis children, Frankfurter weighed the children's right to religious freedom against the State's strong interest in fostering "national cohesion." With respect to the State's interest, Frankfurter clarified that "[w]e are dealing with an interest inferior to none in the hierarchy of legal values." Playing upon fears aroused by the war in Europe, he declared that "[n]ational unity is the basis of national security." For Frankfurter, nothing less than the "the existence of an organized political society" was at stake in the dispute over children's compelled participation in the flag-salute ceremony.

How was it that children's participation in the flag-salute ceremony ensured the continuing existence of the democratic polity? In Frankfurter's view, "[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment." Participation in the flag ceremony fosters a "unifying sentiment" essential to the very existence and survival of our democracy, "without which there can ultimately be no liberties, civil or religious." As Frankfurter described it, this "cohesive sentiment" is fostered "by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization." A democratic society, Frankfurter explained, "may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties." The purpose of the compulsory flag-ceremony law, he explained, is the cultivation of this cohesive sentiment in the hearts and minds of children at an early age, "at those periods of development when their minds are supposedly receptive to its assimilation." He elaborated:

We are dealing here with the formative period in the development of citizenship. Great diversity of psychological and ethical opinion

45. Gobitis, 310 U.S. at 595.
46. Id.
47. Id.
48. Id. at 596.
49. Id.
50. Gobitis, 310 U.S. at 597. The idea that democracy rests on the sentiments of citizens was a theme echoed throughout this period in Supreme Court decisions, including several of the Japanese internment cases. In these cases, the Court repeatedly described the "loyalty" that binds a citizen to his country as "a matter of mind and of heart not of race." Hirabayashi v. United States, 320 U.S. 81, 107 (1943) (Douglas, J., concurring) (affirming a conviction for the violation of a military curfew order imposed on Japanese Americans); see also Ex parte Mitsuye Endo, 323 U.S. 283, 302 (1944) (holding that a military detention of a concededly loyal Japanese American was unauthorized).
51. Gobitis, 310 U.S. at 596.
52. Id. at 600.
53. Id. at 597.
exists among us concerning the best way to train children for their place in society. Because of these differences and because of reluctance to permit a single, iron-cast system of education to be imposed upon a nation . . . even though public education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools. But it is a very different thing for this Court to exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country.\textsuperscript{54}

Frankfurter's view of the vital link between the inculcation of democratic sentiments and the survival of a democratic way of life led him to construe the compulsory flag-ceremony law as a legitimate state interest of the highest magnitude, outweighing the individual interests of the Jehovah's Witness parents and children in this case.

Three years later, the Supreme Court revisited the question of the State's power to inculcate democratic values in school children in \textit{West Virginia State Board of Education v. Barnette},\textsuperscript{55} a case nearly identical on its facts to \textit{Gobitis}. Barnette involved a challenge by Jehovah's Witnesses to a West Virginia law requiring that public school children salute the flag. This time, a majority of the Court firmly rejected the State's argument that democracy requires the public inculcation of values in children in favor of the view that democratic values are best transmitted to children through early exposure to democratic institutions. As Justice Jackson argued for the majority, "[t]hat they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source."\textsuperscript{56} On the question of instilling patriotic loyalty in young children, the concurring Justices reasoned: "Love of country must spring from willing hearts and free minds."\textsuperscript{57} In the majority's view, children's exposure to a democratic environment, and not direct inculcation, is the primary route for the transmission of democratic values to future citizens.\textsuperscript{58} Frankfurter filed a long dissent in which he reiterated the views that he had expressed in \textit{Gobitis}. His strongly worded opinion took the position that the Constitution requires deference to the state legislature's

\textsuperscript{54} Id. at 598–99 (citation omitted).
\textsuperscript{55} 319 U.S. 624 (1943).
\textsuperscript{56} Id. at 637.
\textsuperscript{57} Id. at 644 (Black, J., concurring).
\textsuperscript{58} Id. at 631; see also Betsy Levin, \textit{Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School}, 95 \textit{Yale L.J.} 1647, 1653 (1986) (listing \textit{Barnette} among the cases in which "the Court has noted the state's considerable interest in inculcating democratic values and traditions").
assessments of how best to inculcate democratic values in young children.\textsuperscript{59} As he described it, it is perfectly legitimate, indeed necessary, for the State to promote the affirmative inculcation of particular "ideas and sentiments."\textsuperscript{60} What these ideas and sentiments were is less clear: loyalty, a respect for fundamental rights, and a somewhat vague "appreciation of the nation's hopes and dreams, its sufferings and sacrifices."\textsuperscript{61}

The Court continued the debate over inculcating democratic values in children the following year in \textit{Prince v. Massachusetts}.	extsuperscript{62} Like \textit{Barnette}, this case involved the right of Jehovah's Witness parents to raise their children in accordance with their religious beliefs. Sarah Prince had been convicted of violating the Massachusetts child labor laws after she allowed her niece, for whom she was the legal guardian, to distribute religious publications on the street at night in her company. In upholding the conviction, the Court invoked the constitutional rights of parents: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."\textsuperscript{63} Nevertheless, "these sacred private interests, basic in a democracy," were outweighed by "the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."\textsuperscript{64} Citing empirical research on the effects of child labor, the Court asserted that a "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."\textsuperscript{65} In the same vein, the Court concluded: "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."\textsuperscript{66} The \textit{Prince} Court identified limits to parental authority aimed at reducing the power of parents to foster values inconsistent with children's growth into independent democratic citizens. In contrast to the earlier decisions in \textit{Meyer}, \textit{Pierce}, and \textit{Barnette}, here the Court sustained a powerful role for the

\begin{thebibliography}{9}
\bibitem{59} \textit{Barnette}, 319 U.S. at 662 (Frankfurter, J., dissenting) ("But, it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes.").
\bibitem{60} \textit{Id.} at 669 (Frankfurter, J., dissenting).
\bibitem{61} Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 597 (1940).
\bibitem{62} 321 U.S. 158 (1944).
\bibitem{63} \textit{Id.} at 166 (citing generally \textit{Pierce v. Soc'y of Sisters}, 268 U.S. 510 (1925)).
\bibitem{64} \textit{Id.} at 165.
\bibitem{65} \textit{Id.} at 168.
\bibitem{66} \textit{Id.} at 170.
\end{thebibliography}
State in inculcating democratic values over the objection of parents and guardians.

The opinions in *Meyer, Pierce, Barnette,* and *Prince* all relied on common-sense assumptions about the process by which children acquire the skills and values of democratic citizenship. *Brown v. Board of Education* took a further step in the direction of working out the role of the State in the political socialization of children. The focus in *Brown* was on equal citizenship rather than due process or religious freedom, but the same concern for "strangl[ing] the free mind at its source" was evident: "To separate [African-American children] from others of similar age and qualifications solely because of their race generates 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." The particular importance of *Brown*—beyond its stunning assault on racial segregation—was the introduction of empirical research on child development. The use of empirical research was not unprecedented, as the decision in *Prince* shows. But *Brown* represents an important step forward, albeit short-lived, in the application of developmental research to the constitutional debate over the political socialization of children. With this research came the possibility of moving beyond common-sense ideas about democratic socialization to a much deeper and more sophisticated understanding of the developmental process by which the psychological skills of democratic citizenship are transmitted to future generations.

**B. DEFENDING FOOTNOTE ELEVEN**

The reference to developmental literature in the *Brown* decision did not emerge out of thin air. At the turn of the twentieth century, Oliver Wendell Holmes, Jr. had proclaimed the importance of the newly emerging social sciences for law. In a similar vein, Roscoe Pound had been urging a new sociological jurisprudence that affirmed the superiority of empirical science over formal logic as an instrument of legal reasoning. Originally a critique of late nineteenth century legal formalism, the legal realists' interdisciplinary orientation and empirical focus soon became standard features in legal decisionmaking and scholarship. Yet the application of social science research to the realm of constitutional decisionmaking was

fraught with controversy from the beginning. Much of the controversy can be traced to the outcry over the *Brown* decision.\textsuperscript{72}

The developmental research appeared in *Brown*’s footnote eleven. The footnote included a string citation to social psychology studies on the adverse psychological effects of segregated schools on African-American children.\textsuperscript{73} The Supreme Court referred to this research in concluding that “[t]o separate [black children] from others of similar age and qualifications solely because of their race generates 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.”\textsuperscript{74} Based on this “psychological knowledge,” and supported by the “modern authorit[ies]” listed in the footnote, the Supreme Court came to the unanimous legal conclusion that “[s]eparate educational facilities are inherently unequal.”\textsuperscript{75} As commentators have pointed out, it is not clear that the Supreme Court actually relied on the developmental research to reach its holding.\textsuperscript{76} Even Chief Justice Earl Warren, who authored the decision, expressed surprise at the ensuing controversy. “‘It was only a note, after all,’” he is reported to have observed.\textsuperscript{77}
Chief Justice Warren’s apparent bewilderment about the outcry over footnote eleven belies the extent to which this evidence was the focus of debate from the beginning of the lawsuits through oral argument at the Supreme Court. Most of the litigation controversy centered on what has come to be known as the “doll studies.” At the request of Thurgood Marshall, then a lawyer with the NAACP Legal Defense Fund and the lead lawyer for the plaintiffs, the social psychologist Kenneth Clark testified at trial in three of the four cases that were consolidated on appeal in Brown.78 The focus of Clark’s testimony was a series of studies that he and his wife, Mamie Clark, had carried out with children aged three to seven using brown and white dolls. In these tests, the children were asked: “Give me the white doll” and “Give me the Negro doll,” along with “Give me the doll you like best,” “Give me the doll that is the nice doll,” and “Give me the doll that looks bad.”79 The majority of the African-American children tested showed an unmistakable preference for the white doll and a rejection of the brown doll.80 “In this case,” Thurgood Marshall argued to the Justices, “we have the positive testimony from Dr. Clark that the humiliation that these children have been going through is the type of injury to the minds that will be permanent as long as they are in segregated schools.”81 The problem for Marshall, as pointed out by opposing counsel at oral argument, was that a majority of African-American children in both segregated and non-segregated schools showed a clear preference for the white doll.82 Perhaps for this reason, Chief Justice Warren did not rely directly on Clark’s testimony or on the amicus brief, but instead cited to a comprehensive fact-finding report written by Clark entitled “The Effect of Prejudice and Discrimination on Personality Development for the 1950 Midcentury White House Conference on Children and Youth.”83 While the fact-finding report contained discussion of the doll studies, it also included an extensive review of research by dozens of other prominent social psychologists of the era supporting the proposition that segregated schools have an adverse effect on the psychological well-being of African-American children.84 Nonetheless, although the doll studies were only a small part of

78. Id. at 315–21.
79. Id. at 317–18.
80. Id. at 318.
82. Id. at 58–59.
84. See id. at passim (citing E.L. Horowitz, Attitudes in Children, in CHARACTERISTICS OF THE AMERICAN NEGRO 158 (Otto Klineberg ed., 1944); G.W. Allport & Bernard M. Krumer, Some Roots of Prejudice, 22 J. PSYCHOL. 9 (1946); Robert Blake & Wayne Dennis, The Development of Stereotypes Concerning the Negro, 38 J. ABNORMAL & SOC. PSYCHOL. 525 (1943); M.E. Goodman,
one of the authorities listed in footnote eleven, history has rendered the studies and the footnote synonymous.

Supporters of Brown were among the strongest critics of footnote eleven. Within months of the decision, Edmond Cahn commented on the "danger" of what he took to be the Supreme Court's reliance on social science research. As he described it, "I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records." Critics such as Cahn did not deny that the meaning of the Constitution evolves over time; the Supreme Court's position in Brown that "[w]e must consider public education in the light of its full development and its present place in American life throughout the Nation" was not the problem. Rather, these critics raised the question whether social science research is sufficiently rigorous to provide a basis for ascertaining the evolving meaning of constitutional rules and whether judges in constitutional cases are adequately equipped to evaluate the merits of social science research. The critics' response to footnote eleven rested in part on the uniqueness of constitutional decisionmaking. The use of social science research in drafting legislation and interpreting statutes, ruling on the admissibility of evidence, evaluating child custody awards, and a myriad of other occasions was not at issue. Rather, constitutional law is understood to involve rights more fundamental and more enduring than those guaranteed by statute or common law. As one commentator asked, "Should the meaning of the Constitution and Bill of Rights depend upon a sociologist's most recent study of crowd control, or a political scientist's latest public opinion survey?"

Evidence Concerning the Genesis of Interracial Attitudes, 48 AM. ANTHROPOLOGIST 624 (1946); Marian J. Radke & Helen G. Trager, Children's Perceptions of the Social Roles of Negroses and Whites, 29 J. PSYCHOL. 3 (1950); Marian J. Radke, Helen Trager & Hadassah G. Davis, Social Perceptions and Attitudes of Children, 40 GENETIC PSYCHOL. MONOGRAPH 327 (1949)).


There is an underlying irony to the criticism of psychological research as unscientific since the only apparent alternative to relying on empirical research is to rely on what commentators refer to as "common sense." Shortly after *Brown* was decided, Professor Charles Black offered a compelling defense of the decision as a model of non-scientific, common-sense reasoning. Black argued that social science did not play a determinative role in *Brown*, and that it need not have. "That a practice, on massive historical evidence and in common sense, has the designed and generally apprehended effect of putting its victims at a disadvantage, is enough for law." In a footnote, Black elaborated:

The charge that [the decision in *Brown*] is "sociological" is either a truism or a canard—a truism if it means that the Court, precisely like the *Plessy* Court, and like innumerable other courts facing innumerable other issues of law, had to resolve and did resolve a question about social fact; a canard if it means that anything like principal reliance was placed on the formally "scientific" authorities, which are relegated to a footnote and treated as merely corroboratory of common sense.

Implicit in Black's defense of common-sense reasoning in *Brown* is a more general critique of scientific thinking as a basis for constitutional decisionmaking. He suggests that, because of the normative questions at stake, constitutional fact-finding should be firmly rooted in common understandings and historical experience rather than specialized scientific data. Ronald Dworkin has offered a similar argument regarding the ability of social science to contribute to the kind of "interpretive" fact-finding necessary to normative constitutional decisionmaking. For both Black and Dworkin, the problem is not that the social sciences are insufficiently scientific. The problem is that they are *too scientific* for the normative task at hand.

In the long run, the critics of *Brown*’s use of developmental research have carried the day. In the area of public education, for example, the Court

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Cahn, *supra* note 85, at 167.


89. *Id.* at 430 n.25.

