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Immature Citizens and the State

Vivian E. Hamilton

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Immature Citizens and the State

*Vivian E. Hamilton**

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ABSTRACT

Citizens are born, but they are also made. How its citizens come to be—whether the educations they receive will expand or constrain their future options, whether the values they assimilate will encourage or dissuade their civic engagement, etc.—fundamentally concerns the state. Through the power it wields over a vast range of policymaking contexts, the state can significantly influence (or designate those who will influence) many of the formative experiences of young citizens. Young citizens' accumulated experiences in turn can significantly influence the future mature citizens they will become. The state insufficiently considers the cumulative nature of its citizens' development, however. Discrete spheres of policy- or law-making may be internally consistent, but they lack consistency when combined over time and across a range of contexts—which is the way in which developing citizens experience them. As a result of this discontinuity, the state at best squanders opportunities to more effectively advance its ends with respect to immature citizens; and at worst, fails to meet its most basic obligations to them.

This Article develops a framework to guide the decisions that affect the young across a range of law and policy contexts, providing

consistency and a coherence that will better serve those citizens and further the state's ends. It grounds the framework in the core values and ends of the liberal democratic state, which dictate the state's most basic obligations to its citizens, and its requirements of them. It accounts for the interests and constitutional rights of both parents and children. To better understand how these might change as the young develop to maturity, it reviews the processes of cognitive development, drawing on research from a range of disciplines within developmental science. This review examines developing capacities, ongoing deficiencies, and the effects of external influences on development. It then integrates these theoretical, constitutional, political, and developmental considerations into a framework comprising the ends toward which decisions affecting the young should aim: (1) guaranteeing parents' liberty to form and raise a family; (2) denying anyone absolute authority over the immature, while transferring to the immature themselves authority in realms where they have reliably attained decision-making maturity; (3) ensuring that young citizens will attain maturity with their entitlement to life-deciding liberty intact; and (4) ensuring that young citizens will attain maturity having acquired the capacities to fulfill the basic obligations of citizenship.

To begin illustrating the framework's potential effects, the Article proposes a set of policies consistent with it. For infancy and early childhood, it proposes minimizing interference in parenting. For adolescence, it endorses obligatory, out-of-home education. It more generally proposes that decision makers identify contexts in which young citizens can make competent self-regarding decisions. The Article argues that by mid-adolescence, these include making health care decisions and voting. It also argues for changes to policies in other contexts where young citizens' decision making is likely to remain compromised, even into young adulthood, including driving and combat.

Because the scope of policymaking affecting the young is so vast, future projects will carry forward and expand upon the policymaking implications of the framework set out here.

I. INTRODUCTION

The liberal democratic state *is* its citizens. And citizens are born, but they are also made. How its citizens come to be—whether the educations they receive will expand or constrain their future options, whether the values they assimilate will encourage or dissuade their civic engagement, etc.—fundamentally concerns the state. Through the power it wields over a vast range of policymaking contexts, the state can significantly influence (or designate those who will influence) many of the formative experiences of young citizens. Young citizens' accumulated experiences in turn can significantly influence the future mature citizens they will become. The state insufficiently considers the cumulative nature of its citizens' development, however. Discrete spheres of policy- or law-making may be internally consistent, but they lack consistency when combined over time and across a range of contexts—which is the way in which developing citizens experience them. As a result of this discontinuity, the state at best squanders opportunities to more effectively advance its ends with respect to immature citizens; and at worst, fails to meet its most basic obligations to them.

Consider one example: Parents of children enrolled in a public elementary school want them excused from reading a textbook that promotes values contrary to their religious beliefs. The state board of education refuses to accommodate them, since the readings do not compel the children to act or profess any belief. The parents then remove their children from the school system altogether, opting to continue their education in a more cloistered environment of dubious academic rigor. Assume the school's refusal was lawful, as the Sixth Circuit in *Mozert v. Hawkins* in fact held such a refusal to be.¹ The decision whether to accommodate the children therefore rested within the state's policymaking discretion. Despite its being lawful and justifiable on administrative efficiency and other grounds, however, did the state's decision further its ultimate ends with respect to its developing citizens? Did it even consider these? What would an approach that considers and accounts for such ends look like?

1. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). See also discussion *infra* Part V.D.1.

State actors regularly confront questions, across a wide range of law and policy contexts, whose resolution can profoundly affect the young, both during their immaturity and beyond: Should parents be permitted to provide the entirety of a child's education within their home? Should public schools accommodate the children of parents like those in *Mozert*, who object to their children learning tolerance, respect for difference, and critical thinking? Should fifteen-year-olds make their own health care decisions? Should sixteen-year-olds drive motor vehicles unfettered? Or at all? Should the military have the power to send seventeen- and eighteen-year-olds into combat zones?²

The goal of this Article is to develop means of guiding the myriad state decisions affecting immature citizens so that together, these decisions cohere into a consistent and effective set of policies. In pursuit of this goal, I identify and argue for a set of ends toward which decisions affecting the young should aim.

To identify these ends, I examine political theories of the state, citizenship, and civic education; interpret constitutional doctrine that shapes parents' and children's rights; evaluate individual interests and significant political considerations; and, to gain a better understanding of the ways in which interests and rights may change as the young develop to maturity, survey research in cognitive development, including developmental cognitive and social neurosciences. I then consider the implications of all these and integrate them into a simple four-part framework. Its core comprises the core values of the state itself, but out of that abstract core emerges a structure sufficiently concrete to provide practical guidance to state actors. The framework also provides a normative measure against which state actors might assess the separate and combined effectiveness of their policies or decisions.

To start with as universal a premise as possible, I begin by assuming only the existence of the state and its current structure as a liberal constitutional democracy.³ Drawing on its founding principles

2. *See infra* Part V.C–D.

