Article

Children's Constitutional Rights

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"The idea of children having rights is, in many ways, a revolutionary one."[1]

INTRODUCTION

For almost two centuries, children were largely absent from the class of constitutional rights-holders. It was not until the 1932 decision in *Powell v. Alabama* that the Supreme Court

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1. Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 256 (1979).

expressly held that children have constitutional rights.[2] The fact that the Supreme Court decided no children's rights cases before 1932 does not mean that children possessed no constitutional rights. Even if their rights were not litigated, children clearly had certain fundamental constitutional rights such as a Thirteenth Amendment right not to be enslaved and rights under the Due Process Clause not to be deprived arbitrarily of life or liberty. Yet the inferred existence of some fundamental rights for children does not negate the fact that, well into the twentieth century, children enjoyed—at best—only a minimal set of constitutional entitlements.

This long history of denying children the full range of constitutional rights has roots in a choice theory of rights. Choice theory understands rights as deriving from the decisionmaking autonomy of the individual.[3] From the perspective of choice

2. Powell v. Alabama, 287 U.S. 45, 50, 57–58 (1932) (holding that "young, ignorant" defendants were denied due process of law under the Fourteenth Amendment).

3. *See, e.g.*, Jeremy Waldron, *Introduction* to THEORIES OF RIGHTS 1, 9 (Jeremy Waldron ed., 1984). Choice theory is sometimes referred to as the agency or will theory of rights. Many authors have discussed choice theory as applied to children. *See, e.g.*, DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 54 (2004) [hereinafter ARCHARD, RIGHTS AND CHILDHOOD] ("If, as many will argue, children are incapable of exercising choice then, according to the will theory at least, they do not have rights."); JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 291–92 (2006) (discussing the implications of the will theory of rights for children); David Archard & Colin M. Macleod, *Introduction* to THE MORAL AND POLITICAL STATUS OF CHILDREN 1, 5 (2002) (noting that advocates of choice theory view "[t]he primary and appropriate functions of rights [as] the recognition and protection of the person qua autonomous agent"); Tom D. Campbell, *The Rights of the Minor: As Person, As Juvenile, As Future Adult*, 6 INT'L J.L. & FAM. 1, 2 (1992) (discussing the implications of the will theory of rights for children); Neil MacCormick, *Children's Rights: A Test-Case for Theories of Right*, *in* LEGAL RIGHT AND SOCIAL DEMOCRACY 154, 156 (1982) (noting that the will theory of rights "suggests that what is common to all types of right is that they make the choice, or the will, of the right-holder paramount in a given relationship").

Some of the major legal works on children's rights present choice theory in the process of critiquing it. *See, e.g.*, BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE (2008) [hereinafter WOODHOUSE, HIDDEN IN PLAIN SIGHT]; Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 605, 610–13; Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 1–3 (1986) [hereinafter Minow, *Rights for the Next Generation*]; Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 268–78 (1995) [hereinafter Minow, *What Ever Happened to Children's Rights?*]; Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 801–04

theory, children do not enjoy most constitutional rights because they lack the capacity for autonomous choice.[4] The theory that children do not possess adult rights because they lack autonomous decisionmaking skills is reinforced by the existence of a robust constitutional doctrine of parental rights. Since the early 1920s, parents have enjoyed broad constitutional rights to the care and custody of their children. Parents possess decisionmaking authority because, as the Supreme Court has observed, children are not yet "fully rational, choosing agent[s]."[5] The Court's enthusiastic recognition of parental rights fortifies the view that individuals below the age of majority lack the state of mind required of constitutional rights-holders.

Choice theory not only justifies the long history of denying children rights, but also serves to explain the recent but growing number of modern Supreme Court cases in which children's constitutional rights have been recognized. Choice theory regards these newly recognized rights as "autonomy rights," that is, adult rights given to older children based on their increasing

(1999) [hereinafter Teitelbaum, *Children's Rights*]; Lee E. Teitelbaum, *Foreword: The Meanings of Rights of Children*, 10 N.M. L. REV. 235, 242–52 (1979) [hereinafter Teitelbaum, *Foreword*]; Wald, *supra* note 1, at 257–58; Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 322 (1993).

4. *See, e.g.*, ARCHARD, RIGHTS AND CHILDHOOD, *supra* note 3, at 93 ("On the standard liberal account, children lack rational autonomy."); David Archard, *Free Speech and Children's Interests*, 79 CHI.-KENT L. REV. 83, 91–93 (2004) [hereinafter Archard, *Free Speech*] ("A child incapable of exercising choice is reasonably disqualified from having liberty rights."); Archard & Macleod, *supra* note 3, at 5 ("Since children, at least infants, lack the capacities requisite for autonomy on which the very concept of a right is allegedly predicated, it makes no sense, however well-intentioned this might be, to ascribe rights to children."); Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 358–59 ("The capacity whose relevance to children's exercise of rights is most commonly noted is the capacity for logical thinking."); Campbell, *supra* note 3, at 5 (noting that under choice theory, "[m]inors can have rights only to the extent that they have acquired adult-like capacities for reasoned decisionmaking and willed conduct under the control of rational moral agency"); Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 985 (1993) ("[W]hen discussing the concept of children's rights, the debate invariably returns to the capacity of children."); Hafen, *supra* note 3, at 613 ("The presumption of minors' incapacity has been so strong that the growth of democratic ideals in American society, rather than encouraging the 'liberation' of children from limitations upon their liberty, has encouraged even greater discrimination on the basis of age . . . .").

5. Thompson v. Oklahoma, 487 U.S. 815, 825 n.23 (1988); *see also* Parham v. J.R., 442 U.S. 584, 602 (1979) ("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.").

capacity for autonomous choice. Because they are understood to reflect older children's decisionmaking skills, autonomy rights reinforce rather than undermine the broader framework of choice theory. The seminal cases in this view are *Tinker v. Des Moines Independent Community School District* and *In re Gault*, which held that older children have adult constitutional rights for purposes of speech in school and juvenile proceedings, respectively.[6] Because choice theory focuses on the point at which children will be treated as adults for constitutional purposes, it modifies but does not reject outright the traditional choice thesis. For children deemed too immature to make decisions on their own behalf, the traditional choice thesis—which posits no rights for children and broad parental authority—still applies.

This Article argues that the prevailing choice theory falls short as a theory of children's constitutional rights for two reasons. First, as a descriptive matter, choice theory is simply too narrow to serve as a general theory of children's constitutional rights. As choice theorists would acknowledge, the theory does not address whole categories of existing rights where the decisionmaking autonomy of the right-holder is not at issue. For example, choice theory does not account for the long line of education cases, beginning with *Brown v. Board of Education*,[7] that do not turn on children's autonomy skills but rest on children's special status as developing citizens. But even with respect to that set of "autonomy rights" most closely associated with choice theory, such as students' right to free speech in school, the paradigm still falls short. A review of Supreme Court cases reveals that many if not most modern autonomy rights function not to emancipate mature children from the authority of parents and the state but instead to protect or socialize immature children into becoming autonomous adults. Although the Supreme Court and commentators frequently utilize the language of choice theory, a close examination of the modern autonomy rights cases reveals the Court's deep ambiv-

6. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *In re* Gault, 387 U.S. 1, 78 (1967); *see also, e.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1975); Minow, *What Ever Happened to Children's Rights?*, *supra* note 3, at 275 (citing *In re Gault*, *Goss*, and *Tinker* as the first liberationist cases); Teitelbaum, *Children's Rights*, *supra* note 3, at 810–12 (identifying *In re Gault* and *Tinker* as foundational cases in children's rights jurisprudence); Wald, *supra* note 1, at 266 (identifying *In re Gault*, *Goss*, and *Tinker* as the first autonomy rights cases).

7. 347 U.S. 483 (1954).

alence over the idea of children as mature decisionmakers. Prevailing choice theory thus fails to provide an adequate descriptive account of most existing constitutional rights for children, one that recognizes their important function in socializing children into becoming autonomous adults. More broadly, choice theory has no conceptual apparatus for defining children's rights in terms of children's future autonomy or for conceiving of children's rights in socializing terms.

Second, as a psychology of decisionmaking, choice theory rests on an excessively rationalist model of decisionmaking that ignores numerous core aspects of mature, autonomous choice. Any approach to children's rights premised on children's existing or future decisionmaking capacity requires an underlying psychological theory that explains why children either lack or possess essential autonomy skills. Under choice theory, the quality of mind most frequently identified as missing in children is the capacity for cognitive, rational thought. But while cognitive skills are clearly important to autonomous decisionmaking, choice theory overemphasizes rationality at the expense of other, equally important attributes of choice. Psychological research on decisionmaking illuminates the broad range of mental skills—cognitive, emotional, and imaginative—that children must acquire in order to become autonomous decisionmakers. By associating autonomous choice with critical-thinking skills learned in school, choice theory ignores the noncognitive attributes of choice and the family caregiving essential to their development. The theory's cognitive bias reinforces a constitutional jurisprudence that overlooks the important role that early caregiving plays in the socialization process leading to adult autonomy.

This Article presents a developmental theory of children's constitutional rights that overcomes the descriptive and psychological limitations of the prevailing choice theory while preserving its central commitment to the constitutional value of individual autonomy. The developmental theory views rights as serving first and foremost to foster the social conditions under which children are most likely to develop the skills of adult autonomy. The theory proposes a class of "developmental rights" that operate to secure children's future autonomy by promoting their socialization into autonomous adults. The paradigm of developmental rights, it is argued, better describes children's existing constitutional rights and provides a more robust normative framework for thinking about what rights children

should or should not have. This Article further argues that the concept of children's future autonomy must be informed by contemporary psychological understandings of choice. Drawing from research on decisionmaking, this Article identifies the specific mental attributes of cognition, emotion, and imagination that make autonomous choice possible. The essential insight here is that early family relationships are critical to the development of the skills necessary for adult autonomy. This Article utilizes findings from developmental psychology to show the extent to which family caregiving plays an essential role, along with school, in promoting the cognitive and noncognitive skills of autonomous choice.[8]

The developmental theory's core insight into the importance of caregiving to children's future autonomy supports recognizing children's fundamental constitutional rights in the caregiving relationship. As described in this Article, children's caregiving rights take three basic forms. First are children's rights under the Due Process Clause to be free from state intervention into established caregiving relationships. Second are children's rights arising under other constitutional provisions where the rights at issue touch upon their caregiving interests. Third, and most far-reaching, are children's affirmative constitutional rights to a minimum level of caregiving services from the state. This final category of rights focuses the debate on state support for the caregiving relationships children need to become autonomous adults and citizens. While the proposal raises unavoidable questions regarding the judiciary's role in defining and enforcing children's affirmative constitutional rights, at the very least the developmental theory draws attention to the question of the nature and scope of governmental duties to provide children with essential caregiving services necessary for their development into autonomous adults and citizens.

8. This theory of the close developmental connection between family caregiving and the skills of public life relates to John Rawls's argument in *A Theory of Justice* that early parental love is the developmental beginning for acquiring a sense of justice. *See* JOHN RAWLS, A THEORY OF JUSTICE 405–09 (rev. ed. 1999); *see also* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 140–50 (1980); Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 6–10 (2008). In addition to Alstott, other feminists have asserted the deep interconnection between the virtues of caregiving and the liberal value of autonomy. *See, e.g.*, Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989).

The developmental theory should not be misinterpreted as opening the door to unfettered state control over children's lives in the name of their proper socialization into good citizens. Any objection along these lines is misguided. Numerous Supreme Court decisions already recognize the state's role in children's socialization, most notably in the area of education.[9] The state has long employed its *parens patriae* power to require that students attend school, to regulate their labor, to compel vaccinations, to impose curfews, and a host of other laws. While the developmental theory broadens the state's sphere of legitimate interest to include caregiving, this interest does not give the state carte blanche to override the family's fundamental right of privacy, the parents' right to the care and custody of their children, or children's own developmental rights to relationships with their primary caregivers. As in any constitutional context, the importance of the state interests must be balanced against the particular constitutional rights at stake. Thus, although constitutional recognition of children's caregiving interests would expand state power under section 5 of the Fourteenth Amendment, this power is neither new nor unlimited. Evaluating the extent to which state action directed to supporting children's caregiving interests intrudes on their future autonomy interests will not always be easy. But the potential difficulty of the constitutional inquiry—and the risk that some state overreaching will occur—should not be an obstacle to recognizing the state's legitimate constitutional power and duty to protect children's caregiving interests.

More importantly, failing to recognize the state's responsibility to provide the conditions for children's future well-being simply leaves millions of children vulnerable to the long-term adverse effects of wealth inequality in the United States. The state's failure to provide support for children's caregiving has serious adverse consequences for disadvantaged children, particularly for the nearly twenty percent of children who live in poverty in the United States.[10] Systemic and chronic failure in early caregiving due to childhood poverty is a harm of overriding importance from a developmental point of view. As de-

9. *See, e.g.*, *Tinker*, 393 U.S. at 506; Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925); Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

10. *See* U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, 12 (2008), *available at* http://www.census.gov/prod/2008pubs/p60-235.pdf (showing eighteen percent of all persons under age eighteen living in poverty in 2007).

scribed in Part II of this Article, developmental rights to caregiving will necessarily bring about significant public investment in early childcare for the most disadvantaged children. The developmental theory explains why children at risk for caregiving failure possess these affirmative rights to caregiving services as future members of the constitutional polity.

I. THE CHOICE THEORY OF CHILDREN'S RIGHTS

Choice theory informs Supreme Court decisions relating to children as well as debates over children's rights in the legal literature. Section A describes choice theory's traditional thesis, which justifies the denial of children's rights based on children's impaired capacity for autonomous choice. This section then outlines the theory of children's socialization that underlies choice theory and in particular the Supreme Court's broad protection for parental rights and state *parens patriae* power. Section B describes the emergence of children's "autonomy" rights in constitutional law beginning in the 1960s. The Court's modern decisions recognizing children's autonomy rights are generally understood to reflect the idea that older adolescents possess mature decisionmaking capacities in certain contexts. However, as explained here, many of these cases actually rest on the presumption of children's immature decisionmaking skills and function to protect and socialize children rather than to emancipate them. Section C then explains why the descriptive and psychological limitations of choice theory render it an inadequate framework for understanding and conceptualizing children's constitutional rights.

A. THE TRADITIONAL THESIS

1. Impaired Choice

The prevailing choice theory posits that children lack certain rights accorded to adults because they lack the capacity for autonomous decisionmaking necessary for the exercise of those very rights.[11] With respect to older children especially, who can otherwise function independently, the core missing attribute is the capacity of self-determination.[12] Choice theory views deci-

11. *See* sources cited *supra* note 4; *see also* Campbell, *supra* note 3, at 2 ("[T]he distinctive thing about children's rights [under choice theory] is that there are none.").

12. John S. Mill's work illustrates the classic view on autonomy. *See* JOHN S. MILL, *On Liberty*, *in* ON LIBERTY AND OTHER ESSAYS 5, 14 (John Gray ed.,

sionmaking autonomy as a precondition for the exercise of many of the most important rights in a liberal state, including the rights to vote, to freedom of speech and association, and to personal liberty in matters relating to marriage, reproduction, and childrearing.[13] The traditional choice thesis allows the state to discriminate against children in almost every area of social life.[14] This idea that children lack autonomy and therefore any claim to rights of their own has a distinguished pedigree. As John Stuart Mill observed,

Oxford Univ. Press 1991) (1859) ("The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."). The literature on autonomy is vast. *See, e.g.*, STEPHEN MACEDO, LIBERAL VIRTUES: A LIBERAL THEORY OF CITIZENSHIP, VIRTUE, AND COMMUNITY 262 (1987) (defining autonomy in terms of "the development of the capacity critically to assess and even actively shape not simply one's actions, but one's character itself"); JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986) ("The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 877 (1994) ("To be autonomous, one must be able to form a conception of the good, deliberate rationally, and act consistently with one's goals."); Nedelsky, *supra* note 8, at 8 ("The image of humans as self-determining creatures . . . remains one of the most powerful dimensions of liberal thought.").

13. *See* Hafen, *supra* note 3, at 650 ("The presumptions arising from the limited capacities of minors account in large part for the general limitation on their exercise of rights that are in the 'choice' category, because the law assumes . . . that a basic capacity to make responsible choices is a prerequisite to the meaningful exercise of choice rights."); *see also* Fallon, *supra* note 12, at 876 n.2 ("Autonomy has been identified as a value underlying the constitutional protection of privacy, procedural due process, equal protection, and free exercise rights."); John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1761 (1981) (justifying age-based restrictions on voting "[s]ince ultimately the ballot functions as a means of *self*-government, an activity difficult for those incapable of moral and rational choice").

14. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."); Thompson v. Oklahoma, 487 U.S. 815, 823–24 (1988) (noting that minors in Oklahoma are "[n]ot eligible to vote, to sit on a jury, to marry without parental consent, or to purchase alcohol or cigarettes" (citations omitted)); *id.* at 853–54 (O'Connor, J., concurring) ("Legislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults."); Goss v. Lopez, 419 U.S. 565, 591 (1975) (Powell, J., dissenting) ("Examples of this distinction [between adults and children] abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and hold office.").

> It is perhaps hardly necessary to say that this doctrine [of individual liberty] is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood.[15]

The Supreme Court has expressed a version of this traditional choice thesis in many cases over the past few decades.[16] In 1979, Chief Justice Burger, speaking for a unanimous Court, observed that "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."[17] A decade earlier, in *Ginsberg v. New York*, the Court upheld a state law prohibiting the sale of pornography to minors on the ground that "a child may not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read."[18] Justice Stewart wrote in concurrence:

> [At] least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.[19]

In *Bellotti v. Baird*, the Court recognized the right of mature adolescent girls to choose whether to terminate a pregnancy, while nevertheless expressing "concern over the inability of children to make mature choices."[20] As the Court emphasized, "during the formative years of childhood and adolescence, mi-

15. Mill, *supra* note 12, at 14; *see also* RAWLS, *supra* note 8, at 183 (describing paternalism as the responsibility to "[c]hoose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally"); JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 399, § 170 (Peter Laslett ed., 1960) ("*Paternal or Parental Power* is nothing but that, which Parents have over their Children, to govern them for the Childrens [sic] good, till they come to the use of Reason . . . .").

16. The Supreme Court has declined to provide a general theory of children's rights on at least two occasions. *See* Ginsberg v. New York, 390 U.S. 629, 636 (1968) ("We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the state."); *In re* Gault, 387 U.S. 1, 13 (1967) ("We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state.").

17. Parham v. J.R., 442 U.S. 601, 602 (1979).

18. *Ginsberg*, 390 U.S. at 642 n.10.

19. *Id.* at 649–50 (Stewart, J., concurring).

20. Bellotti v. Baird, 443 U.S. 622, 636 (1979) (plurality opinion).

nors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[21] Accordingly, "the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice."[22] And in striking down the death penalty for individuals who were minors at the time of their crime, the Supreme Court observed:

> [A]s any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.[23]

While the traditional choice thesis is self-evident with regard to younger children, the Supreme Court has been explicit that it applies to older children as well. The Court asserted in *Parham v. J.R.* that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions."[24] In death penalty cases involving older children, the Court has recognized "[minors'] inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives."[25] In the Court's view, even these older children are not yet "fully rational, choosing agent[s]."[26] The dependency thesis is thus reflected in a long line of cases questioning the autonomous decisionmaking power of children. Again and again, the Court has emphasized that, in Justice Stewart's words, the child "is not possessed of that full capacity for individual choice."[27]

The Court has on several occasions identified with greater specificity the two psychological features that render children's choices unreliable for purposes of constitutional law: vulnera-

21. *Id.* at 635.

22. *Id.* at 637 n.15.

23. Roper v. Simmons, 543 U.S. 551, 569 (2005) (internal citations omitted).

24. Parham v. J.R., 442 U.S. 584, 603 (1979); *see also* Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) ("[A]dolescents as a class are less mature and responsible than adults."); Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982) ("[A]dolescents may have less capacity to control their conduct and to think in long-range terms than adults." (internal citations omitted)); *id.* at 116 ("Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults." (quoting *Bellotti*, 443 U.S. at 635)).

25. *Thompson*, 487 U.S. at 825 n.23.