90. See Dworkin, *supra* note 85, at 6.
has hewed closely to the common-sense ideas about exposure and inculcation expressed in the opinions of Justices Jackson and Frankfurter in *Barnette*. In *Tinker v. Des Moines Independent Community School District*, for example, a majority of the Court drew on Justice Jackson's ideas about the importance of children's exposure to democratic environments in upholding the right of students to wear black armbands in protest against the Vietnam War:

"'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"\(^92\)

The application of the marketplace metaphor to the public school classroom reflects the common-sense idea that children exposed to free and open debate will be "trained" in democratic habits of mind. Similar views about exposure were at work in *Board of Education, Island Trees Union Free School District v. Pico*. Here the plaintiff students brought suit against the school board challenging the removal of certain allegedly "anti-American, anti-Christian, anti-[Semitic], and just plain filthy" books from the public school library. The students claimed that the removal of the books violated their rights under the First Amendment. In upholding the students' claim, Justice Brennan's plurality opinion concluded that "access to ideas... prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."\(^96\)

In other cases, the Supreme Court has stressed the importance of direct inculcation of values in children. In *Ambach v. Norwick*, for example, the Court upheld the power of the State to prohibit aliens from obtaining

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94. Id.
95. Id. at 868; see also id. at 876 ("[T]he Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government.") (Blackmun, J., concurring).
96. Id. at 871; see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that school officials could not constitutionally require Jehovah's Witnesses to recite the Pledge of Allegiance in public schools).
DEVELOPING CITIZENS

positions as public school teachers.\textsuperscript{97} Describing public school teaching as "a task 'that [goes] to the heart of representative government,'"\textsuperscript{98} the majority affirmed "[t]he importance of public schools in the preparation of individuals for participation as citizens."\textsuperscript{99} The Ambach Court explained how inculcation works through a process of role modeling whereby children identify with their teachers:

No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. . . . [A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.\textsuperscript{100}

Similarly, in Bethel School District No. 403 v. Fraser,\textsuperscript{101} the Court again described the process of inculcation in terms of role modeling:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.\textsuperscript{102}

The line between exposure and inculcation—so forcefully defended in Barnette—begins to blur in these more recent cases. What at bottom distinguishes an emphasis on inculcation versus an emphasis on exposure is

\begin{itemize}
  \item \textsuperscript{97} 441 U.S. 68 (1979).
  \item \textsuperscript{98}  Id. at 75–76 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).
  \item \textsuperscript{99}  Id. at 76. The Ambach decision suggests that the Court's inculcation model is less protective of rights than the adaptation model, but this is not necessarily the case. As already noted, the Brown Court utilized the inculcation model to strike down segregated schooling. In Plyler v. Doe, the Court drew on the inculcation model in a decision that prevented the State of New York from denying a free public education to alien children. 457 U.S. 202, 221 (1982); see also Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (holding that the State cannot constitutionally require school attendance of Amish students past eighth grade when doing so interferes with the exercise of religious beliefs); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 290 (1963) (Brennan, J., concurring) (arguing that the State may not require daily reading of bible passages in public school).
  \item \textsuperscript{100}  Ambach, 441 U.S. at 78–79.
  \item \textsuperscript{101}  478 U.S. 675 (1986).
  \item \textsuperscript{102}  Id. at 683.
\end{itemize}
one's attitude toward state authority. In the inculcation view, students should emulate, not challenge, their teachers. In the exposure view, such an authoritarian environment runs the risk of fostering totalitarian habits of mind.103

The Supreme Court's ideas about exposure and inculcation raise important and pressing questions about the role of the public school in the democratic socialization of children. Yet the ideas as elaborated in these cases lack sufficient empirical grounding and conceptual clarity. The Court fails to cite any developmental literature supporting the idea that children's exposure to a democratic environment or marketplace of ideas, particularly at the elementary school level, fosters democratic values and skills, however defined. We are not told exactly what democratic values are to be inculcated, or how that process will occur. In Ambach, the Court did note that the "perception of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists."104 But as the Court then acknowledged, these findings "generally reinforce the common-sense judgment, and the experience of most of us, that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be viewed as political."105 Common sense, rather than empirical research, remains the standard for constitutional fact-finding in the realm of children's democratic education.

This is not to say that social science research has played no role in constitutional decisionmaking since Brown.106 While the use of social science data appears fairly well-settled in many areas,107 it is the application of

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104. Ambach, 441 U.S. at 77 (citing R. DAWSON & K. PREWITT, POLITICAL SOCIALIZATION (1969); HESS & TORNEY, supra note 6; V. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY (1961)).

105. Id. at 79 n.9.


107. Mark Yudof argues that even in those cases where the Supreme Court has referenced social science research, it is "primarily on factual matters." Mark G. Yudof, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, 42 LAW & CONTEMP. PROBS. 57, 70 (1978).
psychological research that continues to ignite passions.\textsuperscript{108} Justice Scalia bitingly remarked in a recent dissent, "interior decorating is a rock-hard science compared to psychology practiced by amateurs,"\textsuperscript{109} and his views do not differ greatly from those expressed in the immediate aftermath of \textit{Brown}. Yet singling out psychology as uniquely unscientific ignores the large amount of scientific studies taking place in the fields of cognitive psychology, neurobiology, and child development. One might reasonably insist that the application of psychological research to constitutional law, as in any social or natural science, involves efforts to identify the best possible empirical findings given the available knowledge in the field. This standard requires evaluating research methodologies, sifting through conflicting research findings, and ascertaining scientific consensus in the field. The effort can hardly be considered so technical as to be beyond the professional capacity of judges accustomed, for example, to dealing with the science of complex patent cases or the economics of large-scale antitrust suits. The argument that psychological research equates to the latest public opinion survey or that social science findings fluctuate with the latest fashions clearly overstates the case. Few would argue that the social sciences exhibit the level of scientific rigor associated with the natural sciences, although the natural sciences—particularly the biological sciences—may not always be as exacting as their reputation suggests.\textsuperscript{110} But it is not clear why this concern should be a basis for excluding psychological research from consideration in constitutional cases. While divisions among behaviorists, biological scientists, cognitive researchers, and psychodynamic psychologists do pose distinct challenges for this task, these divisions are grounds for entering the field more deeply, rather than not at all.

Moreover, common-sense decisionmaking does not avoid the problems associated with the use of psychological research, and it creates several of its own. Obviously, common sense does not alleviate the problems of subjective bias, contested viewpoints, or empirically untestable hypotheses.\textsuperscript{111} More important, relying on judicial common sense to guide constitutional interpretation in this area runs the additional risk of tying constitutional law to outmoded ways of thinking. Common-sense decisionmaking assumes that facts are readily apparent to, or at least readily recognizable by, the general observer. Yet, the facts about psychological life notoriously elude common-sense understanding. One need not be an orthodox Freudian to recognize the power that unconscious emotions and beliefs exert over conscious thinking and decisionmaking, the role of defense mechanisms such as


\textsuperscript{110} See Robert K. Merton, \textit{Foreword to BERNARD BARBER, SCIENCE AND THE SOCIAL ORDER} 16 (1952).

\textsuperscript{111} BARBER, supra note 110, at 245.
denial, rationalization, and reaction formation in distorting one's conscious perception of the world, or the capacity of humans to regress psychologically at times of overwhelming stress. For over a century, psychoanalytic and cognitive researchers have documented the ways in which human subjectivity eludes our everyday grasp. Empirical psychology plays a vital role in illuminating those aspects of the human experience that are opaque to common understanding or that go against our deeply held intuitions. Charles Black was right that the facts about segregated schools in 1954 were obvious to everyone and needed no research data to support them. But common sense did not dictate the same result in 1896, when Plessy v. Ferguson affirmed the constitutional principle of separate but equal.112 As the debate over affirmative action now illustrates fifty years later, the social and psychological dynamics of discrimination are not so clearly available to common understanding."113 Indeed, contemporary psychological research suggests that common-sense assumptions about racial discrimination may even serve to mask more insidious forms of unconscious stereotyping and race-based decisionmaking.114

Some Justices have taken tentative steps in recent years to incorporate developmental research into constitutional decisionmaking. In Lee v. Weisman,115 Justice O'Connor relied on developmental research to support the holding that a student-led prayer at a public high school graduation violates the Equal Protection Clause: "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."116 Similarly, Justice Kennedy relied on developmental research in Roper v. Simmons,117 a decision that struck down the death penalty for defendants who were under eighteen at the time they committed their crimes.118 Both of these opinions are an encouraging sign of the current Supreme Court's willingness to look to developmental psychology in the process of defining the place of adolescents in the constitutional polity. The task undertaken here is to push back this inquiry even further to examine the implications of developmental research on the caregiving environment for very young children.

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113. See Yudof, supra note 107, at 73–74.
116. Id. at 593–94 (citing developmental research on peer influence).
118. Id. at 1195–96 (citing developmental research on adolescent decisionmaking).
C. DEVELOPING CITIZENS

A developmental perspective on citizenship throws into question two central assumptions regarding the democratic socialization of children in constitutional law: that the skills of reasoned thinking exclude emotions and that schools are the primary venue for transmitting the skills of democratic citizenship. First, developmental research challenges the common-sense assumption that the primary psychological attribute of citizenship is a kind of reasoned thinking that excludes emotional and other non-cognitive, unconscious processes. The traditional assumption that children lack the ability "to make critical decisions in an informed, mature manner" justifies many, if not all, of the restrictions on minors' rights, including the rights to marry, vote, obtain medical treatment, and work. It underlies the State's power to impose compulsory education on citizens and sets the parameters for the State's political education of children. The unstated corollary of this presumption is that adults naturally acquire this ability sometime before, or perhaps magically upon, the age of majority. This corollary proposition is one facet of a much broader and robust assumption of individual reason in constitutional law. Absent mental incompetence or incapacity, the adult individual is presumed to have acquired—at some point and in some manner—the mature psychological capacities for reasoned choice.

In the sphere of individual liberties, the constitutional understandings of privacy, free speech, free exercise of religion, equal protection, and the rights of the accused all draw to some extent on an ideal of the rational, intending, choosing, self-directing individual. For example, the right against self-incrimination recognized in *Miranda v. Arizona* rests on an ideal of the rational, intending individual who is capable—even at the moment of interrogation by police officers—of choosing to confess freely and voluntarily. In *Brewer v. Williams*, Justice White filed a dissent in which he put the matter succinctly: "Men usually intend to do what they do, and there is nothing in the record to support the proposition that respondent's
decision to talk was anything but an exercise of his own free will." In *Colorado v. Connelly*, the Court held that the confession of a man suffering from schizophrenia and experiencing command hallucinations that told him to confess to the killing of a young girl was a voluntary confession.\(^{124}\) As Justice Rehnquist wrote in that case, "the Fifth Amendment privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion."\(^{125}\) The subjective mental state of the defendant is itself irrelevant to the constitutional presumption that, in the absence of state misconduct, confessions are the product of free and voluntary reasoned choice.

*Roe v. Wade*, the centerpiece—and the Achilles heel—of modern fundamental rights jurisprudence, also gives expression to the ideal of reasoned choice.\(^{126}\) The Supreme Court specifically held in cases after *Roe* that a woman has no right to an abortion if she has no money to pay for one or cannot afford time off from work to travel to an abortion provider.\(^{127}\) It is a right to choose an abortion, not a right to the abortion itself.\(^{128}\) In an earlier case involving the right of unmarried women to use contraceptives, *Eisenstadt v. Baird*, Justice Brennan had voiced this same theme: "If the right of privacy means anything," Brennan argued, "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\(^{129}\) This bedrock ideal of reasoned choice penetrates constitutional analysis even in the area of religious freedom.\(^{130}\) The Court's recent decision upholding the Cleveland City School District's school voucher program held that the voucher scheme did not violate the Establishment Clause because it promoted the "true private choice" of parents.\(^{131}\) The Court held that:

\[\text{123. 430 U.S. 387, 434 (1977) (White, J., dissenting).}\]
\[\text{124. 479 U.S. 157, 169-70 (1986).}\]
\[\text{125. Id. at 170.}\]
\[\text{126. 410 U.S. 113, 153 (1973).}\]
\[\text{128. Justice Blackmun wrote in recognizing a woman's fundamental right to choose:}\]

\[\text{The Constitution does not explicitly mention any right of privacy . . . [But] the}\]
\[\text{Court has recognized that a right of personal privacy, or a guarantee of certain}\]
\[\text{areas or zones of privacy, does exist under the Constitution. . . . This right of}\]
\[\text{privacy . . . is broad enough to encompass a woman's decision whether or not to}\]
\[\text{terminate her pregnancy.}\]

\[\text{Roe, 410 U.S. at 152-53 (emphasis added).}\]
\[\text{129. 405 U.S. 438, 453 (1972) (second emphasis added).}\]
\[\text{130. See Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": Assimilation,}\]
\[\text{that liberal concepts of reason, free choice, and individual liberty "transform[]}\]
\[\text{[fundamentalist] values through exposure to competing views").}\]
where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.\(^{132}\)

Similarly, the principles articulated in the Supreme Court’s voting rights and education cases under the Equal Protection Clause implicitly appeal to the democratic value of individual reasoned choice.\(^{133}\) More recently, the principle of reason was at work in the Supreme Court’s decision in Lawrence v. Texas, which struck down a Texas anti-sodomy statute.\(^{134}\) As Justice Kennedy described it in that case, the concept of individual liberty under the Due Process Clause encompasses the freedom “to make certain fundamental decisions affecting one’s destiny.”\(^{135}\)

So it is that the fundamental, driving principle of individual reason underlies many of the great advances in individual rights over the last century. Likewise in the realm of democratic principles, the assumption of reason has a central role to play. Strong theories of deliberative democracy clearly emphasize the importance of reason to the deliberative processes of democratic decisionmaking.\(^{136}\) Yet one need not embrace full-scale participatory democracy to recognize the inexorable connection between reason and democratic self-government. Any theory of interest-group pluralism or simple majoritarian decisionmaking must take for granted that some significant percentage of individuals vote in accordance with their own values, beliefs, and preferences. More participatory accounts of democracy will emphasize collective decisionmaking, but the basic assumption about the reasoning capacity of most individual citizens remains the same. A system of democratic self-government would exist in name only if most individuals, or even a significant minority, were guided by irrational impulse, emotional excess, or external coercion. A constitutional commitment to democratic self-government carries with it a commitment to ensuring that electoral decisions are, to the greatest extent possible, the product of individual reasoned choice.

\(^{132}\) Id. at 652 (emphasis added).


\(^{134}\) 539 U.S. 558 (2003).

\(^{135}\) Id. at 565.

Yet the skills of reasoned thinking necessary to democratic life involve more than rational choice or cognitive decision-making. Developmental research challenges the prevailing behavioral assumption that reasoned choice excludes emotional or other non-cognitive elements. A developmental perspective reveals how, beginning in the earliest days of life and extending across the lifespan, emotional attachments and cognitive thinking are inextricably bound together. Intuition based on non-cognitive factors, unconscious perceptions, or memory plays an important role in reasoned thinking, as does the emotional skill of empathy. The capacity for regulating the effects of emotions on cognition is also central to the process of reasoned thinking. As explained in depth in Part III, the psychological skills of reasoned thinking depend on the balanced integration of cognitive and emotional processes.