3. To be clear, "liberal" here refers not to the progressive ideology of the left-leaning faction of the Democratic Party. It instead refers more broadly, and loosely, to the political philosophy that served as the country's founding principle and thus includes the core political commitments of most of its citizens—"that all men are created equal," that among their inalienable rights is the right to "Life, Liberty, and the pursuit of Happiness," and that governments are instituted "to secure these rights, . . . deriving their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The

and the work of classical through contemporary political liberal theorists, it is no great leap to derive the core value of the state—individual liberty. To be more precise, its core value is negative liberty, a conception of freedom as noninterference.⁴ It is another modest step to derive from its core value the primary, most basic end of the state—safeguarding citizens’ liberty. And since the young are both current and future citizens, the state must guard not only their current liberty, but also their future liberty. It thus must deny all others, including parents, the right to deprive the young either of their basic liberty during their immaturity, or their ability to develop the capacity to exercise their future liberty.⁵

Safeguarding their current and future liberty is thus the state’s most basic end with respect to its young citizens. But this is abstract and does not explicitly account for the interests of both parents and children. So I refine the state’s ends in these ways: Because of the importance of their role as children’s default caregivers, because they value childrearing to such an extent that many consider that activity part of their own identities, and because they also are citizens whose liberty the state seeks to ensure, the state should consider and try to accommodate parents’ interests while working toward its young-citizen-respecting ends.⁶ It should do likewise with respect to the interests of its young citizens—those related to their welfare (their well-being irrespective of their choices) as well as their autonomy (their interests in exercising those liberties of which they are capable).⁷

The welfare and autonomy interests of young citizens both change dramatically as they mature. Their immediate and long-term welfare will depend in large part on external influences—education, environment, and experience. State decision making should take account of these influences on the young, since developmental research confirms that they can enrich or constrain development. State decisions should also take account of the autonomy interests of the young, a task complicated by the ambiguity inherent in assessing decision-making capacity. Insights from the science of development

Constitution’s Preamble announces the document’s purpose to include “secur[ing] the Blessings of Liberty to ourselves and our Posterity.” U.S. CONST. pmbl.

4. *See infra* Part II.A.

5. *See infra* Part II.B.

6. *See infra* Part III.

7. *See infra* Part IV.A–B.

can inform these efforts as well. Research across disciplines describes a predictable developmental trajectory and explains many of the age- and context-specific aspects of young persons' decision-making competence (and decision-making deficiencies). Understanding the basic trajectory of development therefore becomes critical.

I derive from these refinements a more specific set of ends to guide decision making affecting the young. These are: (1) guaranteeing parents' liberty to form and raise a family; (2) denying anyone absolute authority over the immature, while transferring to the immature themselves authority in realms where they have reliably attained decision-making maturity; (3) ensuring that young citizens will attain maturity with their entitlement to life-deciding liberty intact; and (4) ensuring that young citizens will attain maturity having acquired the capacities to fulfill the basic obligations of citizenship.⁸

Having proposed the set of ends toward which decision making affecting the young should aim, I then begin considering implications of this approach—what sorts of decisions might the framework support? I commend one possible set of policies. Putting them forward as a set renders transparent the tradeoffs made among the sometimes-competing priorities of the framework.

During infancy and early childhood, the state should interfere only minimally in parenting. This furthers parents' liberty interests, allowing them to pass their values on to their children. It also aims to further young citizens' welfare interests by improving parents' commitment to childrearing. The state should nonetheless step up efforts to increase parents' awareness of the importance of enriching young children's early experience, in light of the overwhelming evidence of its positive effects on development. The sorts of experiences that enhance children's development (talking, reading, singing to them, etc.) are well within the abilities of, and unlikely to be resisted by, most parents; the state's efforts on this front should thus stop short of imposing mandatory obligations on them.⁹

Parental deference does not, on its own, maximize children's liberty. But as part of a coherent set of policies, it does. Early parental deference would give way to reduced parental authority in adolescence. Beginning in early adolescence (which developmental

8. *See infra* Part V.B.

9. *See infra* Part V.C.

scientists increasingly recognize as a second critical period of brain and cognitive development), the state would take more affirmative measures to ensure young citizens' future liberty and capacity to fulfill the obligations of citizenship.¹⁰

Chief among these more affirmative measures would be obligatory, out-of-home secondary education. Adolescents' education would include certain minimum substantive content, with attendance mandatory until late adolescence (age eighteen, perhaps). This policy would help ensure that young citizens will reach maturity having gained the capacities to exercise their basic, life-deciding liberty and to perform the functions required of the citizenry. Denying parents the ability to educate their adolescent children entirely within the home guarantees that all citizens will be exposed to the life choices available to them and be reasonably able to pursue them. Parents would retain the ability to enroll children in privately-run schools. Though some private schools might present concerns similar to those presented by homeschooling, the state is better able to monitor these than it is to monitor in-home education. Parents would retain the ability to homeschool children prior to secondary school, and of course, nothing would prevent their otherwise continuing to educate and influence their children.¹¹

This prescription in important respects runs counter to the Supreme Court's decision in *Wisconsin v. Yoder*, which requires states to respect parents' religiously grounded objections to their adolescent children's continued formal education.¹² I join others who have urged that, despite the bedrock nature of religious rights in this country, *Yoder* should be reconsidered. There are at least two justifications for this position: First, no one, not even a parent, should receive state-sanctioned power to unduly constrain or foreordain another's future; giving parents the right to dominate their children's education or deny them formal schooling altogether (which is, of course, in addition to the significant influence already wielded by parents over their children) does just that. Second, the argument that children will be confused or unduly influenced by

10. See *infra* Part V.D.

11. See *id.*

12. 406 U.S. 205 (1972) (holding that the First Amendment requires that states exempt from school attendance requirements adolescent children whose parents' objections to their continued formal education is grounded in religious belief). See discussion *infra* Part V.D.1.

exposure to values inconsistent with those held by their families of origin may hold true for younger children, but not for adolescents. Instead, by mid-adolescence, individuals have reached adult-like information-processing and logical reasoning abilities (other abilities continue to mature into adolescence). They thus have the same (imperfect) cognitive abilities as their parents to distinguish their “public” education from their home education and compartmentalize the two if/when they conflict.¹³

Finally and more broadly, I urge state decision makers to identify to the extent possible those contexts where young citizens will have reliably attained competent decision-making capacities, and others where their decision making is most likely to be compromised. The state should aim to afford them decision-making authority with respect to the former, and constrain their authority with respect to the latter. This approach safeguards young citizens’ liberty, both current and future. Respecting their autonomy expands their current liberty; protecting them from their deficiencies promotes their current welfare and also preserves their future liberty.