26. *Id.*

27. Ginsberg v. New York, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring).

bility to outside coercion and an innately impaired capacity for rational decisionmaking. In *Roper v. Simmons,* a majority of the Court, in an opinion by Justice Kennedy, stressed the two factors of vulnerability to coercion and impaired rational decisionmaking skills.[28] Similarly, in *Bellotti*, a plurality of the Court, in an opinion by Justice Powell, reiterated that children exhibit a vulnerability to outside influences and an "inability to make critical decisions in an informed, mature manner."[29] The Court in *Thompson v. Oklahoma* came to the same conclusion.[30]

The fact that children are more vulnerable to psychological persuasion than adults often surfaces in cases involving children's coerced confessions or speech directed at children.[31] In the Supreme Court's view, a child under interrogation or in school is positioned like "someone in a captive audience."[32] In contrast, the point that children have impaired rational choice—that is, that they lack innate decisionmaking skills—is

28. The Court added a third factor in the particular context of the death penalty: "[T]he character of a juvenile is not as well formed as that of an adult." *Roper*, 543 U.S. at 570 (citing generally E. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).

29. *Bellotti*, 443 U.S. at 634. Here again, the plurality identified a third factor specific to the particular context of parental consent laws: "the importance of the parental role in child rearing." *Id.*

30. *Thompson*, 487 U.S. at 816. Extensively citing developmental research in the area of adolescent decisionmaking, the Court in *Thompson* emphasized that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* The Court observed that "[t]he difference that separates children from adults for most purposes of the law is children's immature, undeveloped ability to reason in an adultlike manner." *Id.* at 835 n.43 (citing VICTOR STREIB, DEATH PENALTY FOR JUVENILES 184–89 (1987)).

31. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[Youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage."); *Ginsberg*, 390 U.S. at 642 n.10 (citing to materials describing pornography's "potent influence on the developing ego"); Gallegos v. Colorado, 370 U.S. 49, 53–54 (1962) (holding that a fourteen-year-old boy "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions"); Haley v. Ohio, 332 U.S. 596, 601 (1948) (holding that "on the facts of [the] record," a fifteen-year-old had no "freedom of choice"); s*ee also* Fare v. Michael C., 442 U.S. 707, 729 (1979) (Marshall, J., dissenting) (evaluating the potential for coerciveness in the custodial interrogation of a juvenile under investigation).

32. *Ginsberg*, 390 U.S. at 649.

present either explicitly or implicitly in almost all cases involving children's rights.[33] According to the plurality in *Bellotti*, the specific decisionmaking attributes missing in children are "experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[34] That same year, in *Parham*, a unanimous Court repeated that lack of "maturity, experience, and capacity for judgment" is what impairs children's innate capacity for autonomous choice.[35] The Supreme Court's assumption of children's impaired choice is reinforced by the correlative constitutional doctrine of parental rights. In case after case, the Supreme Court has afforded parents the constitutional right "to direct the upbringing and education of children under their control."[36] Indeed, as the Supreme Court has recently observed, "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[37] First applied in a pair of cases from the 1920s, the doctrine of parental rights under the Due Process Clause expresses and reinforces the dependency view of children's rights by establishing parental decisionmaking authority over children.[38] As the Supreme Court observed in *Prince v. Massachusetts,* "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply

33. *See infra* Part I.B.

34. *Bellotti*, 443 U.S. at 635.

35. Parham v. J.R., 442 U.S. 584, 602 (1979).

36. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); s*ee also* Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) (noting that a natural parent's right to care for his or her children is an "interest far more precious than any property right"); *Parham*, 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (identifying that the private "interest of a parent in the companionship, care, custody, and management of his or her children" warrants deference); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (recognizing a "parent's claim to authority in her own household and in the rearing of her children"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (including within an adult's due process liberties the right to "establish a home and bring up children").

37. Troxel v. Granville, 530 U.S. 57, 65 (2000).

38. *Pierce*, 268 U.S. at 534; *Meyer*, 262 U.S. at 401.

nor hinder."[39] In *Parham*, the Court further emphasized that parental authority derives from a presumption that parents possess what children lack in decisionmaking skills.[40] As the plurality in *Thompson* expressed it: "[P]aternalism bears a beneficent face, paternalism in the sense of a caring, nurturing parent making decisions on behalf of a child who is not quite ready to take on the fully rational and considered task of shaping his or her own life."[41]

Of course, parental rights are not absolute. The state has the *parens patriae* authority to intercede in the lives of children in order to protect their safety, to promote their education, or otherwise to further their best interests.[42] The Court in *Prince* explained: "Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."[43] The state power to intervene as a benevolent parent in the life of the child has given rise to laws establishing the modern juvenile court system and the system of universal public education.[44] But state *parens patriae* authority does not lead to children having rights of their own. As the Supreme Court observed in *In re Gault*, "[t]he Latin phrase proved to be a great help to those who sought to

39. *Prince*, 321 U.S. at 166; s*ee also* Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.").

40. *Parham*, 442 U.S. at 602 ("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.").

41. Thompson v. Oklahoma, 487 U.S. 815, 825 n.23 (1988).

42. *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982) (noting that the state has "a *parens patriae* interest in preserving and promoting the welfare of the child").

43. *Prince*, 321 U.S. at 166 (citations omitted). As the Court stated, "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." *Id.* at 170.

44. *See* Schall v. Martin, 467 U.S. 253, 263 (1984) (observing that a state's *parens patriae* interest in the welfare of a child makes "juvenile proceeding[s] fundamentally different from an adult criminal trial"); Kent v. U.S., 383 U.S. 541, 554–55 (1966) (noting that "[t]he State is parens patriae rather than prosecuting attorney or judge" in the juvenile justice system); Hafen, *supra* note 3, at 613 ("The juvenile court movement and the expansion of compulsory public education are obvious examples of the way American democratization has reflected the views of Locke and Mill about protecting and developing the capacities of the young.").

rationalize the exclusion of juveniles from the constitutional scheme."[45] In other words, parental rights and state *parens patriae* authority together operate to reinforce and justify the paternalistic treatment of children as less than full constitutional rights-holders.

2. Children's Socialization

Under choice theory, adult individuals are presumed to have the capacity for autonomous choice absent mental incapacity or incompetence.[46] But the presumption of autonomous choice has not blinded commentators and courts to the fact that this capacity is an acquired skill.[47] Theorists have long acknowledged the obvious fact that the capacity for autonomous choice develops over time.[48] Children are born into a state of physical and emotional dependence, and—if all goes well—slowly acquire the skills for leading an independent, autonomous life.[49] Moreover, this developmental process has traditionally been understood as one of learning rather than innate psychological growth.[50] As reflected in the rise of universal pub-

45. *In re* Gault, 387 U.S. 1, 16 (1967).

46. *See supra* note 3 and accompanying text.

47. *See Prince*, 321 U.S. at 165 ("It is 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."); ACKERMAN, *supra* note 8, at 139–67 (discussing the importance of a liberal education); JEFFREY BLUSTEIN, PARENTS AND CHILDREN: THE ETHICS OF THE FAMILY 131 (1982) ("[A]utonomy must be developed and fostered by particular psychological and educational circumstances from very early on in childhood."); JEAN BETHKE ELSHTAIN, *The Family and Civic Life*, *in* POWER TRIPS AND OTHER JOURNEYS: ESSAYS IN FEMINISM AS CIVIC DISCOURSE 45, 49 (1990) ("Liberal and democratic citizenship required the creation of persons with qualities of mind and spirit necessary for civic participation. This creation of citizens was seen as neither simple nor automatic by early liberal theorists . . . .").

48. *See supra* note 47.

49. *See id.*

50. John Locke, for example, posited that children's inchoate powers of reason must be nurtured. *See* LOCKE, *supra* note 15. John Stuart Mill also emphasized education as a central component of a liberal upbringing. MILL, *supra* note 12, at 116–17 ("[I]t is one of the most sacred duties of the parents . . . to give to that being an education fitting him to perform his part well in life towards others and towards himself."). John Dewey and other progressive reformers emphasized the importance of education to the developing needs of children and the long-term health of the democratic polity. *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 440 (2006) (discussing reformers' commitment as "part of a broader progressive-era movement for democracy that rested on a belief in the importance of educating children for democratic citizenship"); *see also* JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL

lic education in the early twentieth century, the idea that all children can and must acquire the psychological skills for participation in the broader liberal society through learning has been widely accepted.[51]

Modern constitutional law impliedly draws on this long-standing tradition of thinking about what needs to happen for children to become autonomous, rights-bearing individuals. As already discussed, "[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."[52] But in addition to their role as surrogate decisionmakers, parents also serve an essential socializing function.[53] The constitutional doctrine of parental rights reflects in part the view that an upbringing for autonomous choice requires, in the first instance, a loving home in which parents have the authority and duty to foster values in their children.[54] In *Pierce v. Society of Sisters*, for example, the Court

DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920, at 377 (1986); ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 90 (1983).

51. *See* Hafen, *supra* note 3, at 613 ("The juvenile court movement and the expansion of compulsory public education are obvious examples of the way American democratization has reflected the views of Locke and Mill about protecting and developing the capacities of the young.").

52. Parham v. J.R., 442 U.S. 584, 602 (1979).

53. *See* ACKERMAN, *supra* note 8, at 140–43 (discussing the role of the family in preparing the child cognitively, linguistically, and behaviorally for participation in the collective liberal state); AMY GUTMANN, DEMOCRATIC EDUCATION 50 (1987) ("Children are first educated by their parents, and so must they continue to be as long as raising children constitutes one of our most valued personal liberties."); RAWLS, *supra* note 8, at 463–67 (describing the parental role in children's moral development); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 477 (1983) ("[T]he family in a democratic society not only provides emotional companionship, but is also a principal source of moral and civic duty.").

54. *See* ACKERMAN, *supra* note 8, at 141 ("[I]t will be enough to assume that the infant needs *some* coherence if he is ever to find himself in the ranks of a liberal citizenry. Once this assumption is allowed, a liberal theory of the family appears . . . ."); BLUSTEIN, *supra* note 47, at 131 ("[I]t is to be expected that parents will impart their own particular conceptions of the good to their children . . . ."); Alstott, *supra* note 8, at 19 ("[F]amilies uniquely perform two principal functions[: t]hey foster emotional and intellectual development via continuity of care, and they foster moral development and cultural identity by living a committed way of life . . . ."); John H. Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 821 (1978) (noting that the family instills in children "the sense of belonging and having roots in a distinct tradition"); Hafen, *supra* note 53, at 477 ("American society has 'relied to a considerable extent on the family

noted 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."[55] In *Wisconsin v. Yoder*, the Court elaborated that these "'additional obligations' . . . include the inculcation of moral standards, religious beliefs, and elements of good citizenship."[56] More recently, a plurality of the Court stated in *Bellotti* that "the guiding role of parents," that is, the "affirmative process of teaching, guiding, and inspiring by precept and example[,] is essential to the growth of young people into mature, socially responsible citizens."[57] And in *Moore v. City of East Cleveland,* the Court found that "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[58] The doctrine of family privacy reflects in part the well-accepted view that parental socialization encompasses initiation into a particular way of life.[59]

not only to nurture the young but also to instill the habits required for citizenship in a self-governing community [such as caring for others and moderating self-interest].'" (quoting W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 222 (1976))).

55. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

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

57. Bellotti v. Baird, 443 U.S. 622, 637–38 (1979) (plurality opinion).

58. Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977) (plurality opinion).

59. *Cf.* Roberts v. U.S. Jaycees, 468 U.S. 609, 618–19 (1984) ("[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State."). While some communitarian critics criticize liberal thinkers for promoting an atomistic conception of the unencumbered self, *see* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 30 (American ed., Univ. of Notre Dame Press 1981) (observing that the self is more than merely the social roles that it inherits); Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 86 (1984) (presenting the foundations of the unencumbered self "understood as prior to and independent of purposes and ends"), most liberal theorists would acknowledge that children acquire a first set of values from their families of origin. *See* ACKERMAN, *supra* note 8, at 141 ("While the degree of cultural coherence required is a matter of great dispute, it will be enough to assume that the infant needs *some* coherence if he is ever to find himself in the ranks of a liberal citizenry."); ARCHARD, RIGHTS AND CHILDHOOD, *supra* note 3, at 82 (discussing how children's capacity for self-determination "starts from a self"); BLUSTEIN, *supra* note 47, at 136 ("Autonomy, the ability to critically reflect on oneself and the freedom to shape one's life in accordance with changing desires and aspirations, cannot exist in a vacuum; it presupposes some relatively settled beliefs, desires, etc., in short a self, to reason from and with."); GUTMANN, *supra* note 53, at 42 (discussing the necessary role of parents, with the state and professional educators, in "cultivating moral character" in children);

The Supreme Court has made clear that broad power to instill moral values in children does not belong to the state.[60] Parental rights operate as an important limitation on the state's power to mold children through the indoctrination of morals.[61] The Court's early decisions in the area of public education provide the best example. As the Supreme Court famously stated in *Pierce*, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children."[62] Two years earlier in *Meyer v. Nebraska*, the Supreme Court first recognized parents' right to control the upbringing of their children free from governmental control.[63] In so doing, the Court emphasized the danger posed when a state attempts to "foster a homogenous people."[64] Concern about the state's unbridled power to standardize children has been present in Supreme Court cases involving parental challenges to the limits of public education for almost a century.

As children develop, schools assume an increasingly critical role in the development of children's decisionmaking skills.[65] As discussed above, Supreme Court decisions recognize

MACEDO, *supra* note 12, at 220 ("In making difficult choices we draw upon an already existing sense of what is fundamentally important, and further articulate and shape that sense.").

60. *See Bellotti*, 443 U.S. at 638 ("[A]ffirmative sponsorship of particular ethical, religious, or political 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."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

61. *Cf. supra* note 36 and accompanying text.

62. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

63. Meyer v. Nebraska, 262 U.S. 390 (1923).

64. *Id.* at 402; *see also* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 785 (1989) ("The spectre of an insidious, thought-numbing standardization underlay the *Barnette* decision . . . .").

65. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[E]ducation of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials . . . ."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (identifying the role and purpose of public schools as preparing students for citizenship), *modified on other grounds by* Morse v. Frederick, 551 U.S. 393 (2007); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 839 (2007) ("[A]lthough families are major sites for socializing children, states also play a socializing role . . . ."). The state's socializing authority is not restricted to the realm of education. The first Supreme Court decision upholding state *parens patriae* power involved state regulation of child labor. *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (acknowledging the state's power to promote children's "growth into

a parental duty to make decisions on their children's behalf until the age when the children can choose for themselves.[66] In contrast, schools are given the primary task of cultivating in children the cognitive skills of choice[67] and a studied perspective on their way of life through exposure to "the marketplace of ideas."[68] As presented in Supreme Court decisions and commentary, critical learning and exposure to ideas are the main features of the educational enterprise.[69] Schools are expected to foster children's critical thinking and in doing so to provide an objective perspective from which the child may assess his or her received moral framework.[70] Traditional choice theory as articulated by the Supreme Court and commentators anticipates that parents will first socialize children into a particular way of life, and then schools will give children the cognitive tools and alternative views they will need in order to choose whether to accept or reject their parents' way of life as their own.[71]

free and independent well-developed men and citizens"). Similarly, in *Ginsberg*, the Court upheld the power of the state to prohibit the sale of pornography to minors on the ground that reading this material "may conceivably be damaging" to children's development. 390 U.S. 629, 642 n.10 (1968) (quoting Willard M. Gaylin, *The Prickly Problems of Pornography*, 77 YALE L.J. 579, 592–93 (1968)).

66. *See supra* note 40 and accompanying text.

67. *See* Lemon v. Kurtzman, 403 U.S. 602, 655 (1971) (Brennan, J., concurring) ("The State's interest in secular education may be defined broadly as an interest in ensuring that all children within its boundaries acquire a minimum level of competency in certain skills, such as reading, writing, and arithmetic, as well as a minimum amount of information and knowledge in certain subjects such as history, geography, science, literature, and law."). In this regard, the meaning of the marketplace of ideas metaphor in school is slightly different from its meaning in other spheres of public life. *See* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2363 (2000) (describing the truth-seeking function of the marketplace of ideas).

68. Bd. of Educ. v. Pico, 457 U.S. 853, 867–70 (1982); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969).

69. *See* Alstott, *supra* note 8, at 7–8 ("A liberal education ideally would prepare children to choose among diverse visions of the good; such an education should, among other things, foster the capacity to reason and provide cultural opportunities that differ from the child's family background.").

70. *See id.*

71. *See, e.g.*, *Pico*, 457 U.S. at 868 ("[A]ccess [to ideas] prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."); *Tinker*, 393 U.S. at 512 ("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.'" (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967))); ACKERMAN, *supra* note 8, at 162 ("[A] liberal education requires toleration—indeed, encouragement—of

The traditional choice thesis is not negated by Supreme Court decisions that take a broad view of the school's role in inculcating democratic values in children.[72] In a series of cases, the Court has taken the position that public schools, while they cannot be "enclaves of totalitarianism,"[73] nevertheless do have the authority and duty to instill certain civic values such as tolerance for opposing viewpoints and civility.[74] The Court has

. . . doubts. It is only by questioning the seeming certainties of his early moral environment that the child can begin to glimpse the larger world of value that may be his for the asking."); BLUSTEIN, *supra* note 47, at 132 (commenting that children must develop "the psychological strengths and reflective and critical abilities that enable them to reject [parental] attitudes and standards if they so choose"); GUTMANN, *supra* note 53, at 30 ("[A state] makes choice meaningful by equipping children with the intellectual skills necessary to evaluate ways of life different from that of their parents."); 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, 648 (1993) ("[Liberalism] assumes and values the ability of individuals to rationally, objectively, and critically determine their attachments to competing ways of life by distancing themselves from any particular worldview.").

72. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 77 (1979). For a review of some of the "voluminous" literature on "[t]he fundamental conflict in public schools between the inculcation of values and a student marketplace of ideas," William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 506 n.4 (1989), see *id. passim*. *See also* Mark G. Yudof, Tinker *Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 366 (1995) (stating that public schools are increasingly "devoted to the socialization of the young and to the inculcation of values and skills").

73. *Tinker*, 393 U.S. at 511.

74. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986), *modified on other grounds by* Morse v. Frederick, 551 U.S. 393 (2007) (arguing that public schools "'must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation'" (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968))); *id.* ("These fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular."); New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (Stevens, J., concurring in part and dissenting in part) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."); *Pico*, 457 U.S. at 864 ("[T]here is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."); *id.* at 880 (Blackmun, J., concurring) ("[A]llowing a school board to [suppress ideas intentionally] hardly teaches children to respect the diversity of ideas that is fundamental to the American system."); *Ambach*, 441 U.S. at 86 n.6 (contending that the purpose of public education is the "inculcation of fundamental values . . . necessary to the maintenance of a democratic political system"). Schools also have the latitude to impose discipline. *See Tinker*, 393 U.S. at 508 ("The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.").

"acknowledged the importance of the public schools 'in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests.'"[75] Thus, beginning with *Tinker v. Des Moines Independent Community School District*,[76] the Supreme Court has sought to balance the school's role in providing a marketplace of ideas against the school's mission to discipline students in the art of civil discourse. As Justice Black argued in his dissent in *Tinker*, "School discipline, like parental discipline, is an integral part of training our children to be good citizens—to be better citizens."[77]

Nevertheless, although schools have latitude to teach basic democratic values, most Supreme Court cases addressing the matter also, implicitly, reinforce the prevailing choice model's emphasis on schools as a place of cognitive learning and exposure to ideas. The Court focuses on tolerance and civility as among the values inculcated by schools; commentators, too, stress tolerance, respect, and self-control as the central values of a democratic education.[78] But the values of tolerance, civility,

75. *Pico*, 457 U.S. at 876 (quoting *Ambach*, 441 U.S. at 76); *see also id.* ("Because of the essential socializing function of schools, local education officials may attempt to promote civic virtues, and to awaken the child to cultural values." (internal citations omitted)).

76. 393 U.S. 503.

77. *Tinker*, 393 U.S. at 524–25 (Black, J., dissenting); *see also* Yudof, *supra* note 72, at 368 (commenting that, in Justice Black's view, "the whole school enterprise is an instrument of socialization, an instrument for teaching about discipline and disciplinary rules, and about the authority structure within that school").