A second, related constitutional assumption challenged by developmental research is the prevailing view that schools are the primary venue for cultivating the skills of citizenship. To the extent that political and legal commentators consider the role of the family in the political socialization of children, they tend to focus on the family's role in the transmission of political values, particularly attitudes toward government, affiliation with a political party, and expectations for group life, but they identify schools as the place where the reasoning skills of democratic citizenship are cultivated. What this assumption overlooks is the extent to which the psychological qualities that are necessary for reasoned thinking and that are developed through schooling depend upon skills first acquired in the context of the early caregiving relationship. Schools, civic organizations, and a wide variety of voluntary intermediate associations do have an important role in developing the skills of reasoned thinking in children. Yet educational institutions must build upon psychological structures and processes cultivated and established in the very earliest years. Early family relationships play a foundational role in fostering the emotional and cognitive mechanisms—the psychological infrastructure, if you will—upon which a liberal democratic education can then build.

The Supreme Court has occasionally alluded, however obliquely, to the family's affirmative role in the political socialization of children. *Pierce v. Society of Sisters* appealed to the role of families in educating young children to become citizens by noting that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the

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137. *See* HESS & TORNEY, *supra* note 6, at 95–96. Most commentators acknowledge that some early training in democratic values such as respect and fairness takes place in the family, *see* MACEDO, *supra* note 136, at 273–74; Galston, *supra* note 11, at 300, but how this comes about is rarely examined with empirical rigor. For an exception, *see* ACKERMAN, *supra* note 7, at 140–54.


139. 268 U.S. 510 (1925).
right, coupled with the high duty, to recognize and prepare him for additional obligations." In *Prince*, too, the Court emphasized that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Wisconsin v. Yoder* recognized the right of Amish parents to withdraw their children from public school after the eighth grade. Noting that the Amish "are productive and very law-abiding members of society," Chief Justice Burger emphasized how "the Amish qualities of reliability, self-reliance and dedication to work" reflect the ideal American citizen. More recently, Justice Powell relied on *Yoder* in *Bellotti v. Baird* for the proposition that "[t]his affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens." Yet the idea that families perform an essential socializing function necessary to the life of the polity has been dramatically overshadowed by the constitutional commitment to freedom from state indoctrination, a freedom that appears to rule out the idea that families play an essential unifying role in the political socialization of children.

To be fair, Justice Frankfurter's opinion in *Gobitis*, discussed earlier, did identify childrearing as one avenue for the cultivation of the "cohesive sentiment," as Frankfurter named it, which binds an individual to the Nation. While *Gobitis* was quickly overruled, similar views have emerged in recent cases on the constitutionality of gender-based naturalization laws. In *Nguyen v. INS*, the Supreme Court upheld federal laws that grant United States citizenship virtually automatically at birth to children born abroad to unmarried citizen-mothers but impose additional requirements in order for children of unmarried citizen-fathers to obtain citizenship. Writing for the majority, Justice Kennedy described the connection between early caregiving and adult citizenship in terms of "the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States ... during the formative years of the child's minority." In *Miller v. Albright*, an earlier case considering the same federal statutes, Justice Breyer, joined by Justices Souter and Ginsburg, elaborated: "The statutes focus upon two of the most serious of human relationships, that of parent to child and

140. *Id.* at 535.
143. *Id.* at 222, 224.
147. *Id.* at 59-60.
148. *Id.* at 65, 68.
that of individual to the State. They tie each to the other, transforming both while strengthening the bonds of loyalty that connect family with Nation.149

When the Justices in these immigration cases recognize a connection between childrearing and citizenship, they likely have in mind the family's role in cultivating the "cohesive sentiment" of patriotic loyalty Justice Frankfurter described in *Gobitis*.150 What these cases overlook is that family attachments are not only one important source of patriotic loyalty but also the source of the capacity to set appropriate limits on nationalistic excess. The capacity for emotional self-mastery, for subordinating passions to reason, and for bringing excessive political attachments under control begins to develop in the early caregiving period. Understanding the developmental roots of the skills needed to manage and integrate emotional excesses and patriotic fever must be a central task for any democratic polity committed to the ideal of individual reason.

III. DEVELOPMENTAL PERSPECTIVES ON CITIZENSHIP

Although not a psychological concept per se, the capacity for reasoned thinking represents a developmental line, or maturational sequence, beginning in the earliest physical interactions with an emotionally responsive caregiver and ending in a mature complex capacity to lead an independent, autonomous, self-directed life. Many factors affect the course of development, both innate and environmental, and it is impossible to say with any certainty how these factors will affect any particular child's development. Nevertheless, developmental research shows us that one of the most important environmental factors in this developmental trajectory is the relationship with early caregivers, in particular the relationship between an infant and its primary caregiver in the first two or three years of life.151 Empirical research from the cognitive, neurobiological, attachment and social psychological literature supports the view that early relationships with significant caretakers are critical to the building up of psychic structure and stable ego functions.152 This research correlates with the clinical observation

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150. *Gobitis*, 310 U.S. at 596.
that the early caregiving relationship stimulates and consolidates the
development of the most important early mental processes.153

The developmental pathway under study here encompasses at least five
early interrelated mental capacities: representational thinking, affect
regulation, self-other differentiation, imagination, and mentalization. These
early mental processes constitute interrelated, overlapping advances in the
child’s psychological growth toward a mature capacity for reasoned thinking.
A direct connection between these early mental processes and the mature
capacity for reason cannot be definitively established through empirical
methods. Nevertheless, developmental psychology allows us to draw some
tentative conclusions regarding the connections between these five early
psychological functions and the more mature, complex, and consolidated
mental processes of reasoned thinking. Representational thinking, for
example, is a foundational step in the development of more advanced
symbolization and conceptual thinking essential to reasoned
decisionmaking; affect regulation constitutes a necessary precursor to
emotional maturity and self-control; self-other differentiation reflects an
early stage in the development of the capacity for autonomous, independent
thinking and awareness as a political subject; imagination is an essential
element in the development of the capacities for mature self-reflection and
authentic choice; and finally, mentalization eventually gives rise to the
capacity to see the world from another’s point of view.

Section A of this Part examines the ways in which the early caregiving
relationship fosters the development of these five early mental processes.
The importance of internalization to the development of these five
foundational mental processes will be discussed, along with the relevant
clinical, cognitive, neurobiological, attachment, and social psychological
research. Section B examines the question of what constitutes a good-
enough caregiving relationship in the context of the broader familial and
social environment. This Section focuses on one, although far from the only,
serious environmental stress on the early caregiving relationship: chronic,
severe poverty. Section C explains how early modes of thinking evolve but
are never entirely replaced by higher-level psychological processes. A
developmental perspective sheds light on the threat that uncontrolled
regression on a societal scale poses to the long-term health, and even
survival, of a democratic citizenry. This Section shows how, by helping to
strengthen foundational mental processes, good-enough caregiving provides
some measure of resilience against the occasional, but inevitable, collapse of
the mature psychological process of reasoned thinking in democratic life.

153. See generally Linda C. Mayes & Donald J. Cohen, The Development of a Capacity for
A. INTERNALIZATION OF THE CAREGIVING RELATIONSHIP

Internalization, or the psychological taking in of the relationship with a primary caregiver, is a psychoanalytic concept that emphasizes the deep connection between early affective experiences and the creation of an inner representational world. In Freud's view, the infant's attachment to a primary caregiver develops secondarily as a means of satisfying the primary instinctual oral needs. As early as the 1940s, however, child psychoanalysts began to recognize the infant's biologically programmed need for sociability. Anna Freud was among the first to posit this innate predisposition to develop what psychoanalysts call "object relations," or relationships with other people. Rene Spitz, one of the earliest psychoanalytic empirical researchers, established that the affective reciprocity between the infant and primary caregiver stimulates the development and integration of psychological structure and processes. John Bowlby also emphasized the infant's innate need for a secure attachment to the primary caregiver.

Modern research supports the view that infants are born with an innate predisposition to develop affective relationships with caregivers. Infants only a few days old, for example, prefer human faces to other stimuli and human voices to other sounds. Even at three months, infants become withdrawn and upset if their primary caregiver remains emotionally neutral during an interaction. At first, the newborn relates to its environment physically, experiencing pleasure at the gratification of instinctual drives and displeasure at their frustration, and in general, being oriented to the sensorimotor regulation of bodily tensions. The primary caregiver responds to the infant's need for physiological homeostasis through feeding, holding, verbalization, facial expression, and other forms of soothing and stimulation. The beginnings of the infant-caretaker relationship reside in the infant's early need for the external regulation of bodily tensions, but the primary caregiver's emotional responsiveness serves a soothing or

156. Id. at 55.
158. See MAHLER ET AL., supra note 151, at 3; see also FONAGY ET AL., supra note 151, at 4; STERN, supra note 151, at 9, 7; TYSON & TYSON, supra note 152, at 24-25.
160. See TYSON & TYSON, supra note 152, at 147.
161. See id. at 32-33, 147; Mayes & Cohen, supra note 153, at 28-29.
containing function that reduces bodily tensions. At this stage, the infant begins to integrate basic neurophysiological capacities such as the ability to maintain an alert state, to direct attention to selected elements in the environment, and to make perceptual discriminations in areas such as visual patterns or the pitch of speech. These developing neurophysiological capacities make it possible for the infant to move beyond experiencing the world in terms of bodily pleasure and displeasure, and to begin to process external stimuli in an organized way. As the infant learns to associate particular facial characteristics, body parts, vocal pitch, and physical sensations with the primary caregiver, representations of these associations in the form of memories are created. Researchers postulate that from very early on—perhaps even from the earliest days of life—infants begin the process of building an internal representational world from the memories created by the integration of neurophysiological functions with the affectively laden interactions with a primary caregiver.

The internalization of affective exchanges between caregiver and infant, and the memories to which these exchanges give rise, lay the foundation for the development of basic mental processes. Representational thinking involves the process of creating a "stable mental image of a thing in place of the thing itself"; it is the first step in the development of the mental processes leading to more complex forms of memory, symbolization, and conceptual thinking. When all goes well, the infant's interactions with the primary caregiver become stored as memories of physical pleasure. Inevitably, however, the primary caregiver disappoints the infant by failing to provide immediate gratification. A short absence or small delay on the part of the primary caregiver stimulates feelings of frustration on the part of the infant. In these moments of frustration, the infant experiences the absence of the gratifying caregiver. Through these repeated experiences of gratification and frustration, the infant begins the process of creating internal representations associated with the presence or absence of the

162. See Fonagy, supra note 155, at 56.
164. See Mayes & Cohen, supra note 153, at 30 (stating that these capacities "allow the infant to 'metabolize' the input from the social world").
165. See Fonagy et al., supra note 151, at 37.
166. See id. at 40–41; Mayes & Cohen, supra note 153, at 27–28.
167. See Tyson & Tyson, supra note 152, at 93.
169. See Fonagy, supra note 155, at 96; Blatt & Behrends, supra note 154, at 283.
170. See Mayes & Cohen, supra note 153, at 28.
171. See id. at 29; see also Mayes & Cohen, supra note 163, at 199.
These affectively laden representations, in turn, can be called up by the young child during times of physical separation from the caregiver.

Internalization of the caregiving relationship is thus a vital step in the child’s emerging capacity for representational thinking and what will eventually lead to the more abstract processes of symbolization and conceptual thinking necessary for reasoned thinking. Empirical research supports psychoanalytic observations regarding these internalized representations, often referred to in the empirical literature as prototypes, templates, schemas, or internal working models. Neuroscientists have studied the biological mechanisms involved in the creation of these prototypes. Cognitive researchers have created neural network models that, using parallel processing, attribute the creation of representations, or internal schemas, to the strength of the connection between neurons. Attachment research has shown that securely attached children have a more balanced view of themselves, remember positive events more accurately, and score higher on tests of emotional understanding.

The clinical and empirical evidence showing a close association between early caregiving and the development of internal prototypes helps to explain why the early caregiving relationship is so important in the child’s long-term psychological development. Once these prototypes are laid down, they attain a certain stability necessary for psychic structure and organization. An adult whose early experience was one of severe deprivation or neglect, for example, is more likely to perceive other people and events in disappointing, depriving, or anxiety-provoking ways than an adult whose early family environment was emotionally nurturing. When severe enough, problems with the internalization of the relationship with an emotionally responsive caregiver and the creation of positive internal

172. See Blatt & Behrends, supra note 154, at 283–84; see also Tyson & Tyson, supra note 152, at 93; Mayes & Cohen, supra note 153, at 29. Peter Fonagy and his co-authors offer a revision of the “template” theory that sees early caregiving as essential to the development of “mentalizing” skills allowing an individual to interpret the social environment. See Fonagy et al., supra note 151, at 16–17.

173. See Blatt & Behrends, supra note 154, at 283–84; Mayes & Cohen, supra note 153, at 29.

174. See Vaughn, supra note 159, at 81.

175. Id. at 200 (citing Joaquin M. Fuster, Memory in the Cerebral Cortex (1995); Eric R. Kandel, James H. Schwartz & Thomas M. Jessell, Essentials of Neural Science and Behavior (1995); Stephen M. Kosslyn & Oliver Koeng, Wet Mind: The New Cognitive Neuroscience (1995)).

176. See id. at 37.

177. See Fonagy, supra note 155, at 31.

178. Id. at 31–35; Sidney J. Blatt & Golan Shahar, A Dialectic Model of Personality Development and Psychopathology: Recent Contributions to Understanding and Treating Depression, in Theory and Treatment of Depression: Towards Integration 137, 139–40 (J. Cousseley, P. Luyten & Sidney J. Blatt eds.); Mayes & Cohen, supra note 152, at 130–33.
prototypes can interfere with the capacity for perceiving both oneself and the world in an adaptive, undistorted way.\textsuperscript{179}

Internalization and the creation of internal representations are also central to the development of the capacity for affect regulation and what will eventually become the mature capacities for emotional integration and self-control. We have already seen how the internalization of the relationship with a soothing, containing caregiver allows the child to use these internal representations for the self-regulation of physiological and emotional tensions. The internalization of the primary caregiving relationship plays a crucial role in helping the infant to metabolize emotional distress in ways that strengthen, rather than overwhelm, the psychological immune system.\textsuperscript{180} Even for the very young child, affect regulation does not involve a simple reduction in emotional energy. Affect regulation always involves some acknowledgment of emotional arousal and, in its mature form, integration of the emotions into higher, more conceptual and eventually verbalized forms of thinking. An emotionally responsive caregiver, for example, acknowledges the emotional outbursts of the young child by providing a safe holding environment for the expression and discharge of overwhelming feelings.\textsuperscript{181} In the early years, a responsive caregiver mirrors the feelings being experienced by the infant in a way that helps to organize and diminish the overwhelming affects.\textsuperscript{182}

Research in neurobiology and attachment theory supports the psychoanalytic view that early caregiving is essential to the development of affect regulation. Over the course of the first year, children develop cortical inhibitory controls for the physiological arousal caused by normal environmental stress.\textsuperscript{183} Evidence from animal models suggest that high levels of stress, such as those experienced by infants in the absence of minimally sufficient caregiving, lead to lower cortisol neuromodulators.\textsuperscript{184} There is support, then, for the proposition that the early caregiving environment actually alters the infant’s biological make-up, an example of how experience can shape the basic hardwiring of the brain.\textsuperscript{185} Attachment theory also shows that insecurely attached children fail to develop the capacity to regulate emotional arousal. Studies have shown “[h]igh levels of negative affectivity, emotional outbursts, inattentiveness,” and frustration

\textsuperscript{179} See Fonagy et al., supra note 151, at 25.
\textsuperscript{180} See Mayes & Cohen, supra note 152, at 133 (discussing how traumatic events during early childhood lead to overwhelmed psychological immune systems later in life).
\textsuperscript{181} See Fonagy, supra note 155, at 96–100.
\textsuperscript{182} See Fonagy et al., supra note 151, at 37.
\textsuperscript{183} See id., at 132.
\textsuperscript{184} See Fonagy, supra note 155, at 37; Mayes & Cohen, supra note 152, at 132 (discussing the effect of increased arousal on central processes).
\textsuperscript{185} See Tyson & Tyson, supra note 152, at 93–96; Mayes & Cohen, supra note 152, at 129.
among these children. The internalization of the infant-caregiver relationship provides the young child with the psychological tools that eventually equip him to regulate his emotions. This capacity for emotional integration is the foundation of more mature forms of emotional regulation and self-control, including the qualities of patience, toleration, and self-restraint.

