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Anne C. Dailey

University of Connecticut School of Law

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DEVELOPING CITIZENS

Anne C. Dailey*

* Evangeline Starr Professor of Law, University of Connecticut School of Law. B.A. Yale College; J.D. Harvard Law School. Work on this Article was supported by a Chancellor's Research Fellowship from the University of Connecticut. Thanks to Doron Ben-Atar, Steve Ecker, Peter Gay, Sally Gordon, Linda Mayes, Jeremy Paul, Jeff Powell and Vicki Schultz for comments, some on a much earlier draft.

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DEVELOPING CITIZENS

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*¹

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 “hearts and minds” of African-American schoolchildren in a way that undermines “the very foundation of good citizenship.”² On many other occasions as well, the Justices have formulated constitutional doctrine to foster the development of “willing hearts and free minds” in future citizens.³ 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. We have instead witnessed the elevation of “reason” as the defining attribute of democratic citizenship,

¹ 321 U.S. 158, 168 (1944).

² 347 U.S. 483, 493 (1954).

³ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1942) (Black, J. and Douglas, J., concurring); *see infra* Part II.A.

and the banishment of “emotion” as reason’s antagonist and democracy’s foe. This Article aims to reintroduce constitutional law to the importance of hearts *and* minds by presenting a comprehensive theoretical and empirical account of the deep developmental interconnection between early caregiving relationships and the reasoned thinking of adult citizens.

The ideal of the autonomous individual capable of meaningful choice and informed decision-making is a core operative concept in modern constitutional law, central to contemporary accounts of individual liberty and democratic self-government. The individual capacity for reason defines the essence of this constitutional ideal. 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 reason involves is much less clear. An individual’s capacity for leading a self-directed life and participating in the processes of democratic self-government clearly entails much more than the cognitive skills of conceptual thinking, information processing and logical analysis. At a minimum, a citizen must also 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 self-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 self-regulation. Reasoned thinking as understood here requires the ability to regulate emotions and to integrate them into

higher-order cognitive thinking. The psychological skills of citizenship so defined encompass *both* heart and mind: basic cognitive abilities as well as the integrated psychological capacities for critical 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 begin to develop in the context of the early caregiving relationship. While the early caregiving relationship is not the only context of importance 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. This primary interconnection between emotion and cognition persists, in varying configurations, throughout the individual's life. Early family relationships are the source of our most emotionally-charged attachments and commitments *as well as* our capacity for integrating and managing those deeply-felt passions and prejudices.

The implications of this 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 the mature capacity of reasoned thinking. 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 useful specificity the caregiving conditions most likely to foster the cognitive and emotional skills required of citizens in our constitutional polity. 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 a prerequisite to the maintenance and flourishing of our modern democratic polity.

The developmental view of the importance of early caregiving to adult 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,⁴ constitutional and family law scholars have shown little or no interest in the topic.⁵ Feminists and family law scholars have long criticized the idea of the family as a private

⁴ See, e.g., Ross D. Parker & Rayond Buriel, Socialization in the Family: Ethnic and Ecological Perspectives, in 3 HANDBOOK OF CHILD PSYCHOLOGY 463 (William Damon & Nancy Eisenberg, eds. 3^ded. 1997). Kent Jennings & Richard G. Niemi, GENERATIONS AND POLITICS (1981); Robert D. Hess & Judith V. Torney, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN (1965); Richard M. Merelman, The Family and Political Socialization: Toward a Theory of Exchange, 42 J. of Politics 461 (1980); Richard E. Dawson & Kenneth Prewitt, POLITICAL SOCIALIZATION (1969).

⁵ For an important exception, see Bruce A. Ackerman, SOCIAL JUSTICE IN THE LIBERAL STATE 140-154 (1980) (examining the family's role in the development of the "cognitive, linguistic, and behavioral" skills necessary for adult citizenship).

enclave separate and apart from the public sphere,⁶ but these critics have failed to consider the existence of a distinctly political role for the family in developing citizens.⁷ Similarly, constitutional scholars have come to regard family relationships as more appropriately governed by the values of free choice and personal autonomy than by norms of democratic political life.⁸ The right of privacy, in the sense of the individual right to make decisions relating to intimate relationships, still defines the family's place in modern constitutional law.⁹ Yet, as argued here, privacy doctrine's emphasis on individual freedom in intimate relationships needs to be balanced against the role of families in providing for the development of future citizens. Communitarian theorists acknowledge the role of families, schools, religious associations, neighborhoods and other social groups in the socialization of children,¹⁰ but these theorists have not given 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

⁶ The feminist and family law literature on family privacy is enormous. For some representative articles, see Martha Minow, "Forming Underneath Everything That Grows": Toward a History of Family Law, 1985 *Wis. L. Rev.* 819 (1985); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497 (1983); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *Yale L. J.* 2117; Symposium: Privacy and the Family, 1999 *Geo. Wash. L. Rev.* 1207 *et seq.* (articles by Martha Albertson Fineman, Naomi R. Cahn and Barbara Bennett Woodhouse).

⁷ Jean Bethke Elshtain, *PUBLIC MAN, PRIVATE WOMEN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* (1993), recognizes although does not explore this relationship. 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 Susan Moller Okin, *JUSTICE, GENDER, AND THE FAMILY* (1991); Michael Walzer, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1990). Feminist theorists who have identified the unique importance of caregiving to collective life, although tied to an ethic of care rather than the political socialization of children, include Martha Albertson Fineman, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Mona Harrington, *CARE AND EQUALITY* (1999); Robin West, *CARING FOR JUSTICE* (1999); Naomi Cahn, *The Power of Caretaking*, 12 *Yale J. L. & Feminism* 177 (2000).

⁸ See *infra* pp. .

⁹ See Jed Rubenfeld, *The Right of Privacy*, 102 *Harv. L. Rev.* 737 (1989).

¹⁰ See Michael J. Sandel, *LIBERALISM AND THE LIMITS OF JUSTICE* 179 (1982); Alasdair MacIntyre, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 220 (2nd ed. 1984).

family law scholars overlook the possibility that early caregiving provides something *unique* in the developmental 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 skills for political socialization are laid down in the early caregiving years.

The absence of a developmental perspective in constitutional 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. Because the only universal value insisted upon is *reasoned thinking*, the developmental approach is entirely compatible with modern constitutional principles of cultural pluralism, religious freedom and gender equality. A developmental understanding does not open the door to state intervention into the lives of those families who fail to conform to the prevailing norms of childrearing. 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 a developmental 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.

This Article's elaboration of the need for an open, deliberate and empirically-grounded developmental perspective in constitutional law is new, but attention to the

political socialization of children in a democratic society clearly 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 turned on the state's proper role in inculcating democratic values and loyalties in public school children.

Section A of this Part describes this debate as it emerged in the foundational cases of *Meyer*, *Pierce*, *Barnette*, *Prince* and *Brown*,¹¹ and explores the developmental themes that tie these cases together into a distinct tradition. By considering the developmental themes in *Brown* and these related seminal cases in the equal protection, free speech, free exercise and due process areas, we are rewarded with a new and comprehensive framework for reconceptualizing these cases in light of the political socialization of children. Section B takes note of the important turn toward empirical research in *Brown* and the ensuing controversy over the application of developmental research in constitutional decision-making. This Section reconsiders the importance of *Brown*'s use of developmental research to modify common-sense assumptions about the role of race in the development of democratic citizens. Section C explains why common-sense psychological assumptions uninformed by developmental research put at risk the long-term stability of a democratic political system. In particular, the common-sense assumptions that reason and emotion are psychologically distinct and that schools are the primary venue for the political socialization of children are both modified by developmental research on the importance of the early caregiving relationship to the development of reasoned thinking.

Part III identifies the ideal of individual reason as a central defining feature of

¹¹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Prince v. Massachusetts*, 321 U.S. 158 (1943); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).

modern constitutional conceptions of individual liberty and democratic government. This discussion explains how a developmental perspective challenges three common-sense assumptions associated with the assumption of individual reason in constitutional law: that reason and emotion are psychologically distinct; that schools are the primary venue for the development of the skills of reasoned thinking; and that the capacity of reasoned thinking does not magically emerge at the age of majority but unfolds over time. Part IV presents empirical research relating to 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 an emotionally-attuned and responsive caregiver. The developmental research on internalization presented in this Part comes from a number of sub-fields within the discipline of psychology, including neuroscientific, cognitive and social psychologies, but the primary framework derives from the field of psychoanalytic developmental psychology. No other discipline offers as broad and deep an understanding of child development. 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. 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 is the subject of this Part. The importance of the social environment to the early caregiving relationship, and the connection between early caregiving and the citizenry's vulnerability to societal regression at times of political crisis, are explored in Part IV as well.

Part V 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. 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 starting point here is the observation that constitutional decision-makers and scholars envision robust democratic institutions and flourishing rights-bearing citizens without any consideration of the work that must be done by family caregivers in order for this constitutional system to function and survive. This reorientation of family caregiving from a solely private activity to one with significant political meaning has implications for several doctrinal areas in constitutional law. 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 setting limits on congressional power to control the moral dimensions of family life.

A final caveat is in order. While there is some overlap with developmental psychopathology, the developmental thesis presented here does not define citizenship in terms of mental health. To the contrary, the focus is on fostering the familial preconditions for *expanding access* to the rights and duties of democratic citizenship. It must be noted that one of the main accomplishments of modern constitutional law has been to eliminate 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 were all justified at one time on the ground that these groups lacked the capacity for reason, and the eradication of such barriers to citizenship reflects the ascendance over time of a more inclusive ideal of

membership in the democratic polity. Yet an assumption of universal reason should not become a barrier to probing the complex social, cultural and economic factors that affect the individual's capacity for leading a self-directed, politically-engaged life. The assumption of universal reason, standing alone, runs the risk of weakening democratic values and institutions over the long run by neglecting the socially-derived dimensions of personal freedom and democratic self-government. Recognizing that the skills of citizenship inhere in the early caregiving relationship constitutes a vital first step in identifying and securing for future generations the social preconditions to full membership in our constitutional polity.

II. The Developmental Tradition in Constitutional Law

[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.

*Board of Education, Island Trees Union Free School District v. Pico*¹²

Developmental ideas have been an important but largely unacknowledged part of constitutional decision-making over the last century. This Part first considers the role of developmental ideas in a series of early cases addressing the state's interest in the political socialization of children. The developmental tradition in constitutional law has centered on a debate about the proper role of government in cultivating democratic skills and values in young children, primarily in the context of public education. The debate has turned on competing common-sense assumptions about the affirmative inculcation of democratic skills and values in children, on the one hand, and the adaptation of children to democratic environments, on the other hand. This early series of cases culminated in 1954 with the Supreme Court's application of empirical developmental research in *Brown v. Board of Education*. 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 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 common-sense assumptions about the political socialization of children in constitutional law.

¹² 457 U.S. 853, 876 (1982) (Brennan, J., concurring in part and concurring in the judgment).

A. The Foundational Developmental Cases: *Meyer, Pierce, Barnette, Prince and Brown*

Attention to developmental issues in constitutional law can be found as early as the 1908 decision in *Muller v. Oregon* involving a challenge to the State of Oregon's maximum hours law for women. A one-hundred page brief submitted by Louis Brandeis on behalf of the State of Oregon focused on the physical and psychological differences between men and women as a basis for justifying the state's regulation. A short section of the brief, entitled "The Effect of Women's Overwork on Future Generations," introduced statistics and other evidence on the indirect effects of women's long work hours on children, both born and unborn.¹³ The research listed in this section of the brief varied in the description of the ill effects suffered by the children of mothers forced to work long hours, from infant mortality to nervous disorder and moral degeneracy. In his opinion for the Court, Justice Brewer expressed concern for the effect of mothers' long work hours on the development of children by observing that "a proper discharge of [woman's] maternal functions – having in view not merely her own health, but the well-being of the race – justif[ies] legislation to protect her from the greed as well as the passion of man."¹⁴ As this passage makes clear, Justice Brewer had developmental concerns partly in mind when he upheld the maximum hours legislation in this case.

The decision in *Muller* offers several lessons from a developmental perspective. The case illustrates how traditional norms of maternal domesticity and children's development operated to restrict women's participation in the economic sphere. Justice

¹³ Brief for the Defendant in Error, *supra* note at 51-55.

¹⁴ *Id.* at 422.

Brewer relied primarily on an ideology of the maternal role, as supported by the empirical data introduced by Brandeis, to uphold the legislation limiting women's work hours.¹⁵ The case also serves as a valuable reminder of the historical limitations of all social science; here, the best empirical data of the period was understood to establish women's inherent physical infirmities and mental weaknesses. Despite these obvious shortcomings, though, the decision in *Muller* opened the door, however slightly, to a developmental perspective in constitutional law. Over the next half century, the Court would grapple with developmental issues in several of its major cases defining constitutional liberties under the due process, free speech and freedom of religion clauses, most of these in the context of public education.

In a pair of cases decided fifteen years after *Muller*, the Supreme 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. State of Nebraska*, the Supreme Court considered a challenge to a state law forbidding the teaching of any modern language other than English to primary school children.¹⁶ 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 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.¹⁷

While acknowledging that "the State may do much, go very far, indeed, in order to

¹⁵ See Anne C. Dailey, *Lochner* for Women, 74 Texas L. Rev. 1217 (1996).

¹⁶ 262 U.S. 390 (1923).

¹⁷ *Id.* at 398 (quoting 107 Neb. 657).

improve the quality of its citizens, physically, mentally and morally,” the Court nevertheless held the statute to be an unconstitutional intrusion, “in time of peace and domestic tranquility,” of the parents’ right to control their children’s education under the Fourteenth Amendment.¹⁸ 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.¹⁹

Yet, the Court held, “[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.”²⁰ 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.”²¹ The parental right recognized in *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.

Developmental concerns were also apparent in the second of the two cases, *Pierce v. Society of Sisters*.²² This case involved the constitutionality of Oregon’s Compulsory Education Act, a law that required children to attend public school up through the eighth grade. Relying on *Meyer*, the Court held that the Oregon statute “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of

¹⁸ *Id.* at 402.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 403 (emphasis added).

²² 268 U.S. 510 (1925).

children under their control.”²³ 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 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.²⁴

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.”²⁵ 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 political socialization of children in a democratic polity. It should come as no surprise that the question of control over children’s education arose at this point in time.²⁶ Developmental views played a central role in the child reform movement that emerged in the early decades of the twentieth century. Progressive legal reformers collaborated with developmental experts in social work and other fields to bring about legal changes in many areas, including child neglect, child labor, juvenile justice and public education.²⁷ Spurred on

²³ *Id.* at 534-35.