The state should, however, proceed with caution. Insights from developmental science can inform these decisions, but science cannot prescribe policy. State actors may take account of development and the specific autonomy interests of the young, but their decisions must also consider and take account of the full range of interests affected, including the potential negative externalities of adolescents’ bad choices in a given context.¹⁴

Keeping that caution in mind, the state should endeavor to allow young citizens to exercise the liberties of which they are capable, especially in purely self-regarding contexts. In other words, in those contexts where they have achieved decision-making competence, they should correspondingly have decisional autonomy. With respect to those specific liberties, the young are mature; the justifications for denying them those liberties or permitting others to make decisions on their behalf thus disappear.

In what contexts, and by what age, can it be safely said that adolescents have achieved decision-making competence? Developmental scientists have concluded that by mid-adolescence (around ages fifteen or sixteen), basic cognitive and information-

13. *See infra* Part V.D.1.

14. *See infra* Part V.D.2.

processing abilities are mature. So long as they can make a considered decision, outside the presence and influence of peers, adolescents have the capacity for mature decision making. I suggest two contexts that meet these criteria and in which adolescents should receive decisional autonomy—health-care decision making and the franchise.¹⁵

Conversely, even after adolescents have attained the cognitive capacities needed to make rational, considered decisions, real-world stressors can confound their capacities and impede their decision making. For example, the quality of their decision making suffers in situations that require adolescents to quickly assess and react to risk, to reason while highly stressed or in the heat of passion, to make decisions in unfamiliar circumstances, or to act in the presence of peers. The neurobiological processes that support mature decision making under these conditions do not fully mature until late adolescence or early adulthood. In addition, risk-taking and sensation-seeking behaviors peak in early- to mid-adolescence (ages fourteen to sixteen or so), then decline. Researchers are also beginning to understand the neurobiological bases of these behaviors. That adolescents' decision-making deficiencies and risk- and sensation-seeking behaviors have neurobiological underpinnings helps explain why educational interventions, which provide information about the risks that attend certain behaviors, have had little success in changing adolescent behavior.¹⁶

In light of their cognitive deficiencies, I propose that states more assertively constrain adolescents' liberties in contexts that compromise their decision-making abilities, particularly where their bad decisions might have serious negative externalities. Driving is one example. Driving requires near-instant risk assessment and quick decisions—factors that hinder adolescent decision making. Adolescents' proclivity for risk-taking compounds their decision-making deficiencies. Indeed, traffic fatalities are the leading cause of death among adolescents, and their crash rates are higher than those of any other group. These rates worsen, moreover, in the presence of peers. States should thus consider imposing additional restrictions on adolescent driving. Many states have begun doing so. Despite efforts to improve their driving skills and increasing adoption of graduated

15. *See infra* Part V.D.3.

16. *See infra* Part IV.C.2–3.

licensing programs, evidence suggests that only age, not education or even practice, correlates with reductions in crashes and fatalities.¹⁷

Examples of other contexts that may compromise adolescents' and emerging adults' decision making including alcohol consumption and certain aspects of military service. I thus briefly discuss possible approaches to curbing alcohol abuse. And finally, I question the wisdom of sending into combat the youngest adults who serve in the military. Young soldiers must assess risk in stressful, unfamiliar circumstances and make split-second decisions; mistakes are obviously more likely in this context than in others to lead to loss of life, as well as enduring trauma for the soldier himself.

The Article proceeds as follows:

Part II describes the state's interests in and roles with respect to its citizens generally, and its immature citizens in particular. It argues that the state's most basic end is citizens' liberty, and its secondary end is its citizenry's performance of those functions necessary for the state's continued existence. It then extends the application of these ends to the young.

Part III describes parents' interests in and constitutional rights to childrearing. It notes that although the latter are a highly valued component of parents' individual liberties, they receive relatively weak constitutional protection because of their unique—and illiberal—status as an entitlement in the life of another.

Part IV describes children's interests and constitutional rights. To inform this discussion with a better understanding of the course of development to adulthood, it surveys recent research in cognitive development, including developmental cognitive and social neuroscience. While it is important not to draw conclusions that this still-emerging research does not support, it is also important for state actors to understand and, where appropriate, account for the significant changes wrought by the course of development. Developmental scientists' understanding of cognitive development, its neural underpinnings, and how these relate to children's and adolescents' decision making and behavior may help state actors develop policies more effective than those to date.

Part V synthesizes from the previous three Parts a framework comprising the basic ends toward which state action affecting the young should aim. To illustrate its possibilities, it uses the framework

17. *See infra* Part V.D.4.

to make an initial set of policy recommendations, outlined above. I only begin addressing implications of this proposed approach; it remains to subsequent projects to develop and build upon the foundation established here. The range of policymaking decisions affecting young citizens is vast, and varied. By each looking to a shared overarching standard, state actors across this vast range help ensure that the cumulative influence of their decisions on immature but developing citizens is consistent with and furthers the state's ends.

II. THE LIBERAL DEMOCRATIC STATE AND ITS CITIZENS, MATURE AND IMMATURE

State actors—federal and state courts, legislatures, administrative agencies, etc.—make countless decisions that influence immature citizens' lives. These decisions can be more effective and coherent when decision makers take to heart the ends toward which they should aim. This Part identifies the most basic of the state's ends. The next two Parts will refine these ends by considering and accounting for specific interests and rights of parents and the young, and the final Part synthesizes from the previous three a single overarching framework to guide state decision making.