78. Many scholars have described the "liberal values" in similar terms. *See* MACEDO, *supra* note 12, at 251 (defining the "ideal liberal personality" as characterized by "reflective self-awareness, active self-control, a willingness to engage in self-criticism, an openness to change, and critical support for the public morality of liberal justice"); *see also* WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 221–24, 227 (1991) (courage, law abidingness, loyalty, independence, toleration, capacity to discern and respect the rights of others, and willingness to engage in public discourse); GUTMANN, *supra* note 53, at 44 (honesty, religious toleration, and mutual respect for persons); Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 357–59, 366–67, 376–77 (1994) ("public reasonableness," "political participation," and "sense of common identity"); Judith N. Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND THE MORAL LIFE 21, 33 (Nancy L. Rosenblum ed., 1989) ("habits of patience, self-restraint, respect for the claims of others, and caution"); Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 275 (1983) (dignity, respect, and autonomy). *But see* MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 12 (1995) (empathy and imagina-

and respect are all closely associated with reasoned thinking. Tolerance and civility imply a rational, objective perspective on the world; they are the products of an intellectually controlled, rather than impassioned, irrational, or even faith-based, state of mind. Both tolerance and civility involve emotional composure and a disciplined respect for others' points of view. And exposure to diverse points of views is intended, at least in part, to foster the kind of critical reflection about values associated with cognitive rather than noncognitive thinking.

Obviously, not all the learning that goes on in school is value neutral or cognitive in nature. Although value neutrality is the constitutional standard for judging the activities of school officials,[79] schools clearly instill values other than tolerance and civility, some going to the heart of ideas about moral right and wrong.[80] This value immersion is an inevitable byproduct of an educational system. But apart from instilling patriotic feelings,[81] moral instruction has not been considered a legitimate mission of the public schools.[82] The vision of the educa-

tion); Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503, 514–22 (2002) (empathy, creativity, and imagination).

79. *See Pico*, 457 U.S. at 871 ("If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed . . . then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*." (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943))); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963) (requiring that the government maintain neutrality with respect to religion in accordance with the First Amendment); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (holding that there is "no general power of the State to standardize its children").

80. *See, e.g.*, Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1068–69 (6th Cir. 1987); *see also* Stolzenberg, *supra* note 71, at 644–46. Roger Levesque has observed that "lower courts' decisions, with some exceptions, reflect the ideology that school officials have the authority to inculcate the shared values of their local communities and of the larger society." Roger J.R. Levesque, *Educating American Youth: Lessons From Children's Human Rights Law*, 27 J.L. & EDUC. 173, 185 (1998). These cases tend to arise in the context of sex education or family life education programs. *Id.* at 186 n.79.

81. As early as 1943, the Court recognized the state's interest in promoting patriotic sentiments through rituals such as the Pledge of Allegiance. *See Barnette*, 319 U.S. at 640 ("National unity as an end which officials may foster by persuasion and example is not in question."); *see also Ambach*, 441 U.S. at 78 n.8 ("Flag and other patriotic exercises also are prescribed [in school], as loyalty is a characteristic of citizenship essential to the preservation of a country.").

82. Several Supreme Court cases have emphasized the importance of teachers as role models for children. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("The process of educating our youth for citi-

tional socialization process contained in the Supreme Court's First Amendment cases largely reinforces the view of school as a center of critical (i.e., cognitive) learning.[83]

Thus the prevailing choice theory rests on a model of children's socialization that associates the parental role with the inculcation of values and the school's role with the cultivation of critical-thinking skills. This division of labor between parents and school has never been absolute.[84] Moreover, parents have the choice to homeschool their children or to send them to religious school.[85] As the Court stated in *Everson v. Board of*

zenship 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."), *modified on other grounds by* Morse v. Frederick, 551 U.S. 393 (2007); *Ambach*, 441 U.S. at 78–79 ("[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.").

83. The distinction between critical thinking and moral indoctrination is challenged by the fundamentalist critique of secular humanism in the public schools. *See* Stolzenberg, *supra* note 71, at 651.

84. The division of labor between families and schools is a vestige of a gendered philosophy of separate spheres that dates to the late nineteenth century. According to this philosophy, mothers worked in the domestic sphere to provide children with an emotionally nurturing environment, while fathers worked outside the home to support children financially and to provide them with access to the broader public sphere of market work and politics. *See, e.g.*, JEAN ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT 125–45 (1981); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504–13 (1983); Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, *in* FEMINISM AND EQUALITY 103 (Anne Phillips ed., 1987). While the prevailing choice model of children's upbringing no longer insists on a gendered split between public and private, its emphasis on the family as the place where private values are nurtured and on schools as the place where the public skills of critical thinking are taught retains elements of this gendered public-private divide. *See* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989); Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955 (1993).

85. As Bruce Ackerman has noted, language acquisition is one way parents socialize children in a particular way of life. *See* ACKERMAN, *supra* note 8, at 146–47; *see also* ARCHARD, RIGHTS AND CHILDHOOD, *supra* note 3, at 108 (discussing the importance of cognitive development in children); MACEDO, *supra* note 12, at 272 (arguing that children learn "something about due process, and fairness, and respect for others" from families). Republican models of children's upbringing envisioned families, and particularly mothers, as the primary source of civic education. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 8 (1985); LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 229 (1997).

Education, "[P]arents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school *if the school meets the secular educational requirements which the state has power to impose*."[86] However, even here the Supreme Court has emphasized that "religious schools pursue two goals, religious instruction and secular education."[87] Thus, while religious schools clearly impart moral values to their students, they are also under an obligation to instill secular skills that, presumably, encompass some elements of critical thinking. In addition, as already discussed, public schools are generally expected to inculcate the basic values of a liberal democratic society, which can go beyond toleration and civility to include "traditional values be they social, moral, or political."[88] Yet despite these important qualifications, the prevailing view of the relationship between families and schools is not generally conceptualized as a continuum of childrearing activity. Instead, the Supreme Court and commentators emphasize the importance of parental moral guidance, on the one hand, and a public education in critical-thinking skills on the other.

In summary, constitutional law denies children many, if not most, adult rights on the ground that they lack autonomous decisionmaking powers. But the prevailing choice theory of children's rights not only treats rights as incompatible with children's lack of autonomous decisionmaking capacity, but also views them as affirmatively antithetical to their proper socialization at home and in school. As a plurality of the Court stated in *Bellotti*, children's autonomy rights potentially threaten "the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."[89] Children's autonomy rights in school potentially undermine development of critical-thinking skills by limiting school authorities' discipline in the classroom.[90] Children's right to

86. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (emphasis added) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 524 (1925)).

87. Bd. of Educ. v. Allen, 392 U.S. 236, 245 (1968).

88. Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982) (internal citations omitted); s*ee also* Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675, 681 (1986) (averring schools' responsibility to instill certain fundamental values in students), *modified on other grounds by* Morse v. Frederick, 551 U.S. 393 (2007).

89. Bellotti v. Baird, 443 U.S. 622, 638–39 (1979) (plurality opinion).

90. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that student speech may be suppressed only where such

make decisions in the family against parental wishes potentially undermines parental discipline and guidance.[91] Choice theory thus views children's autonomy rights with deep skepticism. From the perspective of choice theory, children's rights pose a threat to the parental and state authority necessary for the familial and educational socialization of children into autonomous adults and citizens.

B. CHILDREN'S "AUTONOMY" RIGHTS

The view that children's lack of autonomous decisionmaking skills excludes them from the class of constitutional rights-holders still maintains a strong hold on the constitutional imagination. But even a cursory examination of the constitutional decisions relating to children reveals that, over the past half century, this idea has slowly given way to a number of rights for children. In the 1960s and 1970s, children's liberationists argued that children should enjoy the full range of rights accorded to adults.[92] Although children were never fully "liberated," the Supreme Court began to recognize a limited number of rights for children in a series of cases primarily involving schools, reproductive choice, and juvenile justice.[93] On the surface, these children's rights cases suggest that older children will be treated as adults in certain circumstances.[94] Viewed in this way, these autonomy rights for older adolescents do not

speech will "materially and substantially disrupt the work and discipline of the school").

91. *See Bellotti*, 443 U.S. at 638–39 ("[T]he guiding role of parents . . . is essential to the growth of young people into mature, socially responsible citizens.").

92. *See* HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN *passim* (1980); RICHARD EVANS FARSON, BIRTHRIGHTS 191–227 (1974); SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 76–104 (1993); Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 344 (1972). *See generally* Minow, *What Ever Happened to Children's Rights?*, *supra* note 3, at 270 ("[S]ome child liberationists in the early 1970s viewed children as the next group entitled, like blacks and women, to a civil rights revolution.").

93. *See generally, e.g.*, *Bellotti*, 443 U.S. 622 (children's rights in public schools); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (reproductive choice); *In re* Gault, 387 U.S. 1 (1967) (juvenile justice).

94. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 404–05 (2007) (noting that high school students' speech "in a public forum outside the school context . . . would have been protected"); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 656 (1995) (upholding a child's right to constitutional protection from unlawful search and seizure); *Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

substantially revise the traditional choice thesis so much as renegotiate the time when an individual will be treated as an adult for purposes of the specific right.

Upon closer inspection, however, these autonomy rights cases turn out to be much more complicated. Frequently these decisions often rest on traditional assumptions about children's immature decisionmaking skills, assumptions patently at odds with choice theory's view of rights as premised on the right-holder's autonomy. Although the Supreme Court adopts the rhetoric of choice theory in many cases, the reasoning often departs from choice theory's autonomy-based view of rights. These children's rights cases point to the limitation of choice theory as a general theory of children's rights in constitutional law, and thus open the door to conceiving of children's rights more broadly in socializing terms.

One of the first Supreme Court cases to recognize children's rights was *West Virginia State Board of Education v. Barnette*.[95] In that case, the Court held that the state could not compel school-aged children to recite the Pledge of Allegiance.[96] Few decisions upholding children's rights come as close as *Barnette* did to holding that children's rights are "co-extensive with those of adults."[97] The Court did not indicate that it was interpreting the First Amendment's Free Exercise Clause in any way differently than it would have had the school children been adults. To the contrary, the Court went out of its way to emphasize that both parent and child "stand on a right of self-determination in matters that touch individual opinion and personal attitude."[98] Nowhere did the Court inquire whether the children were of a sufficient age to have independent beliefs and religious views apart from their parents.[99] Indeed, the case is best known for its "fixed star" passage which still stands as

95. 319 U.S. 624 (1943). *Barnette* did not explicitly recognize children's First Amendment rights, but a year later in *Prince* the Supreme Court referred to *Barnette* as recognizing "the rights of children to exercise their religion." Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

96. *Barnette*, 319 U.S. at 642 ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

97. *Tinker*, 393 U.S. at 515 (Stewart, J., concurring); *see also infra* text accompanying note 140.

98. 319 U.S. at 631.

99. *Cf.* Robert A. Burt, *Developing Constitutional Rights of, in, and for Children*, 39 LAW & CONTEMP. PROBS. 118, 124 (1975).

the clearest expression of First Amendment rights held by all persons.[100]

One appears to be on firm ground, then, in identifying *Barnette* as one of the Court's first cases recognizing children's independent autonomy rights. However, this characterization must be qualified. The school board in *Barnette* had argued strenuously that the state must be able to fulfill its educational mission to foster a unified nation, which was not an insignificant concern in 1943. The Court responded that children's liberty rather than their compelled participation best furthers children's growth into democratic citizens: "That 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 and teach youth to discount important principles of our government as mere platitudes."[101] Significantly, the Court concluded that children's First Amendment rights were the best way to instill the values of democracy in developing children. *Barnette* thus introduces the idea that children's constitutional rights will be protected in part on the ground that these rights will promote, rather than impede, children's democratic socialization.

Tinker expresses a similar concern with children's socialization.[102] The *Tinker* case is best known for its express holding that First Amendment rights are available to students: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[103] The students in *Tinker* were suspended for wearing black armbands in protest of the Vietnam War.[104] Like *Barnette*, *Tinker* is in part a tribute to the intrinsic importance of children's autonomy rights:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to com-

100. *Barnett*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

101. *Id.* at 638–39.

102. *Tinker*, 393 U.S. 503.

103. *Id.* at 506.

104. *Id.* at 504.

> municate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[105]

Justice Stewart confirmed the broad scope of the autonomy rights authorized by the majority. As he argued in his concurrence, the majority promoted the idea that "school discipline aside, the First Amendment rights of children are co-extensive with those of adults."[106]

Yet despite its strong language upholding children's autonomy rights in school, the *Tinker* Court justified its holding in part on the ground that recognizing children's free speech rights in school would help prepare them for adult citizenship.[107] The Court turned for support to the "marketplace of ideas" metaphor: "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.'"[108] The "marketplace of ideas"—that traditional sphere of adult self-expression and collective truth seeking—is treated here as a mechanism for instilling the skills of democratic life in developing children.[109] In *Tinker*, as in *Barnette*, the Court defined the right at stake in part as an autonomy right and in part as a right directed to children's political socialization.

Subsequent Supreme Court cases in the school context have addressed the socializing role of children's First Amendment rights as well. In *Board of Education v. Pico*, for example, the plurality held that students' First Amendment rights prohibit school boards from removing books from the school library for the purpose of restricting access to undesirable ideas.[110] This doctrine affirms that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom."[111] In *Pico*, as in *Barnette* and *Tinker*, the Court uses

105. *Id.* at 511.

106. *Id.* at 514–15 (Stewart, J., concurring).

107. *See id.* at 512 (plurality opinion).

108. *Id.* (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

109. As Robert Post has explained, the "marketplace of ideas" metaphor, in theory, furthers the truth-seeking purpose of the First Amendment. *See* Post, *supra* note 67, at 2363. Others have emphasized the autonomy-enhancing purpose of the First Amendment. *See, e.g.*, THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

110. Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982).

111. *Id.* at 870 (quoting *Keyishian*, 385 U.S. at 603).

language affirming that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[112] Included among these rights, the plurality held, is the First Amendment right "to receive information and ideas."[113] But also as in *Tinker*, the plurality went on to describe how access to ideas not only makes it possible for students to exercise their free speech rights "in a meaningful manner,"[114] but it also "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[115] The right of access to ideas in this case is understood to serve the dual ends of preserving children's individual freedom of expression and of fostering the development of their minds as future autonomous adults and citizens.

The conception of rights as serving a socializing function—for example, that the right of free speech is directed to developing children's capacities rather than an entitlement which protects an already-existing capacity—reflects the Court's deep-seated ambivalence over the idea of children's autonomy. Children's rights cases in the First Amendment context capture children's unique developmental status as both semi-autonomous individuals with some capacity for autonomous expression and as developing individuals and citizens. Certainly these cases are at odds with choice theory's traditional view of rights as emancipating children from the socialization process. To the extent that the rights recognized in *Barnette*, *Tinker*, and *Pico* are understood to further the socialization of children, these cases refute choice theory's insistence on the mature decisionmaking capacity of the right-holder.

Children's rights cases in the area of juvenile justice also fail to fit the traditional choice notion of autonomy rights. The juvenile justice system has roots in the child-saving movement of the early twentieth century.[116] The denial of constitutional rights in this system rested on the idea that the state was acting in its capacity as *parens patriae* taking care of dependent

112. *Id.* at 865 (quoting *Tinker*, 393 U.S. at 506).

113. *Id.* at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

114. *Id.* at 868.

115. *Id.*; *see also id.* ("[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." (quoting *Keyishian*, 385 U.S. at 603)).

116. *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 177–78 (1969); ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 4 (1978).

children unable to make decisions for themselves.[117] The modern recognition of children's procedural rights in the juvenile justice context might therefore be taken to reflect an affirmation of children's autonomy interests.[118] Yet, to the contrary, many of these cases reveal special solicitude on the part of the Court for children's immature decisionmaking capacities.

The Supreme Court's first case involving the criminal prosecution of a minor in adult court was *Powell v. Alabama*,[119] although the defendants' ages were not actually known to the Court.[120] In *Powell*, the African American defendants had been convicted of raping two white girls, and were sentenced to death. The Court held that the defendants' right to counsel was denied in violation of the Due Process Clause of the Fourteenth Amendment. Nowhere in the opinion does the Court suggest that the Due Process Clause might not apply because the defendants were "youthful," which suggests an assumption that procedural protections applied to children in criminal court in the same way they applied to adults. Nevertheless, while the decision might appear to be a straightforward application of adult rights to children, the Court's reasoning emphasizes their youthfulness as a factor in finding that "the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process."[121] The scope of the rights was defined in part by reference to the immaturity of the defendants.

Haley v. Ohio was the Court's second case involving children prosecuted in adult court.[122] *Haley* involved a fifteen-year-old African American boy accused of murder; at issue in the case was the voluntariness of the child's murder confession un-

117. *See, e.g.*, Schall v. Martin, 467 U.S. 253, 265 (1984) ("Children, by definition, are not assumed to have the capacity to take care of themselves."); McKeiver v. Pennsylvania, 403 U.S. 528, 551–52 (1971) (White, J., concurring) (rejecting the minor's due process right to trial by jury in a delinquency proceeding and concluding that "[r]eprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control").

118. *See, e.g.*, *In re* Winship, 397 U.S. 358, 365 (1970) ("The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.").

119. 287 U.S. 45 (1932).

120. *Id.* at 51–52 ("The record does not disclose their ages, except that one of them was nineteen; but the record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as 'the boys.'").

121. *Id.* at 71.

122. Haley v. Ohio, 332 U.S. 596 (1948).

der the Due Process Clause of the Fourteenth Amendment.[123] *Haley*, like *Powell*, can be read to express the idea that children should be treated as adults for purposes of constitutional law. In some passages, the Supreme Court indicated that children's and adults' due process rights are coextensive: "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."[124] However, as in *Powell,* the Court did take the defendant's age into account when assessing whether the methods of interrogation in this case were coercive.[125] And with respect to whether the defendant had waived his rights, the Court concluded that "a boy of fifteen" did not have "freedom of choice."[126] Thus, the *Haley* Court walked a fine line between treating children the same as adults for purposes of conferring the right, but distinguishing children when applying the right to the particular context of the case.

In re Gault was the Supreme Court's first decision bestowing procedural due process rights on children in the juvenile justice system.[127] *Gault* is the case most cited as marking the start of the children's rights movement in constitutional law. The decision is understood to have ushered in this new period in children's rights with the oft-quoted phrase: "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[128] Supporting this view of *Gault,* later Supreme Court cases have characterized the decision as standing for the proposition that "the child's right is virtually coextensive with that of an adult."[129] After cataloguing at length the ways in which the juvenile court had failed to benefit children, the Court announced that "the essentials of due process and fair treatment" apply to the adjudication of a delinquent child in juvenile

123. *Id.* at 596.

124. *Id.* at 601.

125. *Id.* at 599 ("What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.").

126. *Id.* at 601.

127. *In re* Gault, 387 U.S. 1 (1967).

128. *Id.* at 13.

129. Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion).

court.[130] The Court specifically held that children have a right to notice of the charges being brought against them, a right to counsel, a right to confrontation and cross-examination of witnesses, and a privilege against self-incrimination.[131]

At first glance, *Gault* seems to fit comfortably within the traditional choice theory of rights. The *Gault* Court based its reasoning on the ground that "[t]here is no material difference . . . between adult and juvenile proceedings."[132] Some subsequent cases also hold that the "same considerations" apply to both adult and juvenile proceedings.[133] It is certainly possible to interpret *Gault* and other cases as recognizing children's autonomy interests, particularly because these cases capture the Court's view that the juvenile justice system was no longer operating on the premise of children's innocence, but more like an adult system orientated toward punishment. To this extent, these cases exhibit a movement toward treating children as autonomous agents responsible for their decisions and behavior and entitled to adult procedural protections.

However, upon closer examination, *Gault* also reveals the Court's ambivalent attitude toward children's autonomy. The case is not primarily concerned with the decisionmaking maturity of the child, but rather with the child's vulnerability to state overreaching. The theme of children's *special* vulnerability in the juvenile justice system, and the need for rights to protect children from state overreaching, is implicit through the Court's discussion.[134] The Court noted that "both common observation and expert opinion emphasize that the 'distrust of confessions made in certain situations' . . . is imperative in the case of children from an early age through adolescence."[135] Thus, while children have access to some of the same criminal

130. *In re Gault*, 387 U.S. at 30 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)).

131. *Id.* at 33, 41, 55, 56.

132. *Id.* at 36.

133. *In re* Winship, 397 U.S. 358, 365 (1970) (requiring proof beyond a reasonable doubt in juvenile proceedings); s*ee also* Goss v. Lopez, 419 U.S. 565, 574 (1975) (requiring "fundamentally fair procedures" when the State withdraws rights). Children have access to some but not all criminal procedure rights. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (holding that there is no right to trial by jury in a delinquency proceeding).

134. *See In re Gault*, 387 U.S. at 36 ("The child 'requires the guiding hand of counsel at every step in the proceedings against him.'" (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932))).