²⁴ *Id.* at 535.

²⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

²⁶ See Barbara Bennett Woodhouse, *Who Owns the Child? Meyer and Pierce and the Child as Property*, 33 *William & Mary L. Rev.* 995 (1992).

²⁷ See Susan Tiffin, *IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA* (1982); Michael Willrich, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003).

by the changing needs of business,²⁸ the movement for universal public education was at the forefront of progressive democratic reform efforts, and by 1918 compulsory education laws were in existence in all the states.²⁹ 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 "striving for democracy" that rested on a belief in the importance of educating children for democratic citizenship.³⁰

Parental rights bore an ambivalent relationship to the early twentieth-century goal of educating children for democracy. On the one hand, universal public education had a strongly *anti-democratic* ring to it, and 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.³¹ Parental rights defused the threat of excessive state authority, thereby fostering the development of 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 were passed during World War One's "frantic

²⁸ See Rodgers, In Search of Progressivism, *supra* note at 29; Anthony Platt, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY xx-xxii (2d ed. 1977).

²⁹ See Willrich, CITY OF COURTS, *supra* note at 145.

³⁰ See James T. Kloppenberg, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT 1870-1920, 377 (1988); Arthur S. Link & Richard L. McCormick, PROGRESSIVISM 90 (1983).

³¹ See Woodhouse, Who Owns the Child?, *supra* note at 1078.

and overreaching days.”³² 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.”³³ On the eve of World War II, securing democracy by inculcating the ways of democratic thinking in young minds had become a national priority.

The Supreme Court squarely entered this national debate over the inculcation of democratic values in children with a controversial and short-lived decision in *Minersville School District v. Gobitis*.³⁴ 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.³⁵

In reaching his decision upholding the school board’s decision to expel the 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, Justice Frankfurter clarified that “[w]e are dealing with an interest inferior to none in the hierarchy of legal values.”³⁶ Playing upon fears aroused by the War in Europe, he

³² *Ambach v. Norwick*, 441 U.S. 68, 82 (1979) (Blackmun, J., dissenting).

³³ CONFERENCE ON CHILDREN IN A DEMOCRACY; Papers and Discussions at the Initial Sessions (April 26, 1939).

³⁴ 310 U.S. 586 (1940), *overruled in* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³⁵ 310 U.S. at 592.

³⁶ *Id.* at 595.

declared that “[n]ational unity is the basis of national security.”³⁷ 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, and “without which there can ultimately be no liberties, civil or religious.” 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.”³⁸ 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.”³⁹ A democratic society, Frankfurter concluded, “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.”⁴⁰ The compulsory flag-salute ceremony cultivates the unconscious sentiments that are, in his view, the very foundation of organized political society.

³⁷ *Id.*

³⁸ *Hirabayashi v. United States*, 320 U.S. 81, 107 (1945); *see Ex Parte Mitsuye Endo*, 323 U.S. 283, 302 (1944).

³⁹ *Id.* at 596.

⁴⁰ *Id.* at 600.

Having identified this unifying sentiment as essential in a democratic society, Frankfurter went on to observe that the sentiment is best instilled at the proper developmental stage. 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.”⁴¹ He elaborated:

We are dealing here with the formative period in the development of citizens. Great diversity of psychological and ethical opinion 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-case system of education to be imposed upon a nation that, 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. *Pierce v. Society of Sisters* 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.⁴²

Frankfurter ultimately rested his decision on a deference to state legislative decision-making on the best time and manner to inculcate democratic sentiments in young children. Nevertheless, his 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, clearly outweighing, in Frankfurter’s view, 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 *West Virginia State Board of Education v. Barnette*,⁴³ a case nearly identical on its facts to *Gobitis*. *Barnette* involved a challenge

⁴¹ *Id.*

⁴² *Id.* at 598.

⁴³ 319 U.S. 624 (1943).

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."⁴⁴ 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, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions."⁴⁵ In the majority's view, children's adaptation to a democratic environment is the primary route for the transmission of democratic values to future citizens. As one commentator has described the adaptation view, "democratic values are taught to youth by more than formal instruction"; to be avoided are those arrangements "where the formal instruction is inconsistent with the students' observations and experience."⁴⁶

Frankfurter filed a long dissent in which he reiterated the views he had expressed in *Gobitis*. His strongly-worded opinion took the position that the Constitution requires deference to the state legislature's assessment of how best to inculcate democratic values in young children. "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

⁴⁴ *Id.* at 637.

⁴⁵ *Id.* at 644.

⁴⁶ Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individuals Rights in Public School*, 95 *Yale L. J.* 1647, 1654 (1986).

and our hopes.”⁴⁷ He argued that the Court should defer to states’ control over the inculcation of democratic values in young children. Frankfurter’s reliance on the principle of federalism in *Barnette* affirmed the strong tie between the inculcation model of political socialization and the tradition of Supreme Court deference to the states in matters relating to parents and children. His deference to state legislatures in *Barnette* is thus consistent with his views on the importance of inculcating democratic values in children. He identified the state’s compelling interest in cultivating an affirmative psychological tie between a citizen and the democratic polity. As he described it, it is perfectly legitimate, indeed necessary, for the state to promote the affirmative inculcation of particular “ideas and sentiments” at the appropriate developmental age. What these ideas and sentiments are 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.”⁴⁸

The debate over inculcation versus adaptation as the vehicle for the transmission of democratic values to children was continued the following year in *Prince v. Massachusetts*.⁴⁹ Like *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

⁴⁷ *Id.* at 662.

⁴⁸ *Gobitis*, 310 U.S. at 597.

⁴⁹ 321 U.S. 158 (1943).

obligations the state can neither supply nor hinder.”⁵⁰ 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.”⁵¹ 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.”⁵² 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.⁵³

The *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 decision in *Meyer* and *Pierce*, here the Court sustained a powerful role for the state in inculcating democratic values over the objection of parents and guardians.

The opinions in *Meyer*, *Pierce*, *Barnette* and *Prince* all drew, implicitly or explicitly, 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

⁵⁰ *Id.* at 166.

⁵¹ *Id.*

⁵² *Id.* at 168.

⁵³ *Id.* at 170.

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.”⁵⁴ 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 developmental 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 debate over the political socialization of children in constitutional law. With this research comes the possibility of moving beyond common-sense ideas about inculcation and adaptation 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. Overcoming Footnote Eleven

The reference to developmental literature in footnote eleven of 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.⁵⁵ 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.⁵⁶ Originally a critique of late nineteenth-century legal

⁵⁴ 347 U.S. 483, 494 (1954).

⁵⁵ Oliver Wendell Holmes, Jr., *The Profession of the Law*, in 3 *THE COLLECTED WORKS OF JUSTICE HOLMES* 471, 472 (Sheldon M. Novick, ed. 1995).

⁵⁶ See Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 *The Green Bag* 607 (1907). See generally John Henry Schlegel, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

formalism, the legal realists' interdisciplinary orientation and empirical temperament soon became standard features in legal decision-making and scholarship. Yet the application of social science research to the realm of constitutional decision-making has been fraught with controversy from the beginning. Much of the controversy can be traced to the outcry over footnote eleven in the *Brown* decision.⁵⁷

Footnote eleven included a string citation to social psychology literature on the adverse psychological effects of segregated schools on African-American children. The Supreme Court cited this research in connection with its conclusion 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.”⁵⁸ Based on this “psychological knowledge,” and supported by the “modern authorities” listed in the footnote, the Supreme Court came to the unanimous legal conclusion that “[s]eparate educational facilities are inherently unequal.”⁵⁹ As commentators have pointed out, it is not clear that the Supreme Court actually relied on this social science literature to reach its holding.⁶⁰ 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.⁶¹

Chief Justice Warren’s reported 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

⁵⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁵⁸ *Id.* at 494.

⁵⁹ *Id.* at 494, 495.

⁶⁰ See, e.g., Mody, *Brown* Footnote Eleven in Historical Context, *supra* note at 793.

⁶¹ Richard Kluger, *SIMPLE JUSTICE* 706 (1976).

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*.⁶² 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." The majority of the African-American children tested showed an unmistakable preference for the white doll and a rejection of the brown doll. "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."⁶³ 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.

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*. 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 African-

⁶² *Id.* at 315-21.

⁶³ THE ORAL ARGUMENT, *supra* note at 42.

American children.⁶⁴ Nonetheless, although the doll studies were only a small part of one of the authorities listed in footnote eleven,⁶⁵ history has rendered the studies and the footnote synonymous. Both have come to symbolize constitutional adjudication gone wrong, a giant miscalculation on the part of the Supreme Court that almost proved the undoing of the legal holding in one of the Century's most important cases.

Supporters of the holding in *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.”⁶⁶ Critics such as Cahn did not deny that the Constitution is a document whose meaning evolves over time;⁶⁷ 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

⁶⁴ E. L. Horowitz, Attitudes of Children in CHARACTERISTICS OF THE AMERICAN NEGRO (Otto Klineberg, ed. 1944); Marion J. Radke, Trager & Helen G. Davis, Social Perceptions and Attitudes of Children, 40 Genetic Psychology Monograph 327-447 (1949); Marion J. Radke & Helen G. Trager, Children's Perceptions of the Social Roles of Negroes and Whites, 29 J. Psychology 3 (1950); M.E. Goodman, Evidence Concerning the Genesis of Interracial Attitudes, 48 Am. Anthropologist 624 (1946); R. Blake & W. Dennis, The Development of Stereotypes Concerning the Negro, 38 J. Abnormal & Soc. Psychology 525 (1943); G. W. Allport & Bernard M. Krumer, Some Roots of Prejudice, 22 J. Psychology 9 (1946).

⁶⁵ Footnote eleven had its origins in an Appendix to the Appellant's Brief entitled “The Effects of Segregation and the Consequences of Desegregation – A Social Science Statement.” See P. B. Kurland & G. Casper, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 43-61 (1975). The Social Science Statement was drafted by the social scientists Kenneth Clark, Isidor Chein and Stuart Cook with support from the Society for the Psychological Study of Social Issues and was signed by thirty-two of the country's most prominent social scientists. See SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION (2001). The eighteen-page Statement concluded that “segregation was psychologically damaging both to minority and majority group children” and “that desegregation could proceed smoothly and without trouble if it were done quickly and firmly.” John P. Jackson, Jr., Creating a Consensus: Psychologists, the Supreme Court, and School Desegregation, 1952-1955 – Experts in the Service of Social Reform: SPSSI, Psychology, and Society, 1936-1996, Journal of Social Issues (Spring 1998).

⁶⁶ Edmond Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157-58 (1955); see also Ronald Dworkin, Social Sciences and Constitutional Rights – The Consequences of Uncertainty, 6 J. L. & Educ. 3 (1977).

⁶⁷ See Mark G. Yudof, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, 42 L. & Cont. Prob. 57 (1978). For a critique of originalism, see Jefferson Powell, COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS (2002).

American life throughout the Nation” was not the problem.⁶⁸ 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 objection to social science as insufficiently scientific rests in part on the uniqueness of constitutional decision-making, for 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 provokes no outcry. Constitutional law, it is argued, involves rights more fundamental and more enduring than those guaranteed by statute or common law. As one commentator has asked, “Should the meaning of the Constitution and the Bill of Rights depend upon a sociologist’s latest public opinion survey?”⁶⁹ Professor Cahn elaborated on this point:

It is one thing to use the current scientific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the findings as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature. . . . What then would be the state of our constitutional rights?⁷⁰

The argument that social science 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

⁶⁸ 347 U.S. at 492-93.

⁶⁹ David M. O’Brien, *Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law*, 64 JUDICATURE 285, 289 (1981); *see also* Doyle, *Can Social Science Data Be Used in Judicial Decisionmaking?*, 6 J. L. & Educ. 13, 18 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 470 (1972) (Burger, C.J., dissenting) (“The commands of the Constitution cannot fluctuate with the shifting tide of scientific opinion.”).

⁷⁰ Cahn, *Jurisprudence*, *supra* note at 167.

with the natural sciences, although the natural sciences may not always – particularly in the case of the biological sciences – be as exacting as their reputation suggests.⁷¹ But it is not clear why this concern should be a basis for excluding social science research from consideration in constitutional cases. It can hardly be denied that the social sciences have *something* to offer constitutional decision-making on the subject of the changing social, cultural and psychological worlds in which we live. This point is hardly original; the main thrust of legal realism was to bring the “arid and abstract” legal reasoning of the *Lockner* era into line with human experience in the modern industrial age.⁷²

More to the point, the Supreme Court itself has relied on social science research in deciding many constitutional cases since *Brown*,⁷³ and the practice, if not the idea, appears well settled. What continues to spark heated controversy is the application of *psychological* research in constitutional decision-making.⁷⁴ For those who entertain doubts about the scientific validity of the social sciences, the behavioral sciences tend to elicit the greatest skepticism and hostility. Justice Scalia bitinglly remarked in a recent dissent, “interior decorating is a rock-hard science compared to psychology practiced by amateurs,”⁷⁵ and his views do not differ greatly from those expressed in the immediate aftermath of *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. Moreover, this criticism hardly provides a basis for

⁷¹ See Bernard Barber, *SCIENCE AND THE SOCIAL ORDER* 16 (1952).

⁷² Paul Rosen, *THE SUPREME COURT AND SOCIAL SCIENCE* 197 (1972).

⁷³ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (affirmative action); *United States v. Virginia*, 518 U.S. 515 (1992) (gender discrimination); *Lockhart v. McCree*, 476 U.S. 162 (1986) (jury right); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (gender discrimination); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (obscenity); *Craig v. Boren*, 429 U.S. 190 (1976) (gender discrimination); *Furman v. Georgia*, 408 U.S. 238 (1972) (eighth amendment); *Williams v. Florida* 399 U.S. 78 (1970) (jury right). See generally John Monahan & Laurens Walker, *SOCIAL SCIENCE IN LAW* (4th ed. 1998).

⁷⁴ See Rosen, *THE SUPREME COURT AND SOCIAL SCIENCE*, *supra* note at 193.

⁷⁵ *Lee v. Weisman*, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting).

excluding even non-experimental psychological research from constitutional decision-making. One might reasonably insist that the application of psychological research to constitutional law, as in any social or natural science, involve efforts to identify the best possible empirical findings given the available knowledge of the field. This standard requires evaluating research methodologies, sifting through conflicting research findings, and ascertaining scientific consensus in the field, but 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. 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.