Part II.A first identifies the core value of the liberal constitutional democracy, settling on the value accepted by all liberals—liberty. A state's values determine the ends ideally furthered by state decision making. The minimum ends that derive from the state's commitment to liberty are simply these: (1) citizens' basic liberty and (2) the collective citizenry's performance of those functions essential to the state's continued existence. The latter ensures the state's ability to achieve the former and is thus secondary to it.¹⁸

Having thus identified the minimum ends of the state, Part II.B next explores how the state might pursue its ends with respect to a particular subset of its citizenry, the immature. It concludes that the duality inherent in the nature of their citizenship—the immature are current citizens but also future mature citizens—requires from the state a similar duality in its approach.¹⁹

First, as current citizens, the immature have a claim to liberty, even during their immaturity. Their claim imposes on the state a

18. *See infra* Part II.A.

19. *See infra* Part II.B.

corresponding duty to withhold from all others absolute, unchecked authority over them. Though other considerations may warrant delegating significant authority over the immature to parents or caregivers,²⁰ the state must itself assert some residual authority or interest—akin to a fiduciary interest—on their behalf until the immature develop the capacity to exercise authority over themselves.²¹

Second, as future mature citizens, the immature have a claim to their future liberty. Because their period of immaturity is critical to and in many ways shapes citizens' future mature lives,²² their claim to future liberty imposes on the state another duty, fundamentally different from the first: preserving immature citizens' *future capacities* to exercise their basic liberty. And to achieve its secondary end, the state should also seek to ensure their future capacities to perform those functions required of the citizenry. The state must accordingly also deny others the right to deprive immature citizens of their abilities to develop these future capacities.²³

Some liberals might dispute the designation of liberty as the core value from which this analysis should proceed. Modern liberal egalitarians, for example, would counter that liberalism's core is more robust than "bare liberty," and that as a result the liberal state has broader obligations towards its citizens.²⁴ That may be, but it is beside the point. Proceeding even from what they might consider a too-skimpy version of liberalism—and of liberty itself—reveals plenty. Identifying just the bare minimum ends of the state with respect to its immature citizens is enough to expose the inadequacies of the state's existing policies; these guarantee neither the current liberty nor the future capacities of immature citizens.²⁵

This Part identifies the bare minimum ends of the state not simply to provide a measure for assessing existing policies with respect to its immature citizens, however, these ends can also serve as fixed points toward which modified policies might coherently aim.

20. This Article will hereafter use the term "parent" to refer to primary caregivers generally. Many non-biological parents act as primary caregivers and "parent" the children for whom they care. The term also reflects that the state designates biological parents as the default caregivers of the children they conceive and bear. *See infra* Part V.C.

21. *See infra* Part II.B.1.

22. *See infra* Part IV.C.

23. *See infra* Part II.B.2.

24. *See infra* Part II.A.

25. *See infra* Part II.B.1–2.

Policies might also pursue more ambitious or broader goals, but they should at a minimum further these.

The United States is a liberal constitutional democracy, and all of this discussion takes the nation's current political and constitutional structures as given.²⁶ It is, moreover, a sufficiently stable political order that to consider things as they might appear in some different order would be a mere academic exercise, in the pejorative sense.

A. The State's Core Values and Minimum Ends

The state's core values should determine its ends, and state actors should make policies and decisions that advance those ends. This Part identifies the core value of the liberal constitutional democratic state as liberty—negative liberty, in particular. From that simple core emerge two basic ends, or goals: (1) citizens' liberty, which is the state's minimum obligation to its citizens, and (2) its citizenry's performance of the functions necessary for its continuance, which is its minimum requirement of them. The next Part (II.B) then argues that the state must begin pursuing its basic ends during citizens' immaturity, else risk failure to achieve its ends generally.²⁷

It will be news to no one that one of the central values of the liberal state is liberty.²⁸ For many liberals, liberty is *the* central value of liberalism. For others, it is part of a more complex and robust core.

To "classical" liberals, individual liberty is the core value of the liberal state.²⁹ Associated in the United States with political conservatives, classical liberals hew more closely to Lockean and

26. Political theorist Stephen Macedo notes that "[i]t has long been a truism that the American political tradition is basically a liberal tradition' and that this tradition is the 'basis' of th[e] country's 'national identity.'" STEPHEN MACEDO, LIBERAL VIRTUES 5–6 (1990) (quoting CLINTON ROSSITER, CONSERVATISM IN AMERICA: THE THANKLESS PERSUASION 67 (1962) and SAMUEL HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 23 (1981)).

27. See *infra* Part II.B.

28. John Locke, for example, asserted that individuals are naturally in "a *State of perfect Freedom* to order their Actions . . . as they think fit." JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, *in* TWO TREATISES OF GOVERNMENT 287 (Peter Laslett ed., 1960). Modern liberal theorists have agreed. See, e.g., JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 44 (Erin Kelly ed., 2001). Some refer to the concept that freedom is normatively basic as the "Fundamental Liberal Principle." See, e.g., GERALD F. GAUS, JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY 162–65 (1996).

29. N. SCOTT ARNOLD, IMPOSING VALUES: AN ESSAY ON LIBERALISM AND REGULATION 3 (2009).

libertarian traditions, which decry government intervention in private ordering.³⁰ They view liberty and private property as closely intertwined; some argue that private property is essential to the protection of liberty,³¹ while others maintain that that property is itself a form of liberty.³² Political philosopher Friedrich Hayek's writings helped spark a late twentieth-century resurgence of classical liberal ideas in the West,³³ where leaders like Ronald Reagan and Margaret Thatcher gave them political voice.³⁴

To "modern" liberals, on the other hand, liberalism's foundational commitment is the equal status and treatment of each person.³⁵ John Rawls, the central figure in modern liberalism, advanced a theory of justice whose first principle is that "[e]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all."³⁶ Modern liberals thus embrace egalitarianism and support a more active role for government in securing personal and political rights.³⁷ The Democratic Party in the United States and the Labor Party in Great Britain generally seek to advance modern liberal egalitarian principles,³⁸ and the existing United States regulatory state tends to reflect them.³⁹

For classical and modern liberals alike, then, individual liberty is a core value. But it is more than this. It is their least common denominator—the value which all liberals agree the liberal state must

30. PAUL KELLY, LIBERALISM 69–70 (2005). See generally IAN HARRIS, THE MIND OF JOHN LOCKE (1994); LOCKE, *supra* note 28.

