A DEVELOPMENTAL PERSPECTIVE ON THE IDEAL OF REASON IN AMERICAN CONSTITUTIONAL LAW

The ideal of reason is central to contemporary accounts of citizenship in American constitutional law. The individual capacity for reasoned choice lies closely aligned with the constitutional values of personal liberty and democratic self-government as they have evolved in Supreme Court decisions over the past century. Yet as presently conceived, the ideal of reason in constitutional law overlooks the process by which individuals actually acquire the capacity to choose their own values and commitments or to engage in reasoned thinking about collective ends. This paper argues that we cannot hope to sustain and foster a constitutional polity committed to the principles of individual liberty and democratic self-government without knowing something about how individual citizens come to possess this requisite skill of mind. A developmental perspective on reason in constitutional law provides a framework for examining the source and contours of the psychological skills that make it possible to lead an autonomous, self-directed life and to participate meaningfully in the processes of democratic self-government. Developmental psychology, together with research in related fields, provides empirical support for the proposition that the psychological capacity for reasoned thinking has its roots in the early caregiving relationship. Thus, a comprehensive and integrated constitutional family law must recognize the role of early caregiving in the political socialization of children. This developmental approach offers a substantial reworking of constitutional doctrine in the areas of family privacy, parental rights, congressional power, and affirmative welfare rights.

The ideal of the autonomous citizen capable of reasoned thinking and meaningful choice is a core operative concept in modern constitutional law, central to contemporary accounts of individual liberty.

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and democratic self-government. But an understanding of the developmental origins of this core ideal—the process by which citizens actually acquire the capacity for reasoned thinking and meaningful choice—is indisputably lacking. This paper proposes that we cannot hope to sustain and foster a constitutional polity committed to the principles of individual liberty and democratic self-government without knowing something about how individuals come to possess this requisite skill of mind. Autonomous citizens endowed with the capacity of reason are not just born or educated; they are raised. Developmental psychology provides important empirical support for the proposition that the psychological essence of citizenship under our Constitution, the capacity for reasoned thinking, has its roots in the early caregiving relationship. The implications of this foundational connection between reason and caregiving for constitutional law are far-reaching and profound.

This paper investigates what psychological researchers know about the role of the early caregiving relationship in the building up of basic psychic structure and processes. Developmental research provides a starting point for understanding the extent to which the psychological capacities necessary for mature reasoned thinking, including the skills of critical self-reflection and affect regulation, derive from the internalization of the early caregiving relationship. The developmental research drawn on in this paper comes from a number of subfields within psychology, including neuroscientific, cognitive, social, and developmental psychology, but the basic conceptual framework is that of psychoanalytic psychology. Contemporary psychoanalysis offers a vision of human nature that, notwithstanding its flaws, resonates deeply with the dual aspirations of individual liberty and democratic self-government in modern constitutional law (Gay 1982). No other psychological approach provides as broad and deep an understanding of children’s psychological development (Tyson and Tyson 1990), and no other approach recognizes the extent to which emotional attachments and critical thinking are inextricably, and developmentally, bound up together through the process of internalization. Early family relationships are the source of our most emotionally intense loyalties and attachments, as well as our capacity for combating irrational and destructive commitments and prejudices through reasoned thinking. Acquiring the skills to manage and integrate the disruptive and potentially self-destructive effects of irrational feelings, the defining work of psychoanalysis, also constitutes a central but overlooked facet of
what it means to be a citizen in our constitutional polity. To borrow from Justice Holmes, the Constitution most certainly does not enact Freud’s *Interpretation of Dreams*, but it *does* require that we understand and account for the development of those characteristics of a citizenry capable of fulfilling the highest aspirations of the constitutional enterprise.

A developmental perspective on the importance of early caregiving to the development of reasoned thinking lays the foundation for a comprehensive and integrated constitutional family law. A developmental approach expands the prevailing view of the family as a private sphere of intimate relations to include the family’s public role in the core activity of raising future citizens. This reorientation of the meaning of child rearing in constitutional law from a solely private activity to one with significant political meaning has implications for three main areas in constitutional family law. A developmental view refashions the law of parental rights under the due process clause of the Fourteenth Amendment to encompass constitutional protection for caregiving relationships. A focus on development also expands Congress’s constitutionally prescribed power to enact economic and social legislation in support of family child rearing while at the same setting limits on Congress’s power to commandeer the moral dimensions of child rearing. Finally, a developmental approach breathes new life into the debate over affirmative welfare rights by recognizing a governmental duty to provide family caregivers basic child rearing necessities as a precondition to citizenship. The approach taken here can be viewed as a first step toward a constitutional jurisprudence that recognizes the social preconditions to the development of the psychological skills of citizenship in American constitutional law.

**DEVELOPMENTAL VIEWS ON REASON**

A developmental perspective on reason in constitutional law requires a close study of the psychological skills that make it possible for someone to lead an autonomous, self-directed life and to participate meaningfully in the processes of democratic self-government. Reasoned thinking in the constitutional sense certainly requires more than the cognitive skills of conceptual thinking, information processing, and

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1 *Lochner v. New York* (1905) (Holmes, J., dissenting).
logical computation. At a minimum, an autonomous, self-directing citizen must be able to reflect on his or her beliefs, values, and commitments and to think and act in a manner consistent with those moral choices. Because beliefs, values, and commitments are not always clear or consistent, critical self-reflection is an essential part of reasoned thinking. Critical self-reflection, in turn, requires the capacity to imagine alternatives to one’s own moral universe. Sources of emotional understanding such as empathy and intuition also play a role in reasoned thinking, and highlight the vital importance of emotional self-regulation. To be an autonomous, self-directed person means having the ability to access as well as to manage and restrain one’s emotions and to limit their distorting, sometimes unconscious, effects on decision making. The ideal of reason in constitutional law thus encompasses the individual’s basic perceptual and cognitive abilities, as well as the mature integrated psychological capacities for critical self-reflection and emotional self-mastery.

Although not a psychological concept per se, the capacity for reasoned thinking can be looked at for these purposes as a developmental line, or maturational sequence, beginning in the earliest physical interactions with an emotionally responsive caregiver and ending in a mature complex capacity to lead an independent, autonomous, self-directed life (Mayes and Cohen 1992). Many factors affect this course of development, both innate and environmental, and it is impossible to say with any certainly how these factors will affect a particular child’s development. Nevertheless, developmental research does show us that one of the most important environmental factors in this developmental trajectory is the relationship with early caregivers, in particular the relationship between an infant and its primary caregiver in the first two or three years of life (Mahler, Pine, and Bergman 1975; Stern 1985; Tyson and Tyson 1990). Empirical research supports the fundamental psychoanalytic axiom that early relationships with significant caretakers are critical to the building up of psychic structure and stable ego functions (Vaughan 1997). This research correlates with the clinical observation that the early caregiving relationship stimulates and consolidates the development of the most important early mental processes in the pathway leading to mature reasoned thinking.