In addition to representational thinking and affect regulation, the internalization of a reciprocal affective relationship with an early caregiver stimulates the differentiation of a sense of self from the external world. Within a matrix of physiological needs and gratification of those needs, the infant early on experiences a state of symbiotic oneness with the primary caregiver. Subjective and objective are completely merged. The infant likely experiences this state of symbiosis with the primary caregiver as absolute omnipotence or absolute narcissism, with immediate gratification of bodily needs creating the illusion of omnipotent control. As neurophysiological functions develop, the infant learns to distinguish parts of his own body from the physical world and eventually comes to distinguish his subjective self from external reality. Along with this growing awareness of physical separation comes the inevitable disillusionment of omnipotence brought about by caregiving failures. The infant experiences a sudden gap between his subjective needs and external gratification. This shift from infantile symbiosis to a mature sense of the subjective and objective worlds is negotiated through what Winnicott calls the “transitional” area opened up by the infant-caregiver relationship. In this space, objects such as a beloved blanket are neither entirely subjective nor entirely reality-based; they are real objects endowed with a subjective meaning created by the infant and recognized by the caregiver. The early caregiver plays a crucial role in affirming the subjective meaning of the transitional object for the infant while at the same time confirming its existence in the real world. Through the creation of a transitional space, partly internalized and partly externalized, the infant-caregiver relationship serves a vital role in the child’s

186. See Fonagy, supra note 155, at 42.
187. See Hans W. Loewald, Ego and Reality, in Papers on Psychoanalysis, supra note 154, at 10–11; Mahler et al., supra note 151, at 44; D.W. Winnicott, Psycho-Analytic Explorations 253–54 (Clare Winnicott, Ray Shepherd & Madeleine Davis eds., Karnac Books 1989). But see Stern, supra note 151, at ch. XIII (arguing “that self/other differentiation is in place and in process almost from the very beginning”).
188. See Winnicott, supra note 187, at 254–55.
189. See Loewald, supra note 187, at 3, 5.
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The capacity to imagine and the capacity for mentalization are interrelated milestones in the developmental pathway leading to adult reasoned thinking. Unlike the other mental capacities discussed here, the capacity to imagine might not seem an obvious precursor to reasoned thinking. To the contrary, imagination appears, at first glance at least, antithetical to the kind of reality-based, undistorted thinking that we associate with mature reason. But imagination turns out to be a crucial capacity in the developmental task of achieving a separate, autonomous sense of self. To begin with, imagination underlies the child's developing capacity for reality testing and for acquiring the concept of mindedness: "[i]t is, in fact, to recognize a difference between the subjective and objective worlds and to appreciate that mind, mental activities, or thoughts define a world different at least in part from sensory perception." Internalization of the early caregiver relationship gives rise to the beginnings of an imaginative inner world as the infant learns to fantasize the image of the caregiver in his or her absence. Having the capacity to imagine allows the child to use mental representations in fantasy for the purpose of affect regulation by calling up the internalized memories of a soothing caregiver. The capacity to imagine underlies the mature ability to empathize with other people, to recognize different perspectives, and to take the other's point of view, all of which have a central place in mature reasoned thinking. These basic empathic capacities are the foundation for the later, more mature capacity to imagine alternatives to one's given values, commitments, and life choices.

Imagination is also a critical element in mentalization—in other words, the ability to perceive other people as having their own minds and perspectives on the world. Sometimes referred to as "theory of mind" or "reflective functioning," mentalization "is the process by which we realize that having a mind mediates our experience of the world." At first, developmental researchers conjecture, the child's early theory of mind is

193. See WINNICOTT, supra note 187, at 254 (explaining that an infant learns to perceive the outside world by interacting with the mother).
195. Id. at 33.
196. Id. at 29.
197. Id.
199. See FONAGY ET AL., supra note 151, at 3.
relatively concrete. The child learns that other people do not see or hear or know the physical world in exactly the same way as he does himself. Eventually, the child will extend this perspective beyond the sensory world to include the realm of ideas, beliefs, and motivations. Mentalization "enables children to 'read' other people's minds" and in doing so interpret their behavior as meaningful and predictable. Research in attachment theory confirms that securely attached infants do better on "theory of mind" tests. This research suggests that a sensitive, empathically attuned caregiver with the capacity for perceiving the child as having a mind of his or her own will foster the development of a mentalizing capacity in the child. As developmental researchers recognize, acquiring a theory of mind is a necessary step in the developmental trajectory leading to the more mature capacities of self-reflection, individual autonomy, and personal responsibility.

Internalization of the primary caregiver relationship is certainly not all there is to the development of the capacity for reason. Many other processes clearly play a role, including innate maturation, constitution, adaptation, and cognitive growth. While not providing a full picture of early development, however, empirical research supports the proposition that internalization is a necessary and foundational factor in the development of the mental processes leading to reasoned thinking.

B. GOOD-ENOUGH CAREGIVING

The developmental pathway leading to reasoned thinking, it is posited here, rests on the infant's internalization of a sufficiently responsive, affectively attuned caregiving relationship. What is sufficient will vary, depending upon the particular relationship. An anxious infant, for example, will likely need a different level of caregiver responsiveness than a placid, easily contented infant. In any case, however, all that is required is a good-enough caregiving relationship, borrowing Donald Winnicott's terminology, one in which the caregiver is emotionally attuned to the needs of the

200. See id. at 31.
201. See Mayes & Cohen, supra note 163, at 204.
203. See FONAGY, supra note 155, at 31.
204. See FONAGY ET AL., supra note 151, at 28.
205. See id. at 25-27.
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particular infant.\textsuperscript{207} We certainly cannot identify with any precision the moment at which caregiving falls below that level needed to sustain a responsive affective relationship. Moreover, serious failures in this relationship do not always result in long-term developmental problems, nor are the developmental problems that do arise always irremediable.\textsuperscript{208} Factors that may mediate the effect of early failures in the caregiving relationship include temperament, intelligence, the presence of other caregivers, later corrective experiences, a strong imagination, and simple constitutional resilience.\textsuperscript{209} But overall, \textit{in the aggregate and over time}, a responsive, affective caregiving relationship can be considered a crucial stage in the developmental line leading to the adult capacity for reasoned thinking.

Modern developmental psychology is not alarmed by the unavoidable minor deprivations and disappointments of the average caregiving relationship. As we have seen, some deprivations and frustrations are expected of all caregivers and are essential for development to take place. Developmental psychologists view minor lapses in the caregiving relationship as fostering psychological development by stimulating the child to adapt to the real world through the development of more integrated, higher-order mental processes.\textsuperscript{210} Because this process happens over the course of countless interactions, giving rise to internal prototypes based on a multitude of sensory impressions, even serious deprivations short of trauma do not entail adverse developmental consequences in the vast majority of cases. A good-enough caretaking relationship—one that results in the creation of gratifying internal representations or prototypes—is easily established in the average imperfect family environment. The infant’s innate capacity to adapt to the average caregiving environment and the developmental stimulation that minor frustrations provide mean that it is only intolerable failures in the infant-caregiver relationship—failures going well beyond the usual frustrations and deprivations of the average environment—that raise serious concerns about long-term developmental effects on children.

Developmental theories that emphasize the importance of caregiving are sometimes criticized for placing the responsibility and blame for society’s ills on families and, more to the point, mothers.\textsuperscript{211} In the past, certainly, psychoanalysts and attachment theorists did engage in such “mother-baiting,” an especially cruel practice when it came to biologically

\begin{thebibliography}{9}
\bibitem{207} See \textsc{Donald W. Winnicott}, \textit{The Maturational Process and the Facilitating Environment} 145 (1965).
\bibitem{208} See \textsc{Fonagy}, \textit{supra} note 155, at 31–95.
\bibitem{209} See, \textit{e.g.}, Dante Cicchetti et al., \textit{Resilience in Maltreated Children: Processes Leading to Adaptive Outcome}, 5 \textit{Dev. & Psychopathology} 629, 652–33 (1993).
\bibitem{210} See \textsc{Blatt & Behrends}, \textit{supra} note 154, at 283.
\bibitem{211} See, \textit{e.g.}, \textsc{Carol Sanger}, \textit{Separating from Children}, 96 \textit{Colum. L. Rev.} 375, 437 (1996).
\end{thebibliography}
based disorders such as autism and schizophrenia. Modern developmental psychology has the opportunity to avoid mother-baiting in two ways. First, developmental psychologists do not need to insist that only mothers can perform the emotional tasks of primary caregiving. Fathers and other important figures in the infant’s life can and increasingly do play a central caregiving role. Second, modern developmental psychology can avoid even gender-neutral caregiver-baiting by widening its perspective beyond the traditional infant-caregiver dyad. This shift toward a broader social environmental perspective on the development of the infant-caregiver relationship is the focus of the discussion that follows.

An environmental perspective opens up the possibility of viewing the caregiving relationship as embedded in and responsive to the broader social context, shifting the focus of analysis away from individualized causes of caregiving failure to the dynamic interaction among individual, familial, and societal factors. Examples of individualized causes include autism, illness, temperament, poor parenting skills, and caregiver illness or psychological disorder. It is certainly the case that the establishment of a good-enough infant-caregiver relationship can be disrupted by such individualized factors. But individualized causes, researchers have come to recognize, do not exist in a social vacuum. Contemporary researchers studying at-risk children have expanded the scope of their research to include consideration of the social environments within which the primary caregiving relationship develops. The environmental model opens up the possibility of viewing the caregiving relationship as embedded in and responsive to the broader social context.

Environmentalism itself is hardly a new idea. The pathbreaking work of child psychoanalysts such as Anna Freud, Margaret Mahler, and Donald Winnicott expanded the focus of study beyond the infant’s postulated

212. See Peter Fonagy et al., Psychoanalytic Perspectives on Developmental Psychopathology, in 1 DEVELOPMENTAL PSYCHOPATHOLOGY 504, 537 (Dante Cicchetti & Donald J. Cohen eds., 1995).
213. Empirical research confirms that the father-infant relationship can give rise to "meaningful social interaction" from birth. See id. at 523.
217. See generally Mayes & Cohen, supra note 152.
218. See generally MAHLER ET AL., supra note 151.
219. See generally WINNICOTT, supra note 207.
intrapsychic experience to the relationship between caregiver and infant. The study of children’s environment also has roots in the work of the Russian cognitive psychologist Lev Vygotsky, who argued, in contrast to Jean Piaget, that children’s cognitive development depended on learning from adults. In Vygotsky’s view, the development of children’s minds was a collaborative process that involved the adult’s targeting his or her teaching to the child’s “zone of proximal development.” Both cognitive developmental psychology and psychoanalytic developmental psychology have long advocated the idea that the relationship between infant and caregiver is the driving force behind early development.

The interest in children’s environment has recently emerged in the field of developmental neurobiology. Contemporary neurobiological researchers are beginning to explore the important interrelationship of genes and the environment. This research suggests that genetic hard-wiring is not determinative of development, but merely probabilistic. While the potential range of genetic expression may be biologically determined, the actual expression of a gene will depend upon environmental conditions and the timing of other genetic processes. An individual’s genetic endowment for height, for example, can be affected by environmental factors such as nutrition or illness, or by the timing of puberty. Neurobiological research on animals has shown that the environment can also affect brain development. When cats are deprived of light during a particular developmental stage, for example, certain sections of their visual cortices do not develop. Rats raised in an environment radically deprived of sensory stimulation have significantly thinner brain tissue than rats raised in a normally stimulating sensory environment. Animal models suggest that high levels of stress in humans lead to neurological changes. Although studies on human infants are necessarily limited, researchers believe that elevated levels of stress in the early years interfere with the development of cortical inhibitory controls that regulate stress responses and are associated with long-term changes in brain development.


222. See Roland D. Ciaranello et al., Fundamentals of Molecular Neurobiology, in 1 DEVELOPMENTAL PSYCHOPATHOLOGY, supra note 212, at 109, 151; Mayes & Cohen, supra note 152, at 128; Sameroff & Fiese, supra note 214, at 4-5.

223. See Mayes & Cohen, supra note 152, at 128.

224. See Ciaranello et al., supra note 222, at 151.

225. See Mayes & Cohen, supra note 152, at 132.

226. See FONAGY, supra note 155, at 37; Mayes & Cohen, supra note 152, at 132.

227. See ALISON GOPNIK, ANDREW N. MELTZOFF & PATRICIA K. KUHL, THE SCIENTIST IN THE CRIB: WHAT EARLY LEARNING TELS US ABOUT THE MIND 189-97 (1999); Aber et al., supra note...
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hypothesize that the human brain develops from the interaction between the genetically coded programs for development and the environmental modifiers of those codes. 228

Research in neurobiology provides a useful paradigm for going beyond the infant-caregiver relationship to explore the more general influence of social factors on the quality of the early caregiving relationship. If we assume that all human beings are born with an innate capacity for reasoned thinking, we can posit that our early environment will determine how highly expressed this capacity will be. Extending this metaphor, we can say that the expression of the infant's biologically programmed capacity to make use of the early caregiving relationship will be determined in part by environmental factors, most profoundly caregiver responsiveness. The capacity for caregiver responsiveness, in turn, will be affected by the broader social environment.