31. E.g., Friedrich A. Hayek, *Liberalism*, in FRIEDRICH A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 149 (1978).

32. E.g., HILLEL STEINER, AN ESSAY ON RIGHTS (1994).

33. ARNOLD, *supra* note 29, at 3–4. See generally FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960) [hereinafter HAYEK, THE CONSTITUTION OF LIBERTY]; FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

34. ARNOLD, *supra* note 29, at 3–4.

35. KELLY, *supra* note 30, at 4–7. See generally RONALD DWORKIN, SOVEREIGN VIRTUE (2000); JOHN RAWLS, A THEORY OF JUSTICE (1971).

36. JOHN RAWLS, POLITICAL LIBERALISM 291 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

37. *Id.* at 135–38.

38. ARNOLD, *supra* note 29, at 3.

39. *Id.* at 125–35.

embrace.⁴⁰ For this reason, this Article settles on liberty as the state's core value.⁴¹

Even as they share a commitment to liberty, however, liberals have different conceptions of it; and each suggests different ends for state policies to pursue. In order to derive from the state's commitment to liberty the ends that policies should pursue, we must first define the conception of liberty that operates here. Liberal theorists tend to embrace one of three of these conceptions.⁴²

The first conception of liberty is the one most commonly associated with liberalism—negative liberty.⁴³ As famously described by Isaiah Berlin, “[p]olitical liberty in this sense is simply the area within which a man can act unobstructed by others.”⁴⁴ Negative liberty is freedom from external restraint on action or compulsion to act. It can be boiled down to the idea of freedom as noninterference.⁴⁵ Critics of negative liberty argue, however, that it elides the importance of social and community connections and shared goals and thus mischaracterizes the individual as an atomistic, self-centered being.⁴⁶

The second conception of liberty is positive liberty. Whereas negative liberty requires freedom from external interference, positive liberty requires freedom from internal weaknesses that keep one from acting in accordance with reason or morality.⁴⁷ Proponents of positive liberty characterize freedom as autonomy. And autonomy requires self-mastery, the ability to delay short-term gratification to

40. *See, e.g.*, HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 33, at 257–58.

41. Though liberty is also the central value for classical liberals, this analysis does not embrace classical over modern liberal ideology; instead it merely attempts to set out from as universally acceptable a premise as possible.

42. For a more extensive discussion of the competing versions of liberty, see Samantha Besson & José Luis Martí, *Law and Republicanism*, in *LEGAL REPUBLICANISM: NAT'L AND INT'L PERSP.* 3, 14–15 (Samantha Besson & José Luis Martí eds., 2009).

43. KELLY, *supra* note 30, at 51.

44. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122 (1969).

45. *Id.*; KELLY, *supra* note 30, at 54.

46. Communitarian theorists in particular charge that the liberal preoccupation with the individual ignores the importance of community and the pursuit of shared values and goals. *See, e.g.*, MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 116 (1982). For a response to communitarian critiques of liberalism, see MACEDO, *supra* note 26.

47. BERLIN, *supra* note 45, at 131. *See also* T.H. GREEN, *LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION AND OTHER WRITINGS* 228 (Paul Harris & John Morrow eds., Cambridge Univ. Press 1986) (1895).

achieve long-term goals, and critical self-reflection.⁴⁸ Some critics of positive liberty reject what they see as the perfectionist and paternalistic implications of this concept of liberty, since it empowers the state to impose “true” freedom on its citizens.⁴⁹ Negative liberty theorists like Berlin counter, moreover, that freedom merely requires the abilities to reflect and to choose. Thus while autonomy or enlightenment may be important values, they are values distinct from—not prerequisites to—liberty.⁵⁰

The third main conception of liberty is republican liberty. Republican theorists generally view liberty as the absence of domination, which they distinguish from the absence of interference that defines negative liberty.⁵¹ Domination requires more than mere interference; it requires arbitrary interference, or the possibility of it.⁵² Whereas negative liberty theorists consider all forms of interference to be restrictions on personal freedom, republican theorists argue that certain forms of non-arbitrary interference do not restrict freedom at all. Thus when the people enact laws in furtherance of their collective interests, there is no interference with liberty.⁵³ For republicans, political participation guarantees freedom.

Critics of republican liberty respond that it is more accurate to acknowledge that state interference does restrict personal liberty, but that in some cases it does so legitimately—such as when the state restricts a lesser liberty in order to guarantee a greater liberty.⁵⁴ Because republican liberty and negative liberty both can allow for such interference, critics also contend that the republican and negative conceptions of liberty are effectively indistinguishable.⁵⁵ They claim that republican conception is inferior, however, because it tends to mask inevitable tradeoffs, obscuring that some liberties have been sacrificed to gain greater or more essential liberties⁵⁶

48. GREEN, *supra* note 47, at 228.

49. KELLY, *supra* note 30, at 55–56. Positive liberty seems to allow not only for the existence of universal morality and rationality, but also for paternalistic state intervention aimed at furthering individuals’ attainment of self-dominion.

50. BERLIN, *supra* note 44, at 131.

51. PHILIP PETTIT, LEGAL REPUBLICANISM 287 (1997).

52. *Id.*; Besson & Martí, *supra* note 42, at 13–14.

53. Besson & Martí, *Law and Liberty*, in LEGAL REPUBLICANISM, *supra* note 51, at 39, 53.

54. KELLY, *supra* note 30, at 56–60.

55. *Id.*

56. *Id.*

Of these three, negative liberty—freedom as noninterference—is the thinnest and arguably the most widely acceptable conception of liberty. Negative liberty permits individuals to define and pursue their own versions of freedom. Positive liberty circumscribes that initial choice and instead empowers the state first to define “authentic” freedom, then to coerce citizens into exercising it. Noninterference is also a simpler and more transparent conception of liberty than is the republican conception of non-domination. Consider, for example, some instance where the state interferes with individual liberty *X* to make possible the later enjoyment of a greater liberty *Y*. If the operative conception is negative liberty, the state’s action will constitute an interference with *X*—albeit an arguably legitimate one. The conception of liberty as the absence of interference logically implies the obverse—the presence of interference is the absence (or reduction, perhaps, depending on the extent of the interference) of liberty. In this way, negative liberty makes transparent the tradeoff involved in securing the greater liberty *Y*—sacrificing the lesser liberty *X*. If the operative conception is republican liberty, however, the state’s action would constitute noninterference, rather than legitimate interference with *X*. So republican liberty obscures the tradeoff involved in securing *Y*. For these reasons, and again surmising that the minimal conception will be the least objectionable starting point, this analysis adopts negative liberty as its operative conception.