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 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.”⁷⁶ 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 a question about social fact; a canard if it means that anything like principal reliance was placed on the formally “scientific” authorities, which are

⁷⁶ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L. J.* 421, 428 (1959).

relegated to a footnote and treated as merely corroboratory of common sense.⁷⁷

Implicit in Black's defense of the common-sense reasoning in *Brown* is a more general critique of scientific thinking as a basis for constitutional decision-making. 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 decision-making.⁷⁸ 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.

Yet however compelling a defense of the decision in *Brown*, common-sense decision-making does not avoid the problems associated with the use of social science, and creates several of its own. Obviously common sense does not alleviate the problems of subjective bias, or contested viewpoints, or empirically untestable hypotheses.⁷⁹ But more important, relying on judicial common sense to guide constitutional interpretation runs the additional risk of tying constitutional law to outmoded ways of thinking. Common sense represents the accumulated wisdom of the past which might, or might not, be useful or true for the needs of the present. We need hardly be reminded that the *Lochner* era resulted in part from a Supreme Court whose common sense was out of touch with changing social experience. But particularly in the context of social and psychological knowledge, the problem is not limited to situations where the views of an aging judiciary lag behind a rapidly changing social world. During times of relative

⁷⁷ *Id.* at 430 n.25.

⁷⁸ See Dworkin, *Social Sciences and Constitutional Rights*, *supra* note .

⁷⁹ Barber, *SCIENCE AND THE SOCIAL ORDER*, *supra* note at 245.

social and political quiescence as well, judicial common sense is inadequate for ascertaining the social and psychological facts need to guide and inform constitutional decision-making. This is so because common-sense decision-making assumes that such facts are readily apparent to, or at least readily recognizable by, the general observer. Yet even in the natural sciences some of the greatest advances in knowledge required suppressing simple common-sense understandings: that the earth revolves around the sun; that matter is energy; that disease spreads by way of germs. Establishing these facts initially required overcoming deeply-rooted intuitions about the natural world as we perceive and consciously experience it.⁸⁰

The facts about psychological life elude common-sense understanding to an even greater degree than do facts about the natural world. One need not be an orthodox Freudian to recognize the power that unconscious emotions and beliefs exert over conscious thinking and decision-making, or the role of defense mechanisms such as 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 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.⁸¹ And as the debate over affirmative action now illustrates, fifty years later the

⁸⁰ See *id.* at 23.

⁸¹ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

social and psychological dynamics of discrimination are not so clearly available to common understanding. 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 decision-making.⁸² The Supreme Court's decision this Term in *Roper v. Simmons*⁸³ striking down the death penalty for individuals who were under eighteen at the time they committed their crimes is 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.

C. Development and the Limits of Common Sense

The case for applying developmental research in constitutional law thus goes well beyond getting the facts right. The argument made here is that constitutional law *needs* developmental research to modify common-sense assumptions relating to the normative task of developing democratic citizens. In the years since *Brown*, these developmental assumptions have not advanced terribly far beyond the ideas about adaptation and inculcation expressed in the opinions of Justices Jackson and Frankfurter in *Barnette*. In *Tinker v. Des Moines Independent Community School District*,⁸⁴ 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:

⁸² See, e.g., Charles R. Lawrence, III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunities*, 47 *Stan. L. Rev.* 1161 (1995).

⁸³ 125 S.Ct. 1183 (2005).

⁸⁴ 393 U.S. 503 (1969).

“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.’”⁸⁵

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. Children exposed to democratic institutions will adapt to their surroundings by identifying with, rather than rejecting, the values in their environment.

Similar views about child adaptation were at work in *Board of Education, Island Trees Union Free School District v. Pico*.⁸⁶ In this case, 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.”⁸⁷ For Justice Brennan, it is not a pluralistic environment *per se* that defines a democratic education, since he concluded that the school board had the power to remove books deemed pervasively vulgar, whatever the ideas presented. The school board also obviously had broad discretion to decide what books to buy in the first place. The constitutional injury in this case turned on the motivation behind the removal of the books. “If petitioners *intended* by their removal decision to deny respondents access to

⁸⁵ *Id.* at 512 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) and *Keyishian v. Bd of Regents*, 385 U.S. 589, 603) (1967)).

⁸⁶ 457 U.S. 853 (1982).

⁸⁷ *Id.* at 871.

ideas with which petitioners disagreed,” then a constitutional violation would be found.⁸⁸ For Brennan, the importance of the marketplace of ideas to children’s development lies not in their exposure to a plurality of ideas but rather in their exposure to a democratic way of life that rejects “prescribed orthodoxy.”⁸⁹

In other cases, the Supreme Court has stressed the importance of direct inculcation of values in children more closely aligned with Justice Frankfurter’s dissent in *Barnette*. In *Ambach v. Norwick*, for example, the Court upheld the power of the state to prohibit aliens from positions as public school teachers.⁹⁰ Describing public school teaching as “a task ‘that [goes] to the heart of representative government,’”⁹¹ the majority affirmed the “[t]he importance of public schools in the preparation of individuals for participation as citizens.”⁹² The cases emphasizing direct inculcation do not limit the range of democratic values to the basic skills of reading and writing. As Justice Frankfurter put it, “[t]he ultimate foundation of a free society is the binding tie of *cohesive sentiment*.”⁹³ In *Brown*, too, the Supreme Court had indicated an important affective dimension to the role of schools in shaping the “hearts and minds” of young children. More specifically, 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]

⁸⁸ *Id.* (emphasis supplied).

⁸⁹ *Id.*; see *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 642.

⁹⁰ 441 U.S. 68 (1979).

⁹¹ 441 U.S. at 75-76 (quoting *Sugarman v. Dougall*, 413 U.S. 634 (1973)).

⁹² *Id.* at 76 (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)). The *Ambach* decision suggests that the Court’s inculcation model is less rights protecting 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. And 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 (1982); see also *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

⁹³ *Gobitis*, 310 U.S. at 596.

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.⁹⁴

Similarly, in *Bethel School District No. 403 v. Fraser*,⁹⁵ 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.⁹⁶

The line between adaptation and inculcation – so forcefully defended in *Barnette* – begins to blur in these more recent cases as inculcation comes in the form of exposure to teachers as role models. What at bottom distinguishes inculcation from adaptation, in the Court's view, is the authority of the state. In the inculcation view, students emulate, but do not challenge, their teachers. In the adaptation view, such an authoritarian environment runs the risk of instilling the habits of mind of a totalitarian state.⁹⁷

The Supreme Court's ideas about adaptation and inculcation raise important and pressing questions about the role of the public school in the political socialization of children, but these ideas as elaborated in the case law 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,

⁹⁴ 441 U.S. at 78-79.

⁹⁵ 478 U.S. 675 (1986).

⁹⁶ *Id.* at 683.

⁹⁷ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, Appellant's Brief at 12; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969).

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, nor 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,” listing several books on the subject.⁹⁸ 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.”⁹⁹ The Court’s focus on the role of teachers as role models suggests that identification may play an important role in the political socialization of older children, although the Court has never investigated the psychological concept of identification nor gone beyond conclusory, common-sense remarks on the subject.

Overcoming skepticism toward the use of developmental research in constitutional decision-making is essential to the task of evaluating and modifying common-sense assumptions about the transmission of democratic skills to future generations. While the Court refers frequently in the public school cases to democratic values, exactly what these values are and how they are acquired – beyond general references to adaptation and inculcation – never gets the full empirical investigation constitutional law needs and deserves. Nowhere do we find sustained consideration of the development of the psychological skills necessary for a citizen to be cognizable as a political subject under our Constitution, in other words capable of enjoying some measure

⁹⁸ *Id.* at 77 (citing R. Dawson & K. Prewitt, *POLITICAL SOCIALIZATION* (1969); R. Hess & J. Torney, *THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN* (1967); V. Key, *PUBLIC OPINION AND AMERICAN DEMOCRACY* (1961)).

⁹⁹ *Id.* at 79 n.9.

of personal liberty and of participating in the processes of democratic self-government. More important, the focus on schools as the primary locus of political socialization misses a crucial arena for the transmission of democratic skills to future generations. When the Supreme Court adheres to the widely-shared view that, as Justice Douglas described it, “[t]he public school is the cradle of our democracy,”¹⁰⁰ the Court overlooks the fundamental importance of the cradle itself to democratic life.

¹⁰⁰ Adler v. Board of Education of the City of New York, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

III. The Heart and Mind of Citizenship

Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.

*Prince v. Massachusetts*¹⁰¹

The traditional assumption that children lack the ability “to make critical decisions in an informed, mature manner”¹⁰² justifies many if not all of the restrictions on minor’s rights, including the rights to marry, to vote, to obtain medical treatment and to 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 of democratic citizenship.¹⁰³

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

¹⁰¹ 321 U.S. 158, 165 (1944).

¹⁰² *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

¹⁰³ Recognition of the non-cognitive, irrational elements in human nature can be found in the occasional Supreme Court opinion. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting) (“Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keep up barriers that just come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.”).

individual.¹⁰⁴ For example, the right against self-incrimination recognized in *Miranda v. Arizona* rests on an ideal of the rational, intending individual, capable – even at the moment of interrogation by police officers – of choosing to confess freely and voluntarily.¹⁰⁵ 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.”¹⁰⁶ 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.” 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.”¹⁰⁷ The subjective mental state of the defendant is itself irrelevant to the constitutional presumption that, in the absence of state misconduct, confessions are the produce of free and voluntary reasoned choice.

So, too, *Roe v. Wade*, the centerpiece – and the Achilles heel – of modern constitutional rights, gives expression to the ideal of reasoned choice.¹⁰⁸ 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.¹⁰⁹ It is a right to *choose* an abortion, not a right to the abortion itself. Justice

¹⁰⁴ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (due process); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (establishment clause); *Lee v. Weisman*, 505 U.S. 577 (1992) (free exercise); *Washington v. Davis*, 426 U.S. 229 (1976) (equal protection); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (due process); *Miranda v. Arizona*, 384 U.S. 436 (1966) (criminal procedure); *Miranda v. Arizona*, 384 U.S. 436 (1966) (criminal procedure); *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring) (free speech).
¹⁰⁵ 384 U.S. 436 (1966).

¹⁰⁶ 430 U.S. 387, 434 (1977).

¹⁰⁷ 479 U.S. 157, 170 (1986).

¹⁰⁸ 410 U.S. 113 (1973).

¹⁰⁹ *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

Blackmun wrote in recognizing a woman's fundamental *right to choose*: "The Constitution does not explicitly mention any right of privacy. But the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . . This right of privacy . . . is broad enough to encompass a woman's *decision* whether or not to terminate her pregnancy."¹¹⁰ 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."¹¹¹

This bedrock ideal of reasoned choice penetrates constitutional analysis even in the area of religious freedom, where we would expect to find the greatest resistance to reason.¹¹² 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.¹¹³ The Court held that "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."¹¹⁴ Similarly, the principles implicit in the Supreme Court's voting rights and education cases under the equal protection clause appeal to the democratic value of individual

¹¹⁰ 410 U.S. at .

¹¹¹ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹¹² See Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education," 106 Harv. L. Rev. 581 (1993).

¹¹³ *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002).

¹¹⁴ *Id.* at 652 (emphasis added).

reasoned choice.¹¹⁵ More recently, the principle of reason was at work in the Supreme Court's decision in *Lawrence v. Texas* striking down the Texas anti-sodomy statute. 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."¹¹⁶ Going well beyond freedom from physical constraint, the capacity to make meaningful choices about how to live one's life has become the animating ideal of religious freedom and personal liberty in modern constitutional law.

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 decision-making.¹¹⁷ 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 decision-making 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 decision-making, but the basic assumption about the reasoning capacity of 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

¹¹⁵ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (education); *Reynolds v. Sims*, 377 U.S. 533 (1964) (voting); *Plyler v. Doe*, 457 U.S. 202 (1982) (education).

¹¹⁶ *Lawrence v. Texas*, 539 U.S. at 565.

¹¹⁷ See, e.g., *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman & William Rehg eds., 1999); *DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS* (Harold Hongju Koh & Ronald C. Slye eds., 1999); see also Bruce Ackerman, *WE THE PEOPLE: vols I & II* (1991 and 1997); Amy Gutmann, *DEMOCRATIC EDUCATION* 52 (1987); Stephen Macedo, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 269 (1990); Symposium, *The Civic Republican Tradition*, 97 *Yale L. J.* 1493 (1988).

external coercion. The constitutional commitment to democratic self-government presumes that electoral decisions are, overall, the product of individual reasoned choice.

A developmental perspective on citizenship and its attributes throws into question three common-sense assumptions underlying the constitutional ideal of reasoned choice. First, developmental research challenges the common-sense assumption that reason and emotion are separate and opposing regions of psychological life. 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 up together. Because beliefs, values and commitments are often outside one's conscious awareness, conflicting, and unstable over time, the process of reasoned decision-making requires some degree of critical self-reflection. This process of critical self-reflection, in turn, calls upon the capacity to imagine alternatives to one's own moral universe. Intuition based on non-cognitive factors, unconscious perceptions or memory also plays a role in reasoned thinking. In addition to these reason-congruent emotional processes, emotions can also overwhelm and distort the cognitive and perceptual processes of reasoned thinking. A developmental perspective reveals that reasoned thinking involves, along with basic perceptual and information-processing skills, the mature integrated capacities for critical self-reflection and emotional self-mastery. In the language of the Supreme Court, the psychological skills of citizenship encompass both heart *and* mind.

Second, developmental research challenges the prevailing common-sense view that schools are the first and primary venue for cultivating the skills of citizenship. This research points to the family as the foundational venue for the development of reasoned thinking. To the extent political and legal commentators consider the role of the family in

the political socialization of children, they tend to focus on the transmission of political values, particularly attitudes toward government, affiliation with a political party, and expectations for group life,¹¹⁸ but do not do not identify the family's role in cultivating the psychological skill of reasoned thinking. What this assumption overlooks is the extent to which the psychological qualities necessary to reasoned thinking and 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. As the Supreme Court recognized in *Brown, Ambach* and *Fraser*, schools engage the emotional lives of students in ways that foster the development of democratic values. Yet these later influences on cognitive development 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*¹¹⁹ 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 right, coupled with the high duty, to recognize and prepare him for additional obligations.¹²⁰ 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

¹¹⁸ See Hess & Torney, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN, *supra* note at 95-96. For an exception, see Ackerman, SOCIAL JUSTICE IN THE LIBERAL STATE, *supra* note .