Attention to children's early environment is entirely compatible with clinical understandings of the caregiving relationship. Psychoanalytic theory has been criticized in the past for elevating the child's intrapsychic experience over the actual interpersonal relationships with adult figures. 229 Yet an interest in the child's social environment has always been an important part of psychoanalytic thinking. Freud's Oedipal theory, for one, is a developmental account of the way in which young children come up against and eventually internalize social norms as represented by parental figures. 230 Child psychoanalyst Anna Freud focused her observational techniques on at-risk children, first at the Jackson Nurseries in Vienna and then later at the Hampstead Nurseries in London. 231 Erik Erikson's groundbreaking work, Childhood and Society, 232 explores the importance of culture to child development. Modern ego psychology generally, beginning with Heinz Hartmann's Ego Psychology and the Problem of Adaptation, 233 is a kind of social psychology interested in the individual's dynamic engagement with the social world. In his elaboration of the concept of transitional phenomena, Donald Winnicott laid the foundation for a theory of

215, at 117; Joan Kaufman & Christopher Henrich, Exposure to Violence and Early Childhood Trauma, in HANDBOOK OF INFANT MENTAL HEALTH, supra note 214, at 195, 199.
228. See Sameroff & Fiese, supra note 214, at 4.
231. See Mayes & Cohen, supra note 152, at 120–21.
individual psychological development in relation to a social world.\textsuperscript{234} Moreover, the study of the effect of trauma on children's development, particularly in the context of war or community violence, has long characterized psychoanalytic research.\textsuperscript{235} This is not to say that psychoanalysis has ever generated a satisfactory account of individual development in relation to the social universe. Rather, the point here is that, despite its emphasis on intrapsychic meaning, psychoanalytic developmental psychology is not incompatible with, and indeed calls for, an environmental understanding of the dynamic developmental interaction among the individual, familial, and social realms.

Broadening the scope of inquiry beyond the infant-caretaker relationship to include social factors is also a central concern in the newly emerging field of social cognition, which goes beyond the traditional model of information processing to consider sociocultural learning theories.\textsuperscript{236} Family systems analyses and cross-cultural research, too, provide insights into the larger social context in which the caregiving relationship resides.\textsuperscript{237} But some of the most important studies on the influence of environmental factors on caregiving come from the domain of developmental psychopathology. The field of developmental psychopathology has begun to take a serious look at the role of social stress factors such as poverty and violence on the early caregiving relationship.\textsuperscript{238} This research shows that the likelihood of failure in the caregiving relationship significantly increases with the presence of multiple environmental stress factors.\textsuperscript{239} Most children exposed to one or two environmental stress factors appear to be at no increased risk of developmental problems.\textsuperscript{240} Consistent with the general understanding of infant resiliency in the face of caregiving failures, "[i]t is not single environmental factors that make a difference in children's lives but the accumulation of risks in each family's life."\textsuperscript{241} The accumulated effect of environmental stress factors on otherwise average caregivers and their families is what takes its toll on children's development.

For children living in a high-stress environment, the primary caregiving relationship can play a crucial role in filtering out overwhelming stimulation

\textsuperscript{234} See Winnicott, \textit{supra} note 192, at 1–25. An explicit concern with social context can be found in the work of many other psychoanalysts, including Sandor Ferenczi, Harry Stack Sullivan, Eric Fromm, and Clara Thompson. See Steven A. Mitchell & Margaret J. Black, \textit{Freud and Beyond: A History of Modern Psychoanalytic Thought} 60–84 (1995).

\textsuperscript{235} See Mayes & Cohen, \textit{supra} note 152, at 130.

\textsuperscript{236} See Gauvain, \textit{supra} note 221, at 27–40.

\textsuperscript{237} See \textit{id.} at 57.

\textsuperscript{238} See Sameroff & Fiese, \textit{supra} note 214, at 5.

\textsuperscript{239} See \textit{id.} at 6.

\textsuperscript{240} See \textit{id.}

\textsuperscript{241} \textit{Id.} at 9.
in the environment. But when environmental stress becomes sufficiently high, caregivers themselves can experience a diminished capacity to respond to their infants' physiological and emotional needs. Intolerable and long-term environmental stress can adversely affect the caregiver's ability to respond in a way that allows the infant to develop internal mechanisms for the regulation of neurophysiological arousal. Insufficient responsiveness can be caused by parents "who, because of their own difficulties with emotion regulation, are readily overwhelmed by the infant's negative affect." While a vulnerability to stress is especially true for caregivers who themselves lacked good-enough caregiving, anyone is vulnerable. The environmental model helps us to see failure in the caregiving relationship not in terms of bad parenting or bad parents but as a normal response to overwhelming levels of environmental stress on psychological functioning.

All but the most resilient caregivers need a social environment that supports their relationships with children. This does not mean a perfect environment, or even necessarily a good one, but merely one good enough to sustain a responsive infant-caregiver relationship.

Research in developmental psychopathology confirms that persistent, severe poverty is among the most serious, widespread, and predictable risk factors for failure in the caregiving relationship. Although poverty as a social category can be defined in different ways and has different meanings in different contexts, these differences in measurement do not alter the basic facts. Under the federal government's official poverty index, 16.3% of all children lived in poverty in 2001, including 18.2% of children under six, nearly one-fifth of all children under six in the United States. Study after study confirms that, despite some resilience on the part of some children and caregivers, long-term poverty creates a high-risk environment with serious repercussions for children's physical, cognitive, and socioemotional development.

The path-breaking studies in this area were carried out on depression-era families in the 1930s by Glen Elder. Elder studied the effect of job loss
on families during the Great Depression, and his research showed that high levels of environmental stress significantly affected family relationships as parents and children adapted to economic hardship.\textsuperscript{252} Contemporary research confirms Elder’s findings. Studies have produced strong evidence that “poverty and economic stress elevate socioemotional problems in children partly by increasing parents’ tendency to discipline children in a punitive and inconsistent manner and to ignore children’s dependency needs.”\textsuperscript{253} For preschool and school-age children, the effects of poverty may be felt directly, either in the form of a chaotic or distressing home environment or in interactions with an economically impoverished neighborhood, childcare center, school, or community.\textsuperscript{254} But for infants and very young children, the external world is experienced through the primary caregiving relationship. Poverty disrupts the early caregiving relationship in part because of the effect that negative life events and conditions have on adult caregivers.\textsuperscript{255} Research indicates that chronic poverty is more harmful than temporary poverty, that both poor mothers and fathers show a decline in parenting skills, and that caregiver depression and anger are a source of developmental failure in the caregiving relationship.\textsuperscript{256}

As a social risk factor for failure in the early caregiving relationship, poverty is not unique. Other social risk factors, such as domestic violence and substance abuse, also greatly raise the probability of caregiving failure, at least over the short run. What is unique about poverty, however, is its chronic, intergenerational hold on such a large, well-defined number of families, and its frequent association with other social risk factors.\textsuperscript{257} Given the widespread, intergenerational effects of poverty on the early caregiving relationship, the implications for constitutional law are direct and serious. Our constitutional system depends upon citizens possessing the capacity for reasoned thinking, a capacity that in turn depends to some degree on the early experience of a stable, responsive affective relationship. The kind of chronic, severe poverty experienced by families living in the United States

\begin{itemize}
  \item \textsuperscript{252} See Glen Elder, Jr., Children of the Great Depression 62-63 (1974); see also Rand D. Conger et al., Economic Stress, Coercive Family Process, and Developmental Problems of Adolescents, 65 Child Dev. 541, 557 (1994) (concluding that economic pressure experienced by parents increases parental hostility toward children); Glen H. Elder, Jr. et al., Linking Family Hardship to Children’s Lives, 56 Child Dev. 361, 371 (1985) (describing a study that showed that economic hardship adversely affected the psychosocial well-being of female children).
  \item \textsuperscript{253} McLoyd, supra note 216, at 196.
  \item \textsuperscript{254} See Huston et al., supra note 248, at 279.
  \item \textsuperscript{256} See McLoyd, supra note 216, at 196; McLoyd & Wilson, supra note 255, at 108-11.
  \item \textsuperscript{257} Poverty encompasses multiple risk factors in addition to low income such as homelessness, neighborhood violence, substance abuse, poor parenting skills, caregiver depression, and poor physical health. See Sameroff & Fiese, supra note 214, at 9.
\end{itemize}
operates as a form of political disenfranchisement for this entire class of children. Developmental psychology gives us a vital perspective on the lifelong barriers that social conditions like poverty put in the way of children’s future opportunity for developing the psychological skills of democratic citizenship.

C. CAREGIVING AND SOCIETAL REGRESSION

It is tempting to conceptualize psychological development in teleological terms, but in fact the development of mental structures and processes combines both progressive and regressive movement.258 Regression to earlier modes of mental functioning is understood to be a normal part of psychological growth and adult mental experience. Developmental psychologists have noted that progress along developmental lines is subject to temporary relapses to earlier modes of thinking, particularly during times of stress. A tired child, for example, might revert to thumb-sucking; a distressed child might fall prey to temper tantrums. As children reach certain developmental milestones in one area, they will often experience regression in another functional realm.259 The psychoanalyst Hans Loewald has described how periods of consolidation in ego development are often preceded by “periods of relative ego disorganization . . . characterized by regression.”260 Regression in children is also part of a normal reaction to stress, such as a young child’s developmental backslides upon the birth of a younger sibling. Psychological development is thus broadly understood to be discontinuous, involving periods of progression and regression, although always moving ahead in a generally forward, linear way along developmental pathways toward more complex forms of thinking.261

Regression to developmentally earlier modes of thinking is not only a feature of childhood. Regression is a universal feature of mental functioning that reflects the continuing presence of early modes of thinking alongside more mature mental processes.262 The presence of regressive features in

258. See Tyson & Tyson, supra note 152, at 18.
260. See HANS W. LOEWALD, On the Therapeutic Action of Psychoanalysis, in PAPERS ON PSYCHOANALYSIS, supra note 154, at 221, 224. Loewald notes that Erik Erikson described this process of ego regression followed by new consolidations as an identity crisis. Id.
261. See Tyson & Tyson, supra note 152, at 18–19, 29.
normal adult mental functioning can take many different forms. In some situations, regression allows one to let go of the constraints of higher-order, logical thinking, thereby bringing an emotional richness and depth to one's experience of the world. Romantic love, creative inspiration, and spiritual transcendence are all common examples of adult experiences involving some degree of controlled ego-regression. Certain modes of everyday thinking such as fantasies, day-dreaming, or other non-cognitive, emotionally centered mental processes exhibit strong regressive elements. Because it brings the adult caregiver in touch with infantile modes of feeling and thinking, early childrearing also involves a controlled measure of regression. The belief that infantile modes of thinking evolve but are not replaced, continuing to exist alongside more rational, complex mental processes, is a cornerstone of modern psychoanalytic psychology. The kind of controlled regression that promotes adaptive ends such as art or childrearing or therapeutic cure is referred to, in the words of Ernst Kris, as "regression in the service of the ego."264

Despite its name, modern developmental psychologists do not view regression as a simple backward slide along the developmental pathway to early infantile processes. This view of regression is more characteristic of Freud, who conceived of early modes of thinking—what he called the primary process—as located in the unconscious, unchanged by time.265 Freud envisioned the mind as an archeological dig, with the older, more primitive forms of primary process functioning buried beneath the more recent, higher-order, rational secondary processes. In contrast, psychoanalysts today do not view early modes of mental functioning as untouched by the passage of time.266 Longitudinal studies of child development support the view that all forms of mental functioning evolve over time, including primary process functions.267 The relevant modern metaphor for the persistence of early modes of thinking no longer comes from archeology, but from the realm of information processing theory. Drawing on cognitive science, the coexistence of earlier and later modes of thinking can be likened to parallel distributed processing.268

The mature capacities for artistic expression, empathy, emotional attachment, childrearing, and mourning a loved one all call upon controlled

264. Ernst Kris, Psychoanalytic Explorations in Art 177 (1952), quoted in Tyson & Tyson, supra note 152, at 29; Pulver, supra note 262, at 87.
266. See Tyson & Tyson, supra note 152, at 172.
267. See id. at 171.
268. See Vaughan, supra note 159, at 37; Schimek & Goldberger, supra note 263, at 214.
mechanisms of regression. Poetry, for example, has obvious primary process elements in its use of free associations, imagistic language, condensation, and displacement of meaning, but these elements are utilized in the service of the highest-order cognitive endeavors. James Joyce's *Ulysses* is the best-known example of twentieth century literature that upsets the balance between primary and secondary processes, thereby inducing generations of scholars to attempt the painstaking task of interpreting the latent meaning lying beneath the primary process surface. \(^{269}\) All mature forms of thinking combine primary and secondary process elements to some degree. Hans Loewald explains:

Primary and secondary process are ideal constructs. Or they may be described as poles between which human mentation moves. I mean this not only in the longitudinal sense of progression from primitive and infantile to civilized and adult mental life and regressions in the opposite direction. Mental activity appears to be characterized by a to and fro between, and interweaving of, these modes of mental processes, granted that often one or the other is dominant and more manifestly guiding mentation and that the secondary process assumes an increasingly important role on more advanced levels of mentation. \(^{270}\)

An utter lack of primary process functioning—no dreams, no fantasies, no spirituality, no romance—would be taken as a sign of psychopathology, \(^{271}\) not to mention an indication of a greatly impoverished, emotionally wooden inner world. Adult mental functioning optimally relies on an *equilibrium* between the parallel systems of cognition and more emotional, intuitive forms of thinking. \(^{272}\)

Regression thus has an important place in adult mental life. But like most mental processes, regression has its malignant side as well. \(^{273}\) When uncontrolled, regression is no longer in the service of the ego but rather fatally undermines it. We experience minor disruptions in our conscious, rational minds with every slip of the tongue or missed appointment, every daydream or neurotic symptom. At a more serious level, though, uncontrolled regression poses a threat to the very integrity of the self. The destructive effects of regression arise in response to trauma, when the mind's ego-capacities are emotionally overwhelmed and unable to process

\(^{269}\) For a recent, explicitly psychoanalytic interpretation of *Ulysses*, see generally PAUL SCHWABER, THE CAST OF CHARACTERS: A READING OF ULYSSES (1999).

\(^{270}\) See HANS W. LOEWALD, Primary Process, Secondary Process, and Language, in PAPERS ON PSYCHOANALYSIS, supra note 154, at 178-79.

\(^{271}\) See TYSON & TYSON, supra note 152, at 170.

\(^{272}\) See id.

\(^{273}\) See Pulver, supra note 262, at 81, 87-88.
the experience in verbal, conceptual ways.\textsuperscript{274} Long-term stress and anxiety, too, can put regressive pressure on adult modes of thinking.\textsuperscript{275} Developmental failures can also result in an inherent vulnerability to uncontrolled regression in adulthood.\textsuperscript{276} At times of regressive crisis, individuals can lose the capacity to think and make decisions free from the distorting effects of anxiety, fear, or aggression. They can resort to more primitive psychological defenses such as projective identification, splitting, and dissociation, and they can lapse into viewing the world in black-and-white, good-and-evil terms.\textsuperscript{277} This kind of regression can happen to anyone under conditions of personal stress or trauma.

In its extreme forms, therefore, regression signals a retreat from the developmental milestone of adult reason. More broadly, individuals in groups can undergo a form of collective regression when the group itself suffers some form of crisis.\textsuperscript{278} Here, our concern is the danger posed by disproportionate emotional reactions to overwhelming social or political events. Collective regression, as defined here, occurs when the normal processes of collective deliberation have broken down, usually as a result of an event prompting fear, anxiety, or rage in the populace. Poor impulse control, paranoia, and splitting—in which the group exhibits a tendency to split the world into good and evil—can take place.\textsuperscript{279} A society that lacks a strong culture of reasoned thinking, including citizens with the skills of critical self-reflection and emotional self-mastery, will be especially vulnerable to the collapse of mature ego defenses and the resulting irruption of primitive fears and irrational emotions into political life.\textsuperscript{280} The eruption of adult regressive fears, anxieties, and aggressions can distort


\textsuperscript{275} See Dante Cicchetti & Donald J. Cohen, \textit{Perspectives on Developmental Psychopathology}, in \textit{1 DEVELOPMENTAL PSYCHOPATHOLOGY}, supra note 212, at 3, 6.