Internalization is one of the primary psychological mechanisms by which early caregiving relationships are constitutive of early mental capacities. The process of internalization, or the psychological taking in
of the relationship with a primary caregiver, encompasses a reciprocal affective engagement between infant and caregiver that, in combination with innate physiological and maturational processes, gives rise to basic psychological structure and mental processes (Behrends and Blatt 1985; Meissner 1979; Schafer 1972; Tyson and Tyson 1990). Internationalization emphasizes the deep connection between early affective experiences and the creation of an inner representational world (Loewald 1980; Mayes and Cohen 1992). Researchers postulate that from very early on—perhaps even from the earliest days of life—infants begin the process of building an internal representational world from the memories created by the integration of neurophysiological functions with the affectively laden interactions with a primary caregiver. Infants are born, most researchers believe, with an innate predisposition to develop affective relationships with caregivers. Infants only a few days old, for example, prefer human faces to other stimuli and human voices to other sounds (Vaughan 1997, p. 86). As early as three months, infants become withdrawn and upset if their primary caregiver remains emotionally neutral during an interaction. (Tyson and Tyson 1990, p. 147). Although the concept of a “biology of relatedness” is not a traditional psychoanalytic idea (Mayes and Cohen 1996, p. 122), as early as the 1940s child psychoanalysts had begun to recognize the infant’s biologically programmed need for attachment to a responsive caregiver (Fonagy 2001; Buckley 1986; Cassidy and Shauer 1999).

Research in cognition, neurobiology, attachment theory, and social psychology confirms psychoanalytic observations regarding internalized representations, often referred to in the empirical literature as prototypes, templates, schemas, or internal working models (Tyson and Tyson 1990, p. 81). The beginning of the infant-caretaker relationship resides in the infant’s early need for the external regulation of bodily tensions, but the primary caregiver’s emotional responsiveness serves a soothing or containing function that facilitates the infant’s physiological homeostasis and gives rise to an affective relationship that propels psychological development (Fonagy 2001). Developing neurophysiological capacities make it possible for the infant to move beyond experiencing the world in terms of bodily pleasure and displeasure, and to process external stimuli in an organized way (Mayes and Cohen 1994, p. 201). As the infant begins to associate particular facial characteristics, body parts, vocal pitch, and physical sensations with the primary caregiver, it is postulated, representations of these associations in the
form of memories are created. The creation of these internal representations is central to the infant’s developing capacity for affect regulation. The child learns to access these internal representations of a soothing caregiver for the purpose of regulating emotional arousal.²

In addition to representational thinking and affect regulation, the internalization of a responsive affective relationship with a primary caregiver stimulates the differentiation of a sense of self from the external world. As neurophysiological functions develop, the infant learns to distinguish parts of his own body from the physical world, and eventually comes to distinguish his subjective self from external reality. Internalized representations of a caregiver support the move toward physical independence; they allow the young child to begin to use his developing motor capacities to explore the world by providing an internal sense of safety while separated from the primary caregiver. Young children also develop a sense of agency through the process of internalization. When playing on their own, one-year-olds will attempt to engage the attention of their caregivers in what Jerome Bruner (1995) calls “joint attention.” An eighteen-month-old child will look to his primary caregiver for affective signals when confronting an unknown situation, a process called social referencing (Mayes and Cohen 1992). Physical exploration, joint attention, and social referencing are all signs that the child is able to use the internalized relationship with the caregiver to negotiate the self-other differentiation on the way to becoming a fully self-conscious, autonomous adult.

The capacity to imagine and acquiring a theory of mind are also interrelated milestones in the developmental pathway leading to adult reasoned thinking (Astington, Harris, and Olson 1988; Fonagy et al. 2002; Wellman 1990; Mayes and Cohen 1992). Although imagination seems antithetical to the kind of reality-based, cognitive thinking we associate with reason, it is in fact necessary to the task of developing a separate, autonomous sense of self. As already noted, the capacity to imagine allows the child to use mental representations in fantasy for the purpose of affect regulation by calling up the internalized memories of a soothing caregiver. Imagination is also essential to acquiring a theory

²Studies have shown high levels of negative affectivity, emotional outbursts, inattentiveness and frustration among insecurely attached children (Fonagy 2001, p. 42). Evidence from animal models suggests that high levels of stress such as that experienced by infants in the absence of minimally sufficient caregiving lead to lower cortisol neuromodulators (Fonagy 2001, p. 37; Mayes and Cohen 1996, p. 132).
of mind, the basis for perceiving other people as having their own minds and perspectives on the world (Mayes and Cohen 1992, p. 33). At first the young child’s understanding of other minds is relatively limited; the child initially learns that other people do not see or hear or know the physical world in exactly the same way the child does. Eventually the child will extend this perspective beyond the sensory world to include the realm of ideas, beliefs, and motivations. The capacity to imagine underlies the mature ability to empathize with other people, to recognize different perspectives, and to take the other’s point of view, all of which play a central role in mature reasoned thinking.

Developmental psychology thus illuminates the role of the early caregiving relationship in the complex process by which primitive mental processes evolve over time into the adult capacity for reasoned thinking. It is tempting to conceptualize this evolution in teleological terms, but psychoanalysis teaches us that the development of mental structures and processes combines both progressive and regressive movement (Mayes and Cohen 1996, p. 124; Tyson and Tyson 1990, p. 18). Psychological development is broadly understood to be discontinuous, involving periods of progression and regression, although always moving ahead in a generally forward, linear way along developmental pathways toward more complex forms of thinking. A developmental view thus highlights the important continuing place of regression in adult mental life (Brakel, Shevrin, and Villa 2002; Schimek and Goldberger 1995). The presence of regressive features in normal adult mental functioning can take many different forms. In some situations, regression allows individuals to let go of the constraints of higher-order, logical thinking, thereby bringing an emotional richness and depth to their experience of the world. Romantic love, creative inspiration, and spiritual transcendence are all common examples of adult experiences involving some degree of ego regression. Certain modes of everyday thinking, such as fantasies, daydreaming, or other noncognitive, emotionally centered mental processes exhibit strong regressive elements. Because it brings the adult caregiver in touch with infantile modes of feeling and thinking, early child rearing also involves a controlled measure of regressive experience (Tyson and Tyson 1990, p. 31; Schimek and Goldberger 1995, p. 214).³