¹¹⁹ 268 U.S. 510 (1925).

¹²⁰ *Id.* at 573.

include preparation for obligations the state can neither supply nor hinder.”¹²¹ *Wisconsin v. Yoder*¹²² also recognized the Amish family’s right to withdraw their children from public school after the eighth grade because the children were being educated in the values and skills of good citizenship. 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.¹²³ More recently, Justice Powell relied on *Prince* 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.”¹²⁴ The idea that families perform an essential socializing function necessary to the life of the polity has never advanced beyond vague generalities and, more important, has been eclipsed by the doctrine of privacy. Whatever else privacy might encompass, at a minimum it emphasizes freedom from state indoctrination, a perspective that seems to rule out the idea that families play an essential *unifying* role in the political socialization of children. The developmental view as vaguely referenced in a few Supreme Court cases never surmounted the prevailing assumptions that families are private enclaves and that schools are the primary venue for the political socialization of children.

Third, a developmental approach dispels the common-sense assumption that children are incapable of reasoned thinking. In this regard, the Supreme Court has relaxed the presumption of children’s incompetency in certain situations based on their capacity for reasoned, mature decision-making. “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority,” the

¹²¹ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹²² 406 U.S. 205 (1972).

¹²³ *Id.*

¹²⁴ *Bellotti v. Baird*, 443 U.S. 622, 637 (1979) (plurality opinion) (quoting *Prince*, 321 U.S. at 166).

Court repeatedly explains.¹²⁵ The Supreme Court's decision in *In Re Gault*, for example, holding that minors in a juvenile delinquency proceeding possess due process rights, including the right against self-incrimination, rests in part on the idea that minors deserve to be treated as independent adults in some circumstances. In the due process arena, developmental questions have arisen regarding the assumption that minors lack the mature capacity for reasoned thinking, an assumption used to justify state statutes that require parental notification or consent when a minor seeks an abortion. In *Hodgson v. Minnesota*, the Court held that a pregnant minor has a constitutional right to choose to terminate her pregnancy without parental notification if she can satisfy a court that she has attained sufficient maturity to make a fully informed decision.¹²⁶ Just this Term, in *Roper v. Simmons*, a Majority of the Supreme Court relied on developmental research to strike down the death penalty for individuals who were under eighteen at the time they committed their crimes.¹²⁷ Nevertheless, the Court's paradigm for adolescent decision-making is still one that sorts individuals into two groups: those possessing mature reasoning faculties and those who are incompetent. In *Roper*, the issue revolved around the risk of error in differentiating mature from immature juvenile offenders in the context of the death penalty.¹²⁸ Apart from the first amendment cases discussed above, these cases do not introduce a developmental perspective on the *process* that moves an individual along the maturational pathway from infancy to adult citizenship.

A developmental approach thus begins the vastly belated constitutional task of inquiring how children become citizens of the United States in the full psychological sense. In this regard, the approach undertakes to articulate a conception of national

¹²⁵ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

¹²⁶ 497 U.S. 419 (1989).

¹²⁷ 125 S.Ct. 1183 (2005).

¹²⁸ Slip opinion at 19.

citizenship under the Constitution. 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.”¹²⁹ The citizenship clauses of the fourteenth amendment, aimed at overruling *Dred Scott v. Sanford* and ensuring the rights of newly freed slaves,¹³⁰ were drastically narrowed by the Supreme Court’s 1873 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.”¹³¹ A developmental perspective could be seen as identifying the political socialization of children as a privilege deriving from the “National character” of a democratic polity. But there is no need to force a developmental approach into the Supreme Court’s cramped interpretation of the fourteenth amendment. A developmental perspective on citizenship naturally derives from the document as a whole as interpreted by the Supreme Court over the past two hundred years. As we have seen this approach pulls together the Supreme Court decisions relating to citizenship under the equal protection clause with its decisions on the role of public schools in the political socialization of children under the first amendment. A developmental approach builds on those cases in which the Supreme Court has expressed a willingness to strike down formal barriers to citizenship, such as segregated schools and poll taxes, to address the less visible, but no less formidable, *internal* barriers to participation in democratic political life. By identifying a distinct developmental tradition in constitutional law, this

¹²⁹ United States Constitution, Amendment 14, section 1.

¹³⁰ 85 U.S. (19 How.) 393 (1856).

¹³¹ 16 Wall. (83 U.S.) 36 (1873).

approach offers the best, most integrated account of constitutional precedent on the political socialization of children in constitutional law.

The connection between child development and citizenship has not gone entirely unnoticed by the Supreme Court. Beginning with Justice Frankfurter's opinion in *Gobitis*, discussed earlier, several Supreme Court decisions have identified childrearing as one avenue for the cultivation of the "cohesive sentiment," as Justice Frankfurter named it, which binds an individual to the Nation.¹³² Similar views emerged in recent cases on the constitutionality of gender-based naturalization laws. In *Nguyen v. INS*,¹³³ the Supreme Court upheld federal laws that grant United States citizenship virtually automatically at birth to children born abroad to unmarried citizen-mothers but imposes additional requirements in order for children of unmarried citizen-fathers to obtain citizenship.¹³⁴ Although a majority of the Court accepted the government's empirical claim regarding women's special role as primary caregivers, all the Justices recognized a connection between early caregiving and national citizenship. Writing for the majority, Justice Kennedy described this connection 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."¹³⁵ 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 that of individual to the State. They tie each to

¹³² *Gobitis*, 310 U.S. at 596.

¹³³ 533 U.S. 53 (2001).

¹³⁴ *Id.* At 59-60.

¹³⁵ *Nguyen v. INS*, 533 U.S. 53, 65, 68 (2001).

the other, transforming both while strengthening the bonds of loyalty that connect family with Nation.”¹³⁶

Although the Justices in these cases recognized a connection between childrearing and citizenship, they likely had in mind the family’s role in cultivating the “cohesive sentiment” of patriotic loyalty Justice Frankfurter described in *Gobitis*. What these cases fail to take into account 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, for bringing irrational political attachments under control, begins to develop in the early caregiving period. As described in the following Part, developmental research shows us in what way the internalization of the caregiving relationship gives rise to the psychological capacity to moderate the emotional excesses of attachments to family and nation. 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. This endeavor does not justify itself by appeal to scientific objectivity; psychological research cannot escape subjective values and biases altogether, nor should it try to do so. Rather the aim must be to harness developmental research in an effort to promote and realize our deepest constitutional norms.¹³⁷

IV. Developmental Perspectives on Reason

¹³⁶ 523 U.S. at 617 (Breyer, J., dissenting).

¹³⁷ This project has historical roots. See Christopher Tomlins, Framing the Field of Law’s Disciplinary Encounters: A Historical Narrative, 34 Law & Society Rev. 911, 948 (2002).

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.¹³⁸ 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.¹³⁹ This research correlates with the clinical observation that the early caregiving relationship stimulates and consolidates the development of the most important early mental processes.¹⁴⁰

The developmental pathway under study here encompasses at least five early inter-related mental capacities: representational thinking, affect regulation, self-other differentiation, imagination and mentalization. These early mental processes constitute inter-related, 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

¹³⁸ See Margaret S. Mahler, Fred Pine & Anni Bergman, *THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT* (1975); Daniel N. Stern, *THE INTERPERSONAL WORLD OF THE INFANT* (1985); Phyllis Tyson & Robert L. Tyson, *PSYCHOANALYTIC THEORIES OF DEVELOPMENT* (1990).

¹³⁹ See Susan Vaughan, *THE TALKING CURE* 49 (1997).

¹⁴⁰ See generally Linda C. Mayes & Donald J. Cohen, *The Development of a Capacity for Imagination in Early Childhood*, 47 *The Psychoanalytic Study of the Child* 23 (1992).

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 rational decision-making; 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 allows the development of the capacity to take into account another's point of view.

Section A of this Part examines the ways in which the early caregiving relationship stimulates and consolidates the development of these five early mental processes. The importance of internalization to the development of these five core 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 sufficiently responsive caregiving relationship in light 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 early modes of thinking evolve, as we will see, but are never entirely *replaced* by higher-level psychological processes. Societal regression poses a distinct threat to the long-term health, and even survival, of a democratic polity. This Section shows how, by helping to strengthen internal mechanisms of self-reflection and emotional self-control, 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.

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.¹⁴¹ Infants are born, researchers now believe, 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.¹⁴² As early as three months, infants become withdrawn and upset if their primary caregiver remains emotionally neutral during an interaction.¹⁴³ In Freud's view, the infant's attachment to a primary caregiver, not a subject to which he gave much thought, 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.¹⁴⁴ 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,¹⁴⁵ 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

¹⁴¹ See Hans W. Loewald, PAPERS ON PSYCHOANALYSIS (1980).

¹⁴² See Susan C. Vaughan, THE TALKING CURE 86 (1997) (citing research of Jerome A. Bruner and William P. Fifer).

¹⁴³ See Phyllis Tyson & Robert L. Tyson, PSYCHOANALYTIC THEORIES OF DEVELOPMENT 147 (1990).

¹⁴⁴ See Fonagy, *supra* note at 3.

¹⁴⁵ *Id.* at 55.

the infant's innate need for a secure attachment to the primary caregiver.¹⁴⁶ The notion of an innate predisposition to affective relationships with caregivers has emerged as a central tenet in contemporary psychoanalytic developmental theory.¹⁴⁷

In the psychoanalytic account of human development, the psychological birth of the individual does not coincide with physical birth.¹⁴⁸ 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.¹⁴⁹ 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 infant's experience of the primary caregiver, it is postulated, centers on the satisfaction of these physiological needs.¹⁵⁰ Mind is not yet in evidence. Yet the infant-caregiver relationship involves more than mere physical interaction, even at this very early stage. The beginnings of the infant-caregiver 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 containing function that facilitates the infant's physiological homeostasis.¹⁵¹

Psychological life thus begins with the integration of basic neurophysiological capacities such as the ability to maintain an alert state, to direct attention to selected elements in the

¹⁴⁶ John Bowlby, *I ATTACHMENT AND LOSS: ATTACHMENT* (2d ed. 1982).

¹⁴⁷ See generally *ESSENTIAL PAPERS ON PSYCHOANALYSIS* (Peter Buckley, ed. 1986); *HANDBOOK OF ATTACHMENT THEORY: RESEARCH AND CLINICAL APPLICATIONS* (Jack Cassidy & Phillip R. Shaver, eds. 1999).

¹⁴⁸ See Margaret S. Mahler, Fred Pine & Anni Bergman, *THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT* (1975); Daniel N. Stern, *THE INTERPERSONAL WORLD OF THE INFANT* (1985); Tyson & Tyson, *PSYCHOANALYTIC THEORIES*, *supra* note .

¹⁴⁹ See Tyson & Tyson, *PSYCHOANALYTIC THEORIES*, *supra* note ; Linda C. Mayes & Donald J. Cohen, The Development of a Capacity for Imagination in Early Childhood, 47 *Psychoanalytic Study of the Child* 23, 28-29 (1992).

¹⁵⁰ See Tyson & Tyson, *PSYCHOANALYTIC THEORIES*, *supra* note at 24; 123.

¹⁵¹ Peter Fonagy, *ATTACHMENT THEORY AND PSYCHOANALYSIS* 56 (2001).

environment, and to make perceptual discriminations in areas such as visual patterns or the pitch of speech.¹⁵² 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 internationalization 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.¹⁵³ Representational thinking involves the process of creating a fixed mental image of an object in place of the object itself,¹⁵⁴ the first step in the development of the mental processes leading to more complex forms of symbolization and conceptual thinking. Good-enough caregivers, borrowing Donald Winnicott's terminology, are emotionally attuned to the needs of the infant.¹⁵⁵ When all goes well, the infant's interactions with the primary caregiver become stored as memories of physical pleasure and gratification. Inevitably, however, the primary caregiver disappoints the infant by failing to provide immediate gratification. A short absence or small delay on

¹⁵² See Linda Mayes & Donald J. Cohen, Experiencing Self and Others: Contributions from Studies of Autism to the Psychoanalytic Theory of Social Development, 42 J. Am. Psychoanalytic Ass. 191, 201 (1994).

¹⁵³ See Tyson & Tyson, PSYCHOANALYTIC THEORIES, *supra* note at 93.

¹⁵⁴ Serge Lecours & Marc-Andre Bouchard, Dimensions of Mentalisation: Outlining Levels of Psychic Transformation, 78 Int'l J. of Psychoanalysis 855, 857 (1997).

¹⁵⁵ See Donald W. Winnicott, THE MATURATIONAL PROCESS AND THE FACILITATING ENVIRONMENT (1965).

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 and develops a capacity to long for his or her return.¹⁵⁶ 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 primary caregiver.¹⁵⁷ These affectively-laden representations,¹⁵⁷ in turn, can be called up by the young child during times of physical separation from the caregiver.¹⁵⁸

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. Research in cognition, neurobiology, attachment theory, and social psychology¹⁵⁹ supports psychoanalytic observations regarding these internalized representations, often referred to in the empirical literature as prototypes, templates, schemas or internal working models.¹⁶⁰ Neuroscientists have studied the biological mechanisms involved in the creation of these prototypes.¹⁶¹ 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.¹⁶²

¹⁵⁶ See Mayes & Cohen, *Experiencing Self*, *supra* note at 199

¹⁵⁷ See Sidney J. Blatt & Rebecca Smith Behrends, *Internalization, Separation-Individuation, and the Nature of Therapeutic Action*, 68 *Int'l J. of Psychoanalysis* 279, 283 (1987); Tyson & Tyson, *supra* note at 93. 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 Peter Fonagy, Gyorgy Gergely, Elliot Jurist & Mary Target, *AFFECT REGULATION, MENTALIZATION, AND THE DEVELOPMENT OF THE SELF* (2002). This Article discusses mentalization skills *infra* pp. .

¹⁵⁸ See Blatt & Behrends, *Internalization, Separation-Individuation, and the Nature of Therapeutic Action*, *supra* note at 283.

¹⁵⁹ See Vaughan, *supra* note at 49.

¹⁶⁰ Tyson & Tyson, *PSYCHOANALYTIC THEORIES*, *supra* note at 81.

¹⁶¹ *Id.* (citing Eric R. Kandel, James H. Schwartz & Thomas M. Jessell, *ESSENTIALS OF NEURAL SCIENCE AND BEHAVIOR* (1995); Joaquin M. Fuster, *MEMORY IN THE CEREBRAL CORTEX* (1995); Stephen M. Kosslyn & Oliver Koenis, *WET MIND* (1995)).