\textsuperscript{276} See id.

\textsuperscript{277} See \textit{FONAGY ET AL.}, supra note 151, at 359–67.


\textsuperscript{279} See Volkan, supra note 278, at 199.

\textsuperscript{280} See Peter Gay, \textit{Liberalism and Regression}, \textit{37 PSYCHOANalytic STUDY OF THE CHILD} 523, 526 (1982) ("Precisely because liberal culture is a late acquisition, it is also the first to be sacrificed in times of stress, just as the liberal conduct of the individual, which also is the fruit of maturity, is the most vulnerable among his psychological achievements.").
decisionmaking at times of political crisis and render a democratic citizenry especially vulnerable to political suggestion and mass hysteria.\(^{281}\)

Although the tendency to regress at moments of extreme stress or crisis is a universal trait of human nature rooted in individual development, the vulnerability to regression and the form it takes will vary given the particular historical circumstances. War, economic depression, and the serious failure of national leadership often define these extraordinary times. Such times are also marked by the revival of “regressive ideologies” such as nationalism, militarism, and xenophobia.\(^{282}\) Examples of regressive political crises in the twentieth century are plentiful. McCarthyism, for one, represented the collective regressive collapse of reasoned thinking, or the “triumph of anti-intellectualism,” as Richard Hofstadter phrased it.\(^{283}\) The enforcement of the Espionage and Sedition Acts during World War I and the internment of the Japanese during World War II were massive failures in the reasoned judgment of legal decision-makers and ordinary citizens.\(^{284}\) Collective fears and anxieties can lead to impulsive, irrational, and often self-destructive political behavior combined, at times, with a rise in public hysteria and governmental efforts to exploit those fears by creating an “outraged people.”\(^{285}\) President Wilson’s Committee for Public Education produced what one historian describes as “a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials, and motion pictures, all designed to instill a hatred of all things German.”\(^{286}\) In the aftermath of World War I, John Dewey described the regressive feelings triggered in the populace and dangerously exploited by the government as “the rise of the irrational.”\(^{287}\) The fact that many of these twentieth century regressive crises were rationalized through legal processes, such as the Supreme Court’s decision in *Korematsu v. United States*,\(^{288}\) or through congressional hearings, as in the McCarthy era, does not change the fact that fear and anxiety, rather than mature reasoned judgment, dominated collective decisionmaking at the time. With the benefit of hindsight, we can

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282. See Gay, supra note 280, at 538 (discussing the “regressive ideologies” of Christian Science and theosophy as “provid[ing] a holiday from the strenuous demands that liberal maturity imposed”).


285. Id. at 223.

286. Id. at 224.


288. 323 U.S. 214, 220 (1944) (justifying a criminal conviction for a violation of a military detention order on national defense grounds).
see that the emotions prevailing at the time were far out of proportion to the actual threat.⁸⁹

A developmental approach explains why fostering a citizenry with the skills of critical self-reflection and emotional self-mastery usable in times of political crisis is central to the long-term health of the constitutional polity. Among the most established and important modern constitutional tools for the control of regressive decisionmaking in political life are a commitment to the rule of law and to freedom of speech. Equally important, although less obvious, is a constitutional culture that recognizes the fundamental importance of early childrearing to democratic government. The propensity of adults to uncontrolled regression in times of severe stress is at least partly dependent on ego strength, which in turn, as we have already seen, is itself partly dependent on the quality of the early caregiving relationship. When families are able to provide good-enough caregiving, children ideally learn to master the regressive compulsions, urges, and desires that can threaten to overwhelm mature ego functions. A good-enough caregiving relationship facilitates the development of those ego processes that bring these progressive and regressive forces into equilibrium. Stated in its strongest terms, the point is this: our collective capacity to manage uncontrolled regressive forces in political life is dependent over time on a constitutional polity committed to the social preconditions of good-enough caregiving. A developmental perspective helps us to see public support for family childrearing as an essential constitutional tool, along with the rule of law and freedom of speech, to mastering the regressive impulses that threaten our democratic way of life from inside the body politic.

IV. CONSTITUTIONAL FAMILY LAW IN THE DEVELOPMENTAL TRADITION

The main contribution of a developmental perspective to constitutional family law lies in its identification of the important federal interest in the early caregiving relationship. In a certain sense, the developmental account of citizenship is nothing new. An early version can be traced back to Plato's infamous proposal for removing children from their parents at birth and placing them with a guardian class who would oversee their proper education into citizenship.⁹⁰ The Supreme Court expressly rejected the Platonic approach to childrearing in a 1923 case involving state control over

⁸⁹ For a discussion of proportionality in regard to collective behavior, see Erich Goode & Nachman Ben-Yehuda, Moral Panics: Culture, Politics, and Social Construction, 20 ANN. REV. SOC. 149, 158 (1994). Arnold Hunt raises questions about the possibility of assessing proportionality in the context of group behavior. See Arnold Hunt, "Moral Panic" and Moral Language in the Media, 48 BRIT. J. SOC. 629, 637 (1997) ("The line between 'fear' and 'hysteria,' 'alarm' and 'panic,' is a fine one: if it is rational to be alarmed about crime, it may also, perhaps, be rational to panic.").

public education, noting that state-controlled childrearing would do "violence to both letter and spirit of the Constitution." But however outlandish, Plato's republican ideal nevertheless captures an important insight regarding the fundamental importance of childrearing to the life of the constitutional polity. How to translate this insight about childrearing from an ancient republic to a modern liberal democracy is the subject of this Part.

A. General Principles

To the extent it sheds light on our understanding of the connection between early caregiving and adult citizenship, a developmental approach has far-reaching implications for the field of constitutional family law. Since the early 1960s, the primary framework for addressing issues of constitutional family law has been deciding how and when the state may intervene in the private sphere of family life. Adopting this privacy-centered framework, the foundational cases in this area have addressed the power of government to regulate the use of contraceptives by married couples; to require that parents send their children to school until age sixteen; to define who may live together as a family under zoning ordinances; to terminate parental rights; and to enforce grandparent visitation over the objection of custodial parents. In all these cases, the inquiry has focused on defining the proper reach of governmental power into decisionmaking regarding private family matters.

Privacy has thus been the centerpiece of constitutional thinking about the family for decades, if not longer. The right to raise one's children free from governmental interference is, along with free speech and religious liberty, a "fixed star" in the constitutional firmament of negative liberties. Although the view that parents rather than the State provide the necessary guidance for impressionable young children is implicit in the Supreme Court's protection for family privacy, this parental task is understood to involve the cultivation of diverse private preferences, moral values, and religious beliefs, rather than the inculcation of uniform civic skills. Indeed, the notion of family privacy as developed by the Court is directly at odds with the idea that families have an obligation to instill particular attitudes or

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299. See Bellotti v. Baird, 443 U.S. 622, 637-38 (1979) (holding that state parental consent to abortion statute must include provision for judicial bypass).
ways of thinking in their children. Vague generalities about the family's important role in socializing young children occasionally surface in Supreme Court opinions, but modern constitutional law does not recognize a direct connection between childrearing and the maintenance of democratic institutions and values. In the eighteenth and nineteenth centuries, the family's obligation to instill the moral values of good citizenship in young children was a widely recognized duty. Today, however, the doctrine of privacy has reduced the family's political role to that of passively sheltering family members from governmentally imposed ideas about "the good life."

A serious consideration of the concept of family privacy, however, confronts an inescapable conundrum. Our first set of beliefs, values, and commitments is instilled in us from birth by our families, but what justifies those original involuntary commitments and relationships of authority? As hard as we may try to fit the parent-child relationship into the framework of fundamental rights, we cannot ignore the obvious fact that children, too, are individuals and that parental authority is, as the term suggests, authoritarian. One approach to the problem of parental authority in a democracy has been to set some limits on acceptable parental values and behavior. As the Supreme Court emphasized in *Prince v. Massachusetts*, parents are not free "to make martyrs of their children before they have reached the age of full legal discretion when they can make that choice for themselves." However, while *Prince* suggests that there are some limits, parental authority to initiate children into a particular way of life cannot easily be reconciled with the ideal of individual liberty that is privacy's jurisprudential foundation. The right to "control [one's] destiny," as the Supreme Court recently phrased it, simply does not apply in the context of parental control over the lives of children. At the same time, families are the primary institution in our democratic state entrusted with the task of instilling moral values in the next generation. The parental duty to inculcate moral values in children appears to be directly at odds with the ideal of individual liberty that gives rise to parental rights in the first place.

A developmental perspective allows us to see why, in the long run, the concept of family privacy is compatible with the individual right to personal liberty and political self-government. Parental caregiving not only involves the inculcation of values, but it also plays a critical role in fostering the development of the psychological skills that eventually allow the individual to accept or reject those initial values as his or her own. In the context of minors' abortion rights, the Supreme Court observed:

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.\textsuperscript{303}

Parental authority serves the long-term interests of children by fostering the development of the skills of reasoned thinking. The early caregiving relationship serves as a bulwark against governmental authority over childrearing, but it is also an affirmative, facilitating force in the development of children’s capacity for personal choice and democratic participation. Striking the proper constitutional balance between the privacy-enhancing and citizenship-facilitating aspects of the early caregiving relationship defines a core goal for constitutional family law in the twenty-first century.

A developmental approach that recognizes the affirmative role of families in the political socialization of children is entirely consistent with the modern constitutional commitment to cultural pluralism.\textsuperscript{304} Apart from family practices that pose a risk of harm to children, the only way of life excluded by a developmental approach is one that denies children the opportunity to develop the basic skills of independent, reasoned thinking. A developmental approach does rule out the possibility that a commitment to democratic citizenship is compatible with depriving children of the means by which to choose whether to accept or reject family beliefs or practices. The unexamined life—a life premised on faith rather than reason—is a perfectly acceptable choice for adult citizens, but foreclosing children from eventually making that choice for themselves is not compatible with democratic principles or the maintenance of a democratic constitutional polity.\textsuperscript{305} A developmental perspective sets some outer limits on the extent to which communities of faith may sustain themselves by depriving children of the opportunity for acquiring the skills of democratic citizenship. Securing the skills of reasoned thinking in this context does not require that parents adopt a life of moral skepticism. At a minimum, however, it does require that children not be entirely shielded from alternative ways of life, or

\textsuperscript{303} See Bellotti, 443 U.S. at 638–39.

\textsuperscript{304} On the tension between traditional family cultures and a democratic, pluralistic polity, see generally CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); Stolzenberg, supra note 130.

\textsuperscript{305} But see WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 254 (1991) (“As a political matter, liberal freedom entails the right to live unexamined as well as examined lives—a right the effective exercise of which may require parental bulwarks against the corrosive influence of modernist skepticism.”).
exposed to parenting practices that clearly violate the norms of good-enough caregiving.306

A developmental approach also accords with modern constitutional principles of gender equality. In the early years of the Republic, the family’s responsibility for instilling the virtues of citizenship in young children was widely acknowledged.307 As historians tell us, the task of cultivating moral and civic virtue in young children during this period fell primarily to mothers.308 The revolutionary ideal of maternal citizenship emphasized the mother’s role in instilling moral and civic virtue in her children.306 Despite a similar emphasis on the importance of child-rearing to the constitutional polity, however, a developmental approach does not endorse the revival of traditional family roles in the name of civic virtue. Indeed, a developmental approach recognizes that fathers and other non-traditional caregivers can and do play an equal and often primary role in children’s lives.310 Developmental research also confirms the importance of multiple caregivers to children’s developmental well-being.311 There is no connection between a developmental perspective and a gendered division of labor in the family or a preference for the nuclear family over alternative lifestyles.312

306. See id. at 255. See generally Stolzenberg, supra note 130 (examining the claim that mere exposure transforms fundamental values).


309. See Grossberg, supra note 307, at 7–8; Linda K. Kerber, The Republican Mother and the Woman Citizen: Contradictions and Choices in Revolutionary America, in Women’s America: Refocusing the Past 112, 117 (Linda K. Kerber & Jane Sherron De Hart eds., 2000); Minow, supra note 8, at 819, 866–84. Poor and working-class women were of course excluded from the ideal of the virtuous mother. See Minow, supra.


312. The debate over the rights of custodial parents to relocate away from a non-custodial parent is one situation that potentially, although not necessarily, pits the rights of custodial parents, usually mothers, against the needs of children to maintain a caregiving relationship with the other parent. See, e.g., Ireland v. Ireland, 717 A.2d 676, 680 (Conn. 1998); Tropea v. Tropea, 87 N.Y.2d 727, 736 (N.Y. 1996). For debate in the developmental literature on this issue, see generally Sanford L. Braver, Ira M. Ellman & William V. Fabricius, Relocation of Children After Divorce and Children’s Best Interests: New Evidence and Legal Considerations, 17 J. Fam.
In addition to challenging the traditional concept of family privacy, a developmental approach also confronts the common-sense assumption that fit parents always act in the best interest of their children. Some dissenting Justices over the years have launched empirical assaults on this assumption. In Wisconsin v. Yoder,313 for example, the Supreme Court upheld the right of Amish parents to withdraw their children from public school after the eighth grade. The majority opinion by Chief Justice Burger accepted the Amish claims regarding the adverse effect of compulsory school education “during the crucial and formative adolescent period of life.”314 In evaluating the State’s interest in compulsory education beyond eighth grade, the Chief Justice concluded that there was “strong evidence that [the Amish children] are capable of fulfilling the social and political responsibilities of citizenship.”315 In dissent, Justice Douglas challenged the presumption that the parents were acting in the best interest of their children. One of the children had testified at trial that she was opposed to high-school education, but the views of the other children were unknown. He noted that “[w]hile the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views.”316 In a footnote reminiscent of footnote eleven in the Brown opinion, Douglas cited developmental research on child decision making for the proposition that children fourteen years old and older should have the constitutional right “to be masters of their own destiny.”317

Justice Douglas is not the only Supreme Court Justice to use developmental research to challenge the prevailing assumption that parents always act in the best interests of their children. In Parham v. J.R., a majority of the Court voted to uphold a state statutory scheme that gave broad discretion to parents to commit their children to a psychiatric inpatient hospital as long as the decision was subject to review by a neutral factfinder.318 The Chief Justice specifically relied on two common-sense presumptions:

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314. Id. at 211.
315. Id. at 225.
316. Id. at 244. See generally Emily Buss, What Does Frieda Yoder Believe?, 2 U. PA. J. CONST. L. 53 (1999) (critiquing the majority opinion in Yoder).
The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that the natural bonds of affection lead parents to act in the best interests of their children.  