135. *Id.* at 48 (quoting 3 JOHN HENRY WIGMORE, EVIDENCE § 822 (3d ed. 1940)).

procedure rights as adults, it is not exclusively on the ground of their enhanced autonomous decisionmaking skills but instead—somewhat paradoxically—their enhanced psychological vulnerability.

Gault stands for the proposition that the Supreme Court will address children's procedural due process rights in the juvenile justice system in light of their special cognitive immaturity as children. The Court in *Bellotti* commented upon the *Gault* line of cases, noting its "concern for the vulnerability of children . . . in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State."[136] What may look like children's autonomy rights—treating children the same as adults for purposes of criminal proceedings—actually has only a passing surface resemblance. *Powell*, *Haley*, and *Gault* all turn on children's differences—their special status as children with impaired decisionmaking skills. This fact is evident in the Court's discussion of the waiver of these constitutional rights. The *Haley* Court had concluded that the child had no "freedom of choice" and therefore any asserted waiver was invalid.[137] In *Gault*, although the Court refers to "a waiver of the right to counsel which [the mother] and her juvenile son had," the Court only discusses the mother's actions in this regard.[138] Nothing suggests the *Gault* Court meant to depart from the decision in *Haley* that children are not, with respect to waiver at least, to be treated as autonomous decisionmaking adults.

Cases addressing children's procedural due process rights in contexts other than the criminal justice system reveal a similar concern with children's immature decisionmaking skills. In *Goss v. Lopez*, for example, the Court held that children have a right to a hearing in connection with being suspended from school.[139] Citing *Barnette* and *Tinker*, the Court used broad language suggesting that children's rights are coextensive with those of adults.[140] The Court also assumed that children are capable of participating in an informal hearing in a mature manner.[141] However, the Court stopped short of granting chil-

136. Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion).

137. Haley v. Ohio, 332 U.S. 596, 601 (1948).

138. *In re Gault*, 387 U.S. at 42.

139. Goss v. Lopez, 419 U.S. 565, 582 (1975).

140. *Id.* at 574.

141. *See id.* at 582 (noting that the accused student must be given an opportunity to explain).

dren anything close to a full adversarial hearing, in part on the ground that doing so might interfere with the "the teaching process."[142] Ultimately *Goss*, like *Tinker* and *Gault* before it, does not endorse the idea that children's rights rest on the full decisionmaking autonomy of older children.[143] To the contrary, these rights derive in part from the recognition of children's immature decisionmaking capacities.

Decisions concerning children's rights in the area of reproductive choice also assume children's impaired choice, although this was not true at the beginning of this line of cases. *Planned Parenthood of Central Missouri v. Danforth* came very close to holding that adolescent girls have the same rights as adults based on their mature decisionmaking capacities.[144] In this case, the Supreme Court held that the state cannot impose a parental consent requirement on minor girls seeking an abortion. Citing *Gault* and *Tinker*, the Court famously confirmed that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[145] The Court did go on to qualify its sweeping statement by noting that "the State has somewhat broader authority to regulate the activities of children than of adults."[146] But the parental consent provision was struck down with very little discussion except that the Court clarified that it was protecting "the right of privacy of the competent minor mature enough to have become pregnant."[147]

With this observation, the *Danforth* Court suggested that girls who engage in sexual activity leading to pregnancy are to be treated the same as adult women for purposes of the decision whether to terminate their pregnancies. Unlike the First Amendment and due process rights discussed above, the privacy right recognized in *Danforth* does emancipate minor girls from the socialization process, in this case from the decisionmaking authority of their parents. Surprisingly, the Court dis-

142. *Id*. at 583.

143. The dissent discusses at length the traditional themes associated with the dependency thesis: that children's due process rights will adversely affect the school's ability to maintain "discipline and good order," and that there are differences between adults and children that the law must recognize. *Id.* at 590–91 (Powell, J., dissenting).

144. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

145. *Id.* at 74.

146. *Id.*

147. *Id.* at 75.

missed the effect of the case on the parental role in raising children. Indeed, it was the parents' decisionmaking that was described as potentially "arbitrary," and the minor's decisionmaking that was construed as potentially a mature, reasonable determination reached in consultation with the physician.[148]

Only one year later, in *Carey v. Population Services International*, a plurality of the Court revised its position on the question of pregnant girls' autonomy.[149] In an opinion by Justice Brennan, the plurality began by describing the issue of children's rights as a "vexing one, perhaps not susceptible of precise answer."[150] Despite this reluctance to define "the totality of the relationship of the juvenile and the state," the plurality enunciated certain principles, most importantly the fact that children possess some rights that must be balanced against state interests in controlling their conduct.[151] Although the plurality recognized the privacy right in the case, it clarified that the test to be applied in cases involving the privacy rights of minors is "less rigorous" than the compelling interest test applied to state restrictions on adult privacy.[152] In a dramatic departure from *Danforth*, the Court now emphasized that the right of privacy protects the interest "'in making certain kinds of important decisions' . . . and the law has generally regarded minors as having a lesser capacity for making important decisions."[153] The theme of children's impaired capacity for choice thus reemerged in this line of reproductive choice cases as well.

Bellotti most dramatically illustrates the constitutional collision between the Court's assumption of children's impaired capacity for choice and the choice theory of rights.[154] This case also offers one of the only Supreme Court opinions to attempt a systematic overview of children's constitutional rights. Here a plurality of the Court identified three reasons "justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental

148. *Id.* at 74.
149. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (plurality opinion).
150. *Id.* at 692.
151. *Id.* (quoting *In re* Gault, 387 U.S. 1, 13 (1967)).
152. *Id.* at 693 n.15.
153. *Id.* (quoting Whalen v. Roe, 429 U.S. 489, 599–600 (1977)).
154. Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion).

role in child rearing."[155] The plurality emphasized "the inability of children to make mature choices" as a central justification for state laws requiring parental consent in the abortion context.[156] In the plurality's words, "That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support."[157] The picture painted here of a "girl of tender years" is a far cry from the mature pregnant minor described in *Danforth*.

The plurality also stressed "the guiding role of parents in the upbringing of their children."[158] In the plurality's view, the deference accorded to parental decisionmaking authority reflected 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."[159] The plurality affirmed that parental authority is essential to preserving the values of a liberal democratic state:

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.[160]

The plurality at this point cites to a well-known article by Bruce Hafen arguing against recognizing broad autonomy rights for children.[161]

Having set out the broad principles governing children's rights, the *Bellotti* plurality ultimately held that the parental consent requirement at issue in the case violated the pregnant girl's right to privacy by denying her judicial authorization for an abortion even where the court had found her "to be mature and fully competent to make this decision independently."[162] In the context of reproductive choice, pregnant minors have the right to go to court and obtain a determination that they are mature enough to make the decision whether to terminate a

155. *Id.* at 634.
156. *Id.* at 636.
157. *Id.* at 641 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 91 (1976) (Stewart, J., concurring)).
158. *Id.* at 637.
159. *Id.* at 638.
160. *Id.* at 638–39.
161. *Id.* at n.17 (citing generally Hafen, *supra* note 3).
162. *Id.* at 651.

pregnancy on their own.[163] The right recognized in *Bellotti* is a classic autonomy right to the extent it emancipates mature minors on a case-by-case basis from the decisionmaking authority of their parents.

The *Bellotti* decision captures the Court's deep ambivalence over the nature and origin of children's constitutional rights. On the one hand, the Court at times has come close to recognizing children's rights based on children's mature decisionmaking skills; *Bellotti* is perhaps the clearest example of this approach. In many of the cases described here, however, the Court walks an unexamined line between acknowledging children's autonomy interests and recognizing their immature decisionmaking skills. While children's autonomy interests clearly do play some role in the constitutional jurisprudence relating to children, they are overshadowed by the many cases that conceive of rights as protecting vulnerable children or as fostering the socialization process leading to adult autonomy.

C. THE LIMITATIONS OF CHOICE THEORY

This section reviews the descriptive and normative limitations of choice theory as a framework for children's constitutional rights. Critiques of choice theory and its emphasis on children's autonomy rights already abound. The prevailing critique of choice theory comes from scholars who argue that the theory fails to take into account children's welfare and relational interests. These scholars fall into different camps. Some critics draw on the rival interest theory of rights to argue directly in favor of children's welfare rights.[164] In the view of

163. The Court held the statute unconstitutional because "it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests." *Id.*

164. *See, e.g.*, DWYER, *supra* note 3, at 125–40 (discussing the welfare-based justifications for children's rights); Archard & Macleod, *supra* note 3, at 5 (describing the interest theory of children's rights under which "the primary function of rights is the protection of fundamental interests"); Samantha Brennan, *Children's Choices or Children's Interests: Which Do Their Rights Protect?*, *in* The MORAL AND POLITICAL STATUS OF CHILDREN, *supra* note 3, at 53, 54–57 (contrasting interest theory with choice theory); Campbell, *supra* note 3, at 5 ("[T]he more attractive theory of rights is that which relates rights to the normative defence and furtherance of interests."); Ferdinand Schoeman, *Childhood Competence and Autonomy*, 12 J. LEGAL STUD. 267, 268 (1983) ("[*T*]*he protection of relationships*, and not just the issue of judgmental capacity, is an important factor to take into account when considering the moral status of the child."). The welfare theory of rights has strong support among pro-

these scholars, children's rights should be rooted in children's fundamental welfare interests rather than children's autonomy. Other critics emphasize that choice theory misunderstands children's fundamental need for protection and discipline rather than liberty.[165] These scholars would prefer a legal discourse that focuses on governmental or societal duties rather than rights. Finally, some theorists object to choice theory's focus on autonomy.[166] In this regard, feminist and communitarian scholars reject choice theory because it privileges the ideal of the autonomous individual over social relationships, community ties, and caregiving.

While contemporary critics of choice theory have much to offer the debate over children's constitutional rights, this Article ultimately does not share the view that children's rights are fundamentally misguided or that autonomy is not a value worth preserving. To the contrary, this Article argues that critics who prefer a discourse of interests over rights undervalue the important role that rights can play in socializing children to become autonomous adults and citizens. Moreover, feminist

ponents of children's rights. *See, e.g.*, DWYER, *supra* note 3, at 293–94 (discussing children's welfare rights theories).

165. *See, e.g.*, MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 252 (2005) (discussing the law's facilitation of juvenile prosecutions and commenting that "the juvenile rights advocate is well advised to try to find a different way of advancing children's interests than through the rhetoric of 'rights'"); LAURA M. PURDY, IN THEIR BEST INTERESTS? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 41–43 (1992) (making a case against liberationists); Hafen, *supra* note 3, at 650 ("[T]he development of the capacity for responsible choice selection is an educational process in which growth can be smothered and stunted if unlimited freedom and unlimited responsibility are thrust too soon upon the young."); Onora O'Neill, *Children's Rights and Children's Lives*, *in* CHILDREN, RIGHTS, AND THE LAW 24, 25 (Philip Alston et al. eds., 1992) (arguing for a focus on obligations to children rather than children's rights).

166. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 14 (Routledge 1995); LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 18 (2006) (discussing the relational approach to family law that recognizes that "the self is socially situated and develops in the context of, rather than independent of, society and relationships"); MARTHA MINOW, MAKING ALL THE DIFFERENCE 283 (1990) (arguing for a theory of rights "reconstructed as features of important, communal relationships"); Federle, *supra* note 4, at 1017 ("Feminists object to notions of autonomy and individuality as fundamentally hierarchical and patriarchal because these principles emphasize power and minimalize the interconnectedness of human beings."); Minow, *Rights for the Next Generation*, *supra* note 3, at 24 (arguing for "a richer debate over the rights for children—a debate joining goals of autonomy and goals of affiliation").

critics of autonomy tend to overlook the deeply creative and relational dimensions of the capacity for choosing how to lead one's life. As this Article argues, an ideal of autonomy that takes into account the full range of psychological skills relevant to autonomous choice emphasizes the cognitive, emotional, and imaginative components of choice and their developmental roots in the early caregiving relationship.

This section critiques the choice theory of children's rights from a different perspective. The argument has two parts. First, choice theory fails to acknowledge the important socializing function of children's rights, and second, it rests on an excessively rationalist account of autonomy. These two shortcomings—having to do with the socializing function and the psychology of children's rights—are discussed in turn.

1. The Socializing Function of Children's Rights

With respect to the function of children's rights, the review of Supreme Court decisions above makes clear that these decisions cannot be squared doctrinally with choice theory's emphasis on the emancipating role of children's rights. From the choice theory perspective, the emergence of children's rights signifies a movement in the direction of bestowing adult rights on older children based on their increasing capacity for autonomous decisionmaking.[167] But children's constitutional rights do not always—or even largely—look like adult rights or turn on assumptions about children's autonomy.[168] Indeed, few constitutional rights held by children can be conceptualized as pure autonomy rights, that is, adult rights that follow from older children's possession of mature decisionmaking skills. To briefly summarize from the discussion above, children's First Amendment rights in school serve in part the end of socializing immature children in the ways of democracy; children's due process rights in the juvenile justice system are premised on children's special vulnerability; and children's reproductive

167. *See* Buss, *supra* note 4, at 363 ("What is common to all is that children, at best, get adult rights."); Campbell, *supra* note 3, at 18 ("We could regard the movement for children's rights as being, in this way, a movement towards giving adult rights to children.").

168. Theorists have pointed out that children's procedural due process and property rights never turn on protecting the autonomy of the right-holder. *See, e.g.*, Buss, *supra* note 4, at 359 ("Many of the Court's children's rights cases, however, do not consider children's right to make choices."); Garvey, *supra* note 13, at 1761 n.27 (observing that children's due process rights do not turn on the right-holder's agency).

choice rights shift power to the courts to determine on a case by case basis whether a pregnant girl is mature enough to make the decision on her own.[169] Although we might be inclined to view these decisions as recognizing children's adult autonomy rights, it is nevertheless clear that these rights also reflect, to varying degrees, concerns about children's status as immature decisionmakers.

Similarly, the choice theory of children's rights does not pretend to account for a variety of Supreme Court cases recognizing children's unique rights based on their developmental vulnerability or immaturity. These are cases involving rights unique to children. For example, in *Roper*, the Supreme Court held that the individual has an Eighth Amendment right not to be executed for crimes committed as a minor, a right not available to individuals who committed crimes as adults.[170] The Court based its decision on children's lack of decisionmaking autonomy, citing extensive developmental data on the subject.[171] Further, in *Lee v. Weisman*, the Court held that children have a First Amendment right against the inclusion of prayers in public school graduations.[172] The right in *Weisman* is not a right available to adults, but instead a right premised on children's specific vulnerability to coercion.[173] Choice theory does not account for cases such as these, which confer special rights on children based on their immature decisionmaking capacities. Rather than liberating children, as autonomy rights would do, this special class of rights protects vulnerable children from harm resulting from their decisionmaking immaturity.

Choice theory's focus on the emancipating role of rights also cannot justify or explain the decision in *Brown v. Board of Education*. Clearly *Brown* cannot be treated as a standard autonomy rights case. No one would argue that the Court's decision in *Brown* turned on children's capacity for autonomous choice since the whole point of the decision was the importance of fostering children's educational socialization.[174] The equality

169. *See supra* Part I.B.

170. Roper v. Simmons, 543 U.S. 551, 574 (2005).

171. *Id.* at 569–70.

172. Lee v. Weisman, 505 U.S. 577, 599 (1992).

173. *Id.* at 597–99 (discussing the uniqueness of public schools in the evaluation of a state's coercive impact).

174. *See* Dailey, *supra* note 50, at 445 ("*Brown* took a further step in the direction of working out the role of the State in the political socialization of children."). The fact that *Brown* fails to fit within the modern choice framework may explain why constitutional law scholars treat the case primarily as

right recognized in *Brown* and in subsequent cases protects the child's underlying interest in education and reinforces the role of education in the socializing process.[175] Rather than liberating children, *Brown*'s equality right furthers the child's interest in developing the skills of autonomous decisionmaking. Unlike autonomy rights, which by definition follow from children's already-acquired autonomy skills, educational rights are oriented toward children becoming autonomous adults and citizens.[176] *Brown*'s express emphasis on children's lack of adult decisionmaking capacities, its reliance on the then-existing developmental literature, and its recognition of rights as furthering children's socialization, all cannot be squared with the choice theory of rights.

Thus, choice theory is not so much wrong as it is limited. To the extent the theory views children's rights in terms of their emancipating function, the theory provides no conceptual framework for understanding that rights can play an essential role in furthering children's socialization into autonomous adults. Indeed, as described above, children's rights often foster *both* emancipating and socializing ends. To take the most famil-

a race discrimination case and only secondarily—if at all—as a seminal children's rights case. Indeed, most constitutional law treatises and casebooks discuss *Brown* at length but fail to situate it in the context of children's rights. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 475–80 (5th ed. 2005) (identifying *Brown* as a major race discrimination case).

175. As is well known, the Court in *Brown* emphasized that education is a prerequisite to citizenship in a democratic republic:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

176. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (examining "[t]he process of educating our youth for citizenship in public schools"), *modified on other grounds by* Morse v. Frederick, 551 U.S. 393 (2007); Ambach v. Norwick, 441 U.S. 68, 76 (1979) (noting "[t]he importance of public schools in the preparation of individuals for participation as citizens"); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."); Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFF. 338, 349 (1980) ("[A] child's right to compulsory education is a precondition to becoming a rational human being and a full citizen of a liberal democratic society."); Graham Haydon, *"The Right to Education" and Compulsory Schooling*, 9 EDUC. PHIL. & THEORY 1, 8 (1977) ("[T]here is a human right . . . to be an autonomous person.").

iar example, the *Tinker* Court's recognition of children's right to wear black armbands in school in part liberates children from the educational authority of school officials. But the Court's decision also makes clear that the wearing of the arm bands actually fosters the educational mission of inculcating the values and skills of democratic life in developing children.[177] Because it views rights as functioning to emancipate older children, choice theory cannot conceptualize rights as performing a socializing function in children's lives. Moreover, the descriptive limitations of choice theory correspond to a limitation in the underlying justification for children's rights. Choice theory views rights as deriving from the already acquired decisionmaking autonomy of the individual. But as described in greater detail below, choice theory neglects the fact that rights for children might legitimately be rooted in children's status as future autonomous individuals and citizens.

2. Psychological Assumptions About Choice

The second major limitation of the prevailing choice theory relates to its psychological assumptions about choice. The theory has long rested on a presumption that competent adults possess the necessary decisionmaking skills.[178] With respect to adults, there has traditionally been no need for a psychological theory at all, beyond a minimum standard of mental capacity or competence. Similarly, the traditional choice theory obviated the need for a psychological account of autonomous choice with respect to children, who were simply treated under the opposite presumption—that they lacked decisionmaking skills. But choice theory recognizes children's rights based on their developing capacity for autonomous choice, and thus the need for a psychological model of the skills of decisionmaking has emerged.[179]

177. *Cf.* Burt, *supra* note 99, at 122–24 (explaining that, given the reality of parental authority over children, the right in *Tinker* protected the parents' rather than the child's interest in free expression).

178. *See, e.g.*, ACKERMAN, *supra* note 8, at 96 ("*Everybody* who has reached an age where a human being can typically satisfy the tests of dialogue and behavior should be *presumed* to be a full citizen of the liberal state."); Archard, *Free Speech*, *supra* note 4, at 93 ("At a certain age, the child becomes mature enough to make her own choices.").

179. *See* Schoeman, *supra* note 164, at 269 ("Even though we acknowledge that judgmental capacities are relevant to recognition of rights to self-determination, we do not know, short of the grossest incompetence, what exact level of competence should be related to abridging specific rights paternalistically."); Wald, *supra* note 1, at 269 n.59 ("[C]riteria for 'good' decision-making

As described above, most children's rights cases emphasize the notion of children's impaired capacity for decisionmaking.[180] Case after case highlights the point that children are not yet "fully rational, choosing agent[s]."[181] We see the extent to which autonomous choice means rational choice in the context of the First Amendment school cases, where the Court has emphasized the role of public schools in inculcating critical thinking, tolerance, and civility—all attributes of a rational and emotionally disciplined state of mind.[182] Cases exploring the classroom as the "marketplace of ideas" also imply the cultivation of a critical perspective on received values.[183] Political and legal theorists discussing what it means for children to be autonomous similarly emphasize rational decisionmaking skills.[184] The psychology of choice in Supreme Court decisions

in these areas must be established before we can examine whether children of various ages are capable of making 'good' decisions.").

180. *See supra* Part I.B.