¹⁶² See Vaughan, *supra* note .

Attachment research has shown that securely-attached children have a more balanced view of themselves, remember positive events more accurately and score higher on test of emotional understanding.¹⁶³ 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, 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 prototypes can interfere with the capacity for perceiving both oneself and the world in an adaptive, undistorted way.¹⁶⁴

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.¹⁶⁵ Even for the very young child, affect regulation does not involve a simple reduction in emotional energy. Affect

¹⁶³ See Fonagy, *supra* note at 31.

¹⁶⁴ See Fonagy, Gergely, Jurist & Target, AFFECT REGULATION, MENTALIZATION AND THE DEVELOPMENT OF THE SELF, *supra* note .

¹⁶⁵ See Mayes & Cohen, Anna Freud, *supra* note at 133.

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. 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.

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.¹⁶⁶ Evidence from animal models suggest that high levels of stress such as that experienced by infants in the absence of minimally-sufficient caregiving lead to lower cortisol neuromodulators.¹⁶⁷ 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.¹⁶⁸ Attachment theory also shows that insecurely-attached children fail to develop the capacity to regulate emotional arousal. Studies have shown high levels of negative affectivity, emotional outbursts, inattentiveness and frustration among these children.¹⁶⁹ The internalization of the infant-caregiver relationship provides the young child with the psychological tools that allow him to integrate emotions, and thereby transform them, into verbal, conceptual thinking.¹⁷⁰ This capacity for emotional integration is the foundation of more mature

¹⁶⁶ See *id.* at 132.

¹⁶⁷ See Fonagy, *supra* note at 37; Mayes & Cohen, Anna Freud, *supra* note at 132.

¹⁶⁸ See Mayes & Cohen, Anna Freud, *supra* note at 129; Tyson & Tyson, PSYCHOANALYTIC THEORIES, *supra* note at 396.

¹⁶⁹ See Fonagy, *supra* note at 42

¹⁷⁰ See Jonathan Lear, OPEN MINDED: WORKING OUT THE LOGIC OF THE SOUL (1998).

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 a primary 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 begins life in a state of symbiotic oneness with the primary caregiver.¹⁷¹ Subjective and objective are completely merged. The infant likely experiences this state of symbiosis with the primary caregiver as absolute omnipotence¹⁷² or absolute narcissism,¹⁷³ 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 space* opened up by the infant-caregiver relationship.¹⁷⁴ 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 primary 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,

¹⁷¹ See Mahler *et al.*, *supra* note ; Loewald, *supra* note .

¹⁷² See Winnicott, *supra* note .

¹⁷³ See Loewald, *supra* note at 5.

¹⁷⁴ Winnicott, *supra* note .

partly internalized and partly externalized, the infant-caregiver relationship serves a vital role in the child's development of a stable sense of a subjective self in relation to the world.¹⁷⁵

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 seems, at first glance at least, antithetical to the kind of reality-based, undistorted thinking we associate with reasoned deliberation. But imagination turns out to be a crucial capacity in the developmental task of achieving a separate, autonomous sense of self.¹⁷⁶ To begin with, imagination underlies the child's developing capacity for reality testing and for acquiring the concept of mindedness. "To imagine is 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 perceptions."¹⁷⁷ Internalization of the primary 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. In addition to these basic empathic capacities, having the capacity to imagine alternatives to one's given values,

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 33.

commitments and life choices is what defines the capacity for individual choice that defines personal liberty and democratic government under our Constitution.

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.¹⁷⁸ 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.”¹⁷⁹ At first, developmental researchers conjecture, the child’s early theory of mind is 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 in meaningful and predictable ways.¹⁸⁰ Research in attachment theory confirms that securely-attached infants do better on “theory of mind” tests.¹⁸¹ What this research suggests is 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.¹⁸²

Internalization of the primary caregiver relationship is certainly not all there is to

¹⁷⁸ See Mayes & Cohen, Imagination, *supra* note at 33; *see generally* Janet W. Astington, Paul L. Harris & David R. Olson, DEVELOPING THEORIES OF MIND (1988); Henry M. Wellman, THE CHILD’S THEORY OF MIND (1990).

¹⁷⁹ Fonagy, Gergely, Jurist & Target, AFFECT REGULATION, MENTALIZATION, AND THE DEVELOPMENT OF THE SELF, *supra* note at 3.

¹⁸⁰ *Id.* at 24.

¹⁸¹ See Fonagy, ATTACHMENT THEORY AND PSYCHOANALYSIS, *supra* note at 31.

¹⁸² See Fonagy, Gergely, Jurist & Target, AFFECT REGULATION, MENTALIZATION, AND THE DEVELOPMENT OF THE SELF, *supra* note at 27.

the development of the capacity for reason. Many other processes clearly play a role, including innate maturation, constitution, identification, adaptation and cognitive growth. While not a full picture of early development, however, internalization nevertheless is a necessary and foundational element in the development of the mental processes leading to reasoned thinking. The next Section investigates the broader familial and social environment within which the early caregiving relationship is situated. Our inquiry here is not whether the successful internalization of a responsive, affectively-attuned caregiver is likely to lead to a happy, well-adjusted life. Rather, our inquiry focuses on the way in which good-enough caregiving understood in its full social context contributes to the development of the mature psychological capacity for reasoned thinking that lies at the heart of our constitutional system.

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, obviously, 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*, one associated with the average caregiving figure in the average family.¹⁸³ We cannot identify with any precision the moment at which caregiving falls below that level needed to sustain a responsive affective relationship. Serious failures in this relationship do not always result in long-term developmental problems, nor are the developmental problems that do arise always

¹⁸³ See. Winnicott, THE MATURATIONAL PROCESS, *supra* note .

irremediable. Other factors may mediate the effect of early failures in the caregiving relationship, including temperament, intelligence, the presence of other caregivers, later corrective experiences, a strong imagination, or simple resilience. But overall, *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. 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.¹⁸⁴ Indeed, “inevitable, progressive, minute losses of aspects of the original [caregiver]-infant relationship” allow the child to internalize the caregiving relationship.¹⁸⁵ 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. *Some* deprivations and frustrations are expected of all any caregivers, and essential for development to take place. 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

¹⁸⁴ See Blatt & Behrends, Internalization, Separation-Individuation, and the Nature of the Therapeutic Action, *supra* note at 283.

¹⁸⁵ *Id.* at 283.

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 often believed to place the responsibility and blame for society's ills on families and, more to the point, mothers.¹⁸⁶ In the past, certainly, psychoanalysts and attachment theorists did engage in such "mother-baiting," an especially cruel practice when it came to biologically-based disorders such as autism and schizophrenia.¹⁸⁷ Even with respect to less serious developmental problems, though, the focus on maternal inadequacy was always more effective at reinforcing traditional gender roles than helping children. Modern developmental psychology avoids mother-baiting in two ways. First, developmental psychologists do not 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.¹⁸⁸ Second, modern developmental psychology avoids 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 model 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 social factors. The dominant risk model in

¹⁸⁶ See, e.g., Carol Sanger, *Separating From Children*, 96 Colum. L. Rev. 375 (1996).

¹⁸⁷ See Peter Fonagy, Mary Target, Miriam Steele & Andrew Gerber, *Psychoanalytic Perspectives on Developmental Psychopathology*, in *I DEVELOPMENTAL PSYCHOPATHOLOGY* 504, 537 (1995).

¹⁸⁸ Empirical research confirms that the father-infant relationship can give rise to meaningful social interaction from birth. See *id.* at 523.

modern psychology recognizes that individual, familial and social factors all play a role in early childhood development. 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.¹⁸⁹ 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 comes to be. 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 intrapsychic experience to the relationship between caregiver and infant. The environmental model 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.¹⁹⁰ In Vygotsky's view, the development of children's minds was a collaborative process that involved the adult targeting his or her teaching to the child's "zone of proximal development."¹⁹¹ 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.

¹⁸⁹ Ample empirical evidence exists suggesting a strong correlation between caregiver depression and impairment in the infant-caregiver relationship. *See id.*; *see also* Geraldine Downey and James C. Coyne, *Children of Depressed Parents: An Integrative Review*, 108 *Psychological Bulletin* 50 (1990).

¹⁹⁰ *See* Lev S. Vygotsky, *THOUGHT AND LANGUAGE* (1962); Jean Piaget, *THE LANGUAGE AND THOUGHT OF THE CHILD* (1926).

¹⁹¹ *See* Mary Gauvain, *THE SOCIAL CONTEXT OF COGNITIVE DEVELOPMENT* 35 (2001).

The environmental model has more recently penetrated the field of developmental neurobiology, a discipline not known for its attention to environmental factors. 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.¹⁹² 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.¹⁹³ Neurobiological research on animals has shown that brain development can also be affected by the environment. When cats are deprived of light during a particular period developmental stage, for example, certain sections of their visual cortex do not develop.¹⁹⁴ Rats raised in a radically deprived environment have brains that are significantly less thick than rats raised in a normally stimulating sensory environment, and their offspring have smaller brains, too.¹⁹⁵ Animal models suggest that high levels of stress in humans lead to neurological changes.¹⁹⁶ 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

¹⁹² See Arnold J. Sameroff & Barbara H. Fiese, Models of Development and Developmental Risk, in HANDBOOK OF INFANT MENTAL HEALTH 3, 5 (2d. ed) (Charles H. Zeanah, Jr., ed. 2000); Roland D. Ciaranello, Junko Aimi, Robin R. Dean, David A. Morilak, Matthew H. Porteus & Dante Cicchetti, Fundamentals of Molecular Neurobiology, in *id.* at 109, 151; Mayes & Cohen, Anna Freud, *supra* note at 128.

¹⁹³ See Mayes & Cohen, Anna Freud, *supra* note at 128.

¹⁹⁴ See Ciaranello *et al.*, *supra* note at 151; T. Wiesel, Postnatal Development of the Visual Cortex and the Influence of the Environment, 299 Nature 583 (1982).

¹⁹⁵ See Mayes & Cohen, Anna Freud, *supra* note at 132.

¹⁹⁶ See Fonagy, *supra* note at 37; Mayes & Cohen, Anna Freud, *supra* note at 132.

responses and are associated with long-term changes in brain development.¹⁹⁷ These studies should lead us to hypothesize that the human brain develops from the interaction between the genetically-coded programs for development and the environmental modifiers of those codes.¹⁹⁸

The neurobiological model 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.

The environmental model is entirely compatible with clinical understandings of the caregiving relationship. 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. 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.¹⁹⁹ Erik Erikson's pathbreaking work, *Childhood and Society*, explores the importance of culture to child development.²⁰⁰

Modern ego psychology generally, beginning with Heinz Hartmann's *Ego Psychology*

¹⁹⁷ See Joan Kaufman & Christopher Henrich, Exposure to Violence and Early Childhood Trauma, in HANDBOOK OF INFANT MENTAL HEALTH, *supra* note at 195, 199; Alison Gopnik, Andrew N. Meltzoff & Patricia K. Kuhl, THE SCIENTIST IN THE CRIB: WHAT EARLY LEARNING TELLS US ABOUT THE MIND 174-97 (1999).

¹⁹⁸ See Sameroff & Fiese, *supra* note at 4.

¹⁹⁹ See Mayes & Cohen, Anna Freud, *supra* note at 121.

²⁰⁰ See Erik Erikson, CHILDHOOD AND SOCIETY (1963).

and the Problem of Adaptation, is itself a kind of social psychology interested in the individual's dynamic engagement with the social world.²⁰¹ In his elaboration of the concept of transitional phenomena, Donald Winnicott laid the foundation for a theory of individual psychological development in relation to a social world.²⁰² Moreover, the study of the effect of trauma, particularly in the context of war or community violence, on children's development has long characterized psychoanalytic research.²⁰³ 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 psychoanalytic developmental psychology is not incompatible with, and indeed calls for, an environmental theory of the dynamic developmental *interaction* among the individual, familial and social realms.

Broadening the scope of inquiry beyond the infant-caretaker relationship to include familial and social factors is also a central concern in the newly-emerging field of social cognition, which bridges the fields of information processing and sociocultural learning theories.²⁰⁴ Family-systems analyses and cross-cultural research too provide insights into the larger socio-cultural context in which the caregiving relationship resides. 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 children's development. This research shows that the likelihood of failure in the caregiving relationship significantly increases

²⁰¹ See Heinz Hartmann, *EGO PSYCHOLOGY AND THE PROBLEM OF ADAPTATION* (1939).

²⁰² See Winnicott, *supra* note . 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, *FREUD AND BEYOND: A HISTORY OF MODERN PSYCHOANALYTIC THOUGHT* 60-84 (1995).

²⁰³ See Mayes & Cohen, Anna Freud, *supra* note at 130.

²⁰⁴ See Gauvain, *supra* note .

with the presence of *multiple* environmental stress factors. Children exposed to one or two environmental stress factors appear to be at no increased risk of developmental problems.²⁰⁵ Consistent with the general understanding of infant resiliency in the face of caregiving failures, “it is not single environmental factors that make a difference in children’s lives but the accumulation of risks in each family’s life.”²⁰⁶ The accumulated effect of environmental stress factors on otherwise average, good-enough caregivers and their families 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 in the environment. But when environmental stress becomes sufficiently high, caregivers themselves can experience a diminishment in their capacity to respond to their infant’s 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.²⁰⁷ 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.”²⁰⁸ Caregiver responsiveness is tied to environmental stress factors, such as poverty, violence and substance abuse, that interfere with the ability to establish or carry on an average, expectable caregiving relationship. While a vulnerability to stress is especially true for caregivers suffering from low ego resiliency or who themselves lacked early caregiving, *everyone is vulnerable*. The environmental model helps us to see failure

²⁰⁵ See Sameroff & Fiese, *supra* note at 6

²⁰⁶ *Id.* at 9.

²⁰⁷ *Id.*

²⁰⁸ Fonagy, Gergely Jurist & Target, AFFECT REGULATION, MENTALIZATION, AND THE DEVELOPMENT OF THE SELF, *supra* note at 9.

in the caregiving relationship not in terms of bad parenting or bad parents, but as a *normal* effect of overwhelming levels of environmental stress on psychological functioning.²⁰⁹ All but the most resilient caregivers need a good-enough social environment to support their relationships with children. This does not mean a perfect environment, or even necessarily a good one, but merely one good enough for the average parent to sustain a responsive infant-caregiver relationship.