To be clear, adopting negative liberty as the core value and operative concept of liberty here is not the same as claiming that it always trumps other values, nor that interference is always a bad thing.⁵⁷ John Locke, who championed individual liberty, understood that without laws and some state interference, there would be no liberty. He envisioned the state’s power as the aggregation of individuals’ powers delegated to it with the understanding that the state would then restrict some liberties of some individuals (e.g., restraining those who would wrongfully deprive others of “life,

57. One can make that argument, of course, as some libertarians do, claiming that the only legitimate basis for state action is preserving individual liberty. See KELLY, *supra* note 30, at 56–57. Making the argument, however, requires more than adopting a particular conceptual analysis of liberty. The concept of negative liberty considers state action to be interference with some aspect of someone’s freedom; but one who takes that view might nonetheless accept that some other value (e.g., equality, justice, etc.) or policy goal justifies that interference. KELLY, *supra* note 30, at 53–56.

health, liberty, or possessions”) in order to maximize and preserve the liberties of all.⁵⁸

How might the state actualize its commitment to its core abstract that value? The next two Parts derive from the state’s commitment to liberty the ends that its policies should aim to achieve. Part II.A.1 concludes that the state’s primary end is simply safeguarding its citizens’ basic liberty; this is its minimum obligation to its citizens. Achieving its primary end requires the state itself to be stable and effective. Part II.A.2 thus concludes that the state’s secondary end must be ensuring its continued existence, which it can achieve only through citizens’ participation in its functioning; this participation is the state’s minimum requirement of its citizenry.

Having thus identified the state’s primary and secondary ends, the following Part (II.B.) next considers whether, and how, the state should pursue its ends with respect to its immature citizens in particular.

1. The state’s minimum obligations to citizens generally

If liberty is the state’s core value, then, at the risk of stating the obvious, it follows that safeguarding its citizens’ liberty must be its primary end. This guarantee is the state’s minimum obligation to its citizens.

The conception of liberty guaranteed by the state is that of noninterference, or negative liberty.⁵⁹ To have liberty in the negative sense requires the distinct personhood of the individual. In other words, if a person can be free from the interference of others, the person must have some capacity for meaningful existence separate or distinct from others. A person lacks that capacity if her life is wholly and ultimately decided by another—instead, the person effectively

58. JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 144 (Henry Regnery Co. 1955) (1689). Even when negative liberty is the ideal, government in a populous and diverse society must restrain some individual liberties to avoid harm to others and to safeguard the liberty of all. A traffic regulation may require that motorists drive only in assigned lanes on one side of the road, depriving them of the liberty to drive in other lanes or on sidewalks. But it deprives them of the lesser liberty (the liberty to drive to a destination using any part of the road or the sidewalk) in order to preserve the greater liberty (the liberty to drive to a destination). (It also preserves pedestrians’ liberty to travel by foot without losing their lives.)

59. *See supra* notes 54–56 and accompanying text.

becomes an extension of the other, and her life becomes an expression of the other's will.⁶⁰

The basic liberty to decide one's ultimate life course for oneself is thus a minimum entitlement of the citizen in the liberal state.⁶¹ Its complement is the absence in every other person of a liberty to decide that citizen's life course.⁶² The state's liberty guarantee thus confers on each citizen a claim, or right, to have the state withhold from all other persons the right to be "other-determining."⁶³

The basic liberty to decide one's life course entails at a minimum choosing the social, moral, and political paths to which one will or will not commit. The basic liberty to decide one's life does not, despite the ominous warnings of liberalism's critics, require the liberal citizen to be an unmoored individual, free from external influence or community connection. No one leads an acontextual life.⁶⁴ As social beings, citizens are parts of families and communities

60. The U.S. Constitution captures the same notions in its guarantee against servitude in the Thirteenth Amendment. U.S. CONST. amend. XIII. The Supreme Court's definition of slavery is "the state of entire subjection of one person to the will of another." *Hodges v. United States*, 203 U.S. 1, 17 (1906) (quoting Webster's Dictionary). Locke's "natural State of Freedom" is the contrapositive: the capacity to act "without asking leave, or depending on the Will of any other Man." LOCKE, *supra* note 28, at 287.

61. This discussion aims to keep to as plain a notion of decision making as possible. It avoids concepts like "autonomy," "autarchy," "self-determination," etc. Political theorists and philosophers frequently use these terms to refer to the attainment of specific competencies or ideals of personhood. Macedo, for example, defines autonomy as an "ideal of character" that approximates the republican conception of liberty. MACEDO, *supra* note 26, at 216. He argues that true autonomy requires "the capacity critically to assess and even actively shape not simply one's actions, but one's character itself, the source of our actions." *Id.* The "autarchic" person, on the other hand, is capable of practical reasoning and choice but fails to critically evaluate conventions and customs. Instead, he or she tends to adopt them uncritically. See JOHN STUART MILL, ON LIBERTY 66 (David Spitz ed., 1975); MACEDO, *supra* note 26, at 216.

62. This is the correlativity thesis advanced by Wesley Newcomb Hohfeld, the influential cataloguer of legal rights. See generally WESLEY NEWCOMB HOHFELD, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, in FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 65 (Walter Wheeler Cook ed., 1923).

63. Just as one party's liberty correlates to another party's absence of liberty in Hohfeld's analysis of legal relations, a claim correlates to a duty. *Id.* See also, PAVLOS ELEFThERiADIS, LEGAL RIGHTS 107-14 (2008) (discussing Hohfeld's model of legal relations). The term "other-determining" here simply refers to the ability to determine or control the life-course of another. I avoid the term "self-determining" for reasons stated in *supra* note 62.