181. Thompson v. Oklahoma, 487 U.S. 815, 825 (1988).

182. *See supra* Part I.B.

183. *See supra* Part I.A.

184. *See, e.g.*, ARCHARD, RIGHTS AND CHILDHOOD, *supra* note 3, at 93 ("The capacity in question [regarding autonomy rights] is most frequently described as that of rational autonomy."); BLUSTEIN, *supra* note 47, at 135 ("To respect autonomy is fundamentally to respect the *capacity* of an agent to rationally determine for himself what he shall do and be."); GUTMANN, *supra* note 53, at 30, 50 (explaining that education fosters "the intellectual skills necessary to evaluate ways of life different from that of parents" and children must "also develop capacities for criticism, rational argument, and decisionmaking by being taught how to think logically, to argue coherently and fairly, and to consider the relevant alternatives before coming to conclusions"); RAWLS, *supra* note 8, at 209 ("We must choose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally."); Archard, *Free Speech*, *supra* note 4, at 91–93 (pointing out that critical habits of mind include the ability "to form consistent and stable beliefs, and to appreciate the significance of options and their consequences"); Harry Brighouse, *Civic Education and Liberal Legitimacy*, 108 ETHICS 719, 728 (1998) ("[T]he capacities involved in critical reflection help us to live autonomously."); Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1250 (2000) ("[Some] theorists focus more specifically on the importance of children's acquiring critical reasoning skills as a precondition for autonomy."); John Eekelaar, *The Emergence of Children's Rights*, 6 OXFORD J. LEGAL STUD. 161, 171 (1986) (describing children's right "to mature to a rationally autonomous adulthood . . . capable of deciding on [their] own system of ends as free and rational beings" (quoting M.D.A. FREEMAN, THE RIGHTS AND WRONGS OF CHILDREN 57 (1983))); Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 40 (2004) ("To become full citizens, children must develop their capacity for rational choice and autonomous action."); Tei-

on children, as in the literature on children's rights more generally, is decidedly cognition centered. But as psychologists and legal theorists are beginning to understand, the skills of autonomous choice go well beyond cognition to encompass emotional and imaginative skills as well. The next Part of this Article examines the psychological research showing that autonomous decisionmaking involves a broad range of interrelated cognitive and noncognitive capacities.

The Supreme Court's cognition centered perspective on choice has had significant adverse consequences for children's status in constitutional law. The cognitive model has reinforced a division of labor between parents and schools, one that depicts parents as providing moral guidance and schools as fostering critical-thinking skills. But this division of labor has obscured the deep connection between family caregiving and the skills of autonomous choice. The prevailing choice theory of children's socialization should be revised in light of research identifying the central role of caregiving in the development of the full range of skills needed for autonomous choice. This approach dismantles the traditional divide between home and school to capture the deep interconnections between parental and educational socialization processes.

The problem with a rational-choice framework for children's rights, however, runs deeper. By assuming that autonomous decisionmaking skills are best cultivated in school, choice theory fails to recognize the importance of what this Article calls "caregiving rights." Educational rights as recognized in current Supreme Court doctrine are certainly central to children's autonomy interests. But as described below, a core set of caregiving rights fosters children's developmental interests in maintaining ties to their primary caregivers, not only because such ties serve children's welfare interests but because caregiving relationships are vital to children's future autonomy as well. Personal as well as citizenship interests are at stake in the extension of children's constitutional rights beyond education to the realm of family relationships.

In summary, the prevailing choice theory of children's rights fails in two ways. First, as a descriptive matter, the theory fails to account for the ways in which children's constitutional rights do not turn on children's increasing capacity for autonomous choice and do not serve an emancipating function.

telbaum, *Children's Rights*, *supra* note 3, at 805 (describing "the capacity for rational choice on which membership in liberal society is founded").

Upon close examination, it turns out that many constitutional rights for children serve to socialize children in the skills of adult autonomy. Choice theory fails to recognize the socializing dimension in modern Supreme Court cases and its importance to a framework for children's future autonomy rights. Second, choice theory remains wedded to an Enlightenment view of the centrality of reason to human liberty and overlooks the nonrationalist, noncognitive dimensions of the choosing, autonomous self. The theory has traditionally been tied to a rationalistic psychology that fails to take sufficient account of the noncognitive attributes of decisionmaking and the family environment that fosters them. The remainder of this Article presents an alternative theory of children's rights in constitutional law that overcomes the descriptive and psychological limitations of choice theory while preserving choice theory's normative commitment to the constitutional ideal of autonomy.

II. TOWARD A DEVELOPMENTAL THEORY OF CHILDREN'S RIGHTS

The developmental theory of children's constitutional rights presented in this Part reinterprets existing Supreme Court decisions on children's rights from the perspective of children's development. Section A explains how the developmental theory presented here differs from the existing literature on children's future rights as well as the literature on family caregiving. Section B presents the psychological research supporting the developmental theory's model of autonomous decisionmaking. Drawing from research on decisionmaking, this section describes the basic cognitive, emotional, and imaginative features of autonomous choice, and the way in which caregiving relationships foster the development of these autonomy skills. Finally, section C elaborates on how the developmental theory of children's rights supports children's constitutional rights in the caregiving relationship. As explained here, reconceiving the function and psychology of children's rights underscores the foundational role of family caregiving in the development of children's decisionmaking skills and the essential place of caregiving rights in the socialization process leading to adult autonomy.

The developmental theory views the capacity for autonomous decisionmaking as central to the concept of individual liberty in modern constitutional law. The history of constitutional law is in large part a history of expanding citizenship rights to

excluded groups, such as blacks and women. The developmental theory does not promote full citizenship rights for children, obviously. But the theory offers a new framework for thinking about children's rights, one that conceives of rights as serving a socializing as well as emancipating function in children's lives. This new framework grounds children's rights in a notion of their future autonomy, an approach that embraces rather than represses the Supreme Court's ambivalence over the status of children as autonomous decisionmakers. From a developmental perspective, children are on their way to becoming autonomous adults, and children's rights help to ensure that this developmental trajectory is successfully negotiated. Moreover, the freedoms and rights of adult members of the constitutional polity depend on extending developmental rights to its youngest members. Without overstating the case, it is the future of the constitutional polity itself that turns on providing children with developmental rights to the educational and caregiving services they need to become autonomous adults and citizens.

A. DEVELOPMENTAL RIGHTS

The concept of developmental rights is related to the notion of future rights found in the work of some political and legal theorists. Future rights theorists generally focus on the child's potential for leading an autonomous life. John Eekelaar, for example, argues that children's future rights should reflect the idea that children's "capacities are to be developed to their best advantage."[185] Joel Feinberg identifies the child's "rights-in-trust" or "anticipatory autonomy rights," which he defines as the child's right "to have . . . future options kept open until he is a fully formed self-determining adult capable of deciding among them."[186] Lee Teitelbaum advocates for "taking account of the developmental nature of capacity in formulating a rights theory."[187] What ties these future rights theories together is

185. Eekelaar, *supra* note 184, at 170.

186. Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 125–26 (William Aiken & Hugh LaFollette eds., 1980).

187. Teitelbaum, *Children's Rights*, *supra* note 3, at 822 (1999); *see also* ARCHARD, RIGHTS AND CHILDHOOD, *supra* note 3, at 56 (describing some rights "as protecting the future adults the children will become"); Campbell, *supra* note 3, at 19 (discussing the "distinctively children's interests and subsequent [future] rights which do relate to the rational capacities of adults, namely the rights we ascribe to children in light of their future as adults"); Garvey, *supra* note 13, at 1771–74 (detailing the interest in socializing chil-

their focus on the rights children need to maximize their opportunity to acquire the skills of adult autonomy. The developmental theory presented in this Article shares with these theories a vision of the importance of children's rights in fostering the development of children's future autonomy.

However, this Article goes beyond existing theories of children's future rights by identifying with specificity what autonomous choice entails psychologically. The term "autonomy" is employed by theorists of children's rights without very much elaboration, often as if the concept were self-explanatory. Sometimes what theorists mean by future rights is simply children's right to have their future options kept open.[188] At other times, theorists make reference to children realizing "their full potential," although what "potential" means is rarely set out with any greater specificity.[189] But the most common meaning of autonomy in the cases and literature on children's rights is the capacity for rational choice. As discussed above, both Supreme Court decisions and children's rights theorists emphasize critical thinking as the core component of the autonomy skills children must learn.[190] Beyond passing references to cognitive skills, however, the case law and existing literature on children's future rights fail to identify with any psychological depth the core attributes of autonomous choice.[191]

dren to become "mature adults capable of democratic self-government" and in children's future capacity for "self-realization"); Gutmann, *supra* note 176, at 349 (describing children's rights "in virtue of their basic needs and interests as future adult citizens"); Minow, *What Ever Happened to Children's Rights?*, *supra* note 3, at 277 ("Advocates for children's rights sometimes resolved the tension between protection and liberation through a conception of children as potential adults."); Teitelbaum, *Foreword*, *supra* note 3, at 236 (discussing "integrative rights").

188. *See, e.g.*, Eekelaar, *supra* note 184, at 170 (noting that children's rights should "minimize the degree to which they enter adult life affected by avoidable prejudices incurred during childhood"); Gutmann, *supra* note 176, at 352 (defining children's future autonomy as, in the abstract, the ability "for choosing unprejudicially among all conceivable conceptions of the good life").

189. One theorist does specify what "potential" means. *See* Minow, *What Ever Happened to Children's Rights?*, *supra* note 3, at 296 ("[T]he Convention calls for developmental rights—rights to education, cultural activities, play and leisure, and freedom of thought—to meet children's needs in reaching their full potential.").

190. *See supra* Part I.A–B.

191. Barbara Woodhouse is an important exception, and this Article builds on her work. WOODHOUSE, HIDDEN IN PLAIN SIGHT, *supra* note 3, at 28 ("A developmental perspective is foundational to a theory of children's rights."). Woodhouse provides a rich analysis of children's needs and capacities at different stages of development. *Id.* at 18–28 (discussing the work of Piaget,

The developmental theory presented in this Part fills this gap in the literature on children's future rights by specifying the cognitive and noncognitive skills that children ideally will possess as adult decisionmakers. In recent decades, liberal theorists interested in children's education have tried to identify in detail the qualities associated with adult liberal citizenship, such as law abidingness, tolerance, and independent thinking. Without taking a position on what those broader qualities might be, this Article focuses only on the attributes of mind associated with the capacity for autonomous decisionmaking. The following section describes in detail how psychological research on decisionmaking confirms the centrality of cognitive, emotional, and imaginative capacities to adult choice. A deeper understanding of the psychology of choice leads to a more nuanced understanding of the importance of early family relationships to the development of these capacities. Early caregiving relationships are central to the unfolding of the cognitive, emotional, and imaginative processes essential to choice. Schools obviously have an important role to play in the development of critical thinking. Schools may also play a vital role in cultivating values such as tolerance and civility. It is possible as well that schools do and should have a caregiving role in the lives of children. But schools must build upon a caregiving foundation already laid down. For these reasons, children's rights to education—already protected under all fifty state constitutions as well as the Equal Protection Clause of the Federal Constitution—are essential but not enough. The focus of the rest of this Article is on children's fundamental rights in the caregiving relationship.

Erikson, Bronfenbrenner, Elder, and Coles). She argues for the recognition of both children's needs-based and capacity-based rights, with the latter focused on recognizing children's fundamental right to be heard. *Id.* at 38 ("Looking at children's agency through the lens of needs-based and capacity-based rights, children should be able to exercise their capacities to speak and act within a framework that acknowledges their stage on the road to adulthood."). Emily Buss also incorporates developmental psychology into her theory of children's constitutional rights, focusing on the development of cognitive thinking, moral reasoning, and sociocognitive and identity development. Buss, *supra* note 4, at 355–58. Buss's approach, which focuses on broader developmental processes such as identity formation, is an important contribution to the literature, and moves us closer to a full developmental account of adult autonomy. *Id.* at 358–62. However, her description of autonomy is largely limited to an analysis of cognitive development. *See id.* at 358–59 ("The capacity for logical thinking has most relevance for the exercise of autonomy rights, which reflect our faith in individuals' competence to assess their own interests.").

The developmental theory supplements contemporary caregiving theories in two important ways. First, the developmental theory embraces rather than rejects the liberal value of individual autonomy. Family law scholars, such as Martha Fineman, have long insisted on the importance of caregiving but they take the position that caregiving values are incompatible with a liberal regime.[192] In these scholars' views, support for caregiving can only take place within a nonliberal legal framework oriented around an ethic of care, civil society values, or communitarian ideals.[193] In contrast, this Article argues that the constitutional ideal of individual autonomy and a commitment to caregiving values are not inherently antithetical. Second, the theory of children's caregiving rights presented here focuses on the psychological dimension of children's development. This approach differs from the important work of scholars such as Robin West, who also take a liberal perspective but focus primarily on the rights of caregivers to engage in caregiv-

192. FINEMAN, *supra* note 166, at 70; *see also* Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 22 (calling liberal feminism "empty at [its] core"); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 768 (1988) ("[M]others' desire[s] . . . are incompatible with the symbolic presentation of equality by liberal mainstream feminism."); Kathryn L. Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 56 (rejecting an "individualistic perspective" of law that "focuses narrowly on equality of formal legal rights and opportunities" and promoting instead a "participatory perspective" that endorses "the equal participation of women and men in all social activities").

193. *See, e.g.*, MCCLAIN, *supra* note 166, at 110 (arguing for the necessity of a new social contract that recognizes and supports caregiving as a "public value . . . [that] build[s] upon and reinforce[s] a definition of personal responsibility that does not define it solely in terms of market labor but affirms the value of care work as a component of social reproduction"); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 304–05 (1988) (arguing in favor of a process of "community norm-building about what it means to be a parent" in the place of the "focus on the rights of individuals"); Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 34 (1986) (advocating for a society that promotes the "moral imperative of nurturing responsibility for children, not a set of 'rights' that can be earned (or declined)"); Becker, *supra* note 192, at 49 ("[T]he need to value caretaking and relationships, particularly with dependents, will be high on a relational feminism agenda, and might not even appear on a formal equality or anti-subordination agenda."); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 19 (2008) (contending that a proper treatment of the problem of caretaking will require "[r]eplacing the [idea of the] liberal subject with [the idea of the] vulnerable subject").

ing work without social or economic penalty.[194] Their work examines the social meaning of caregiving with the goal of establishing the equality rights of caregivers. The theory of children's caregiving rights presented here is not intended to displace the valuable work being done by feminist liberal scholars, but supplements that work by focusing on the psychological meaning of caregiving and establishing the developmental rights of children.[195]

The concept of children's caregiving rights does not exclude the possibility that older children possess autonomy rights. As described in Part I, some important Supreme Court cases do recognize older children's capacity for self-determination, particularly in the context of reproductive choice. The developmental theory of children's rights does not reject the recognition of autonomy rights for that class of children claiming rights based on their mature capacity for decisionmaking. However, the distinction between autonomy and developmental rights should not be overstated. It is true that children's autonomy rights rest on children's claim to being treated the same as adults while developmental rights rest on their claim to special treatment based on their inherent difference from adults. But what this surface distinction obscures is a deeper connection between children's autonomy rights and their future rights, and the emancipating and socialization functions that these rights serve. Put simply, future rights are a precondition to the future enjoyment of autonomy rights and are directed to ensuring that children become adult, autonomous, rights-holding citizens. And conversely, children's autonomy rights are always defined by reference to children's developmental maturity. Despite obvious differences, autonomy rights and developmental rights

194. *See* Robin West, *Re-Imagining Justice*, 14 YALE J.L. & FEMINISM 333, 343 (2002) ("We need rights that protect our ability . . . to care for the young, and bring them to responsible maturity. . . . We need those rights to valorize and honor this fundamental aspect of our being."); *see also* ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 15–20 (2004) [hereinafter ALSTOTT, NO EXIT] (discussing the realities parents face in providing continuity of care to children); Anne L. Alstott, *What Does a Fair Society Owe Children—and Their Parents?*, 72 FORDHAM L. REV. 1941, 1977–78 (2004) ("Every child deserves the parental care she needs to develop her autonomy and take her place in adult life, but every parent deserves the chance to provide that care while leading a life of her own.").

195. Anne Alstott has done important, related work on what a liberal society owes children. *See* Alstott, *supra* note 8, at 1–2.

both turn on the question of children's developmental capacities and achievements.[196]

The question of children's affirmative entitlements to essential caregiving services raises a final conceptual issue concerning the relationship of developmental rights to classic welfare rights. The welfare theory of rights defines children's rights in terms of the protection of children's fundamental interests.[197] Developmental rights can be distinguished on their face from children's welfare rights to the extent the latter focus on the protection of children's present needs as opposed to their future capacities.[198] While this conceptual distinction—present versus future interests—has a logical appeal, the fact is that many of children's important present interests such as food and health are also essential to their development into autonomous adults. Moreover, welfare rights by definition provide children with positive claims to fundamental social goods. Future rights, on the other hand, encompass negative rights to protection of certain kinds of activities and relationships as well as affirmative rights to the social goods related to their future interests. The extent to which developmental rights to affirmative goods—which would encompass many traditional welfare rights—can and should be recognized as constitutional entitlements is addressed in the final section of this Article.

B. CHILDREN'S FUTURE AUTONOMY

1. The Psychology of Choice

Upon first consideration, it may come as no surprise that choice theory has traditionally equated autonomous choice with cognitive thinking. The idea of cognition is commonly associated with concepts such as intellect, critical inquiry, rationality, and reason. While each of these terms emphasizes slightly different aspects of decisionmaking, they all suggest mental ac-

196. *See* WOODHOUSE, HIDDEN IN PLAIN SIGHT, *supra* note 3, at 43 (arguing that autonomy and dependence are "two sides of the same coin"); Ezer, *supra* note 184, at 39 (noting that children's rights "flow from both their dependency and developing autonomy"). As discussed above in Part I.A.2, children's First Amendment rights in school can serve both socializing and emancipating functions at the same time. As described earlier, the *Tinker* court viewed the free speech right in that case as protecting children's freedom of expression at the same time that it served to train young children in the ways of democratic life. *See supra* Part I.A.2.

197. *See supra* Part I.C.

198. *See, e.g.*, Feinberg, *supra* note 186, at 126.

tivities relating to believing, perceiving, analyzing, and logical thinking, and they generally exclude such qualities as emotions, intuitions, and fantasies.[199] Common sense supports the idea that to be self-governing is to think cognitively rather than to be swept away by emotion or fantasy. As with most psychological issues, however, common sense may not be the best guide. Psychological research suggests that the skills of individual decisionmaking are much broader than mere intellect alone.[200]

Choice theory's emphasis on cognition has been reinforced in recent years by legal scholars doing work on individual decisionmaking in law.[201] These scholars have turned to research in cognitive psychology in an effort to understand better the psychological mechanisms of individual choice. They draw on experimental research that identifies particular cognitive biases, heuristics, and frameworks that are shown to adversely affect individual decisionmaking.[202] Legal scholars have also utilized cognitive research supporting the existence of unconscious cognitive processes that govern individual decisionmaking in unseen ways. Mental scripts or prototypes acquired in childhood have also been studied for their effect on adolescent decisionmaking.[203] The stated goal of this behavioral legal scholarship is to enable courts and legal policymakers to design laws that will help to improve the cognitive processes of choice so that individual decisions are, in the words of behavioral scholars, more rational.[204]

199. The field of cognitive psychology reflects a view of the human mind as operating according to structure, rules, and plans, much like the software of a computer processing system. *See* HOWARD SHEVRIN ET AL., CONSCIOUS AND UNCONSCIOUS PROCESSES: PSYCHODYNAMIC, COGNITIVE, AND NEUROPHYSIOLOGICAL CONVERGENCES 51 (1996). Cognitive research studies how the mind processes information in order to understand "the kinds of information we have in our memories, and the processes involved in acquiring, retaining and using that information." MICHAEL G. WESSELLS, COGNITIVE PSYCHOLOGY 1–2 (1982).

200. *See* Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175, 175–80 (2010).

201. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–79 (1998).

202. *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahnman et al. eds., 1982) (discussing how cognitive biases and heuristics affect individual decisionmaking).

203. Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 723–33.