³The kind of controlled regression that promotes adaptive ends such as art or child rearing or therapeutic cure is referred to as “regression in the service of the ego.” The phrase comes from Ernst Kris. (See Tyson and Tyson 1990, p. 31.)
Modern developmental psychologists do not view regression as a simple backward slide along the developmental pathway. Adult forms of regression to primary process functioning, such as those associated with creative, religious, or romantic experiences, may have their roots in early infancy, but they do not represent an actual reemergence of infantile life. The mature capacities for artistic expression, empathy, emotional attachment, child rearing, and mourning a loved one all call upon controlled mechanisms of regression. Indeed, all mature forms of nonpsychotic thinking combine primary and secondary process elements to some degree. Hans Loewald (1980) explains:

Primary and second process are ideal constructs. Or they may be described as poles between which human mentation moves. I mean this not only in the longitudinal sense of progression from primitive and infantile to civilized and adult mental life and regressions in the opposite direction. Mental activity appears to be characterized by a to and fro between, and interweaving of, these modes of mental processes, granted that often one or the other is dominant and more manifestly guiding mentation and that the secondary process assumes an increasingly important role on more advanced levels of mentation [pp. 178–179].

An utter lack of primary process functioning—no dreams, no fantasies, no spirituality, no romance—would be taken as a sign of psychopathology, not to mention an indication of a greatly impoverished, emotionally wooden inner world (Tyson and Tyson 1990, p. 170; Schimek and Goldberger 1995, p. 214). Adult reasoned thinking optimally relies on an equilibrium between the parallel systems of cognition and more emotional, intuitive forms of thinking.

Regression thus has its important place in adult mental life and in the processes of reasoned thinking under study here. But when the equilibrium between secondary and primary process is upset by a surge

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4This view of regression is more characteristic of Freud, who conceived of early modes of thinking, what he called the primary process, as located in the unconscious, unchanged by time. In his view, primary process functions “have no reference to time at all” (Freud 1915, p. 187).

5Poetry, for example, has obvious primary process elements in its use of free associations, imagistic language, and condensation and displacement of meaning, but these elements are utilized in the service of the highest-order cognitive endeavor. James Joyce’s *Ulysses* is the best-known example of twentieth-century literature that upsets the balance between primary and secondary processes, having induced generations of scholars to attempt the painstaking task of interpreting the latent meaning lying beneath the primary process surface. For a recent, explicitly psychoanalytic, reading of *Ulysses*, see Schwaber (1999).
of regressive feelings, regression is no longer in the service of the ego but fatally undermining of it. The destructive effects of uncontrolled regression can arise in response to trauma, when the mind’s ego capacities are emotionally overwhelmed and unable to process the experience in verbal, conceptual ways. Long-term stress and anxiety, too, can put regressive pressure on adult modes of thinking (Cicchetti and Cohen 1995, p. 6). At times of regressive crisis, individuals lose the capacity to think and make decisions free of the distorting effects of primitive anxieties, fears, and aggressive states of mind. At these times, uncontrolled regression signals a retreat from the developmental milestone of adult reasoned thinking.

Early developmental failures may result in an inherent vulnerability to regressive pressures in adults. Without too much speculation, we may posit that one important factor in the control of regressive crises in adult life is the successful internalization of a good-enough caregiving relationship (Winnicott 1965; Hartmann 1939). Serious failures in the caregiving relationship do not always result in long-term developmental problems, nor are the developmental problems that do arise always irremediable. Other factors may mediate the effect of early failures in the caregiving relationship, including temperament, intelligence, the presence of other caregivers, later corrective experiences, a strong imagination, or simple good luck. But overall, and especially for children already at risk for other reasons, the absence of a good-enough caregiving relationship is more likely to impair the adult capacity for maintaining balanced, reasoned thinking during times of emotional crisis. By strengthening the mechanisms of emotional self-control, good-enough child rearing provides some measure of resilience against the occasional but inevitable collapse of mature psychological processes in adult life. Over time, our collective capacity to manage uncontrolled regressive forces is dependent in part on families providing good-enough caregiving for children.

Consideration of the good-enough caregiving relationship directs our attention to the social environment within which the infant-caregiver relationship exists. An environmental approach opens up the possibility of viewing the caregiving relationship as embedded in and responsive to the broader social context, shifting the focus away from individualized causes of caregiving failure to the dynamic interaction among individual, familial, and social factors. Caregiver responsiveness is especially vulnerable to social stress factors, such as poverty,
violence, and substance abuse, that interfere with the ability to establish or maintain a good-enough caregiving relationship (McLoyd 1998). While this vulnerability is heightened for caregivers suffering from low ego resiliency or who themselves lacked sufficient early caregiving, everyone is vulnerable. Because stress factors such as poverty so strongly and predictably affect the quality of early caregiving, a full developmental account of reason must include consideration of the environmental factors that bear on the early child rearing relationship.

Attention to the long-term developmental consequences of social factors is entirely compatible with psychoanalytic understandings of the caregiving relationship. Child psychoanalytic research from the beginning focused its observational techniques on at-risk children. At the Jackson Nurseries in Vienna and then later at the Hampstead Nurseries in London, Anna Freud developed child psychoanalytic observation techniques in the course of studying mainly disadvantaged children (Mayes and Cohen 1996, p. 121). Erik Erikson’s pathbreaking work, *Childhood and Society* (1963), explored the importance of culture to child development. Modern ego psychology generally, beginning with Heinz Hartmann’s *Ego Psychology and the Problem of Adaptation* (1939), is itself a kind of social psychology interested in the individual’s dynamic engagement with the social world. In his elaboration of the concept of transitional phenomena, D. W. Winnicott (1965) also laid the foundation for a theory of individual psychological development in relation to the social world. Moreover, the study of the effect of trauma, particularly in the context of war or community violence, on children’s development has long characterized psychoanalytic research (Mayes and Cohen 1996, p. 130). This is not to say that psychoanalysis has ever generated a satisfactory account of individual development in relation to society. Rather, the point here is that psychoanalytic developmental psychology is not incompatible with, and indeed calls for, an integrated theory of the dynamic developmental interaction among the individual child, family caregivers, and the social environment.