64. It is no shame to admit that John Donne put it better: "No man is an island, entire of itself." JOHN DONNE, *Meditation XVII*, in DEVOTIONS UPON EMERGENT OCCASIONS (1624).

that embrace diverse values. In a liberal democracy, this is generally to the good. Liberty leads to pluralism. Individuals pursue various commitments according to their values, sometimes congregate in communities with others who are like-minded, and usually endeavor to pass their values on to their children.⁶⁵ The liberal state accommodates and respects the pluralism that results from liberty, including inherited cultural and religious values.

But while the liberal state's commitment to pluralism is broad, it is not unlimited. The state may not permit majority, community, or other individuals' values to foreordain the individual citizen's life course. Parents and communities may transmit their values and beliefs to the immature, but they may not deprive them of the eventual ability to decide for themselves which of those values and beliefs to accept or reject.

2. The state's minimum requirements of citizens generally

Guaranteeing individuals' basic liberty requires the continued existence of the guarantor, the state itself. Ensuring its own existence thus becomes a secondary end, and the state relies on its citizenry generally to perform functions necessary to achieve that end. First, citizens govern themselves. They sometimes do so directly but more frequently indirectly, when they choose those who will represent their interests in government. Their political participation ideally safeguards their own liberty, by checking state power and creating lawmaking bodies responsive to their general will (which presumably reflects their general welfare). Second, citizens drive the nation's economy, their labor providing goods and services to meet society's needs. And third, citizens procreate and care for the young, the state's future.

Its citizenry's performance of these functions ensures the state's continued existence and thus its ability to achieve its primary end, citizens' liberty. But at the same time, the state does not compel

65. This is especially true in a society characterized by immigration and religious pluralism. Even absent the cultural and religious heterogeneity of the United States, however, theorists posit that pluralism is an enduring and ineradicable social fact. This is, they argue, due to the limits of human reason—we are not capable of developing universally acceptable justification of fundamental issues like truth, justice, or the meaning of life. Because of the importance of these issues, however, individuals strive to understand them, and having reached some understanding, live their lives accordingly. The freedom to do so in the liberal state enables individuals to determine their lives in this way. Pluralism itself thus becomes a permanent fact of life and an important secondary democratic value.

their performance by any particular citizen, because the state's primary commitment to citizens' liberty restrains it from doing so. Short of compulsion, though, state policies may create institutions and structures that seek to ensure citizens' capacity to perform these necessary functions. Not all citizens will choose to perform all functions. The state can nonetheless achieve this secondary end when its citizenry collectively performs them.⁶⁶

*B. The State's Minimum Ends with Respect to Immature
Citizens in Particular*

At the risk of again stating the obvious, immature citizens become mature ones. Thus to secure its ends, the state must attend to its immature citizens and the duality inherent in their citizenship: On the one hand, they at birth enjoy the legal status of citizens, who happen to be immature.⁶⁷ But on the other, they lack the political and identity-related dimensions of citizenship and instead possess merely the potential to exercise the liberties and perform the functions of mature citizens. As such, they embody future mature citizens.⁶⁸ The state should pursue its ends with respect to both young citizen-types. It otherwise risks failing twice over: first, with respect to citizens during their immaturity, then again later, after they have reached maturity.

This Part first establishes that immature citizens have a claim to basic liberty, which the state must safeguard. The next Part, II.B.1, then examines what it means for the state to pursue its minimum ends—safeguarding citizens' basic liberty—with respect to immature citizens. Part II.B.2 concludes by analyzing what it means for the state to pursue those ends with respect to the immature as future mature citizens.

The immature are both distinct persons and citizens at birth, despite their temporary dependence and other incapacities.⁶⁹ The

66. The term "citizenry" here thus refers to the collective body. While individual citizens might or might not choose civic participation, the collective citizenry must do so.

67. Theorists discuss three elements, or dimensions, of citizenship: legal, political, and identity (which refers to the psychological dimension of membership in a political community as a source of identity). See, e.g., Will Kymlicka & Wayne Norman, *Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 1–41 (W. Kymlicka & W. Norman eds., 2000). The immature are born with the legal status of citizenship but can later develop the political and identity dimensions of citizenship.

68. See *id.*

69. U.S. CONST. amend. XIV, § 1.

state's ends would seem to include this subset of its citizenry, at least presumptively. Yet its ends seem inapplicable to the young; the very incapacities that characterize immature citizens render them generally unable either to exercise the basic liberty guaranteed by the state or to perform the functions required by it. Indeed, because the immature lack the capacity for rational choice, some theorists deny that they can have a right to liberty at all.⁷⁰

Theorists paint with too broad a brush, though, when they argue that liberty requires the capacity for rational choice. It is true that exercising certain specific liberties requires the capacity for rational choice.⁷¹ But the conception of negative liberty itself contemplates that liberty exists when others are restrained. Thus, when the state restrains others from exercising absolute authority over immature citizens, it ensures those immature citizens' basic liberty.

By denying all others absolute, unchecked power over them, the state ensures that even totally dependent immature citizens remain distinct persons, not wholly subsumed by the will of another. It is true that to affirmatively decide her life, the immature person must first develop the capacity to do so. It is only once a person has developed the capacity to exercise a specific liberty that she may be

70. John Stuart Mill, for example, suggested their non-right to be all but self-evident. After asserting the now-famous liberty principle, Mill thought it "perhaps hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children . . ." John Stuart Mill, *On Liberty*, in *THE UTILITARIANS* 484 (Doubleday 1961). See also, H.L.A. Hart, *Bentham on Legal Rights*, in *OXFORD ESSAYS IN JURISPRUDENCE* 192–97 (A.W.B. Simpson ed., 1973); Hillel Steiner, *Working Rights*, in *A DEBATE OVER RIGHTS* 261 (Matthew H. Kramer ed., 1998); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 *HOFSTRA L. REV.* 799, 802–03 (1999). For a helpful overview and analysis of the philosophical debate, see JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 291–307 (2006). Dwyer sets forth the primary arguments made both for and against the conceptual possibility of children's having rights and concludes that children can indeed be rights-holders.