204. *See, e.g.*, Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420,

This current legal scholarship on individual decisionmaking strongly reinforces the prevailing view that individual choice is primarily—and ideally—a cognitive activity. When scholars discuss the kinds of critical-thinking skills essential to autonomous choice, they generally mean to emphasize a range of mental activities that include rational thinking but exclude emotions. Traditionally, to think emotionally or to act upon emotions is taken as an indication of the failure of autonomous choice. Emotions have long been deemed incompatible with the mature exercise of autonomous choice and deliberative self-government. The Federalist Papers emphasized that the new constitutional government would operate to contain the passions of the majority.[205] Similarly, early in the twentieth century, the Supreme Court expressed its concern that a strong reading of the First Amendment would help to incite the unruly passions of the crowd.[206] The reasonable person and the rational actor embody a well-known view of law as the domain of reason. Juries are instructed not to make decisions based on sympathy. The achievement of emotional self-mastery—that is, emotions under the control of the intellect—is central to the prevailing legal understanding of individual decisionmaking.

Yet the notion of emotional self-mastery does not suffice as a full portrait of the role of emotions in individual decisionmaking.[207] Although emotions can lead to "hot cognition" and thus adversely affect judgment, experimental research in the field

1425 (1999); Jolls et al., *supra* note 201, at 1508–10; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1165–66 (1995); Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 171–72 (1997). For similar discussions in the popular press about individual decisionmaking, see generally DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008), and RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008). For a review of both books, see generally Anne C. Dailey & Peter Siegelman, *Predictions and Nudges: What Behavioral Economics Has to Offer the Humanities, and Vice-Versa*, 21 YALE J.L. & HUMAN. 341 (2009) (book review).

205. *See* THE FEDERALIST NO. 10 (James Madison).

206. Geoffrey R. Stone, *Civil Liberties in Wartime*, 28 J. SUPREME CT. HIST. 215, 228 (2003).

207. For a collection of essays addressing the topic of emotions in law, see generally THE PASSIONS OF LAW (Susan Bandes ed., 1999), and Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006).

yields the conclusion that emotions are not all bad.[208] Emotional self-mastery requires disciplining one's emotions as well as affirmatively utilizing emotional skills to understand and evaluate both oneself and the world. Studies have been carried out which show that in some circumstances emotions can facilitate reasoned thinking. For example, emotions can operate as fast, intuitive guides to an outcome that would otherwise have taken long deliberation.[209] And some emotions, like empathy, actually improve decisionmaking by broadening the scope of information available to the individual.[210] Information obtained through emotional responses to a situation is often some of the most valuable information needed for making important decisions. Indeed, the absence of emotion—an affectless mental state—would exclude critical information from the decisionmaking process.[211] Psychological research thus confirms the Romantic insight that emotional experience serves to deepen and expand knowledge about oneself and the world.

Broadening the traditional account of autonomous choice to include emotional self-mastery in the full sense of the term is essential, but emotions and cognition are not the only psychological features central to adult decisionmaking. Largely overlooked but no less important is the role of imagination in individual decisionmaking.[212] Because conceiving of alternatives to the present state of affairs is a necessary component of decisionmaking, imagination is what, in part, makes autonomous choice possible. At the most fundamental level, imagination vitally facilitates the process by which individuals generate the alternatives which make choice possible. Imagination operates cognitively in some respects, as when an individual puts his or her wishes, needs, and desires into words. But imagination also

208. Dailey, *supra* note 200, at 184; *see* ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 191–96 (1994); George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, *in* HANDBOOK OF AFFECTIVE SCIENCES 619, 619–20 (Richard J. Davidson et al. eds., 2003); Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23, 25 (1996).

209. *See* TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS 50 (2002); Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition*, 19 J. BEHAV. DECISION MAKING 115, 132 (2006).

210. *See* NUSSBAUM, *supra* note 78, at 66; Dailey, *supra* note 200, at 185–86.

211. Impairment in emotional interrelatedness is one of the criterion for diagnosis along the autism spectrum. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 75 (4th ed. 2000).

212. *See* Dailey, *supra* note 200, at 187–92.

involves the kind of wishing, needing, and desiring associated with nonverbal states of fantasy and creativity.[213]

Every act of choice involves to some extent the creative act of producing the alternatives under consideration. Obviously, alternatives originate to some degree from outside the self as, for example, in the decision whether to attend college or whether to marry. This is why traditional liberalism places such a heavy emphasis on exposure. But exposure alone cannot explain why particular alternatives present themselves as possible choices to the individual. At some level, alternatives themselves are "chosen" in the sense that their emergence as alternatives is driven by deeply felt, sometimes unconscious wishes, needs, and desires. The process of producing alternatives to the current state of affairs is thus a creative process that draws on the particular individual's unique imaginings about the self and his or her place in the world.

The skills of imagination include the capacity for reality testing, which involves mediating between conscious, rational beliefs, wishes, and perceptions, on the one hand, and conscious and unconscious imaginings, on the other.[214] Reality testing is a more complex skill than might be thought at first. Even for adults, a clear line between fantasy and reality can sometimes be difficult to maintain, particularly under periods of emotional stress. For example, a fight with a significant other can lead to unrealistic fantasies of abandonment, or the loss of a job can lead to unreal fears of financial ruin. In addition, everyday understandings of the world require imagining what other people are thinking, feeling, or perceiving. Empathy, for example, is a process drawing on our powers for imaging what other people are feeling and experiencing. The capacity to imagine what others are feeling and thinking implicates the skills of reality testing. For example, transitory moments of paranoia can happen to anyone as concerns about the intent of others become temporarily unrealistic, usually under strong emotional pressure. Our wishes, needs, and desires both give meaning to our experience of the world but can also distort the actual state of affairs. Mature decisionmaking thus includes the skill of reality testing which allows an individual to discern the difference between the two.

213. *Id.* at 178.
214. *Id.* at 180–83.

Reality testing is present in any context where future options are being considered, for individuals must assess how realistic the particular alternatives are by imagining what the options will bring.[215] This process of assessment is partly a straightforward consideration of probabilities, but it also includes imagining how people will behave, what they will think, how circumstances will feel, what intangible rewards there will be, and a range of other factors not easily reducible to cost-benefit ratios or probabilistic tables.[216] Some interesting empirical research is beginning to be done on the mistakes individuals make in imagining how they will feel if certain events were to happen, and it turns out that individuals are not very good at getting it exactly right.[217]

Imagination also informs the process of introspection to the extent individuals must discover and reflect on the alternatives that make choice possible. Prevailing views about autonomy often, but not always, emphasize the skills of critical self-insight.[218] To the extent self-insight is a factor in autonomous decisionmaking, it is important to note that introspection is not as easy a skill to master as might commonly be thought. Identifying possible alternatives is hard enough, but understanding why they present themselves as alternatives is even more complex.[219] Moreover, imagined alternatives can be unconsciously

215. *Id.* at 189.

216. *Id.*

217. *See, e.g.*, RICHARD LAYNARD, HAPPINESS: LESSONS FROM A NEW SCIENCE 3–4 (2005).

218. *See* BLUSTEIN, *supra* note 47, at 132 (contending that autonomy is "a self-critical ability"); MACEDO, LIBERAL VIRTUES, *supra* note 12, at 216 (defining autonomy in terms of "the development of the capacity critically to assess and even actively shape not simply one's actions, but one's character itself"); Meira Levinson, *Liberalism, Pluralism, and Political Education: Paradox or Paradigm?*, 25 OXFORD REV. EDUC. 39, 50 (1999) (defining autonomy "as the capacity self-critically to evaluate one's values and ends with the possibility of revising and then realising them"); Frank L. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25–27 (1986) (describing the Kantian concept of freedom as involving both will and self-knowledge). *But see* GALSTON, *supra* note 78, at 254 (arguing that "liberal freedom entails the right to live unexamined as well as examined lives").

219. The communitarian philosopher Michael Sandel describes this process in "cognitive" terms, although his description comes close to a psychoanalytic model:

> For a subject to play a role in shaping the contours of its identity requires a certain faculty of reflection. Will alone is not enough. What is required is a certain capacity for self-knowledge, a capacity for what we have called agency in the cognitive sense . . . . [T]he capacity for reflection enables the self to turn its lights inward upon itself, to in-

repressed for a variety of reasons, such as guilt or anger. Critical self-awareness of the wishes, needs, and beliefs that give rise to available alternatives rests on the capacity for imaginative contemplation of what one's own internal motivations might be.

The skills of autonomous choice thus go well beyond the traditional focus on critical thinking. As discussed above, autonomous choice involves a complex interplay among cognitive decisionmaking skills, emotional self-regulation, and imagination. These interrelated processes of cognition, emotion, and imagination come together to make autonomous choice possible. The following section sets out the importance of family caregiving to the socialization process by which these cognitive and noncognitive skills of choice develop.

2. Children's Socialization Revisited

By broadening our understanding of the psychology of choice, the developmental theory leads to a reconsideration of the process by which children are socialized into adulthood. The developmental research shows that the capacity for autonomous choice does not evolve from intrinsic maturational forces alone but depends, in the first instance, on the interplay between innate biological factors and the early caregiving environment.[220] The diverse skills of autonomous choice begin to develop in the earliest relationship with a caregiving figure and

> quire into its constituent nature, to survey its various attachments and acknowledge their respective claims, to sort out the bounds—now expansive, now constrained—between the self and the other, to arrive at a self-understanding less opaque if never perfectly transparent, a subjectivity less fluid if never finally fixed, and so gradually, throughout a lifetime, to participate in the constitution of its identity.

MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 152–53 (1982).

220. *See* Steven Marans & Donald J. Cohen, *Child Psychoanalytic Theories of Development*, *in* CHILD AND ADOLESCENT PSYCHIATRY: A COMPREHENSIVE TEXTBOOK 129, 129 (Melvin Lewis ed., 1991); *see also* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1883 (1987) ("Recent theories of human development emphasize how aspects of the self develop from experiences with others, notably the mothers, such that 'the core of the self, or self-feeling is also constructed relationally.'" (quoting Nancy Julia Chodorow, *Toward a Relational Individualism: The Mediation of Self Through Psychoanalysis*, *in* RECONSTRUCTING INDIVIDUALISM: AUTONOMY, INDIVIDUALITY, AND THE SELF IN WESTERN THOUGHT 197, 201 (Thomas Heller et al. eds., 1986))). For an elaboration of the ideas in this and the following paragraphs, see Dailey, *supra* note 50, at 462–68.

involve the complex unfolding of cognitive, emotional, and imaginative processes.[221]

First, with respect to cognitive development, the neuroscientific, cognitive, and attachment research show that early caregiving sets in motion the development of the mental apparatus necessary for higher cognitive skills.[222] Researchers are in agreement that "experiences in the first year or two of life are particularly formative: they establish the fundamentals of language and cognitive functioning."[223] These findings are found in naturalistic settings, which show that "high-quality care during the infant and toddler years is generally associated with better cognitive functioning, complex play, and language development."[224] The economist James Heckman and his colleagues describe the connection between caregiving and cognitive development:

> The effects of early experience on perceptual and cognitive skills have been studied extensively by neuroscientists . . . . Complex cognitive capacities, which mature and change throughout our lifetimes, depend on the analytic, synthetic, and recognition capabilities of specific neural circuits. The properties of many of these brain circuits have been shown to be particularly sensitive to the shaping influences of experience during early life.[225]

221. For decades, family law theorists have written about the importance of the early caregiving relationship to children's psychological well-being. Goldstein, Freud, and Solnit were the first and most influential family law scholars to write about the child's basic need for attachment. *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 7 (1973); *see also* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 8 (1979); JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT SOLNIT & SONJA GOLDSTEIN, IN THE BEST INTERESTS OF THE CHILD 4 (1986).

222. *See* MARY GAUVAIN, THE SOCIAL CONTEXT OF COGNITIVE DEVELOPMENT 30–31 (2001); James E. Ryan, *A Constitutional Right to Preschool?*, 94 CALIF. L. REV. 49, 64–65 (2006) (showing that brain research shows significant cognitive development between infancy and three years of age).

223. Nat'l Inst. of Child Health Human Dev. Early Child Care Research Network, *The Relation of Child Care to Cognitive and Language Development*, 71 CHILD DEV. 960, 961 (2000) [hereinafter NICHD]; *see also* Peter Fonagy & Mary Target, *Attachment, Trauma and Psychoanalysis: Where Psychoanalysis Meets Neuroscience, in* MIND TO MIND: INFANT RESEARCH, NEUROSCIENCE, AND PSYCHOANALYSIS 15, 23–25 (Elliot J. Jurist et al. eds., 2008) (describing the "evolution of the social brain"); Eric R. Kandel, *Biology and the Future of Psychoanalysis: A New Intellectual Framework for Psychiatry Revisited*, 156 AM. J. PSYCHIATRY 505, 512–13 (1999).

224. NICHD, *supra* note 223, at 961.

225. Eric I. Knudsen et al., *Economic, Neurobiological and Behavioral Perspectives on Building America's Future Workforce* 8–9 (IZA Discussion Paper, Paper No. 2190, 2006), *available at* http://ssrn.com/abstract=919962.

Through repeated interactions with primary caregivers, the infant learns to create internal representations associated with the presence of these figures,[226] representations which are the basis for the development of internal schemas or prototypes.[227] These internal schemas or prototypes are established early in life and provide the stability and structure necessary for adult cognitive functioning. Research has also shown that maternal speech patterns "predict vocabulary growth during the first years of life . . . as well as prekindergarten measures of emergent literacy and print-related skills."[228] As legal scholar James Ryan reports, "Advances in neuroscience have made it clear that the first few years of life are crucial for cognitive development and that early experiences can influence the emerging architecture of the brain."[229] At all levels of cognitive development—structural, analytic, and linguistic—research shows that early caregiving plays a formative role. When early caregiving is not good enough—for example, when the early caregiving environment is one of severe emotional deprivation or neglect—the child's future capacity for perceiving and thinking about the world in an adaptive, undistorted way is likely to be impaired.[230]

The early caregiving relationship is also central to the adult capacity for emotional self-regulation. Common sense tells us that parental discipline is important to the child's development of emotional self-regulatory mechanisms. But the role of parents as affirming, nonprohibitory figures in the very early years plays a primary role in establishing the psychological and physiological processes of emotional self-regulation and integration.[231] At first, the external presence of an emotionally attuned caregiver helps the infant to diminish physiological

226. *See* PHYLLIS TYSON & ROBERT L. TYSON, PSYCHOANALYTIC THEORIES OF DEVELOPMENT: AN INTEGRATION 93 (1990); Sidney J. Blatt & Rebecca Smith Behrends, *Internalization, Separation-Individuation, and the Nature of Therapeutic Action*, 68 INT'L J. PSYCHOANALYSIS 279, 283–84 (1987); Dailey, *supra* note 50, at 463–64; Linda C. Mayes & Donald J. Cohen, *The Development of a Capacity for Imagination in Early Childhood*, 47 PSYCHOANALYTIC STUDY OF THE CHILD 23, 29 (1992).

227. *See* Kandel, *supra* note 223, at 512–13.

228. NAT'L RESEARCH COUNCIL, FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 246 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000).

229. *See* Ryan, *supra* note 222, at 50.

230. *See* PETER FONAGY ET AL., AFFECT REGULATION, MENTALIZATION, AND THE DEVELOPMENT OF THE SELF 33 (2004); Dailey, *supra* note 50, at 464–65.

231. *See* ACKERMAN, *supra* note 8, at 149; Dailey, *supra* note 50, at 465.

and later emotional tensions.[232] Through repeated interactions, the infant creates internal representations associated with the presence of the caregiver. In the normal course of development, the child learns to call up these internal representations of a soothing caregiving relationship to help moderate and contain strong emotions.[233] At a physiological level, research on animals shows that high levels of stress, such as that which might be experienced by infants in the absence of a good-enough caregiver, impair the development of cortisol neuromodulators that control physiological arousal.[234] Similarly, attachment studies have shown "[h]igh levels of negative affectivity, emotional outbursts, [and] inattentiveness" among children whose caregivers failed to provide a minimally responsive environment.[235] In this way, emotional self-mastery evolves as a developmental achievement with its roots in the affirming and containing aspects of a good-enough caregiving relationship.

Finally, the skills of imagination also begin in the earliest interaction with important caregivers. This fact of children's development is often overlooked in the legal literature, which instead emphasizes children's exposure to diverse viewpoints in school as a primary route for the development of imagination. It is certainly true that exposure to alternative ways of life is necessary for children to develop a sense that choice is possible. These diverse viewpoints are presented through books and instruction as well as by exposure to other children or to the broader social environment. But while it is true that exposure is essential to imaginative activity, school-age children's exposure to diverse viewpoints is only part of what is needed to equip children with imaginative capacities. Although exposure to diverse viewpoints fuels the imagination, and can instill in children the knowledge that alternative ways of life exist, the process of imagining also requires particular mental skills developed in the early childhood years.[236]

As discussed above, the mental schemas and prototypes laid down early in life can affect the individual's perception of the world, but they also affect the content of the individual's

232. *See* Dailey, *supra* note 50, at 465.

233. *See* Blatt & Behrends, *supra* note 226, at 283–84; Mayes & Cohen, *supra* note 226, at 29.

234. *See* PETER FONAGY, ATTACHMENT THEORY AND PSYCHOANALYSIS 37 (2001).

235. *See id*. at 42.

236. *See* PAUL HARRIS, THE WORK OF THE IMAGINATION 27–28 (2000).

imaginings. An individual whose early experience was one of severe deprivation or neglect is more likely to perceive the world in disappointing or depriving ways than an individual whose early caregiving experience was affirming.[237] Even more fundamentally, by engaging in pretend play with caregivers, children learn to master the process of reality testing that is so important to adult decisionmaking.[238] Using one's imagination to interpret other people and the world is a necessary skill that every young child must learn to master.[239] As developmental psychologists are beginning to discover, the emergence of imaginative thinking in young children is "linked with a move *toward objectivity* rather than away from it."[240] In experimental work with children, researchers have measured children's ability to imagine what goes on in other people's minds, a skill called mentalization.[241] Children learn the fundamental distinction between fantasy and reality, and to utilize their imagination in ways that give meaning to the external world, through the earliest interactions with a responsive caregiver.[242]

Early caregiving need not be perfect, or even necessarily good, to foster the development of cognitive thinking, emotional self-mastery, and strong reality-testing skills. It need only be "good enough."[243] Good-enough caregiving is caregiving sufficient to set in motion the development of these basic psychological skills. It arises from a stable, continuous, emotionally responsive relationship between a child and one or more adult

237. *See* Dailey, *supra* note 50, at 464.

238. *See* HARRIS, *supra* note 236, at 28; D.W. WINNICOTT, PLAYING AND REALITY 12–13 (1971).

239. *See* Robert N. Emde & Joann Robinson, *Guiding Principles for a Theory of Early Intervention: A Developmental-Psychoanalytic Perspective*, *in* HANDBOOK OF EARLY CHILDHOOD INTERVENTION 160, 174–75 (Jack P. Shonkoff & Samuel J. Meisels eds., 2d ed. 2000).

240. HARRIS, *supra* note 236, at 6–7 (emphasis added).

241. *See* FONAGY ET AL., *supra* note 230, at 210.

242. While genetic variation and cultural environment play an important part in children developing imaginative skills, researchers believe it likely "that many children, particularly under conditions of environmental deprivation and stress, show less of such abilities." Emde & Robinson, *supra* note 239, at 175; Mayes & Cohen, *supra* note 226, at 41 ("It is not only the blurring of the distinction between pretend and real but also the failure to imagine others' feelings, beliefs and wishes that mark [autism and related developmental disorders] as examples of the failure to develop an imaginative capacity that supports ongoing social differentiation.").

243. *Cf.* D.W. WINNICOTT, THE MATURATIONAL PROCESS AND THE FACILITATING ENVIRONMENT 145–48 (1965) (comparing the "good-enough" mother with the "not good-enough" mother).

caregivers.[244] A good-enough standard of caregiving does not strive for an unrealistic ideal of childrearing. The standard reflects the fact that childrearing is imbedded in the imperfect realm of human relationships and necessarily characterized by quite ordinary successes and failures. A good-enough caregiving relationship is easily established in the average family where minor deprivations and frustrations are expected to occur. Indeed, minor failures in caregiving are considered essential to stimulate the child to develop higher-order mental processes.[245] Because good-enough caregiving unfolds over the course of countless interactions, even serious deprivations may not have adverse developmental consequences in the particular case.[246] Moreover, some children exhibit unusual resilience in the face of even profound failures in caregiving, and experiences later in life can sometimes compensate for early deprivations.[247]

Understanding the family's role in the development of autonomy skills means fundamentally revising the prevailing constitutional theory of children's socialization. As discussed above, choice theory generally assumes that parents first socialize children into a particular way of life, and then schools give children the cognitive tools and alternative views they will need as adults to choose whether to accept or reject the parents' way of life as their own. However, this division of labor between families and schools overlooks the central role of family caregiving to the cultivation of the cognitive and noncognitive skills of choice. Families and schools are not autonomous realms of activity. Parents and schools both contribute to the development of children's autonomy skills. For example, research confirms that, by almost every measure, children exposed to a stable, emotionally responsive caregiving environment do better in school.[248] Caregiving is important not only in its own right, but

244. *See generally* MARGARET S. MAHLER ET AL., THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT (1975) (describing how a responsive relationship with adult caregivers is necessary to normal separation and individuation); DANIEL N. STERN, THE INTERPERSONAL WORLD OF THE INFANT: A VIEW FROM PSYCHOANALYSIS AND DEVELOPMENTAL PSYCHOLOGY (1st paperback ed. 2000) (outlining the infant to caregiver bond in human development).