**DEVELOPMENTAL PERSPECTIVES ON CONSTITUTIONAL FAMILY LAW**

For at least the last century, legal decision makers have relied on a basic assumption of individual reason for fashioning legal rules and policies
in most areas of private conduct and public regulation. The ideal of reason has been a dominating presence in legal decision making ever since Justice Holmes introduced the concept of “the reasonable man” as a guiding common law principle in 1881. In constitutional law, the individual capacity for reason has been a founding principle across the entire spectrum of modern constitutional rights and democratic principles. Examples abound. In the sphere of individual liberties, the assumption that individual behavior is the product of deliberative choice has been central to the development and elaboration of modern liberal rights relating to personal autonomy, individual equality, and freedom of expression. The constitutional understandings of privacy, free speech, free exercise of religion, equal protection, and the rights of the accused all rely to some extent on an ideal of the rational, intending, choosing, self-directing individual. As developed, these rights carry with them the predicate assumption that human beings are inherently capable of directing their lives in accordance with their beliefs, values, and commitments. Going well beyond freedom from physical constraint, the capacity to make meaningful choices about how to live one’s life has become the animating ideal of individual liberty in modern constitutional law. As the Supreme Court recently described it, the concept of individual liberty under the due process clause encompasses the freedom to make certain fundamental decisions affecting one’s “destiny.” This modern decisional understanding of personal liberty takes the individual’s capacity for reasoned thinking as a given.

The ideal of reason is also a central theme running through modern conceptions of collective self-government under our Constitution, as reflected in the democratic principles implicit in the Supreme Court’s voting rights and education cases under the equal protection and free speech clauses. Strong theories of deliberative democracy indisputably

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6Washington v. Davis (1976) (equal protection); Lawrence v. Texas (2003) (due process); Eisenstadt v. Baird (1972) (due process); Whitney v. California (1927) (free speech); Lee v. Weisman (1992) (free exercise); Zelman v. Simmons-Harris (2002) (establishment clause).

7Lawrence v. Texas (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”); Planned Parenthood of Southeastern Pennsylvania v. Casey (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”).

8Lawrence v. Texas (2003).

9Brown v. Board of Education (1954) (education); Reynolds v. Sims (1964) (voting); Plyler v. Doe (1982) (education); Miranda v. Arizona (1966) (criminal procedure).
emphasize the importance of reason to the deliberative processes of democratic decision making (Bohman and Rehg 1999; Koh and Slye 1999). Yet one need not embrace full-scale participatory democracy to recognize the centrality of reason to democratic self-government. Any account of democratic processes in constitutional law must assume, implicitly or explicitly, that most citizens—however politically inactive or self-interested—have the capacity to deliberate about their own values and preferences when they go to cast their vote. More participatory accounts of democracy emphasize collective decision making, but the basic constitutional assumption about the reasoning capacity of individual citizens remains the same. Even quantitative theories emphasizing simple majoritarian decision making must assume that most individuals vote in accordance with their own values, beliefs, and preferences. For the constitutional commitment to democratic self-government to have meaning, pluralist and market models of political decision making no less than deliberative models must posit that electoral decisions are fundamentally the product of individual reasoned choice.

So it is that the fundamental, driving principle of individual reason underlies many of the great advances in individual rights and democratic self-government over the last century. Yet despite the foundational importance of the ideal of reason as the predicate concept underlying modern constitutional law, courts and commentators have failed to give serious consideration to the psychological features, developmental origins, or empirical substrata of this fundamental human attribute. The ideal invoked rests on a universal, abstract model of rational decision making that obscures the lived complexity of individual decision making and, in particular, overlooks the process by which individuals actually acquire the capacity to choose their own values, commitments, and life goals or to engage in reasoned deliberation over collective ends.10 When Justice Holmes established the “reasonable man” standard,

10Recognition of the noncognitive, irrational elements in human nature can be found in the occasional Supreme Court opinion. See, for example, Adarand Constructors, Inc. v. Pena, p. 274 (1995) (Ginsburg, J., dissenting): “Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.” But these are exceptions to the dominant prevailing ideal of reason. In recent decades, behavioral law and economics scholars have become interested in sorting out the influence of unconscious attitudes or biases on legal decision making, although their studies of systematic and predictable distortions in rational thinking remain wedded to the information-processing model of rationality (see Dailey 2000).
he never believed that the standard actually captured a truth about human nature. To the contrary, he viewed the standard as a legal fiction that could serve to civilize the elemental human passions and instincts (Dailey 1998). Holmes recognized that, over time, law becomes unjust and ineffective—it becomes, as Robert Cover (1986) later described it, the exercise of mere violence—when it ignores the psychological complexities of the human condition. Understanding the developmental dimensions of reason is essential to the Holmesian goal of bringing constitutional law into line with the lived reality of human experience.

Developmental psychology thus provides compelling empirical support for the proposition that good-enough child rearing is an essential social precondition to the development of individuals endowed with the psychological skills of democratic citizenship. In this regard, developmental psychology does more than simply confirm the commonsense proposition that well-functioning families are good for children and therefore good for society. The field helps us to identify with some specificity the social conditions most likely, in the aggregate and over time, to foster successful early child rearing. Developmental researchers cannot identify with any degree of precision the point at which the quality of child rearing falls below the threshold required for the normal processes of internalization to unfold. Nor can developmental psychology explain why some children who are raised in severely deprived circumstances grow up to become developmentally healthy adults. The most that developmental psychology can offer—and this is still significant—is that good-enough caregiving, in the aggregate and over time, makes an essential contribution to fostering the adult capacity for balanced, self-reflective, reasoned thinking.