Research in developmental psychopathology confirms that among the most serious, widespread and predictable risk factors for failure in the caregiving relationship is *poverty*. Although poverty as a social category can be defined in different ways,²¹⁰ 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, the percentage of all children living in poverty in 2001 was 16.3 and the percentage of children under six was 18.2, *nearly one-fifth of all children under six in the United States*.²¹¹ Low income alone does not appear to lead to increased developmental risk, but 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.²¹² Whether viewed as a single overriding factor or a composite of multiple risk factors, poverty is one of the most reliable indicators of the social conditions likely to impose excessively-high environmental stress levels on the early caregiving relationship.

The influence of poverty on caregiving is obviously a very complex phenomenon.

²⁰⁹ See Vonnie C. McLoyd, Socioeconomic Disadvantage and Child Development, 53 Am. Psychologist 185 (1998).

²¹⁰ See Aletha C. Huston, Vonnie C. McLoyd, Cynthia Garcia Coll, Children and Poverty: Issues in Contemporary Research, 65 Child Development 275 (1994).

²¹¹ See Poverty in the United States: 2001, United States Census Bureau 3 (2002).

²¹² See Sameroff & Fiese, *supra* note at 9.

For many families, the increase in environmental stress brought about by poverty might not, particularly in combination with other compensating factors, lead to a serious disruption in the early caregiving relationship.²¹³ In these cases, there is evidence showing that the early caregiving relationship can *protect* the child from environmental stress. A good-enough caregiving relationship can serve to mediate the adverse effects of an economically-deprived environment.²¹⁴ The resilience of caregivers and children under adverse social conditions such as poverty may be due in part to individual factors, such as innate temperament or the presence of other caregivers, social networks and governmental services. Duration of poverty, too, has been shown to affect the quality of home environments.²¹⁵ Yet despite the wide range of individual and familial responses to the situation of severe economic deprivation, *overall* these studies confirm the tragic toll that poverty takes on the developmental lives of children across generations. Study after study confirms that, despite some resilience on the part of some children and caregivers, poverty creates a high-risk environment with serious repercussions for children's physical, cognitive and socio-emotional development.²¹⁶ For pre-school 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-impooverished neighborhood, childcare center, school or community.²¹⁷ For infants and very young children, however, the external world is experienced through the primary caregiving

²¹³ Studies of children's resilience to environmental stress are numerous. See N. Garmezy, Resilience in Children's Adaptation to Negative Life Events and Stressed Environments, 20 *Pediatrics* 459 (1991); Cicchetti, *et al.*, *supra* note .

²¹⁴ See Resilience in Maltreated Children: Processes Leading to Adaptive Outcome, Dante Cicchetti, Fred A. Rogosch, Michael Lynch & Kathleen D. Holt, 5 *Development and Psychopathology* 629 (1993).

²¹⁵ See Huston *et al.*, *supra* note at 277; Greg T. Duncan, Jeanne Brooks-Gunn and Pamela Kato Klebanov, Economic Deprivation and Early Childhood Development, 65 *Child Dev.* 296 (1994).

²¹⁶ See, e.g., McLoyd, Socioeconomic Disadvantage, *supra* note at 190-98; J. Lawrence Aber, Stephanie Jones & Jennifer Cohen, The Impact of Poverty on the Mental Health and Development of Very Young Children, in *HANDBOOK OF INFANT MENTAL HEALTH*, *supra* note at 113.

²¹⁷ See Huston, *et al.*, Children and Poverty, *supra* note .

relationship. Poverty disrupts the early caregiving relationship in part because of the effect that negative life events and conditions have on adult caregivers.²¹⁸

The path-breaking work in this area was carried out on 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 problems with caregiving are a normal, predictable response to high levels of environmental stress.²¹⁹ Contemporary research confirms Elder's findings. Numerous studies with pre-school and school-age children establish that poor caregiving "stem[s] partly from an overabundance of negative life events and conditions that confront poor adults."²²⁰ These 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."²²¹ 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 as well as anger are a source of developmental failure in the caregiving relationship.²²² Based on these studies, it is reasonable to conclude that all but the most stress-resistant families will experience the effects of chronic poverty on caregiving to some degree.

As a social risk factor for failure in the early caregiving relationship, poverty is

²¹⁸ See Vonnie C. McLoyd & Leon Wilson, *The Strain of Living Poor: Parenting, Child Support, and Child Mental Health*, in *CHILDREN IN POVERTY* 105 (Aletha C. Huston, ed. 1991).

²¹⁹ See Glen Elder, *CHILDREN OF THE GREAT DEPRESSION* (1974); Glen H. Elder, Tri Van Nguyen & Avshalom Caspi, *Linking Family Hardship to Children's Lives*, 56 *Child Development* 361 (1985).

²²⁰ McLoyd, *et al.*, *The Strain of Living Poor*, *supra* note ; see also Vonnie C. McLoyd, *The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting and Socioemotional Development*, 61 *Child Development* 311 (1990); J. McLeod & M. Shanahan, *Poverty, Parenting and Children's Mental Health*, 58 *American Sociological Review* 351 (1993); R. Conger, X. Ge, G. Elder, F. Lorenz & R. Simons, *Economic Stress, Coercive Family Process, and Developmental Problems of Adolescents*, 65 *Child Development* 541 (1991).

²²¹ McLoyd, *Socioeconomic Disadvantage*, *supra* note at 196.

²²² See *id.*

not unique. Other social risk factors such as domestic violence, substance abuse, and community violence 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. 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 upon the early experience of a stable, responsive affective relationship. Chronic, severe poverty of the kind existing in the modern United States undermines the political socialization of an entire class of children. Development psychology gives us a vital perspective on the life-long psychological barriers that social conditions like poverty put in the way of children's future opportunity for developing the skills of democratic citizenship vital to the long-term survival of our constitutional system of government.

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.²²³ 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

²²³ See Tyson & Tyson, PSYCHOANALYTIC THEORIES, *supra* note at 18.

lose a recently-acquired bladder control or fall prey to temper tantrums. As children reach certain developmental milestones in one area, they will often experience regression in another functional realm.²²⁴ 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.²²⁵ 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.

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.²²⁶ The presence of regressive features in 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

²²⁴ See Mayes & Cohen, Anna Freud, *supra* note at 122; Phyllis Tyson & Robert L. Tyson, Development, in PSYCHOANALYSIS: THE MAJOR CONCEPTS, *supra* note at 396.

²²⁵ See Hans W. Loewald, PAPERS ON PSYCHOANALYSIS 224 (1980). Erik Erikson described this process of ego regression followed by new consolidations as an identity crisis. See Erikson, *supra* note .

²²⁶ Sydney E. Pulver, The Psychoanalytic Process and Mechanisms of Therapeutic Change in PSYCHOANALYSIS, *supra* note at 81, 87 (citing Arlow & Brenner, PSYCHOANALYTIC CONCEPTIONS AND THE STRUCTURAL THEORY 71 (1964)); see Linda A.W. Brakel, Howard Shevrin & Karen K. Villa, The Priority of Primary Process Categorization: Experimental Evidence Supporting a Psychoanalytic Developmental Hypothesis, 50 Jour. Am. Psychoanalytic Ass'n 483 (2002).

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.²²⁷ This kind of controlled regression that promotes adaptive ends such as art or childrearing or therapeutic cure is referred to as “regression in the service of the ego.”²²⁸

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. In his view, primary process functions “have no reference to time at all.”²²⁹ 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.²³⁰ Longitudinal studies of child development have shown that all forms of mental functioning evolve over time, including primary process.²³¹ 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 co-existence of earlier and later modes of

²²⁷ See Tyson & Tyson, PSYCHOANALYTIC THEORIES, *supra* note at 31; Jean Schimek & Leo Goldberger, *Thought*, in PSYCHOANALYSIS: THE MAJOR CONCEPTS 209, 214 (Burness E. Moore & Bernard D. Fine, eds. 1995).

²²⁸ See Tyson & Tyson, PSYCHOANALYTIC THEORIES, *supra* note at 31.

²²⁹ See Freud, *The Unconscious* in 14 THE STANDARD EDITION, *supra* note at 161, 187 (1915).

²³⁰ See Tyson & Tyson, *supra* note at 171.

²³¹ See *id.*

thinking can be likened to the concept of parallel distributed processing.²³²

The mature capacities for artistic expression, empathy, emotional attachment, childrearing and mourning a loved one all also call upon controlled 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.²³³ All mature forms of thinking combine primary and secondary process elements to some degree. Hans Loewald explains:

Primary and second 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.²³⁴

An utter lack of primary process functioning – no dreams, no fantasies, no spirituality, no romance – would be taken as a sign of psychopathology,²³⁵ 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.

²³² See Vaughan, *supra* note at 37.

²³³ See Paul Schwaber, *THE CAST OF CHARACTERS: A READING OF ULYSSES* (1999).

²³⁴ See Loewald, *supra* note at 178-79.

²³⁵ See Tyson & Tyson, *PSYCHOANALYTIC THEORIES*, *supra* note at 170.

Regression thus has its important place in adult mental life. But like most mental processes, regression has its malignant side as well. When uncontrolled, regression is no longer in the service of the ego but fatally undermining of it. Uncontrolled regression results in the *disruption* of mature reasoning processes. We experience minor disruptions in our conscious, rational minds with every slip of the tongue or missed appointment, every day-dream 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 the experience in verbal, conceptual ways. Long-term stress and anxiety, too, can put regressive pressure on adult modes of thinking.²³⁶ Developmental failures can also result in an inherent vulnerability to uncontrolled regression in adulthood. At times of regressive crisis, individuals can lose the capacity to think and make decisions free from the distorting effects of uncontrolled anxiety, fear or aggression. They can resort to more primitive psychological defenses such as projective identification, splitting and dissociation, and they sometimes lapse into viewing the world in black-and-white, good-and-evil terms. In its extreme forms, therefore, regression signals a retreat from the developmental milestone of adult reason.

Regression in both its controlled and uncontrolled forms has important implications for the adult processes of reasoned thinking. Controlled access to primary process functioning provides a very important supplement to cognitive processes. The process of mature reason often demands more than logical reasoning and information processing.²³⁷ While the prevailing model of legal decision-making emphasizes rational thought processes, or cognition over emotion, an excessive reliance on cognition to the

²³⁶ See Cicchetti & Cohen, *supra* note at 6.

²³⁷ See Law and the Emotions, *supra* note ; Richard A. Posner, FRONTIERS OF LEGAL THEORY (2001).

exclusion of imaginative, intuitive or emotional sources of understanding and thinking can also seriously distort our understanding of the world and other people. An utter lack of primary process functioning – no dreams, no fantasies, no spirituality, no romance – would be taken as a sign of psychopathology, not to mention an indication of a greatly impoverished, emotionally-wooden inner world. In a legal decision-maker, it would certainly reflect a lack of judicial wisdom and human insight. Adult reasoned thinking in law as elsewhere optimally relies on an *equilibrium* between the parallel systems of cognition and more emotional and intuitive sources of understanding. Uncontrolled regression, on the other hand, unleashes emotional currents that run counter to reasoned deliberation. This kind of regression can happen to anyone under conditions of personal stress or trauma. More broadly, individuals and groups can undergo a form of collective regression when the group itself suffers some form of crisis.²³⁸

Development psychology clarifies the danger that collective regression poses to the constitutional enterprise over time. Good-enough caregiving serves to safeguard democratic values and institutions over the normal course of time, but it protects democracy during extraordinary times as well. Here our concern is not the slow erosion of the skills of democratic citizenship from one generation to the next, but the danger of acute regressive reactions to overwhelming social or political events. At these moments, 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.²³⁹ The eruption of adult regressive fears, anxieties

²³⁸ For a recent discussion of the phenomenon of group regression, see Vamik D. Volkan, September 11 and Societal Regression, *Mind and Human Interaction* 196 (2001).

²³⁹ See Peter Gay, Liberalism and Regression, 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,

and aggressions distorts decision-making at times of political crisis and can render a democratic citizenry vulnerable to political manipulation.

War, economic depression or the serious failure of national leadership often define these extraordinary times.²⁴⁰ These times are often marked by the revival of “regressive ideologies” such as nationalism, militarism and xenophobia.²⁴¹ 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.²⁴² The enforcement of the Espionage and Seditious Acts during WWI and the internment of the Japanese during WWII were massive failures in the reasoned judgment of legal decision-makers and ordinary citizens.²⁴³ Collective fears and anxieties can lead to impulsive, irrational and often self-destructive political actions combined at times with a rise in public hysteria and governmental efforts to exploit those fears by creating an “outraged people.”²⁴⁴ 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.”²⁴⁵ 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.”²⁴⁶

just as the liberal conduct of the individual, which also is the fruit of maturity, is the most vulnerable among his psychological achievements.”).

²⁴⁰ As Bruce Ackerman has argued, moments of extraordinary citizen engagement can call forth a level of collective deliberation qualitatively different from normal politics. See Bruce A. Ackerman, *WE THE PEOPLE: FOUNDATIONS* (1991); *WE THE PEOPLE: TRANSFORMATIONS* (1997).

²⁴¹ See Gay, *Liberalism and Regression*, *supra* note at 538.

²⁴² Richard Hofstadter, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1963).

²⁴³ See Geoffrey R. Stone, *Civil Liberties in Wartime*, 28 *Supreme Court History* 215 (2003).

²⁴⁴ Stone, *supra* note at 223.

²⁴⁵ *Id.* at 224.

²⁴⁶ See John Dewey, “The Cult of Irrationality,” *The New Republic* (Nov. 9, 1918), p. 35.

A developmental approach explains why fostering a citizenry with the skills of critical self-reflection and emotional self-mastery usable at 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 decision-making in political life are a commitment to the rule of law and protection for 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 threaten to overwhelm mature ego functions. A good-enough caregiving environment 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 culture 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 constitutional way of life from inside the body politic.

V. Constitutional Family Law in the Developmental Tradition

To the extent it sheds light on our understanding of the connection between early

caregiving and adult citizenship, developmental research has far-reaching implications for the field of constitutional family law. The main contribution of a developmental perspective lies in its identification of the important federal constitutional interest in establishing and supporting the early caregiving relationship. This approach modifies the primary constitutional inquiry in this area from the traditional question of state intervention into the private family to include a consideration of the role of the early caregiving relationship in fostering constitutional values. Although a full empirical understanding of the relationship between caregiving and citizenship may never be achieved, the facts about human development are nevertheless sufficiently established to be of use to constitutional decision-makers. As this Part explains, the fundamental principles of the developmental approach – its empirical perspective, its focus on the relationship between early caregiving and adult reason, and its commitment to establishing the social preconditions to national citizenship – offer a substantial reworking and integration of constitutional family law.