245. Blatt & Behrends, *supra* note 233, at 283.

246. *See id.*

247. *See, e.g.*, FONAGY, *supra* note 234, at 28–30.

248. *See, e.g.*, Alstott, *supra* note 8, at 8 (noting that empirical evidence "documents that family background matters for children's life chances"). Some of the best work in this area has to do with early intervention programs into disadvantaged families. Early intervention in the lives of poor children likely

also because early caregiving more than any other factor determines the course of children's educational outcomes and, as a consequence, their adult capacities and potentials.

C. RIGHTS IN THE CAREGIVING RELATIONSHIP

The developmental theory highlights the importance of caregiving rights to children's socialization into autonomous adults. As explained in this section, children's constitutional rights in the caregiving relationship take three main forms. First, children have rights under the Due Process Clause to be free from state interference with established primary caregiving relationships. Second, children's interests in caregiving are also protected under other constitutional provisions where the challenged state action touches upon these developmental interests. Third, and most far-reaching, children have affirmative constitutional claims to a minimum level of family caregiving services. Each of these three types of caregiving rights is addressed in turn.

From the perspective of choice theory, parental rights are the proper vehicle for protecting children's interest in establishing and maintaining secure caregiving relationships.[249] A developmental perspective on children's caregiving relationships, however, highlights the problem with a constitutional approach that relies exclusively on parental rights. Under current doctrine, children have no independent constitutionally protected

has positive effects in part because the intervention supports and improves existing caregiving relationships. *See* W. Steven Barnett, *Benefit-Cost Analysis of the Perry Preschool Program and Its Policy Implications*, 7 EDUC. EVALUATION & POL'Y ANALYSIS 333, 336 (1985); Dale L. Johnson & Todd Walker, *A Follow-Up Evaluation of the Houston Parent Child Development Center: School Performance*, 15 J. EARLY INTERVENTION 226, 226–27 (1991); Vonnie McLoyd, *The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting, and Socioemotional Development*, 61 CHILD DEV. 311 *passim* (1990); Samuel J. Meisels & Jack P. Shonkoff, *Early Childhood Intervention: A Continuing Evolution*, *in* HANDBOOK OF EARLY CHILDHOOD INTERVENTION, *supra* note 239, at 3, 3–4; Milagros Nores et al., *Updating the Economic Impacts of the High/Scope Perry Preschool Program*, 27 EDUC. EVALUATION & POL'Y ANALYSIS 245, 247–52 (2005); Victoria Seitz et al., *Effects of Family Support Intervention: A Ten-Year Follow-Up*, 56 CHILD DEV. 376, 387 (1985).

249. *See* BLUSTEIN, *supra* note 47, at 10 (justifying parental rights by reference to children's interest in a form of upbringing that furthers their growth to autonomy); Burt, *supra* note 99, at 127 ("A presumption favoring parents corresponds both to the social reality that state child rearing interventions are inherently difficult enterprises and to the psychological reality that an intensely intimate bonding between parent and child lays the best developmental foundation for this society's most prized personality attributes.").

right to a relationship with nonparental caregivers no matter how central these relationships might be to children's caregiving experience. The Supreme Court has made it clear that children's rights in these contexts, if any even exist, are "at best" "the obverse" of the parents' rights.[250] The proposition that children have an independent constitutionally protected right to maintain primary caregiving relationships has never been openly accepted by a majority of the Supreme Court.[251]

The pivotal case addressing nonparental caregiving is *Smith v. Organization of Foster Families for Equality and Reform*.[252] While the Court held in that case that the foster parents did not have a protected liberty interest in a relationship with their foster children, the majority discussed at length the fact that unrelated individuals may develop emotional ties with children as significant as those established by parents.[253] The Court stressed that protection for parental rights stems in part "from the emotional attachments that derive from the intimacy of daily association."[254] And in a somewhat ambiguous passage, the Court intimated that, in the right circumstances, such relationships might rise to the level of a fundamental interest:

> No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.[255]

The Court went on to state that the interest of foster parents must be weighed against "the natural parent's constitutionally-recognized fundamental right."[256] Apparently not raised before the Supreme Court was the question of the children's independent right to maintain caregiving relationship with their foster parents. Had the Court weighed the parental rights against the children's rights, rather than against the fos-

250. Michael H. v. Gerald D., 491 U.S. 110, 131 (1989).

251. *See* Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (holding that constitutional caregiving rights are held by parents).

252. 431 U.S. 816 (1977).

253. *Id.* at 833–44.

254. *Id.* at 844.

255. *Id.* (footnotes omitted).

256. *Id.* at 846–47.

ter parents' interests, a different decision might have been reached.

Over the years, dissenting voices on the Supreme Court have been heard emphasizing children's constitutional interest in nonparental caregiving. Justices Stewart and Stevens have been the most vocal. In *Caban v. Mohammed*,[257] for example, Justice Stewart argued in dissent that parental rights do not inhere solely in "the biological connection between parent and child."[258] Instead, as Justice Stewart phrased it, "[t]hey require relationships more enduring."[259] More recently, Justice Stevens picked up on the same theme in his own dissent in *Troxel v. Granville*, a case involving grandparents petitioning for the right to visit their grandchildren over the objections of the mother. He began with the proposition that, in any dispute between parents and third parties, there exists also "the child's own complementary interest in preserving relationships that serve her welfare and protection."[260] He elaborated: "A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family."[261] Justice Stevens did not go so far as to argue that children's rights to maintain caregiving relationships are on a par with parental rights, but he did reject the absolutism of parental rights in light of the "serious harm" caused by the termination of nonparental family relationships.[262]

The developmental theory expands upon Justice Stevens's observations about caregiving harm by recognizing children's constitutional right to maintain caregiving relationships with their primary caregivers, whether parents or third parties. This developmental approach to maintaining caregiving relationships has close ties to the psychological parent theory espoused

257. 441 U.S. 380, 382 (1979) (holding as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment the statute that gave preference to the mother of a child born out of wedlock over the father in a custody petition).

258. *Id.* at 397 (Stewart, J., dissenting). In these unwed-father cases, the presence of a quasi-marital relationship with the biological mother seemed to serve as a proxy for the father's caregiving relationship with the child. *See* Dailey, *supra* note 50, at 489.

259. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

260. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

261. *Id.*

262. *Id.* at 90.

by Joseph Goldstein, Anna Freud, and Albert Solnit in a series of books beginning in 1973.[263] In these books, the authors argued that custody should always be awarded to the person with whom the child has the strongest emotional bond whether or not that person is the child's legal parent. The psychological parent theory was never fully accepted by the courts in large part because the authors insisted that caregiving rights should be exclusive. Goldstein, Freud, and Solnit's focus on exclusive caregiving relationships did not seem to leave much room for joint custody or blended families, nor for visitation over the objection of the custodial parent. While the psychological parent theory arguably went too far in the direction of caregiving exclusivity, the theory rightly focused on the adverse developmental consequences following serious disruptions in the primary caregiving relationship.[264]

The developmental theory does not override the doctrine of parental rights. Instead, it proposes that a constitutional balance must be reached when conflict exists between parents and their children over the role of nonparental caregivers. In these situations, parental rights must be weighed against the child's right to maintain a primary caregiving relationship, whether custodial or not, with the nonparental figure in his or her life. Recognizing children's due process right to maintain nonparental caregiving relationships means that courts will often be required to balance the various interests on a case-by-case basis. Bright-line rules are necessarily sacrificed but the fundamental nature of children's interests at stake justifies particularized inquiry. In most cases, courts will already be involved in custody disputes or removal proceedings, so the procedures for balancing parental and children's rights will already be underway. Moreover, 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 caregiving relationship to the child's developmental needs.[265]

From a developmental perspective, the Court in *Troxel*[266] should have considered the children's right to maintain rela-

263. *See* sources cited *supra* note 221; *see also* ALSTOTT, NO EXIT, *supra* note 194, at 16–20.

264. *See* ALSTOTT, NO EXIT, *supra* note 194, at 17 ("I begin with Goldstein, Freud and Solnit because their theory has become a classic in the academy and in the legal world, and because it explains, in an accessible and compact fashion, the developmental importance to children of continuity of care.").

265. *See* Dailey, *supra* note 50, at 493.

266. 530 U.S. 57 (2000).

tionships with the primary caregivers in their lives. In this case, a majority of the Court agreed that a Washington trial court decision granting visitation rights to grandparents against the wishes of the mother violated the mother's right to raise her children. In a plurality opinion, Justice O'Connor established a standard that the states may not intrude upon the decisionmaking authority of fit parents.[267] As noted above, Justice Stevens in his dissent took a more developmental approach in finding that "[t]here is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child."[268] From a developmental perspective, the standard in these circumstances should be whether the nonparental caregiving relationship rises to the level of a primary relationship in the child's life. Under this standard, the decision in *Troxel* as it pertained to the facts of that case may have been correct as there was no evidence in the Supreme Court's opinion that the grandparents were primary caregivers in the children's lives. However, a developmental approach would make explicit that children have an independent right to maintain a relationship with their primary caregivers, whether legal parents or not.

Children also experience caregiving harm when the state intervenes to remove children from their parents on grounds of parental abuse or neglect. In these circumstances, parents and children have a shared interest in maintaining these caregiving bonds.[269] In *Santosky v. Kramer*, the Supreme Court held that the state must show by clear and convincing evidence that the parents are unfit before parental rights can be terminated.[270] The Court justified this heightened evidentiary standard in part on the ground that "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[271] While the Court did not focus specifically on caregiving harm, it did note that "[e]ven when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare."[272] The decision illustrates

267. *Id.* at 68–69.

268. *Id.* at 86 (Stevens, J., dissenting).

269. *See* Santosky v. Kramer, 455 U.S. 745 *passim* (1982).

270. *Id.* at 748–49.

271. *Id.* at 760.

272. *Id.* at 765 n.15 (citing Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993 (1975)). The dissent in *Santosky* downplayed the potentially harmful effects of removal, but did focus on the child's independent interest in "[a] stable,

that parental rights can sometimes serve as a proxy for protecting children's independent interest in maintaining a relationship with their primary caregivers. But where a child's primary caregiving relationship is with someone other than the legal parents, then the interests of the parents and the child are no longer aligned, and parental rights must be balanced against the child's independent developmental right to maintain a relationship with that third party.

In related circumstances, children's independent right to maintain a primary caregiving relationship with their parents also comes into play when noncitizen parents of citizen children are deported. All circuit courts to address this issue have concluded that removal orders against a noncitizen parent do not violate the constitutional rights of the citizen child.[273] The recognition of children's constitutional right to maintain a caregiving relationship might in some circumstances prevent the state from deporting noncitizens parents when to do so would require separation of the parent and child.[274] Separation might be necessary, for example, when there is a threat to the child's safety or extreme hardship if the child accompanies the parent to the home country.[275] The immigration cases demonstrate that parental rights alone do not suffice to protect children's caregiving interests because parents and children seeking to preserve their relationship are not always similarly situated with respect to the threatened caregiving harm.

Children's right to maintain caregiving relationships also deserves special recognition in cases arising under other constitutional provisions but touching upon family relationships. Any case that pits parents against the state has a potential impact on the parent-child relationship. For example, the Court in

loving home life," specifically identifying the child's future interest in adult citizenship: "Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance . . . ." *Id.* at 788–90 (Rehnquist, J., dissenting).

273. *See, e.g.*, Payne-Barahona v. Gonzalez, 474 F.3d 1, 2 & n.1 (1st Cir. 2007). *See generally* Satya Grace Kaskade, *Mothers Without Borders: Undocumented Immigrant Mothers Facing Deportation and the Best Interests of Their U.S. Citizen Children*, 15 WM. & MARY J. WOMEN & L. 447 (2009) (detailing the high burden mothers facing deportation must meet when pleading the best interests of their children).

274. *See, e.g.*, Kaskade, *supra* note 273, at 450.

275. *See* Niang v. Gonzalez, 492 F.3d 505, 507–08 (4th Cir. 2007) (describing the harm the daughter would suffer from being subjected to female genital mutilation in the mother's home country if deported).

Wisconsin v. Yoder held that the Amish parents in that case had a First Amendment right to refuse to send their children to school after the eighth grade.[276] The Court rested its decision on the free exercise rights of parents, but at stake in the case was also the children's interest in maintaining caregiving ties with their custodial parents.[277] Justice Douglas's dissent took the classic choice theory approach that the children should have been given the right to make the decision whether to attend school for themselves.[278] Missing from any of the opinions in *Yoder* was a developmental perspective that would have taken into account the potential impact of the state's compulsory education law on the children's primary caregiving relationships. Cases brought by parents challenging school curriculum on First Amendment grounds also raise usually unexamined issues concerning the effect of curriculum requirements on the parent-child relationship.[279] Robert Burt has argued that the school policy in *Tinker,* which forbade the wearing of black armbands in school, potentially adversely affected the parents' relationship to their children.[280] In all these cases, the child's underlying interest in maintaining caregiving relationships comes into play when assessing the constitutionality of the governmental action. The harm to caregiving would not necessarily lead to strict scrutiny in all cases. The level of scrutiny should turn on the nature and degree of the children's caregiving interest in the circumstances of the particular case.

In some cases, primary caregivers themselves should have standing to assert children's rights and interests, particularly where the parent is the sole caregiver in the child's life. The standing issue would arise most frequently when state action threatens to separate parent and child for an extended period of time. For example, when primary caregivers are sentenced to jail, the courts do not usually consider the impact on children's caregiving interests. Similarly, unwanted deployment overseas

276. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

277. *Id.* at 214.

278. *Id.* at 241–43 (Douglas, J., dissenting).

279. *See, e.g.*, Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987) (holding that requiring public school students to study basic materials chosen by school authorities did not create an unconstitutional burden under the Free Exercise of Religion Clause of the First Amendment).

280. *See* Burt, *supra* note 99, at 124 (noting that the *Tinker* court failed to "acknowledge the potential educational and constitutional relevance of the facts in the case suggesting that the children's armbands reflected more their parents' convictions than theirs").

of primary caregivers can have serious consequences for the children of single parents. The issue of parental removal in the immigration context has already been discussed. The analysis here is not so different from the constitutional analysis relating to children's fundamental interest in education. Anytime the state acts to separate primary caregivers from their children, the court should apply heightened scrutiny of the state action based on the harm to children's caregiving rights.

Finally, the developmental theory opens the door to establishing children's affirmative right to a minimum level of caregiving services from the state. Much has been written on the obstacles to a theory of affirmative constitutional rights. As Goodwin Liu has recently observed, "[T]he idea that our Constitution guarantees affirmative rights to social and economic welfare has for some time been out of fashion."[281] Robin West has similarly noted that rights theorists have concluded "that rights, as conceived and employed in at least United States liberal and constitutional jurisprudence, are fundamentally at odds with any purported state obligation to ensure the material preconditions of a good society."[282] Apart from Liu and West,

281. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 204 (2008).

282. Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1907 (2001). Frank Michelman wrote the seminal work on the rights of poor citizens to basic necessities. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). William Forbath also describes a "social citizenship tradition" in American law that he argues supports affirmative constitutional welfare rights. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1827–28 (2001). *But see* Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 695–96; Henry Paul Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 118 (1978).

In the late 1960s and early 1970s, the Supreme Court appeared to be moving in the direction of recognizing affirmative rights to certain basic welfare goods. *See* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* (Univ. of Chi., Public Law Working Paper No. 36, 2003), *available at* http://ssrn.com/abstract=375622. At that time, the Court used language suggesting that there was a fundamental right to "the very means to subsist—food, shelter, and other necessities of life." Shapiro v. Thompson, 394 U.S. 618, 627 (1969); *see also* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 261–62 (1974) (nonemergency medical care); U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 514 (1973) (food stamps); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (pretermination evidentiary hearings). But the Supreme Court soon made clear that in the United States adults do not have affirmative constitutional rights to basic social necessities. *See* Maher v. Roe, 432 U.S. 464, 469–71 (1977) (nontherapeutic abortions); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (public school financing); Lindsey v. Normet, 405 U.S. 56,

there are few contemporary scholars calling for the recognition of affirmative rights as an essential feature of the present constitutional scheme.[283] The Supreme Court has recognized some affirmative constitutional rights, most in the realm of procedure such as the right to a speedy trial or to habeas corpus, but for the most part the Constitution is treated as a charter of negative liberties.[284]

A developmental theory of children's rights rejects the prevailing view of affirmative constitutional rights as they pertain to children. A constitutional regime of negative liberty *for adults* does not preclude recognition of affirmative rights *for children*.[285] The most important recent case addressing the question of affirmative constitutional rights involved a claim for protection from physical harm brought by a child and his mother. In that case, *DeShaney v. Winnebago County*,[286] the child and his mother argued that state authorities had failed to protect the boy from abuse at the hands of his father. In rejecting the claim, the Court observed that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[287] The majority recognized an exception

74 (1972) (housing); James v. Valtierra, 402 U.S. 137, 142–43 (1971) (public housing); Dandridge v. Williams, 397 U.S. 471, 486–87 (1970) (Aid to Families With Dependent Children program).

283. *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 337 (2006) ("Neither the text nor the history of the Constitution forecloses a reading of its broad guarantees to encompass positive rights, and the experiences of other nations suggest that the existence of such rights is compatible with constitutionalism."); West, *supra* note 282, at 1907 ("The notion of a positive right may be disfavored in contemporary liberal discourse, but it is by no means oxymoronic."); *cf.* Ezer, *supra* note 184, at 3 (arguing for "a positive right to protection for children"); Forbath, *supra* note 282, at 1888 ("[A] republican constitution must vouchsafe the social conditions of democratic lawmaking . . . ."); Ryan, *supra* note 222, at 53 (proposing an affirmative right to preschool at the state constitutional level).

284. Some commentators have observed that certain negative rights recognized under the Constitution require a set of background entitlements that might be construed as affirmative rights. *See, e.g.*, Liu, *supra* note 283, at 336–37 (citing David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986)); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 889 (1987)).

285. *See* Ezer, *supra* note 184, at 2 ("Although children defy the conventional view of negative rights, they lend themselves more readily to a positive rights regime.").

286. 489 U.S. 189 (1989).

287. *Id.* at 196.

to this general rule where "the State takes a person into its custody and holds him there against his will."[288] But the holding in *DeShaney* clearly stands for the proposition that children not in the direct custody of the state have no special claim to minimum affirmative constitutional entitlements to their own safety.

What the Court missed in *DeShaney* is the fact that affirmative rights for children are necessary in some circumstances for children to acquire the very skills of autonomous choice that the Court in *DeShaney* seeks to protect. It is not that children have an absolute right not to be harmed. Rather, from a developmental perspective, children have a right to the minimum level of caregiving services necessary to ensure their physical safety. In *DeShaney*, it may in fact have been the case that the State of Wisconsin had adequate services available, and that the harm to the child resulted from unforeseeable errors. Clearly, not every caregiving harm can become a cognizable constitutional offense. But the question of whether the State of Wisconsin's child welfare system provided in general a constitutionally adequate level of services was never considered.[289]

The possibility of affirmative rights unique to children has not entirely escaped the attention of the Supreme Court. The right to custody is the prime example. In *Gault*, the Supreme Court described children's fundamental right to custody as follows:

> The right of the state, as *parens patriae,* to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is "delinquent"—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.[290]

Justice Rehnquist, writing for the majority in the 1984 case of *Schall v. Martin*, endorsed the "right to custody" argument.[291] In upholding the practice of juvenile pretrial detention, he wrote:

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288. *Id.* at 199–200.

289. Many commentators have criticized the Court's affirmative rights holding in *DeShaney*. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2278–97 (1990).