Developmental psychology also points toward a deeper understanding of why the quality of caregiving is so critical to the adult ability to master regressive impulses. The vulnerability of a citizenry to collective fears and anxieties undermines the long-term stability of a constitutional system that places reason at the core of individual self-determination and democratic self-government. The eruption of regressive fears, anxieties, and aggressive states of mind can distort collective decision making at times of political crisis and potentially renders a democratic citizenry vulnerable to political manipulation. These times are often marked by the revival of “regressive ideologies” such as nationalism, militarism, and xenophobia (Gay 1982, p. 538). Examples of regressive political crises in the twentieth century are plentiful.
McCarthyism, for one, represented the collective regressive collapse of reasoned thinking, or the triumph of anti-intellectualism, as Richard Hofstadter phrased it (1963). The enforcement of the Espionage and Sedition Acts during World War I and the internment of Japanese Americans during World War II were massive failures in the reasoned judgment of legal decision makers and ordinary citizens (Stone 2003). Collective fears and anxieties can lead to impulsive, irrational, and often self-destructive political actions combined at times with a rise in public hysteria and governmental efforts to exploit those fears by creating an “outraged people” (p. 223). President Wilson’s Committee for Public Education produced what one historian describes as “a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials, and motion pictures, all designed to instill a hatred of all things German” (p. 224). In the aftermath of World War I, John Dewey described the regressive feelings triggered in the populace, and dangerously exploited by the government, as “the rise of the irrational” (Dewey 1918, p. 35; Frank 1930). These historical events remind us that a society lacking a strong culture of reasoned thinking will be especially vulnerable to the collapse of mature ego defenses and the resulting irruption of primitive fears and irrational emotions into political life.

Among the most important modern constitutional defenses against the collapse of reasoned thinking in political life are a commitment to the rule of law and protection for freedom of speech. Equally important, although much less obvious to legal decision makers, is a constitutional culture that recognizes the fundamental importance of early caregiving to democratic government. By helping to strengthen the psychological mechanisms of critical self-reflection and emotional self-control, good-enough caregiving provides some measure of social resilience against the occasional but inevitable eruption of anxiety, fear, and aggression on the part of the citizenry. Stated in its strongest terms, the point is this: our collective capacity to manage uncontrolled regressive forces in political life is dependent over time on a culture committed to ensuring the provision of good-enough caregiving to young children. A developmental perspective helps us to see public support for child rearing as an essential constitutional tool, along with the rule of law and freedom of speech, for mastering the regressive impulses that can threaten our constitutional life from inside the body politic.

Building a citizenry equipped with the psychological capacities to sustain reasoned thinking places early child rearing among the core
foundational constitutional institutions. The principle that early caregiving is essential to the overall health of the democratic polity requires a substantial reworking and integrating of constitutional doctrine in a wide range of areas. The ideal of reasoned deliberation in free speech law, the notion of discriminatory intent under the equal protection clause, the concept of voluntariness in criminal procedure, and the issue of adolescent decision making in the areas of abortion, prayer in public school, and juvenile justice are just a few examples of constitutional doctrines potentially modified by a developmental perspective on reasoned thinking. One of the most important areas for revision, and the subject of what follows, is the field of constitutional family law.

The United States Constitution does not mention the family or, for that matter, anything having to do with children or child rearing. Its express provisions are occupied with establishing a system of government and providing for a handful of individual rights regarding freedom of expression, the free exercise of religion, due process, and equal protection of the laws. In two cases from the 1920s, however, the Supreme Court read into the express guarantee of liberty under the due process clause an implied right to raise one’s children free from governmental interference. *Pierce v. Society of Sisters* and *Meyer v. Nebraska* struck down state education laws in part on the ground that the laws violated “the liberty of parents and guardians to direct the upbringing and education of children under their control.”11 Forty years later, the Supreme Court extended constitutional protection to the “sacred” sphere of family decision making in *Griswold v. Connecticut* to strike down Connecticut’s ban on the use of contraceptives by married people.12 Since *Griswold*, the family and family relationships can be found in a wide range of cases under the free exercise clause,13 the privileges or immunities clause of the Fourteenth Amendment,14 the equal protection guarantee,15 the Fourth Amendment,16 and the due process clause.17 In its recent revival of states’ rights, too, the Supreme Court has made it clear that the primary power to regulate the family

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11 *Pierce v. Society of Sisters*, pp. 534–535 (1925); see also *Meyer v. Nebraska* (1923).
12 *Griswold v. Connecticut* (1965); see also *Moore v. City of East Cleveland* (1977); *Troxel v. Granville* (2000); *Michael H. v. Gerald D.* (1989); *Stanley v. Illinois* (1972).
13 *Wisconsin v. Yoder* (1972); *Mozert v. Hawkins County Board of Education* (1987).
14 *Saenz v. Roe* (1999).
15 *Nguyen v. INS* (2001); *Miller v. Albright* (1998); *Palmore v. Sidoti* (1984); *Stanley v. Illinois* (1972); *Loving v. Virginia* (1967).
16 *United States v. Orito* (1973).
belongs to the states. Over the course of the past eighty years, the family has assumed a quiet but commanding presence in modern constitutional law.

The traditional basis for assessing the constitutionality of laws touching on the family is privacy. The constitutional inquiry under the due process clause focuses on defining the proper reach of governmental power into the sphere of private family relations. Troxel v. Granville, decided in 2002, is a useful example. Troxel involved a challenge to Washington State’s “grandparent visitation” statute, which allowed any person, not just grandparents, to petition the state court for visitation rights. In this case, the mother and father had lived together unmarried for several years, during which time they had two daughters. The couple separated in 1991, and the father moved in with his parents. His daughters came regularly to his parents’ home for weekend visitation. In 1993, the father committed suicide. His parents continued seeing the two girls regularly for a few months, but the children’s mother eventually reduced the visitation to one short visit a month. The mother has since married a man with six children, and her husband has adopted the two girls (pp. 60–62).

The paternal grandparents filed a petition for visitation pursuant to the Washington visitation statute. The state court granted the petition, awarding the grandparents visitation one weekend per month, one week during the summer, and four hours on each of the grandparents’ birthdays. In explaining its decision, the state court noted that the grandparents “are part of a large, central, loving family, all located in this area” (p. 61). On appeal, the United States Supreme Court held that the Washington visitation statute as applied in this case by the state trial court violated the mother’s constitutional rights to control the upbringing of her children. In an opinion written by Justice O’Connor, a plurality of the Court observed that “[t]he liberty interest at issue in this case—the 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” (p. 65). Justice O’Connor identified the principle of privacy as the basis for the Court’s decision when she observed that “so long as a parent adequately cares for his or her children, there will normally be no reason for the State to inject itself into the private realm of the family” (p. 68).

18 United States v. Lopez (1995); Ankenbrandt v. Richards (1992); United States v. Morrison (2000).
19 Griswold v. Connecticut (1965).
The decision in *Troxel* represents a straightforward application of the doctrine of family privacy as it has been recognized by the Court for forty years. Implicit in the Supreme Court’s protection for family privacy is the view that parents rather than the state must provide the guidance that impressionable young children need.\(^{20}\) This task is understood to involve the cultivation of diverse private preferences, moral values, and religious beliefs, rather than the inculcation of uniform public values or civic skills. Indeed, the notion of family privacy as developed by the Court is directly at odds with the idea that families have an obligation to instill *particular* attitudes or ways of thinking in their children. Occasional references to the family’s important role in socializing young children can be found, but modern constitutional law does not recognize a direct connection between child rearing and the political development of children.