Citing the developmental literature, Justice Brennan dissented on the ground that "the presumption that parents act in their children's best interests, while applicable to most childrearing decisions, is not applicable in the commitment context." The majority responded by conceding that, "[a]s with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point," but they do not override "those pages of human experience that teach that parents generally do act in the child's best interests." Despite the developmental research introduced by the dissent, the Parham majority accepted the traditional legal deference to parental authority over commitment decisions.

The developmental approach revises the traditional paradigm of family privacy with the goal of developing a more balanced view of the shared interests of families and government in the successful establishment and maintenance of the early caregiving environment. This revision does not mean that concerns about governmental control over childrearing are missing altogether from a developmental perspective. To the contrary, by emphasizing the critical importance of the early caregiving relationship to the emotional and cognitive development of the child, this approach provides a strong empirical basis for opposing removal of children from the home in all but the most serious cases. What a developmental approach does alter is the traditional all-or-nothing privacy framework, which dictates either that the State intervene to remove the children from the home or that the State stay out of the family altogether. A developmental approach recognizes both rights against state interference with the caregiving relationship as well as an important constitutional interest in helping families to succeed in their constitutionally defined caregiving duties.

319. Id.
320. Id. at 628 nn.7-9 (citing developmental research).
321. Id. at 632.
322. Id. at 602-03.
323. The Court observed that if the state officials had moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

The absence of a developmental perspective in constitutional family law may be due, in part, to the fact that this perspective acknowledges some degree of political inculcation and moral universalism—conditions that, on their face, appear to be in tension with modern democratic values. Yet any such concerns are misplaced. A developmental approach does not open the door to state intervention into the lives of those families who fail to conform to the prevailing norms of child rearing. To the contrary, a developmental perspective rejects the idea that families have a duty to instill publicly defined values or beliefs in children. What early caregiving provides is the opportunity for developing the psychological capacity for reasoned thinking that allows individuals to choose their own moral values and life goals. Properly understood, a developmental approach promotes reasoned thinking as resistance to state-dictated ways of life. To the extent that this approach identifies the caregiving preconditions best suited to the unfolding of the capacities of personal liberty and collective self-government, it helps to secure the values of cultural pluralism and moral toleration that are the foundation of our modern constitutional polity.

B. RIGHTS IN THE CAREGIVING RELATIONSHIP

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. — Caban v. Mohammed

Parental rights to the care and custody of one's children are a central part of the Anglo-American legal tradition and the defining core of modern fundamental rights analysis under the Due Process Clause. Yet perhaps surprisingly, the question of who has rights to the care and custody of children—who has standing to claim this oldest of fundamental interests—has never been definitively settled by the Supreme Court. No better example of the conceptual vacuum at the heart of parental rights doctrine can be found than in Troxel v. Granville, a recent decision that produced six separate written opinions. The parents in Troxel challenged a Washington statute that allowed the grandparents to seek visitation over the objection of the legal parents. In an opinion for a plurality of the Court, Justice O'Connor observed that "there is a presumption that fit parents act in the best interests of their children" and that "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult

324. 441 U.S. 380, 397 (1979) (Stewart J., dissenting).
Given the presence of a fit parent, "there will normally be no reason for the State to inject itself into the private realm of the family." In contrast, the dissent in Troxel drew on a scattered set of cases suggesting that rights to the care and custody of children may inhere in a substantial caregiving relationship. Justice Stevens's dissent focused on "the child's own complementary interest in preserving relationships that serve her welfare and protection." He concluded that "[a] parent's rights with respect to her child have thus never been regarded as absolute" but must be balanced against the child's independent interest "in preserving established familial or family-like bonds." In a passage consistent with developmental principles, Stevens argued that parental rights are defined by "the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family." The Washington Supreme Court had also taken this position, finding the statute unconstitutional in part because it "do[es] not require the petitioner to establish that he or she has a substantial relationship with the child." Both Justice Stevens and the Washington Supreme Court relied on Stanley v. Illinois, the first in a series of "unwed father" cases decided by the Supreme Court. Stanley held that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." Given that the Stanley Court held that an actual caregiving relationship between a biological parent and his children gives rise to a protected interest under the Due Process Clause, it is not surprising that Stevens and the Washington Supreme Court relied on the case. Despite the references to caregiving, however, Stanley did not signal the beginning of constitutional protection for caregiving rights. To the contrary, in the unwed father cases following Stanley, the presence of a quasi-marital relationship with the mother, rather than a significant caregiving relationship with the child, seemed the determinative factor. The outcome in these cases alone is suggestive. Only one of these unwed fathers prevailed, and he was the only one to have lived in a quasi-marital relationship with the mother and child for a significant period of time.

326. Id. at 68 (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).
327. Id.
328. Id. at 88.
329. Id.
330. Troxel, 530 U.S. at 88.
333. Id. at 651.
The most recent unwed father case, *Michael H. v. Gerald D.*, 335 confirms the view that a substantial caregiving relationship, standing alone, does not give rise to a protected liberty interest under the Due Process Clause. Writing for the plurality, Justice Scalia argued that *Stanley* and its progeny confer constitutional protection only on those parent-child relationships that belong to a traditional cohabitating relationship. As he explained, "[t]he family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children." 336 The biological father in this case was not only an unwed father; he was also, in Justice Scalia's words, an "adulterous natural father." 337 Where the mother was married to another man, Scalia asserted, a biological father—as an adulterous outsider to the marital family—had no constitutionally protected interest in a relationship with his child even if, as was the case here, the father had lived with the mother and child as a family for some period of time.

The most important Supreme Court decision in support of caregiving rights is *Smith v. Organization of Foster Families for Equality & Reform.* 338 This case involved a challenge brought by foster parents to the state procedures for removal of children from their foster homes. The foster parents argued that the psychological relationship that arises between the foster parents and the child after a year of living together gives rise to a constitutionally protected interest on the part of the foster parents toward the child. 339 Writing for the majority, Justice Brennan agreed that "biological relations are not the exclusive determination of the existence of a family." 340 While he concluded that "the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue[s] against any but the most limited constitutional 'liberty' in the foster family," 341 he nevertheless acknowledged the value of caregiving:

Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship. 342

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336. *Id.* at 123 n.3.
337. *Id.*
339. *Id.* at 817.
340. *Id.* at 843.
341. *Id.* at 846.
342. *Id.* at 844.
DEVELOPING CITIZENS

Had the emotional ties that arise from the caregiving relationship developed outside the foster care framework, the Court suggests here, a protected liberty interest might have existed. Yet despite this dictum, no Supreme Court case has gone so far as to recognize rights in a caregiving relationship in the absence of biological or legal ties.

A developmental approach begins where the decision in Smith leaves off. In the developmental view, an individual’s right to the care and custody of a child derives from the foundational constitutional commitment to ensuring that children have the opportunity to acquire the skills necessary for full citizenship under our Constitution. The most important factor in the developmental process leading to the adult capacity for reasoned thinking is the successful establishment and maintenance of a good-enough caregiving relationship. Unlike the traditional parental rights doctrine, a developmental approach does not define the class of caregivers by reference to biology, marriage, gender, or legal ties, but by reference to the concept of good-enough caregiving, where good-enough caregiving is defined in terms of a reciprocal affective bond necessary to the child’s healthy psychological development.

Concerns about the unrestrained exercise of governmental power over childrearing are taken into account by a developmental approach. The Supreme Court has been especially clear and direct about its view that the State has no power to remove a child from otherwise fit parents on the ground that it would be in the best interests of the child to do so. Neither state law nor federal law “authorize[s] unrelated persons to retain custody of a child [whose natural parents have not been found to be unfit] simply because they may be better able to provide for her future and education.”343 Yet a doctrine of caregiving rights does not open up the sphere of parent-child relations to any greater state control. As we have seen, parental rights have never been defined solely in terms of biology; the parameters of this right have always been set by reference to tradition and shared values. A doctrine of caregiving rights rooted in empirical developmental psychology is arguably less subjective than the non-empirical accounts of the importance of the nuclear family that currently inform and direct modern privacy law. Moreover, nothing in the concept of caregiving rights would confer the kind of broad discretionary authority on state authorities associated with the best-interests-of-the-child standard in custody determinations. A standard that turns on the existence of a substantial caregiving relationship focuses the legal analysis on the elements of good-enough caregiving—a standard that approximates more closely to the standard of parental fitness in state abuse and neglect laws than to the open-ended best-interest-of-the-child standard in state child custody laws.

Because it is tied to a human activity rather than biology or legal status, the class of persons possessing constitutional caregiving rights may vary according to time and circumstances. At birth, the caregiving relationship is yet to be established, although this does not mean that states have unrestrained latitude in assigning childrearing rights under the Due Process Clause. Due process principles clearly set constraints on the State’s power to appropriate the process of childrearing by assigning caregiving rights arbitrarily. In most situations, the biological mother of a newborn will be entitled to caregiving rights because she has carried the child during nine months of pregnancy and because no other individual, other than the biological father, plausibly has a stronger claim. In some cases, however, things may not be so simple. A prospective adoptive parent may claim a right to the newborn. In situations involving gestational surrogacy, a contractual mother and a gestational mother may both raise claims to the infant. In such circumstances, a developmental approach focused on good-enough caregiving might allow states the discretion to allocate caregiving rights to either mother, or to both.

Biological fathers face a greater degree of uncertainty with respect to newborns, particularly where the father has no ongoing relationship with the mother. As with biological mothers, most biological fathers will be awarded caregiving rights at birth based on a prenatal commitment to a caregiving relationship with the child and on the fact that no other individual, apart from the mother, plausibly has a stronger claim. In situations where this is not true—if, for example, a stepparent or other individual has expressed a serious commitment to the upbringing of the child—then the State might have greater discretion in allocating caregiving rights. Infant caregiving rights are not limited to one or two adults, nor are caregivers required to be of different genders. In practice, of course, the set of individuals with the strongest interest in infant caregiving is likely to be the biological mother and father. But a caregiver for constitutional purposes is defined solely by an actual or inchoate caregiving relationship with the child regardless of biological, gender, or legal ties.

For young children, different considerations may come into play. Biological parents may be given presumptive caregiving rights, but this presumption must be open to rebuttal by individuals alleging a substantial caregiving relationship. In most cases, this figure will be someone with whom the child lives, such as a foster parent, a stepparent, an older sibling, or a grandparent, although development of this tie can also occur in institutional settings. A standard based on good-enough caregiving would expand the class of persons with standing to raise a claim to the care and custody of children and thus would provoke some contested custody battles.

that would not arise under the current parental-rights doctrine. A constitutional doctrine of caregiving rights does not ignore concerns about administrative costs, but it also acknowledges the overriding developmental importance to children of maintaining established caregiving relationships. In any event, securing these caregiving rights should not significantly add to the administrative burden on state governments. Although states would be prevented from utilizing conclusive presumptions based on biology, gender, or legal ties, federal law already mandates hearings before children can be removed from the custody of their parents. Indeed, the current parental rights doctrine actually puts obstacles in the way of states committed to providing the resources for individualized hearings on visitation and custody by third parties, as the Supreme Court’s recent decision in *Troxel* illustrates.

It is possible that a caregiving standard will raise the costs associated with the litigation of claims involving rights in the caregiver-child relationship. Establishing the existence of a substantial caregiving relationship might lead, in some cases, to a battle of the experts. But a developmental approach that emphasizes good-enough caregiving need not require the introduction of expert testimony on the factual question of whether such a relationship exists in the particular case. Over time, courts can develop a set of factors to be taken into account in assessing the strength of the caregiver-child bond and the importance of the relationship to the child’s developmental well-being. While the standard itself rejects prevailing norms about the primacy of the biological parent-child relationship and the exclusivity of the maternal bond, the determination of the presence or absence of a substantial caregiving relationship in the particular case will not require a significantly greater allocation of resources than most existing custody disputes centered on the best-interests-of-the-child inquiry.

Reformulating the due process right in terms of caregiving rather than parenthood would alter the analysis, if perhaps not the outcome, in *Troxel*. In contrast to traditional parental rights doctrine, a developmental approach sets no strict limit on the number of individuals who may hold a constitutionally protected caregiving relationship with a single child. Ordinarily, of course, children develop significant, stable, long-term affective relationships with only one or two adult figures in their lives. But in some situations, there may be more. At a minimum, a developmental approach would require a factual showing regarding the existence of a primary third-party caregiving bond before caregiving rights can be denied. Had the grandparents in *Troxel* been afforded such an opportunity, it is unclear based on the record in the case whether they would have succeeded in establishing the existence of a caregiving relationship sufficiently important in the life of the Troxel children to merit constitutional protection. It is

possible that a court would have found that the paternal grandparents in this case occupied an important but not essential developmental role in the lives of their grandchildren. On the other hand, given their father's suicide, it is possible that the Court would have concluded that maintaining a tie to the paternal grandparents was necessary in the circumstances of this case. The children in *Troxe*\(^4\) were also beyond the early caregiving years, and the Court could conceivably have taken into account the children's wishes. In *Michael H. v. Gerald D.*,\(^3\) in contrast, a developmental approach certainly might have made a difference to the outcome. Despite the unusual factual circumstances of the case, the natural father in *Michael H.* had what appears from the record to have been an established caregiving relationship with his daughter.\(^4\)

The concept of caregiving rights has some affinities to the psychological parent theory proposed by Joseph Goldstein, Anna Freud, and Albert Solnit in a trilogy of books,\(^3\) of which the first installment, *Beyond the Best Interests of the Child*, was published in 1973.\(^3\) The psychological parent theory reflects many of the same developmental considerations that inform the notion of caregiving rights here. Yet Goldstein, Freud, and Solnit insist that exclusive rights should be given to a primary psychological parent to control the upbringing of the child, including the right to deny visitation to the non-custodial parent or third parties. The emphasis on exclusive custodial rights reveals the extent to which the authors view conflict in the family as the primary detriment to the child's long-term psychological health. The detrimental developmental effects of conflict on children, however, must be weighed against the harm caused by the absence or loss of a significant caregiving figure in the child's life. The issue raises a factual question regarding the circumstances surrounding the caregiving relationships of the particular child. At the least, an individual who is specially situated with respect to a child, whether a grandparent, a non-custodial biological parent, or a prospective adoptive parent, should have the opportunity to show that the caregiving relationship is of significant importance to the child's psychological development.

\(^{346.}\) 530 U.S. 57 (2000).
\(^{348.}\) Id. at 113–14; *see also* id. at 143 (Brennan, J., dissenting) ("Michael H. is almost certainly Victoria D.'s natural father, has lived with her as her father, has contributed to her support, and has from the beginning sought to strengthen and maintain his relationship with her.").


One of the important aims of Goldstein, Freud, and Solnit's psychological parent theory is to reduce the detrimental effects of repeated custody litigation on children's psychological well-being. In their view, such litigation undermines children's sense of a secure attachment to their primary psychological parent as well as raising the amount of conflict among adults to whom the child is exposed. These detrimental effects, in the authors' view, are not outweighed by the benefits of maintaining contact with a non-custodial caregiver or the risk of a wrong determination of the question of physical custody. It is arguable, however, that the Goldstein, Freud, and Solnit approach—never fully accepted by the courts—would simply increase litigation over custody at the initial stage. If parents are informed that custody brings with it the power to exclude non-custodial parents from a relationship with the child, it is sensible to assume that more parents would seek custody. Steps can be taken to protect children from the adverse consequences of litigation, including shortening the time it takes for a court to reach its decision. Given the competing considerations and the fact that no outcome in these cases can be viewed as ideal, a developmental approach that recognizes the importance of children maintaining ties to one or more significant caregivers serves the basic constitutional goal of furthering children's psychological growth into mature, well-functioning citizens.