290. *In re* Gault, 387 U.S. 1, 17 (1967) (citation omitted).

291. Schall v. Martin, 467 U.S. 253, 265 (1984).

> The juvenile's countervailing interest in freedom from institutional restraints . . . is undoubtedly substantial. . . . [T]hat interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody . . . . Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part . . . .[292]

As the passage from *Schall* indicates, one of the ironies of this particular justification for the dependency thesis—that children have a right to custody instead of liberty—is that it provides a basis for arguing that children have an affirmative right to the custodial environments they need. One commentator quoted by the Supreme Court in *Gault* elaborated, "The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so."[293] Justice Rehnquist echoes this point when he notes that the state "must" take custody of a child when parents are unfit.[294]

Schall's right to custody provides the starting point for establishing that the Constitution confers minimum affirmative rights on children. Children's developmental right to education is a familiar idea.[295] Because the prevailing model of children's upbringing emphasizes the importance of education to the cultivation of critical-thinking skills, it has long supported calls for educational rights. In a pair of cases from the 1940s, the Supreme Court first affirmed the state's educational mission of "educating the young for citizenship,"[296] and a decade later *Brown* sounded that same theme.[297] Children's fundamental interest in education has been highlighted in cases brought by children against school authorities under many constitutional provisions, including the First Amendment, the Due Process

292. *Id.* (citation omitted).

293. Curtis C. Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A. J. 719, 720 (1962) (quoted in *In re Gault*, 387 U.S. at 17 n.21).

294. *See Schall*, 467 U.S. at 265.

295. *See, e.g.*, Gutmann, *supra* note 176, at 349; Haydon, *supra* note 176, at 5.

296. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

297. In *Brown*, the Court emphasized that education is a prerequisite to citizenship in a democratic republic:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

347 U.S. 483, 493 (1954).

Clause, and the Equal Protection Clause.[298] Although the Supreme Court has never expressly recognized a fundamental right to public education under the Federal Constitution, the Court has affirmed that public education is not "some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[299] Even *San Antonio Independent School District v. Rodriguez,* known for holding that the Constitution does not protect the right to education, nevertheless opens the door to recognizing an affirmative right to education where not even minimum school services are available.[300] The role of education in socializing children for adult responsibilities played a central role in the Supreme Court's decision in *Plyler v. Doe*, which upheld the right of undocumented alien children to attend public school.[301]

The developmental theory corrects for the prevailing education-centered view of affirmative rights by focusing on children's equally important rights to caregiving. While education is certainly a central developmental right, the prevailing and singular focus on education as the place where children's citizenship skills are developed misses the foundational role of caregiving in the development of autonomous choice, and the important way in which caregiving sets the stage for all later educational experiences. The remainder of this section outlines what an affirmative constitutional right to caregiving would look like.

An affirmative right to caregiving services means that children at risk of caregiving failure would have a claim under the Due Process Clause to state services supporting family caregiving. From a developmental perspective, childhood poverty presents the most compelling case for recognizing children's affirmative rights to minimum necessities because it poses the most substantial risk to the establishment of a good-enough

298. *See, e.g.*, sources cited *supra* note 9.

299. Plyler v. Doe, 457 U.S. 202, 221 (1982).

300. *Compare* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."), *with id.* at 23 (noting that *Rodriguez* did not involve an "absolute deprivation" of education benefits).

301. *Plyler*, 457 U.S. at 222 n.20. The right to education is guaranteed in all state constitutions, and more than one-half of those states guarantee children a qualitative right to equal or adequate education. *See* Ryan, *supra* note 222, at 52.

caregiving environment for the greatest number of children.[302] Childhood poverty adversely affects the early caregiving relationship in part because it coexists with so many other unfavorable risk factors for caregiving failure such as homelessness, substance abuse, unemployment, and neighborhood violence.[303] Research shows that positive parental involvement in children's lives can be a mediating factor between child poverty and child outcomes.[304] However, caregiver depression and anger stemming from poverty are a common and normal facet of life, as well as a significant strain on the caregiving relationship.[305] Abuse and neglect occur at higher rates in families struggling under the strain of poverty.[306] Poverty correlates with single parenthood and broken families, situations that present the greatest challenges to successful caregiving. Given

302. *Cf.* DEANNA M. LYTER ET AL., INST. FOR WOMEN'S POLICY RESEARCH, THE CHILDREN LEFT BEHIND 39 tbl.1 (2003) (highlighting the number of children in poverty). In 2008, nineteen percent of children were living below the poverty line. *See* VANESSA R. WIGHT ET AL., NAT'L CTR. FOR CHILDREN IN POVERTY, WHO ARE AMERICA'S POOR CHILDREN? 3 (2010), *available at* http://www.nccp.org/publications/pdf/text_912.pdf. Forty-six percent of children under age three live in low-income families, MICHELLE CHAU ET AL., NAT'L CTR. FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN, 2009: CHILDREN UNDER AGE 3, at 1 (2010), *available at* http://www.nccp.org/publications/pdf/text_971.pdf, and twenty-four percent of children under age six live below the poverty line, MICHELLE CHAU ET AL., NAT'L CTR. FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN, 2009: CHILDREN UNDER AGE 6, at 1 (2010), *available at* http://www.nccp.org/publications/pdf/text_972.pdf. Even after controlling for other variables such as family structure, parental welfare, parental schooling, parental work, and neighborhood poverty, children raised in long-term poverty experienced higher rates of poverty as adults than did nonpoor children. *See* Mary E. Corcoran & Ajay Chaudry, *The Dynamics of Childhood Poverty*, 7 FUTURE CHILD., no. 2, 1997 at 40, 51 tbl.2.

303. *See* Jeanne Brooks-Gunn et al., *Toward an Understanding of the Effects of Poverty upon Children*, *in* CHILDREN OF POVERTY 3, 17–20 (Hiram E. Fitzgerald et al. eds., 1995); Arnold J. Sameroff, *Models of Development and Developmental Risk*, *in* HANDBOOK OF INFANT MENTAL HEALTH 3, 9 (Charles H. Zeenah, Jr. ed., 1993).

304. *See* Kerry E. Bolger et al., *Psychosocial Adjustment Among Children Experiencing Persistent and Intermittent Family Economic Hardship*, 66 CHILD DEV. 1107, 1108 (1995).

305. *See* Vonnie McLoyd, *Poverty, Parenting, and Policy: Meeting the Support Needs of Poor Parents, in* CHILDREN OF POVERTY, *supra* note 303, at 269, 273; Vonnie C. McLoyd, *Socioeconomic Disadvantage and Child Development*, 53 AM. PSYCHOL. 185, 196 (1998); Vonnie C. McLoyd & Leon Wilson, *The Strain of Living Poor: Parenting, Social Support, and Child Mental Health, in* CHILDREN IN POVERTY 105, 108 (Aletha C. Huston ed., 1991).

306. *See* McLoyd, *supra* note 248, at 324–25.

the demographics of poverty, its impact is greatest on children of color.[307]

The deleterious effect of poverty on early caregiving is supported by the social science research. Research shows that early caregiving intervention has significant long-term beneficial effects on children living in poverty.[308] For example, extensive research has been done showing that enrollment in high quality day care correlates with greater child interest and task orientation and lower child anxiety.[309] Children attending high quality daycare also exhibit relatively fewer unfriendly interactions with their peers, better impulse control, and greater social competency.[310] Socialization is the primary area in which studies have demonstrated long-term psychological effects of quality day care. Multiple studies have found that in comparison with control groups, students enrolled in child care as toddlers exhibited better school attendance and classroom behavior up to ten years later.[311] Studies also consistently show that quality daycare can improve a child's later scholastic performance.[312] The

307. *See* Bolger et al., *supra* note 304, at 1109; McLoyd, *supra* note 248, at 311.

308. *See, e.g.*, W. Steven Barnett, *Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, 5 FUTURE CHILD, no. 3, 1995 at 25, 43–44; Halbert B. Robinson & Nancy M. Robinson, *Longitudinal Development of Very Young Children in a Comprehensive Day Care Program: The First Two Years*, 42 CHILD DEV. 1673, 1681–82 (1971). In this regard:

> Research . . . strongly suggests that good day care can promote children's cognitive and social development. Children in better day-care centers score higher on standardized language and intelligence tests. They demonstrate more task orientation; a higher level of play with objects, adults, and peers; more sociability and consideration; more compliance and self-regulation; higher communicativeness and reciprocity with their mothers; and a more positive attitude toward adults.

Donna King & Carol E. MacKinnon, *Making Difficult Choices Easier: A Review of Research on Day Care and Children's Development*, 37 FAM. REL. 392, 394 (1988) (citations omitted).

309. DEBORAH LOWE VANDELL & BARBARA WOLFE, INST. FOR RESEARCH ON POVERTY, CHILD CARE QUALITY *passim* (2000), *available at* http://aspe.hhs.gov/hsp/ccquality00/ccqual.htm.

310. Deborah Lowe Vandell, *A Longitudinal Study of Children with Day-Care Experiences of Varying Quality*, 59 CHILD DEV. 1286, 1290–92 (1988).

311. *See* Johnson & Walker, *supra* note 248, at 233–35; Seitz et al., *supra* note 248, at 387.

312. Outcomes of quality day care include various achievements. *See, e.g.*, ELLEN S. PEISNER-FEINBERG & NOREEN YAZEJIAN, FPG CHILD DEV. INST., THE RELATION OF PRESCHOOL CHILD CARE QUALITY TO CHILDREN'S LONGITUDINAL SCHOOL SUCCESS THROUGH SIXTH GRADE 7 (2004), *available at* http://www.researchconnections.org/files/meetings/ccprc/2004-04/posters/peisneryazejian.pdf (fewer negative narrative comments in a child's elementary school records); Anders G. Broberg et al., *Effects of Day Care on the Development of*

benefits are most pronounced for children who enter daycare early on, before one year of age.[313]

The research on the beneficial effects of high quality daycare on at-risk children suggests that improvements in early caregiving have significant and long-term effects on children's development in a wide range of areas. Notably, the positive effects of quality daycare for poor children are not limited to childhood outcomes but rather include longer-term life impacts. Perhaps the most famous and commonly referenced example of a program producing substantial long-term effects is the Michigan Perry Preschool program of the 1960s.[314] Longitudinal studies of three- and four-year-olds who attended the program found that participants demonstrated lower lifetime criminal activity, higher educational attainment, and eleven percent to nineteen percent higher earnings between the ages of eighteen and forty as compared to control-group children.[315] Early intervention in the lives of poor children likely has positive effects in part because the intervention supports and improves existing

Cognitive Abilities in 8-Year-Olds: A Longitudinal Study, 33 DEV. PSYCHOL. 62, 67 (1997) (better standardized achievement test scores); Linda Jacobson, *Child-Care Effects Seen into 3rd Grade*, EDUC. WK., May 4, 2005, at 9 (same); *id.* (better memory skills).

313. Bengt-Erik Andersson, *Effects of Public Day-Care: A Longitudinal Study*, 60 CHILD DEV. 857, 864 (1989). Like day care, early childhood educational programs also show significant benefits for children. In the short term, quality preschool programs boost children's IQ, though these effects tend to fade while children are still in elementary school. *See* Ryan, *supra* note 222, at 59–63; *see also* CYNTHIA LAMY ET AL., NAT'L INST. FOR EARLY EDUC. RESEARCH, THE EFFECTS OF NEW JERSEY'S ABBOTT PRESCHOOL PROGRAM ON YOUNG CHILDREN'S SCHOOL READINESS 3 (2005), *available at* http://nieer.org/resources/research/multistate/nj.pdf. However, these programs also lead to longer-lasting and sizeable gains in achievement scores, especially in reading, *see* Ryan, *supra* note 222, at 63, and lower rates of entry into special education, *see* Liza M. Conyers et al., *The Effect of Early Childhood Intervention and Subsequent Special Education Services: Findings from the Chicago Child-Parent Centers*, 25 EDUC. EVALUATION & POL'Y ANALYSIS 75, 77 (2003). Studies based on students' self-reported data at the age of fifteen have found that former participants of quality early education programs place a higher value on schooling than do their nonprogram counterparts. B. Zoritch et al., *The Health and Welfare Effects of Day-Care: A Systematic Review of Randomized Controlled Trials*, 47 SOC. SCI. MED. 317, 322 (1998).

314. *See, e.g.*, LEONARD N. MASSE & W. STEVEN BARNETT, NAT'L INST. FOR EARLY EDUC. RESEARCH, A BENEFIT COST ANALYSIS OF THE ABECEDARIAN EARLY CHILDHOOD INTERVENTION 5 (2002), *available at* http://nieer.org/resources/research/AbecedarianStudy.pdf.

315. *See* Barnett, *supra* note 248, at 336; Nores et al., *supra* note 248, at 247–52. Other long-term advantages of program participation included lower rates of drug use, lower rates of teenage pregnancy, and lower rates of mortality. *See id.*

caregiving relationships. This research on early intervention supports the developmental literature showing the strong connections among childhood poverty, high quality early caregiving, and children's psychological development.

Children's affirmative constitutional right to caregiving services does not mean that caregiving must be perfect, or even necessarily good. The standard for caregiving services need only reach as high as the minimal standard of "good-enough" caregiving, by which is meant the services must offer the child the possibility of establishing and maintaining a responsive, affectively attuned, stable caregiving relationship. The concept of good-enough caregiving sets the parameters for what children on average need, and provides a measure for evaluating the environmental stresses that adversely affect early caregiving. Services providing poor children with basic necessities such as income support, food, housing, and clothing certainly qualify as necessary under this standard. Although investigation of what services beyond basic necessities are constitutionally compelled must await further work, a standard of good-enough caregiving might eventually support poor children's entitlement to early childcare services such as visiting nurses, daycare, and preschool.[316]

While affirmative rights to caregiving services anticipate substantial reallocation of social resources, federal and state laws already currently include scores of programs benefiting poor children.[317] The developmental approach to children's rights thus reflects and builds on this existing social welfare system. Although a developmental model that recognizes children's constitutional rights to caregiving may seem radical in its goal of reducing the worst effects of childhood poverty, this

316. *See* Jeanne Brooks-Gunn, *Strategies for Altering the Outcomes of Poor Children and Their Families*, *in* ESCAPE FROM POVERTY 87, 96 (P. Lindsay Chase-Lansdale & Jeanne Brooks-Gunn eds., 1995); Barbara L. Devaney et al., *Programs That Mitigate the Effects of Poverty on Children*, 7 FUTURE CHILD., no. 2, 1997 at 88, 91 tbl.1; Aletha C. Huston, *Antecedents, Consequences, and Possible Solutions for Poverty Among Children*, *in* CHILDREN IN POVERTY, *supra* note 303, at 282, 312; David L. Olds et al., *Prenatal and Infancy Home Visitation by Nurses: Recent Findings*, 9 FUTURE CHILD., no. 1, 1999 at 44, 61–62.

317. *See, e.g.*, INST. FOR EDUC. LEADERSHIP, CONG. RESEARCH SERV., SPECIAL REPORT no. 15, FEDERAL PROGRAMS FOR CHILDREN & FAMILIES 7 (2000), *available at* http://www.iel.org/pubs/fedprogs.pdf; *Compilation of Selected Federal Programs for Children and Families*, WOMEN'S & CHILDREN'S HEALTH POLICY CTR., http://www.jhsph.edu/wchpc/resources/federal_MCH.html (last visited Apr. 28, 2011).

goal in fact is already deeply embedded in existing entitlement programs and services directed to children's well-being. Indeed, children's right to caregiving services only advances existing social commitments to eliminating the most harmful effects of child poverty. Ultimately, it is to be hoped that this substantial investment in children's upbringing will bring, as research indicates it will, long-term economic benefits of its own.[318]

A final issue regarding the justiciability of children's claims to caregiving services presents itself. Children's affirmative constitutional rights raise the question whether children's developmental rights to caregiving services are judicially enforceable or whether, instead, these constitutional rights are only enforceable through the political branches. That the federal and state legislatures carry the primary responsibility for ensuring that children's affirmative caregiving rights are fulfilled makes sense for a number of reasons, as Liu and West have both explained in recent work on the subject of affirmative constitutional rights generally.[319] Congress and the state legislatures are the only governmental bodies directly empowered to provide the kind of caregiving services required. Any judicial remedy in this area must be directed to executive officials who in turn must look to the legislature for policy guidance and appropriations. Legislatures are also best situated to consider all the policy implications relating to proposed programs for children and how they fit with existing child welfare and educational services at both the national and state levels. Congressional action need not take the form of providing direct governmental services to children, but can include spending initiatives that support the states' activities in these areas. Yet the importance of the constitutional rights at stake demands a minimal degree of judicial intervention, at least in the initial stages to ensure that children's rights become a legislative priority.[320] Once Congress undertakes the task, the federal courts' role will be to ensure that good faith efforts to provide children with minimum levels of caregiving services are being made. It is not the responsibility of the federal courts to micro-

318. *See* Ryan, *supra* note 222, at 65–67 (discussing the economic benefits from early intervention programs).

319. *See* Liu, *supra* note 281, at 204–05; Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 228–29 (2006). Robin West argues that Congress and not the courts has the moral responsibility to further social welfare ends, although—contrary to the argument here—she rejects judicial enforcement of these legislative duties. *Id.*

320. *See* Sunstein, *supra* note 282, at 12.

manage federal and state efforts to implement caregiving programs and services, but some level of judicial oversight on behalf of children is likely to be necessary at the outset.

The developmental theory of caregiving rights is open to the criticism that its vision for the redistribution of resources is simply not politically feasible. Two brief responses are worth making here. First, a theory which reimagines the relationship of the state to children—particularly children living in poverty—is itself worthwhile to the extent it helps to draw attention to children's right to (and need for) caregiving services. Second, as already noted, federal and state laws already confer a wide range of benefits on children. A developmental right to caregiving would expand upon these benefits in the same way that the decision in *Brown* built upon an educational system already in existence. While the developmental theory has the potential for reshaping our social landscape by eliminating the worst effects of childhood poverty, these long-term consequences of recognizing children's constitutional rights to caregiving fulfill, rather than subvert, existing social, constitutional, and political ideals.

CONCLUSION

This Article has presented a developmental theory of children's rights that focuses on the fundamental role of children's rights in the socialization process leading to adult autonomy. As explained above, the long history of denying children the full range of constitutional rights has its roots in a choice theory of rights. Choice theory understands rights as deriving from the decisionmaking autonomy of the individual. From the perspective of choice theory, children do not enjoy most constitutional rights because they lack the capacity for autonomous choice. Choice theory not only justifies the long history of denying children rights, but it also serves to explain the recent but growing number of modern Supreme Court cases in which children's constitutional rights have been recognized. Choice theory regards these newly recognized rights as "autonomy rights," that is, adult rights given to older children based on their increasing capacity for autonomous choice.

As explained in this Article, choice theory falls short as a theory of children's constitutional rights for two reasons. First, as a descriptive matter, choice theory is simply too narrow. As choice theorists would acknowledge, the theory does not address whole categories of existing rights where the decision-

making autonomy of the right-holder is not in issue. Even more troubling, choice theory has no conceptual apparatus for defining children's rights in terms of children's future autonomy or for conceiving of children's rights in socializing terms. Second, as a psychology of decisionmaking, choice theory rests on an excessively rationalist model of decisionmaking that ignores numerous core aspects of mature, autonomous choice. Psychological research on decisionmaking illuminates the broad range of mental skills—cognitive, emotional, and imaginative—that children must acquire in order to become autonomous decisionmakers. By associating autonomous choice with critical-thinking skills learned in school, choice theory ignores the noncognitive attributes of choice and the family caregiving essential to their development.

This Article has proposed a developmental theory of children's constitutional rights that overcomes the descriptive and psychological limitations of prevailing choice theory while preserving its central commitment to individual autonomy. The developmental theory's core insight into the importance of caregiving to children's future autonomy supports recognizing children's fundamental constitutional rights in the caregiving relationship. As described in this Article, children's caregiving rights take three basic forms. First are children's rights under the Due Process Clause to be free from state intervention into established caregiving relationships. Second are children's rights arising under other constitutional provisions where the rights at issue touch upon their caregiving interests. Third, and most far-reaching, are children's affirmative constitutional rights to a minimum level of caregiving services from the state. This final category of rights focuses the debate on state support for the caregiving relationships children need to become autonomous adults and citizens. In elaborating on a developmental theory of children's constitutional rights, this Article aims to secure children's rightful place as full members and future autonomous participants in the constitutional scheme.