Setting constitutional limits on government intervention in the family arguably makes some sense with respect to the sphere of adult decision making and adult intimate relationships (Rubenfeld 1989). Yet family privacy as currently conceptualized raises obvious and insurmountable problems when it comes to the relationship between parents and children. The concept of privacy loses its constitutional moorings when applied to legally defined relationships of authority, in this case parents and children. Parents’ legal authority to initiate children into a particular way of life is impossible to reconcile with the ideals of negative liberty and individual autonomy that are privacy’s jurisprudential foundation. The right to control one’s destiny, as Justice Kennedy recently phrased it,\(^{21}\) simply does not apply in the context of parental control over the lives of children. In *Troxel*, for example, the recognition of the mother’s liberty interests enforced the children’s submission to her will. Privacy cannot provide a principled basis for deciding that the mother in this case, rather than the grandparents or the state or some other interested party, controls the upbringing of the children.

The right of family privacy is not conceptually bankrupt, however. A developmental perspective points us toward a deeper, more satisfying justification for the special protection afforded family relationships in constitutional law by directing us to ask how individuals *become* self-governing, autonomous, reasoning political subjects. Family relationships, and the early caregiving relationship in particular,

\(^{20}\) *Bellotti v. Baird* (1979).

\(^{21}\) *Lawrence v. Texas* (2003).
have a role to play in the development of the psychological skill of reasoned thinking that defines the personal liberty of adult citizens. Our first set of beliefs, values, and commitments is instilled in us from birth, but what justifies those original involuntary commitments and relationships of authority is the development of the capacity to choose to accept or reject those commitments as our own. It is because parental authority promotes the mature capacity for accepting or rejecting its own way of life in the long run that this deprivation of children’s liberty finds constitutional justification.22 Families are not only sites of personal freedom and emotional attachments; they are also institutions that foster the development of the psychological skills necessary for personal autonomy and democratic self-government. The early caregiving relationship serves as a bulwark against governmental authority over children, as well as being an affirmative, facilitating force in the development of children’s capacity for reasoned thinking.

Striking the proper constitutional balance between the privacy-enhancing and citizenship-facilitating aspects of the early caregiving relationship defines the core mission of modern constitutional family law from a developmental perspective. Constitutional decision makers and scholars envision robust democratic institutions and flourishing rights-bearing citizens without any consideration of the work that must be done by families in order for this constitutional system to function and survive. In many cases, broadening the analysis to include a consideration of children’s developmental needs will not make any difference to the outcome of a particular case. In *Troxel*, for example, the record does not suggest that the grandparents had the kind of close caregiving relationship with their grandchildren that would justify setting limits on the mother’s relationship with the children. Nevertheless, consideration of the family’s role in the political socialization of children will bring about a substantial change in legal doctrine by shifting the focus of analysis away from parental rights to the developmental needs of children and the actual existence of a responsive caregiving relationship.

*Michael H. v. Gerald D.*, a case decided by the Supreme Court in 1987, illustrates how a developmental approach would modify constitutional doctrine on parental rights. Carole D., an international model, was married in 1976 to Gerald D., a top executive in a French

22Bellotti v. Baird (1979).
oil company. After their marriage, they moved to California, where Carole became involved in an adulterous affair with Michael H., a neighbor. Three years later, she gave birth to a baby girl, Victoria. California has a presumption of paternity that presumes a child born in these circumstances is the child of the husband. The law provides that “the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.” After Victoria was born, Gerald moved to New York and Carole moved in with Michael. They lived together for periods of time during which they held themselves out to the world as a family. Victoria called Michael “Daddy.” When Victoria was three years old, Carole and Gerald reconciled. Denied access to Victoria, Michael filed an action for paternity seeking visitation. Victoria, too, filed suit through her guardian ad litem seeking visitation rights for Michael. The California courts dismissed both Michael’s and Victoria’s claims based on the California presumption of paternity. On appeal to the United States Supreme Court, Michael and Victoria argued that the California presumption of paternity was unconstitutional because it violated Michael’s fundamental right to a relationship with his child and Victoria’s fundamental right to a relationship with both her fathers. The Supreme Court denied both claims.

Justice Scalia begins his opinion for the plurality by declaring that “the facts of this case are, we must hope, extraordinary.” Justice Brennan responds in dissent by observing that “the situation confronting us here repeats itself every day in every corner of the country.” The conflicting opinions in Michael H. tell us a lot about the Justices and their worldviews, as well as their jurisprudential philosophies, but little about the interest of a biological father in maintaining an established caregiving relationship with his child. Scalia declares irrelevant the fact that the guardian ad litem appointed to represent Victoria concluded that maintaining a relationship with Michael would be of great psychological benefit to Victoria. Brennan, too, fails to assess the importance of the caregiving relationship between Victoria and Michael, focusing more on Michael’s right “not to conform.” A developmental perspective, in contrast, would weigh heavily the existence of an actual or potential affective caregiving bond between adult and child, whether conforming to tradition or not. At the least, an individual who is specially situated with respect to a child, whether a grandparent, a noncustodial biological parent, or a prospective adoptive
parent, should have the opportunity to show that the loss of the caregiving relationship will have a significant and detrimental effect on the child’s developmental well-being.

A claim of caregiving rights has been directly raised and discussed in only one Supreme Court case. In *Smith v. Organization of Foster Families* (1977), foster parents in New York challenged the state procedures for removal of children from their foster homes. The foster parents argued that the psychological relationship that exists between the foster parents and the child after a year of living together confers on them a constitutionally protected interest in a relationship with the child. They based their claims on the “psychological tie” that naturally arises over time in the context of sharing a household (p. 842). The foster parents in *Smith* lost their case, and the decision has come to stand for the proposition that foster parents have no constitutional rights in a relationship with their foster children. Indeed, foster parents are understood to violate their legal obligations when they develop strong emotional attachments to their foster children. Emotional attachments are legitimate grounds for removal of the child from the foster family (p. 836).

The standard account of *Smith* misses an important aspect of the case. Although the foster parents in *Smith* lost their case, the Court explained that it is the emotional caregiving that takes place in the family and not the fact of biological relatedness that justifies constitutional protection: “the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children, . . . as well as from the fact of blood relationship” (p. 844).