C. Political Socialization and the Safeguards of Federalism

In Elk Grove Unified School District v. Newdow, the Supreme Court held that a non-custodial father did not have standing to challenge the constitutionality of a school district policy requiring daily recitation of the Pledge of Allegiance in his daughter's kindergarten classroom. Whether his daughter's exposure to the Pledge of Allegiance at school constituted a legally cognizable injury for standing purposes, in the Court's view, turned on Mr. Newdow's custody rights under state law. The Court concluded that because Mr. Newdow's custody rights were governed by state law, he lacked standing to bring this suit in federal court. The Court did not hold that Mr. Newdow failed to meet the case or controversy requirements of Article III, which require that a plaintiff "show that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress." Instead, the Court held that judicially created prudential limits on standing prevented Mr. Newdow from bringing his claim. The prudential limit in this case was related to what the Court

352. Id.
353. Id. at 2308.
354. Id. at 2312.
described as federal courts' customary refusal to entertain cases where "hard questions of domestic relations are sure to affect the outcome."\textsuperscript{355}

The jurisdictional holding in \textit{Newdow} exemplifies the Supreme Court's long-standing view that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."\textsuperscript{356} The idea that the sphere of family relations falls within a core domain of state sovereignty commands near-unanimous support on a Supreme Court otherwise deeply divided over the doctrine of federalism.\textsuperscript{357} Yet the principle of state sovereignty over family relations is, as Justice Stevens candidly acknowledged recently, "somewhat arbitrary."\textsuperscript{358} To the extent that the principle rests on the idea that matters concerning the family are uniquely distant from national interests, the principle is patently misguided. Although it is true that most family law issues arise in state courts under state law, the federal government has shown a strong, identifiable interest in certain family matters for well over a century, if not longer.\textsuperscript{359} The federal Defense of Marriage Act\textsuperscript{360} is only the most recent in a long history of important federal laws regulating family relationships. It is simply not tenable as a matter of historical fact or contemporary practice to conclude that the federal government has no legitimate interest in the structure or quality of family life.\textsuperscript{361}

A developmental approach is consistent with the views of progressive and feminist critics who argue that the family is and should be a subject of national concern. These scholars point out that federal policy on the family has existed in some form or another for a very long time.\textsuperscript{362} They also identify the ways in which the structure of family life is deeply connected to the economic and political spheres.\textsuperscript{363} Much of this scholarship supports national legislation on the family to correct for inequalities in the economic and political spheres, particularly laws on domestic violence, child support,

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\textsuperscript{356} \textit{Newdow}, 124 S. Ct. at 2309 (quoting \textit{In re Burrus}, 136 U.S. 586 (1890)).
\textsuperscript{357} See United States v. Lopez, 514 U.S. 549, 564–65 (1995); \textit{see also id.} at 624 (Breyer, J., dissenting).
\textsuperscript{358} \textit{Troxel v. Granville}, 530 U.S. 57, 90 n.10 (2000).
\textsuperscript{359} \textit{See generally SARAH BARRINGER GORDON, THE MORMON QUESTION} (2002).
\textsuperscript{361} The presence of a strong federal interest does not rule out principled arguments in favor of state sovereignty in certain areas of family law. \textit{See} Anne C. Dailey, \textit{Federalism and Families}, 143 U. PA. L. REV. 1787 (1995).
\textsuperscript{363} \textit{See, e.g., OKIN, supra note 9, at 5–24; WALZER, supra note 9, at 227–42.}
and family leave policies. But this scholarship tends to focus on the citizenship rights of women in the family. A developmental view, in contrast, draws out the strong national interest in the role of caregivers with respect to cultivating the citizenship rights of children. In most circumstances, admittedly, the interests of caregivers and children in the family will be nearly identical. A developmental perspective that focuses on children's caregiving relationships will in most cases strengthen parental rights against state interference. But in some situations, as discussed earlier, children's independent interest in becoming citizens may run up against the interests of their custodial parents.

A developmental perspective alters the debate over the relationship of the family to the federal government in three important respects. First, a developmental approach draws attention to the fact that constitutional law currently lacks a robust conception of the social preconditions to national citizenship. The Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Citizenship Clauses of the Fourteenth Amendment, aimed at overruling Dred Scott v. Sanford and ensuring the rights of newly freed slaves, were drastically narrowed by the Supreme Court's 1872 decision in the Slaughter-House Cases, which limited the definition of "privileges or immunities" to those interests "which owe their existence to the Federal government, its National character, its Constitution, or its laws." The Slaughter-House Court declined, in other words, to interpret the Privileges or Immunities Clause as establishing a concept of national citizenship beyond the set of federal rights already expressly guaranteed in the Constitution.

The closest the Supreme Court has come to recognizing that the Constitution sets some minimum guarantee to the social preconditions of democratic citizenship is in the area of public education. While the Supreme Court has not expressly held that the Constitution establishes a fundamental right to education at any level of government, the Court has subjected state laws that discriminate in educational opportunities to heightened scrutiny

366. 60 U.S. 393 (1856).
368. 83 U.S. 36, 79 (1872).
under the Equal Protection Clause, sometimes explicitly on the theory that they interfere with the political socialization of children. Brown v. Board of Education, while primarily a racial discrimination case, emphasized the importance of education to democratic citizenship. In Plyler v. Doe, too, the Supreme Court held that a state may not discriminate against illegal alien children because "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system." Building on these cases, a developmental approach recognizes that children have a fundamental, albeit unenumerated, right to the familial preconditions that ensure equal citizenship, a right derived from the Equal Protection and Citizenship Clauses as well as more generally from the democratic structure of the Constitution. Justice Blackmun made this observation in Board of Education v. Pico, where he argued: "[T]he Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government." This unenumerated right of the youngest members of the polity to equal citizenship should be understood to include the right of impoverished families to basic support in their task of good-enough caregiving. Child welfare and family laws and policies must not violate this fundamental constitutional guarantee of equal citizenship.

Second, the federal interest in fostering the familial preconditions to citizenship gives rise to broad congressional power to ensure the basic childrearing needs of families. Given Congress's already broad powers under the Commerce Clause, this expansion will not make a practical difference in most areas where Congress regulates family activity. But it would make a difference in cases where the longstanding principle of federal non-intervention in family law determines the outcome. In Thompson v. Thompson, for example, the Supreme Court held that the Parental Kidnapping Prevention Act did not create a private cause of action to resolve an interstate custody dispute because "instructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state-law questions that they have little expertise to resolve." Similarly, a developmental perspective on federal power over families would change the outcome in the Newdow case. From a developmental perspective, the Supreme Court need not have deferred to state law on the

question of Mr. Newdow's custody rights. While state law governs most child custody decisions, the power to determine the primary rights and obligations of custodial parents under state law need not be binding in a case raising a substantial federal constitutional claim. Deference to state family laws should not trump well-established doctrines on federal protection of state-created interests. The Supreme Court has made clear, for example, that state law determinations of what constitutes a contract for purposes of the Contract Clause are subject to review by the Supreme Court on appeal. The same is true for liberty and property interests under the Due Process Clause of the Fourteenth Amendment and the Just Compensation Clause of the Fifth Amendment.

We know this to be true in the custody context as well because, were a state court to confer child custody rights on an unrelated third party and he or she then proceeded to bring suit on the child's behalf for a constitutional violation, the Supreme Court would likely find that the state's definition of a custodial interest was overly broad for federal standing purposes. Whether we understand this federal review as simply setting limits on state law definitions of a custodial interest, or whether we see this review as establishing a federal common law of custody rights under the Constitution, does not make a significant practical difference. Either way, state law should not be solely determinative of an issue that is antecedent to the review of a substantial federal constitutional claim. The definition of the interests in the caregiver-child relationship sufficient to establish constitutional standing, in the case of Mr. Newdow and his daughter, should not have been held to be a matter of exclusive state concern.

With respect to direct federal regulation of state activity, and in particular federal laws that create a private cause of action for damages against the states, recognizing a substantial federal interest in the welfare of young citizens will make a real difference in the scope of federal legislative power. In recent years, the Supreme Court has made it clear that Congress's power to create a private cause of action against the states is barred under the Eleventh Amendment, with the sole exception of those laws passed pursuant to Section Five of the Fourteenth Amendment. Legislation passed with the goal of fostering the development of democratic citizens falls within Congress's power to enforce the Citizenship Clauses under Section Five of the Fourteenth Amendment, and would therefore confer the power on Congress to abrogate sovereign immunity in this area. A developmental approach would allow Congress to enforce regulation against the states in

the areas of childcare, child support, health insurance, foster care, parental substance abuse, domestic violence, and any other conditions bearing on the early caregiving relationship. In its recent decision in *Nevada v. Hibbs*, the Supreme Court found that the Family and Medical Leave Act created a "congruent and proportional" legislative remedy for states' historical discrimination against women who traditionally have been the primary caregivers in their families. The developmental approach suggests an alternative basis for the decision in *Hibbs* that relies on Congress's important governmental interest not only in equality but also in childrearing, thus providing additional constitutional grounding for the law and any future expansions of its provisions relating to the work-family conflict.

Third, and finally, a developmental approach also recognizes that federal regulatory power over families, while broad, is not plenary. A developmental perspective tells us something about the limits that must be set on the federal government's authority over the caregiving relationship. This approach recognizes that the caregiving environment has a profoundly important influence on the young child's developing mind. This insight establishes both a basis for governmental involvement in ensuring the familial preconditions to citizenship and also the need for carefully circumscribing the exercise of federal power over children. Recognizing the deeply formative influence of the early caregiving relationship reinforces the importance of establishing strict limits on the federal government's power to mold children in its own image. It is because early childrearing is so formative of the individual that government must both be empowered to support it and, at the same time, prohibited from exercising full control over it.

The national government already operates in the area of the family and an unmodified concept of family privacy, like an unmodified idea of state sovereignty, is a misguided fiction. But equally important is the recognition of limits on federal legislative power to control families in a way that conscripts young children into a particular state-defined way of life. As the Supreme Court explained over twenty years ago, "affirmative sponsorship of particular ethical, religious, or practical beliefs is something we expect the State not to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice." A limited principle of federalism in the area of family law ensures that the federal government's duty to support families will not be taken as a carte blanche for directing young children into a uniform state-defined way of life. The principle assumes there is no bright line between the private family and the State, and

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377. Id. at 737, 740.
seeks instead to determine the kinds of governmental action that usurp, rather than reinforce, the family's childrearing role. Drawing the line between federal legislation that "supports" families and federal legislation that conscripts family life will not always be easy, but that is the required constitutional task. It turns in part on the distinction between inculcating particular moral values or life goals and securing the conditions that allow individuals eventually to choose those values and goals for themselves.

The federalism principle places limits on congressional power to prefer traditional family arrangements over non-traditional ones. The federal government's marriage policies in the context of welfare reform, for example, overstep the line by penalizing non-traditional families in the absence of any solid empirical evidence that pro-marriage policies improve the lives of children. There is some evidence that marriage correlates with children's well-being, but these studies draw causal conclusions that are not supported by the data. The developmental view rejects the notion that only the traditional family form or two-parent families can successfully nurture children; from the perspective of child development, the only fact that matters is the quality of early caregiving relationships. Indeed, denying support to non-traditional caregivers would violate the deepest principles of a developmental approach. The family's role in raising citizens involves establishing stable, caregiving relationships with young children, relationships that exist in non-traditional as well as in traditional family settings. A focus on children's early developmental needs requires recognizing the broad array of family arrangements that can successfully fill the caregiving role. Stepparents, foster parents, grandparents, and many others can all be central figures in the life of a child over time, and these relationships—when primary in the young child's life—require governmental support and constitutional protection.

The family remains a heavily state-regulated domain. The developmental perspective provides a principled basis for allocating


regulatory and decisionmaking authority over most family law matters to the states. Entry into marriage, the benefits and duties of marriage and civil unions, the rights and responsibilities of parenthood, the definition of paternity, new reproductive technologies, removal of children, termination of parental rights, adoption, divorce, child custody, and compulsory education laws are only a brief catalogue of the myriad ways in which families are defined, regulated, and dissolved by state law. Allocating this regulatory power over the family to the states serves the prudential aim of decentralizing authority over an area so formative of children's moral, cultural, and social characters. Recent state efforts to recognize civil unions and the debate over same-sex marriage, along with the passage of the Defense of Marriage Act at the federal level, are powerful reminders of the anti-tyranny, pro-democratic importance of state authority in the area of family law. The developmental perspective recognizes that the federal government has a responsibility for securing the familial preconditions to citizenship at the same time that states retain authority over a core domain of family law. In maintaining this balance between federal responsibility and state power, the developmental perspective helps to ensure the long-term success of a national polity whose survival depends on the complex transmission of the psychological skills of democratic citizenship to future generations.

V. CONCLUSION

By expanding on Brown's holding that citizenship requires tending to the "hearts and minds" of young children, this Article aims to realize an ideal of equal citizenship that emerged as one of the twentieth century's crowning jurisprudential achievements. Developmental research contributes to our understanding of the mature skills of reasoned thinking by revealing the interplay between cognition and emotion, the vulnerability of reasoned thinking to regressive emotional crises, and the familial pre-conditions to a democratic citizenry's capacity for reasoned thinking. To borrow from Justice Holmes, the Constitution most certainly does not enact Freud's Interpretation of Dreams, but it does require that we understand and account for the development of those psychological attributes of a citizenry capable of fulfilling the highest aspirations of the constitutional enterprise.

The developmental approach presented in this Article offers a comprehensive conceptual and empirical framework for rethinking the

384. For a more in-depth discussion of this point, see Dailey, supra note 10, at 997–1008.
385. See Dailey, supra note 361, at 1792–93.
387. SIGMUND FREUD, THE INTERPRETATION OF DREAMS (George Aiken & Unwin, Ltd. and The Macmillan Company 1915); see Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics." (referencing HERBERT SPENCER, SOCIAL STATISTICS (1851))).
family's role in the democratic socialization of children. Every new generation must be taught the habits of mind necessary for personal autonomy and political self-rule. Schools, professional associations, workplaces, religious groups, and political parties can all serve, in different ways, to foster the required skills of reasoned thinking in both young children and adult citizens. But what characterizes the family and sets it apart from these diverse intermediate groupings is the important unifying role it plays in fostering—generation after generation—the foundational psychological processes of reasoned thinking. As this Article has explained, our first, and arguably most important, political learning takes place in the early caregiving relationship. It is through the internalization of the early caregiving relationship that young children first take in the political world and then, as their capacity for reasoned thinking unfolds, become full members of that world in their own right.