In a certain sense, the developmental account of citizenship is nothing new. A version of the developmental theory can be traced back to Plato’s infamous proposal that children be removed from parents at birth and raised by the Guardian class who would oversee their proper education into citizenship.²⁴⁷ The Supreme Court expressly rejected the Platonic approach to childrearing in a 1923 case involving state control over public education as doing “violence to both letter and spirit of the Constitution.”²⁴⁸ No one would dispute that the automatic removal of children from biological parents at birth violates well-established constitutional norms. But however outlandish, Plato’s

²⁴⁷ *V The Republic*, in COLLECTED DIALOGUES OF PLATO 696 (Edith Hamilton & Huntington Cairns, eds. 1961).

²⁴⁸ *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

republican ideal nevertheless captures an important insight regarding the fundamental importance of childrearing to the life of the constitutional polity. How we translate this insight about childrearing from an ancient republic to a modern liberal democracy is the subject of this Part.

I.

A. Citizenship and Families

Since the early 1960s, the primary framework for addressing issues of constitutional family law has been how and when the state may intervene in the private sphere of family life. Adopting this privacy-centered approach, the foundational cases in this area have addressed the power of government to regulate the use of contraceptives by married couples,²⁴⁹ to deny a marriage license on the basis of race²⁵⁰ or on the failure to comply with a pre-existing child support order,²⁵¹ to require that parents send their children to school until age sixteen,²⁵² to define who may live together as a family under zoning ordinances,²⁵³ to terminate parental rights²⁵⁴ and to enforce grandparent visitation over the objection of custodial parents.²⁵⁵ In all these cases, the inquiry has focused on defining the proper reach of governmental power into the private family or into decision-making about private family matters.²⁵⁶

Privacy has thus been the centerpiece of constitutional thinking about the family for decades, if not longer. As discussed earlier, vague generalities about the family's

²⁴⁹ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁵⁰ See *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁵¹ See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

²⁵² See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²⁵³ See *Moore v. East Cleveland*, 431 U.S. 494 (1977).

²⁵⁴ See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

²⁵⁵ See *Troxel v. Granville*, 530 U.S. 57 (2000).

²⁵⁶ See generally Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 1416 (2d ed.).

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 political 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.²⁵⁷ Today, however, the doctrine of privacy has reduced the family's political role to the passive virtue of sheltering family members from governmentally-imposed ideas about the good life. Nowhere has this quintessentially modern view of the private family been more forcefully articulated than in constitutional family law. 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.²⁵⁸ Although implicit in the Supreme Court's protection for family privacy is the view that parents rather than the state must provide the guidance that impressionable young children need,²⁵⁹ this 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 ways of thinking in their children.

A serious consideration of the concept of family privacy, however, confronts an inescapable conundrum. Our first set of beliefs, values and commitments are instilled in us from birth by our families of origin, but what justifies those original involuntary commitments and relationships of authority? As hard as we might try to fit the parent-child relationship into the model of individual rights, we cannot ignore the obvious fact

²⁵⁷ See, e.g., Linda K. Kerber, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 229 (1986).

²⁵⁸ West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

²⁵⁹ See Bellotti v. Baird, 443 U.S. 622 637-38 (1979).

that children, too, are individuals and that parental rights violate children's rights to personal autonomy and self-government.²⁶⁰ 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*, discussed above, parents are not free "to make martyrs of their children before they reach the age of full legal discretion when they can make that choice for themselves."²⁶¹ But while *Prince* suggests that there are *some* limits, parental authority to initiate children into a particular way of life is nevertheless impossible to reconcile 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,²⁶² simply has no meaning in the context of parental control over the lives of children. Parental rights include the authority to inculcate values in children, an authority directly at odds with the ideal of individual liberty that gives rise to parental rights in the first instance.

A developmental perspective allows us to see why, in the long run, parental rights need not be incompatible with personal liberty and political self-government. Parental caregiving not only inculcates values but also plays a critical role in fostering the development of a democratic citizenry. Because parental authority fosters the critical capacity for accepting or rejecting the parents' way of life in the long run, this deprivation of children's liberty finds constitutional justification.²⁶³ Parental rights serve the long-term interests of children by establishing the familial preconditions to the development of reasoned thinking. Families are not only sites of authoritarian learning and emotional

²⁶⁰ See Dailey, *Constitutional Privacy*, *supra*; Martha Minow, *Whatever Happened to Children's Rights*, 80 *Minn. L. Rev.* 267, 296 (1995); see also Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 *Yale L. J.* 293 (1988); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Children's Rights*, 14 *Cardozo L. Rev.* 1747 (1993).

²⁶¹ *Prince v. Massachusetts*, 321 U.S. 158, 170 (1943).

²⁶² *Lawrence v. Texas*, 2003 U.S. Lexis 5013.

²⁶³ See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979).

attachments; they are also institutions that promote the development of the psychological skills necessary for personal autonomy and democratic self-government. 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 civic capacity for reasoned thinking. 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 the families in the political socialization of children fits comfortably with modern constitutional respect for cultural pluralism. 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 capacity for reasoned thinking. A developmental approach does rule out the idea that a commitment to democratic self-government is compatible with depriving children of the means by which to choose whether to accept or reject the family beliefs or practices. The unexamined life – a life premised on faith rather than choice – is perfectly acceptable for adult citizens, but *foreclosing* children from eventually making that choice for themselves *is not* compatible with democratic principles or the maintenance of our constitutional polity.²⁶⁴ 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 reasoned thinking.

A developmental approach also accords with modern constitutional principles of

²⁶⁴ On the tension between traditional cultures and a democratic, pluralistic polity, see Carol Weisbrod, EMBLEMS OF PLURALISM,; CULTURAL DIFFERENCES AND THE STATE (2002); Stolzenberg, "He Drew a Circle That Shut Me Out", *supra* note .

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.²⁶⁵ As historians tell us, the task of cultivating moral and civic virtue in young children during the early years of the Republic fell primarily to mothers.²⁶⁶ The revolutionary ideal of maternal citizenship emphasized the mother's role in instilling moral and civic virtue in her children.²⁶⁷ Despite an emphasis on the importance of childrearing 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. Moreover, developmental research confirms the importance of *multiple* caregivers to children's developmental well-being, so this approach need not confer *exclusive* caregiving rights in all cases. 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. The only thing that matters from a developmental point of view is the maintenance of a stable, long-term, affectively-laden caregiver-child bond or bonds.

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

²⁶⁵ See Kerber, *WOMEN OF THE REPUBLIC*, *supra* note at 229; Michael Grossberg, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 8 (1985).

²⁶⁶ See Grossberg, *GOVERNING THE HEARTH*, *supra* at 7-8; Kerber, *WOMEN OF THE REPUBLIC*, *supra* at 229; Bernard Wishy, *THE CHILD AND THE REPUBLIC: THE DAWN OF MODERN AMERICAN CHILD NURTURE* 24-33 (1968). For a discussion of modern "maternal citizenship" theory, see Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 *ETHICS* 352 (1994).

²⁶⁷ See Grossberg, *GOVERNING THE HEARTH*, *supra* note ; Martha Minow, "Forming Underneath Everything That Grows": Toward a History of Family Law, 1985 *Wisc. L. Rev.* 819, 852-57; Mimi Abramovitz, *REGULATING THE LIVES OF WOMEN* 184 (1988). Poor and working class women were of course excluded from the ideal of the virtuous mother. See Minow, *supra*.

have launched empirical assaults on this assumption. In *Wisconsin v. Yoder*,²⁶⁸ 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 relied on common-sense assumptions regarding the effect of compulsory school education “during the crucial and formative adolescent period of life.”²⁶⁹ In evaluating the state’s interest in compulsory education beyond eighth grade, the Chief Justice expressly concluded that there was “strong evidence that [the Amish children] are capable of fulfilling the social and political responsibilities of citizenship.”²⁷⁰ In a famous dissent, Justice Douglas challenged the presumption that parents always act in the best interest of their children. One of the children in the case had testified at trial that she was opposed to high-school education, but the views of the other children were unknown. “While 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.”²⁷¹ 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 have the constitutional right to “to be masters of their own destiny.”²⁷²

Justice Douglas is not the only Supreme Court Justice to have used developmental research to challenge prevailing common-sense assumptions about children’s development. In several of his dissents in important constitutional family law cases, for

²⁶⁸ 406 U.S. 205 (1972).

²⁶⁹ *Id.* at 211.

²⁷⁰ *Id.* at 225-26.

²⁷¹ *Id.* at 244.

²⁷² *Id.* at 245 (citing J. Paget, *THE MORAL JUDGMENT OF THE CHILD* (1948); D. Elkind, *CHILDREN AND ADOLESCENTS* 75-80 (1970); Kohlberg, Moral Education in the Schools: A Developmental View, in R. Muss, *ADOLESCENT BEHAVIOR AND SOCIETY* 93, 199-200 (1971); W. Kay, *MORAL DEVELOPMENT* 172-183 (1968); A. Gesell & F. Ilg, *YOUTH: THE YEARS FROM TEN TO SIXTEEN* 175-182 (1956); M. Goodman, *THE CULTURE OF CHILDHOOD* 92-94 (1970)).

example, Justice Brennan used developmental research to do just that.²⁷³ In *Parham v. J.R.*, for example, a majority 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.²⁷⁴ The Chief Justice specifically relied on two common-sense presumptions:

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.²⁷⁵

Citing the developmental literature,²⁷⁶ Justice Brennan dissented on the ground that “[t]he presumption that parents act in their children’s best interests, while applicable to most childrearing decisions, is not applicable in the commitment context.”²⁷⁷ 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.”²⁷⁸ Despite the developmental research introduced by the dissent, the *Parham* majority adheres to the widespread but misplaced “‘common sense’ conviction that in social matters every man is his own best expert.”²⁷⁹

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

²⁷³ See also *Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977); *Carey v. Population Services International*, 431 U.S. 678, 692 n.19 (1977).

²⁷⁴ 442 U.S. 584, 606 (1979).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 628 nn. 7-9 (citing developmental research).

²⁷⁷ *Id.* at 632.

²⁷⁸ *Id.* at 602-03.

²⁷⁹ Barber, SCIENCE AND THE SOCIAL ORDER, *supra* note at 245.

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 a substantial 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.²⁸⁰ 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.

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*²⁸¹

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

²⁸⁰ See *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

²⁸¹ 441 U.S. 380, 397(1979) (Stewart, J., dissenting).

found than the recent decision in *Troxel v. Granville*, which produced six separate written opinions.²⁸² The parents in *Troxel* challenged the Washington statute that allowed the grandparents to seek visitation over the objection of the legal parents. In an opinion written by Justice O'Connor, a plurality of the Court 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 decisions."²⁸³ Given a fit parent, "there will normally be no reason for the State to inject itself into the private realm of the family."²⁸⁴

In contrast, Justice Stevens in dissent focused on "the child's own complementary interest in preserving relationships that serve her welfare and protection."²⁸⁵ 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."²⁸⁶ In a passage seemingly consistent with a development perspective, he 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."²⁸⁷ 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*."²⁸⁸ Both Stevens and the Washington Supreme Court rely on a series of "unwed fathers" cases.

²⁸² 530 U.S. 57, 60-61 (2000).

²⁸³ 530 U.S. at 68 (quoting *Parham*, 442 U.S. at 602).

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 88.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 88.

²⁸⁸ *In re Smith*, 969 P.2d 21, 31 (1998).

The first in this line of cases, *Stanley v. Illinois*,²⁸⁹ 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.”²⁹⁰ 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.

One might be tempted to conclude that caregiving has been a part of parental rights doctrine since *Stanley*. But despite the references to caregiving, *Stanley* did not signal the beginning of a developmental understanding of caregiving rights. To the contrary, in the unwed father cases following *Stanley*, cohabitation with the mother rather than a caregiving relationship with the child became the focus of constitutional analysis. 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.²⁹¹

The most recent unwed father case, *Michael H. v. Gerald D.*, confirms the Supreme Court’s failure to consider a substantial caregiving relationship as giving 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.”²⁹² The biological father

²⁸⁹ 405 U.S. 645, 646 (1972).

²⁹⁰ *Id.* at 651.

²⁹¹ *Caban v. Mohammed*, 441 U.S. 380 (1979); *but see Lehr v. Robertson*, 463 U.S. 2248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

²⁹² 491 U.S. 110, 123 n.3 (1989).

in this case was not only an unwed father; he was also, in Justice Scalia’s words, an “adulterous natural father.” 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.

Two Supreme Court decisions in the last century do gesture in the direction of a developmental perspective on caregiving rights, even if they have not had an appreciable effect on constitutional doctrine. In the first of these cases, *Moore v. City of East Cleveland*,²⁹³ the Supreme Court struck down a municipal zoning ordinance that prohibited a grandmother from living with her two biological grandsons, who were first cousins.²⁹⁴ In an opinion written by Justice Powell, the plurality reasoned that “[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”²⁹⁵ To the *Moore* plurality, the constitutional interest in children derived from “sharing a household”:

Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household – indeed who may take on major responsibility for the rearing of the children.²⁹⁶

The *Moore* decision turned more directly on the caregiving relationship between adults and children than on traditional family form.

²⁹³ *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 504.

²⁹⁶ *Id.* at 541.

Smith v. Organization of Foster Families for Equality and Reform also identified children’s developmental need for a caregiving relationship. The 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.²⁹⁷ Writing for the majority, Justice Brennan agreed that “biological relations are not the exclusive determination of the existence of a family.”²⁹⁸ While he held 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,”²⁹⁹ he acknowledged the social 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.³⁰⁰

Had the emotional ties that arise from the caregiving relationship developed outside the foster care framework, the Court suggests, a protected liberty interest might have existed.

A developmental approach goes well beyond the decision in *Smith*. In the developmental view, respect for the decision-making autonomy of adult family members must be balanced against support for the familial conditions that foster the development of this same decisional skill in children. An individual’s right to the care and custody of a child derives from the foundational constitutional commitment to ensuring that children

²⁹⁷ 431 U.S. 816 (1977).

²⁹⁸ *Id.* at 843.

²⁹⁹ *Id.* at 847.

³⁰⁰ *Id.* at 844.

have the opportunity to acquire the decision-making 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 this caregiving relationship. Unlike 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 the existence of an actual or potential affective caregiving relationship between adult and child, where caregiving relationship is defined in terms of a reciprocal affective bond essential to the child's healthy psychological development into adult citizenship.