Had the emotional ties that arise from the caregiving relationship developed outside the foster care framework, the Court suggested, a more robust liberty interest might have arisen. At the very least, the Court in *Smith* did not dismiss the idea that “individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship” (p. 846). The Court even suggested that caregiving could give rise to a protected liberty interest within the foster care context: “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” (p. 844).

Although Justice Brennan made a clear gesture here in the direction of recognizing caregiving rights, the point was irrelevant to the holding in the case and has yet to be referred to again by the Court. Indeed, the Court has never taken any significant steps in the direction of recognizing the deep association between parental rights and caregiving. Instead, it has looked to biology or legal ties such as adoption and marriage to define the scope and meaning of this fundamental constitutional interest.23

A developmental perspective would modify current parental rights doctrine by defining the constitutional interest in terms not of biology, marriage, gender, or legal ties, but of an actual or potential affective caregiving bond between adult and child. Because it is tied to a human activity rather than to biology or legal status, the class of persons possessing caregiving rights can vary according to time and circumstances. At birth, the caregiving relationship is yet to be established, although this does not mean that states should have unrestrained latitude in assigning child rearing rights under the due process clause. Privacy principles under the due process clause clearly set constraints on the state’s power to act in Platonic fashion by removing children automatically from their biological parents at birth.24 In most situations, the biological mother of a newborn will be entitled to caregiving rights because she has physically nurtured the child during nine months of pregnancy and because no other individual, other than the biological father, plausibly has a stronger claim.25 Similarly, most biological fathers will be awarded caregiving rights at birth based on an expressed commitment to the child’s upbringing. For older children, legal parents

23*Michael H. v. Gerald D.* (1989); *Lehr v. Robertson* (1983); *Caban v. Mohammed* (1979); *Quilloin v. Walcott* (1978); *Stanley v. Illinois* (1977). The outcome in these cases alone is suggestive. Only two of these unwed fathers prevailed, and they were the only ones to have lived in a quasi-marital relationship with the mother and child for a significant period of time.

24*Meyer v. Nebraska*, p. 402 (1923).

25In some cases, however, things may not be so simple. A prospective adoptive parent may claim a right to the newborn. Or in situations involving gestational surrogacy, a contractual mother and a gestational mother may both raise claims to the infant. In these circumstances, a developmental approach would allow states to allocate caregiving rights to either mother or to both.
may enjoy presumptive caregiving rights under state law, but any pre-
sumption must be open to rebuttal by individuals alleging a substantial
caregiving relationship. This figure may be someone with whom the
child lives, such as a foster parent, a stepparent, an older sibling, a
grandparent, or some other relative, although development of this tie
can also occur in institutional or other settings.26

A developmental perspective also modifies the concept of chil-
dren’s rights in constitutional law. In the context of the family, children’s
constitutional rights are quite limited (see, e.g., Parham v. J.R.). The
Court has never held that children have interests separate and apart
from their parents. To the contrary, as in Troxel, fit parents are pre-
sumed to act in the best interests of their children (p. 68). In the
Michael H. case, Michael H. challenged the presumption of paternity,
but so, too, did his daughter Victoria. Victoria argued that she had a con-
stitutional right to maintain a relationship with both Michael and
Gerald. Justice Scalia rejected this proposition: “Victoria’s due process
challenge is, if anything, weaker than Michael’s. . . . she claims a due
process right to maintain filial relationships with both Michael and
Gerald. This assertion merits little discussion, for, whatever the merits of
the guardian ad litem’s belief that such an arrangement can be of great
psychological benefit to a child, the claim that a State must recognize
multiple fatherhood has no support in the history or traditions of this
country (pp. 130–131).

It may be true that an arrangement of multiple fathers has no
support in formal history or statutes, although informal customs and
social history might provide evidence of arrangements involving
multiple paternal figures. More important, developmental principles
support the recognition of Victoria’s interest in a relationship with her
caregivers. The developmental perspective would at least require a
hearing on the question of Victoria’s independent interest in maintain-
ing a caregiving relationship with both paternal figures in her life.

In a case involving the religious rights of Amish parents, the ques-
tion of children’s rights was discussed in a famous dissent by Justice
Douglas. In Wisconsin v. Yoder (1972), the Supreme Court held that
the State of Wisconsin could not compel Amish parents to send their
children to school after eighth grade. The parents in this case were
convicted of violating Wisconsin’s compulsory school-attendance law

26In re guardianship of Phillip B. (1983).
that required attendance until the age of sixteen. The children were all fourteen or fifteen years old and had graduated from the eighth grade. Challenging their convictions, the parents argued that the compulsory school-attendance law violated their free exercise rights under the Constitution. In upholding the rights of the parents and allowing them to withdraw their children from school, Chief Justice Burger argued that secondary schooling, “by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child” (p. 218). Justice Douglas in dissent disagreed with the majority’s focus on fostering the attachment of children to their parents’ way of life. He emphasized the children’s developing capacity for choosing their own way of life: “On this important and vital matter of education, I think the children should be entitled to be heard. . . . It is the student’s judgment, not his parents’, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny” (p. 244). Although one might disagree with Douglas that adolescent children have the maturity to make such important decisions, one cannot ignore his assertion that children at some point acquire the attributes of autonomous individuals.

In addition to modifying constitutional doctrines of family privacy, parental authority, and children’s rights, a developmental perspective also leads to a clarification and reconsideration of well-established doctrines relating to governmental power. Because the developmental account puts the sphere of family relations and child rearing at the center rather than the periphery of constitutional interests, it suggests a broadening of the scope of national legislative power. At present, congressional support for families is limited by the doctrine of state sovereignty over family law. Any legislation aimed at helping families must be carried out indirectly under an express constitutional grant of power, such as section five of the Fourteenth Amendment or the spending power. To take a recent example, the Family and Medical Leave Act (FMLA) was passed to help working parents meet their child rearing obligations by providing state and private employees twelve weeks of unpaid leave upon the birth or adoption of a child. In its recent decision in Nevada v. Hibbs (2003), the Supreme Court upheld the FMLA as a
proper exercise of congressional power under the equal protection clause. The Court concluded that the FMLA provided a proper remedy for the states’ historical discrimination against women, who traditionally have been the primary caregivers in their families. A developmental perspective provides additional support for the decision in *Hibbs*. Helping to build good-enough families falls squarely within Congress’s implied power to establish the familial preconditions for maintaining the constitutional scheme of individual liberties and democratic processes. The scope of this power should be taken to extend to legislation in the areas of child care, child support, health insurance, foster care, parental substance abuse, domestic violence, and all other areas directly bearing on the social resources needed for successful child rearing.