Concerns about the unrestrained exercise of governmental power over childrearing are bound to be raised in response to a developmental perspective. The fear of governmental tyranny is especially acute in this area, where the possibility of the state molding citizens in its own image exists. 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 authorizes 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 her education."³⁰¹ Yet a doctrine of caregiving rights does not open up the sphere of parent-child relations to 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 morality. A doctrine of caregiving rights rooted in empirical developmental psychology is arguably less subjective than the non-empirical, abstract accounts of decisional freedom that currently

³⁰¹ DeBoer v. DeBoer, 509 U.S. 1301, 1301 (1993) (Stevens, J, acting as Circuit Judge on petition for stay).

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 and limits legal analysis in comparison to the freely-ranging analysis under a best interest of the child approach.

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. Caregivers begin to develop an emotional tie to the child long before birth. Moreover, as discussed earlier, wholesale removal of children from their biological parents at birth would greatly expand the state's power to mold children in its own image. 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 would allow states 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 on-going 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 substantial relationship with the child and on the fact that no other individual, apart from the mother, plausibly has a stronger claim. In situations where that is not true, for example where another individual, such as a step-parent, 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 potential psychological 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 under state law, 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 step-parent, an older sibling, a grandparent or other relative, although development of this tie can also occur in institutional or other settings.³⁰² The caregiving standard 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 dismiss concerns about administrative costs, but it also acknowledges the overriding developmental importance to children of maintaining established caregiving

³⁰² See, e.g., *Guardianship of Phillip B.*, 139 Cal. App.3d 407 (1983).

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 could lead, in some cases, to a battle of the experts. But a developmental approach to the definition of caregiving rights need not require the introduction of expert testimony on the factual question 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 might violate prevailing norms about the primacy of the biological parent-child relationship, or about the exclusivity of the maternal bond, the presence or absence of a substantial caregiving relationship in the particular case can be assessed using simple common sense.

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.³⁰³ 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. More likely the grandparents in this case occupied an important but not primary developmental role in the lives of their grandchildren. Moreover, the children in *Troxel* were beyond the early caregiving years. In such circumstances, particularly given the presence of a primary caregiving relationship with the mother, a developmental approach would not require that the grandparents' claims be recognized. In *Michael H. v. Gerald D.*, by contrast, a developmental approach might have made a difference to the outcome.³⁰⁴ 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. Justice Scalia writing for the plurality concluded that no constitutionally-protected interest existed here, declaring that "California law, like nature itself, makes no provision for dual fatherhood,"³⁰⁵ a conclusion contradicted by the facts of the case as well as developmental research.

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

³⁰³ Cf. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Scalia, J., dissenting).

³⁰⁴ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

³⁰⁵ *Id.*

of which the first installment, *Beyond the Best Interests of the Child*, was published in 1973.³⁰⁶ The psychological parent theory, as it has come to be known, reflects many of the same developmental considerations that inform the notion of caregiving rights here. Yet despite developmental research to the contrary, the authors 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 biological parent or a prospective adoptive parent, should have the opportunity to show that the caregiving relationship is or potentially will be of significant importance to the child's psychological development.

II. C. Political Socialization and the Safeguards of Federalism

In a decision last Term, *Elk Grove Unified School District v. Newdow*, the Supreme Court held that a noncustodial father did not have standing to challenge the constitutionality of a school district policy requiring that the Pledge of Allegiance be recited daily in his daughter's kindergarten classroom.³⁰⁷ Whether his daughter's

³⁰⁶ BEFORE THE BEST INTERESTS OF THE CHILD (1979); IN THE BEST INTERESTS OF THE CHILD (1986)

³⁰⁷ 124 S.Ct. 2301 (2004).

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.³⁰⁸ 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.”³⁰⁹ 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 described as federal courts’ customary refusal to entertain cases where “hard questions of domestic relations are sure to affect the outcome.”³¹⁰

The jurisdictional holding in *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.”³¹¹ 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.³¹² Yet the principle of state sovereignty over family relations is, as Justice Stevens candidly acknowledged recently, “somewhat arbitrary.”³¹³ 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 court under state law, the

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 2309.

³¹⁰ *Id.* at 2312; *see generally* Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction and the Federal Courts, 66 N.Y.U. L. Rev. 1682 (1991).

³¹¹ *Id.* at 2309 (quoting *In Re Burrus*, 136 U.S. 586 (1890)).

³¹² *See United States v. Lopez*, 514 U.S. 549, 564-565 (1995); *id.* at 624 (Breyer, J., dissenting).

³¹³ *Troxel v. Granville*, 530 U.S. 57, 90 n.10 (2000).

federal government has shown a strong, identifiable interest in certain family matters for well over a century, if not longer.³¹⁴ The federal Defense of Marriage Act³¹⁵ 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.³¹⁶

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.³¹⁷ They also correctly identify the ways in which the structure of family life is deeply connected to the economic and political spheres.³¹⁸ 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 and family-leave policies. But most of this scholarship focuses 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, the interests of caregivers and children in the family will be nearly identical. It is true that a developmental perspective rules out a presumption of custody in favor of mothers over fathers. Moreover, the debate

³¹⁴ See, e.g. Sarah Barringer Gordon, *THE MORMON QUESTION* (2002).

³¹⁵ 28 U.S.C. 1738C (1996).

³¹⁶ The presence of a strong federal interest does not rule out prudential arguments in favor of state sovereignty in certain areas of family law. See *infra* pp. ; Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787 (1995).

³¹⁷ See, e.g., Nancy F. Cott, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2003); Naomi Cahn, *Family Law, Federalism, and the Federal Courts*, 79 Iowa L. Rev. 1073 (1994); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. Rev. 1297 (1998).

³¹⁸ See, e.g., Michael Walzer, *SPHERES OF JUSTICE*, *supra* note ; Okin, *JUSTICE, GENDER AND THE FAMILY*, *supra* note .

over the rights of custodial parents to relocate away from the non-custodial parent is one situation that does potentially, although not necessarily, pit the rights of custodial parents, usually mothers, against the needs of children to maintain a caregiving relationship with the other parent.³¹⁹ In most situations, a developmental perspective that focuses on children's caregiving relationships will only strengthen mothers' – and fathers' – interests.

A developmental perspective contributes in three ways to the debate over the relationship of the family to the federal government. First, a developmental approach squarely confronts the fact that constitutional law lacks a robust conception of democratic citizenship and its social preconditions. The privileges and immunities of United States citizenship guaranteed by the fourteenth amendment were immediately rendered a dead letter in *The Slaughterhouse Cases*.³²⁰ Supreme Court review of state laws affecting the opportunities of students to develop the skills of democratic citizenship has been more searching. While the Supreme Court has not held expressly that the Constitution establishes a fundamental right to education at any level of government, the Court has subjected laws that discriminate in educational opportunities to heightened scrutiny under the equal protection clause, at least in part on the theory that they interfere with the political socialization of children. *Brown v. Board of Education*, while primarily a racial discrimination case, articulated the importance of education to democratic citizenship.³²¹ In *Plyler v. Doe*, the Supreme Court held that a state may not discriminate against illegal

³¹⁹ For debate in the developmental literature on this issue, see Judith Wallerstein & Tony T. Tanke, To Move or Not to Move: Psychological and Legal Considerations on the Relocation of Children Following Divorce, 30 Fam. L. Q. 305 (1996); 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. of Family Psychology 206 (2003); Joan B. Kelly & Michael E. Lamb, Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children, 38 Fam & Concil. Cts. Rev. 297 (2000).

³²⁰ 83 U.S. 36 (1872) (Wall).

³²¹ 347 U.S. 483 (1954).

alien children because “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system.”³²² Incorporating these education cases, a developmental approach recognizes a strong tie between caregiving and the psychological skills required for citizenship in our modern constitutional polity. A developmental perspective recognizes an important federal interest in developing citizens that derives, not from the equal protection or citizenship clauses specifically, but more generally from the basic structure of individual rights and democratic values under our Constitution.

Second, the federal interest in securing the development of future citizens gives rise to broad congressional power to ensure the basic childrearing needs of families. Helping to support good-enough caregiving falls within Congress’ power to legislate the social preconditions for citizenship. Given Congress’ already broad regulatory power under the commerce clause, this expansion of regulatory power will not make a practical difference for most areas of private activity. But to the extent the doctrine identifies Congress’s interest in developing citizens, 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 “[i]nstructing 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.”³²³ Recognizing the federal government’s interest in the early caregiving relationship supports the conclusion that

³²² 457 U.S. 202, 221 (1982) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

³²³ 484 U.S. 174, 186 (1988).

Congress may provide a federal forum, where needed, to resolve interstate child custody disputes.

A developmental perspective on federal power over families would change the outcome in *Newdow*, too. From a developmental perspective, the Supreme Court should not have deferred to state law on the question of Mr. Newdow's custody rights. While it is true that state law governs child custody, this power to determine the primary rights and obligations of custodial parents under state law should not be binding in a case raising a substantial federal constitutional claim. Deference to state family law on the threshold jurisdictional issue of standing, itself a substantial federal question, runs counter to well-established doctrines on federal protection of state-created interests. The Supreme Court has made clear, for example, that state law determinations of what is a contract for purposes of the Contract Clause are subject to review by the Supreme Court on appeal, and 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.³²⁴

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, the point is that state law is not solely determinative of an issue that is antecedent to the review of a substantial constitutional claim. This is true because, were a state court to confer child custody rights on an unrelated third party, and he or she then proceeded to bring suit for a violation of the establishment clause, the Supreme Court would find that the state's definition of a custodial interest was overly broad for federal standing purposes. The definition of the interests in the caregiving-child

³²⁴ See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 15 (1980); *Indiana v. Brand*, 303 U.S. 95 (1938).

relationship sufficient to establish constitutional standing, in this case Mr. Newdow's interest in directing the religious upbringing of 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 developing 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.³²⁵ 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, under the reasoning of *Seminole Tribe*, allow Congress to abrogate sovereign immunity in this area. A developmental approach thus 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*,³²⁶ 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 highlights 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

³²⁵ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

³²⁶ *Nevada v. Hibbs*, 123 S.Ct. 1972 (2003).

providing even strong constitutional authority for the law and any future expansions of its provisions relating to the work-caregiving conflict.

Third, and finally, a developmental approach also recognizes that federal regulatory power over families, while broad, is not plenary. A development perspective tells us something as well about the limits that must be set on the federal government's authority over the caregiving relationship. This approach begins with the proposition 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 governmental 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.³²⁷ 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."³²⁸ A limited principle of federalism in the area

³²⁷ *New York v. United States*, 505 U.S. 144 (1992); *see also* *Printz v. United States*, 521 U.S. 898 (1997).

³²⁸ *Bellotti v. Baird*, 443 U.S. 622, 637-38 (1979) (plurality opinion)

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 state-defined way of life. The principle assumes there is no bright line between the private family and the state, and 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,³²⁹ overstep the line by imposing moral rules in the absence of any evidence that marriage *itself* has a beneficial effect on children's development. The developmental view rejects the notion that only the traditional family form or two-parent families can successfully nurture children;³³⁰ 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 just as well in non-traditional as in traditional family settings. A focus on children's early developmental needs requires recognizing the broad array of family arrangements that can successfully fulfill the role of caregiving. Stepparents,

³²⁹ See Personal Responsibility and Work Opportunity and Reconciliation Act 1996; H.R. 4737 (2002); H.R. 4 (2003)

³³⁰ See Young, Mothers, Citizenship, and Independence, *supra* note .

foster parents, grandparents and many others may 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.

Although individuals are accorded some important measure of freedom with respect to decisions bearing on childrearing and intimate family relationships, the family remains a heavily state-regulated domain. The developmental perspective provides a principled basis for allocating regulatory and decision-making 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.³³¹

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 steps being taken at the state level to recognize same-sex marriage, along with the passage of the Defense Against Marriage Act at the federal level, are powerful reminders of the anti-authoritarian, pro-democratic importance of state authority in the area of family law. The developmental perspective is grounded in a developmental view of the relationship between the federal government and the states that takes seriously the connection between federal legislation on the family and democratic citizenship. In doing so, the perspective helps to insure the long-term success of a federal polity whose survival depends on the transmission of the psychological skills of democratic citizenship to future generations.

³³¹ For a more in-depth discussion of this point, see Dailey, *Constitutional Privacy*, *supra* note .

VI. Conclusion

The developmental approach presented in this Article presents a comprehensive conceptual and empirical framework for a wide range of cases relating to the political socialization of children in constitutional family law. The implications of a developmental perspective on reason, however, extend well beyond the domain of families. The concept of discriminatory intent in equality law,³³² the idea of reasoned deliberation in free speech law,³³³ the principle of “true private choice” in establishment clause doctrine,³³⁴ the voluntariness of confessions,³³⁵ and the right of decisional autonomy under the due process clause³³⁶ are just a few examples of the many areas in which ideas about reason and reasoned choice might be usefully informed by developmental principles. For the most part, constitutional law utilizes an assumption of individual reason that ignores the interplay between cognition and emotion, the vulnerability of mature reason to regressive pressures, the developing reasoning capacities of adolescent citizens, and the social and economic conditions that give rise to a democratic citizenry’s capacity for reasoned thinking. The developmental perspective on constitutional family law presented in this Article is only a starting point for examining the assumption of reason across the entire spectrum of constitutional doctrines.

By expanding on *Brown*’s holding that citizenship requires tending to the “hearts

³³² See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

³³³ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Whitney v. California*, 274 U.S. 357, 375-76 (Brandeis, J., concurring).

³³⁴ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

³³⁵ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

³³⁶ See, e.g., *Lawrence v. Texas*, 2003 US Lexis 5013 (2002); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

and minds” of young children, this Article aims to build upon the best aspirations of twentieth-century jurisprudence. As described here, the developmental tradition in constitutional law gives expression to an ideal of equal citizenship that is one of the twentieth century’s crowning jurisprudential achievements. A developmental view expands on the school cases by identifying the importance of early caregiving to the political socialization of children. Families, along with religious groups, schools, neighborhood associations and political parties have long been understood to play a vital role in preserving the moral pluralism and cultural diversity that define a free republic. 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 psychological skill of reasoned thinking central to the ideal of democratic citizenship.

To borrow from Justice Holmes, the Constitution most certainly does not enact Freud’s *Interpretation of Dreams*,³³⁷ 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. 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 habits of mind in both young children and adult citizens. But 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 the capacity for reasoned thinking unfolds, become full

³³⁷ Sigmund Freud, *THE INTERPRETATION OF DREAMS* (1907); see *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting).

members of that world in their own right.