Congressional power over families, while broad, is not plenary. Federal lawmaking authority does not include the power to commandeer families in a way that conscripts young children into a particular, state-defined way of life. As the Supreme Court noted in *Bellotti v. Baird*, “affirmative sponsorship of particular ethical, religious, or practical beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice” (pp. 637–638). The developmental account’s emphasis on the deeply formative influence of early child rearing reinforces the importance of establishing strict limits on the federal government’s power to mold children in its own image. It is *because* early child rearing is so formative of the individual that government must be both empowered to support it and prohibited from commandeering it. Drawing the line between federal legislation that supports families and federal legislation that morally commandeers family life will not always be easy, but that is the required constitutional task. It turns in part on the distinction between inculcating particular moral values or life goals and securing the conditions that allow individuals eventually to choose those values and goals for themselves. The federal government’s marriage policies in the context of welfare reform, for example, arguably overstep the line by imposing moral rules in the absence of any empirical evidence that marriage itself has a beneficial effect on children’s developmental well-being. Where concerns about the power of government to mold individuals into a particular way of life run especially high, as they do here in the context of early child rearing, the anti-commandeering principle serves as an essential check against the potential tyranny of a unified national family policy.
Taken even further, a developmental perspective challenges the Supreme Court’s thirty-year-old ruling that the Constitution establishes no affirmative rights to basic necessities such as welfare, housing, food, or education. In 1969, the idea that the Court might recognize affirmative rights for indigent individuals had seemed a very real possibility given the general direction that fundamental rights analysis seemed to be taking at the time. In *Shapiro v. Thompson* (1969), the Court came as close as it ever had to declaring a fundamental right to “the very means to subsist—food, shelter, and other necessities of life.” Less than one year later, however, a majority of the Court upheld a family welfare classification that, the Court conceded, “involves the most basic economic needs of impoverished human beings.” Since that time, the Court has definitively renounced the idea that the Constitution confers affirmative rights to basic necessities on impoverished individuals. The developmental approach taken here does not rehash this old debate. A theory of affirmative rights based on developmental principles does not advocate a general right to affirmative governmental benefits on the part of individuals based on a theory of economic need or redistributive justice or intrinsic personhood. The theory draws on developmental principles to make a more modest proposal that the Constitution confers affirmative rights on caregivers to the basic child rearing resources required to establish stable emotional bonds with their young children.

A developmental view of affirmative constitutional rights encompasses, first and foremost, the right to the minimum economic resources needed to provide stable, emotionally responsive environments for young children. As discussed earlier in this paper, developmental research strongly suggests that, where early family relationships are weakened by chronic, systemic environmental failures such as poverty, the capacity of families to provide a sufficiently responsive caregiving environment can seriously decline. We are not concerned here with the kinds of minor failures experienced in all families at one time or another. Nor are we concerned with failures, however traumatic, attributable to individual factors such as caregiver illness. From a constitutional perspective, what concerns us here are the kind of chronic, systemic environmental risk factors that—in the aggregate and

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27 *Dandridge v. Williams* (1970).
28 *Harris v. McRae* (1980); *Maher v. Roe* (1977); *DeShaney v. Winnebago County Dept. of Social Services* (1989).
over time—significantly and predictably increase the likelihood of early caregiving failure. When environmental stress becomes sufficiently high, caregivers undergo a diminishment in their capacity to be responsive to their infant’s physiological and emotional needs (Sameroff and Fiese 2000). A developmental model helps us to see failure in the caregiving relationship not in terms of bad parenting or bad parents, but as a normal response to overwhelming or traumatic levels of environmental stress (McLoyd 1998). A developmental perspective highlights how severe long-term poverty can instill powerful internal barriers to democratic citizenship as formidable as the old-style external barriers posed by segregated schooling and poll taxes.

In a recent case involving the rights of impoverished families, the Supreme Court struck down a state durational residency requirement for welfare benefits on the ground that it violated the right to travel protected by the individual’s “status as a citizen of the United States.”

Although on its face the decision in *Saenz v. Roe* relied on the right to travel rather than an affirmative right to basic necessities, two points are worth mentioning here. First, the decision derived the right to travel in part from a structural principle of national unity. In a similar vein, the developmental approach taken here highlights the way in which early family relationships operate as an important unifying force over time for a democratic polity otherwise committed to the principles of toleration, individual choice, and moral pluralism. Second, the fact that this case held unconstitutional a limitation on welfare benefits to families can hardly be overlooked. Although styled a right to travel case, what the law in *Saenz* really burdened was the newly arrived family’s interest in receiving state welfare benefits. We know this because the Court has treated durational residency requirements differently, depending on the nature of the affected interest. Without intending to do so, the Court in *Saenz* took a first step toward interpreting the concept of national citizenship under the Fourteenth Amendment to include affirmative child rearing necessities such as child protection services, affordable health care, adequate housing, sufficient clothing, and nutritious food. The decision in *Saenz* lends support to a developmental perspective on the foundational importance of affirmative caregiving rights to the development of future democratic citizens in constitutional law.

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29 *Saenz v. Roe*, p. 704 (1999).
CONCLUSION

The constitutional ideal of reason as presently conceived overlooks the fact that, at the level of actual experience, the individual capacity for reason is an acquired, socially constituted, and notably unstable psychological skill. Developmental psychology provides important insight into the way in which the skill of reasoned thinking derives from the early caregiving relationship. By investigating the social preconditions to the psychological skills of citizenship, this paper hopes to build on the best aspirations of twentieth-century constitutional law. In its decision holding that segregated schools violated the equal protection clause of the Fourteenth Amendment, the Supreme Court in *Brown v. Board of Education* gave expression to an ideal of equal citizenship and opportunity for political participation that is one of the crowning achievements of the last century. The Warren Court identified education as a prime agent in the political as well as the personal and social development of children. Education, as the Court explained, “is the very foundation of good citizenship” (p. 493). The developmental perspective offered here expands on *Brown*’s commitment to the political socialization of children by bringing to light the importance of early caregiving to the development of future citizens. As this paper has argued, developmental psychology offers a powerful theoretical and empirical basis for understanding the process by which we as citizens acquire and pass on to future generations the psychological skills necessary for realizing our highest constitutional ideals.

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