71. It is for this reason that some theorists find it more useful to discuss specific liberties to do specific things, rather than "liberty" generally. See, e.g., Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 *PHIL. REV.* 312 (1967). Thus, when the motorist's specific liberty to drive on the sidewalk to his destination clashes with the pedestrian's specific liberty to walk on the sidewalk to her destination, and the state interferes, one can more readily identify which specific liberty is restricted, which is preserved, and which greater, but still specific, liberty is advanced (the liberty of all to travel). Though the difference seems subtle, this construction more readily accommodates the sometimes necessary interferences with liberty—when liberties clash, interference may guarantee the more important liberty (however defined) or maximize the total enjoyment of liberty (however measured). Adding the notion of specific liberties thus retains the negative ideal of liberty as the absence of restrictions and compulsions, without resort to a cartoonish conception of all interference with "individual liberty" as bad.

said to have an interest in doing so, if not a right. But persons may have basic liberty prior to developing those capacities.⁷²

The immature are thus citizens entitled to basic liberty. The next two Parts (II.B.1 and II.B.2) consider the implications of this conclusion. They address first the state's pursuit of its ends with respect to the immature as current citizens and then with respect to the immature as future citizens.

1. As citizens who happen to be immature

Because the immature are both distinct persons and citizens, the state must endeavor to meet its minimum obligation to them during (and despite) their immaturity—it must guarantee their basic liberty. This does not require the state to bestow on them specific liberties that they do not yet have the capacity to exercise. Indeed, because of the very dependency that characterizes the immature, the state designates parents to be their default caregivers and grants them significant authority to carry out that role.⁷³ But if the state were to defer absolutely to a child's parents, then the parents' will would control the child's life and extinguish his distinct personhood. Parents would have total dominion over their children's lives—whether they lived or died, whether they endured brutal discipline or cruel neglect, whether they received an education, etc.⁷⁴ Absolute deference thus empowers the parent to decide the child's life, contrary to the minimum requirement of individual liberty.

Ensuring the basic liberty of the immature thus requires the state to withhold from parents absolute or unchecked authority over them. To do otherwise affords parents the right to be other-determining—an entitlement fundamentally inconsistent with the

72. See DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 98–104 (2004) (summarizing deontological arguments that, as humans, children have a right to liberty, given that human self-ownership is universal).

73. See *infra* Part III.

74. In colonial families, fathers in particular were granted virtually absolute authority over their dependent children. An advice book published in the early part of the seventeenth century cautioned parents to “provide carefully for two things: first that children's wills and willfulness be restrained and repressed . . . Children should not know, if it could be kept from them, that they have a will of their own, but in their parent's keeping.” JOHN J. ROBINSON, OF CHILDREN AND THEIR EDUCATION (1628), *quoted in* Lee E. Teitelbaum, *Family History and Family Law*, 2006 UTAH L. REV. 197, 201. Indeed, in several early colonies, the penalty for filial disobedience was death. *Id.*

minimum obligation of the state to all of its citizens. Parents' childrearing authority must thus be something less than absolute.

The immature do not have the capacity to exercise the residual authority over their lives that is withheld from parents, but the state does. And the state claims this authority through its role as *parens patriae*.⁷⁵

The state's assertion of its *parens patriae* power can serve two functions: First, it can guarantee the basic negative liberty of the immature by withholding from others absolute authority over them. Second, it can pursue affirmatively the welfare of the immature by asserting the interests that it believes the immature person would advance herself, were she able to do so.⁷⁶ The former role is arguably more consistent with a negative conception of liberty and the limited government it generally entails. The latter role is not necessarily inconsistent with those views, especially if the state's assertion of authority is viewed as a proxy for the authority of the immature person. However, the latter role tends to be implemented by courts as an explicitly paternalistic interference and is somewhat less consistent with negative liberty.⁷⁷ Regardless, exercising its *parens*

75. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (“[A] parent’s interests in a child must be balanced against the State’s long-recognized interests as *parens patriae*.” (internal citations omitted)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The concept, which means literally “parent of the country,” derives from the English common law concept of *pater patriae*, or “father of the country.” 3 WILLIAM BLACKSTONE, COMMENTARIES *47. *Pater patriae* referred to the British Crown’s inherent power as sovereign. In Britain, the Crown delegated its authority over domestic relations to the chancery courts. Among their delegated duties, chancery courts assumed the obligation to guard the interests of those unable to protect themselves. The crown then surrendered its sovereign power to the democratic state once it attained independence. See *Wheeler v. Smith*, 50 U.S. 55, 78 (1850).

76. See DWYER, *supra* note 70, at 195–203.

77. See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890) (noting that as *parens patriae*, the state performs a “most beneficent” function, and its intervention must “often necessar[ily] . . . be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves”). The U.S. courts expanded the concept of *parens patriae* well into the nineteenth century, invoking the doctrine to uphold sweeping child protection statutes that authorized significant state intervention into families. See *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1198, 1225–61 (1980). See generally Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847 (2000) (discussing extension of *parens patriae* role to allow states to assert various sorts of claims on behalf of their citizens). In the early twentieth century, however, the Supreme Court reined in its use, noting that the state’s exercise of its *parens patriae* power implicated and was limited by parents’ constitutionally protected rights in childrearing, discussed further in the next Part. See generally Gregory Thomas, *Limitations on*

patriae authority is a necessary liberty-protecting function of government in the liberal constitutional democracy.

2. *As future mature citizens*

Guaranteeing citizens' basic liberty during their immaturity is necessary but not sufficient to ensure their future liberty. The state must also attend to the effects this period will have on their lives as future mature citizens, for it is during their immaturity that they must develop the capacities to exercise the liberties and perform the functions of mature citizens. This section thus identifies additional, intermediate ends the state should pursue during citizens' immaturity to help secure its minimum basic ends once they reach maturity.

Again, the liberty to decide ultimately how one's life will go—choosing one's social, moral, and political commitments—is a minimum entitlement of the citizen in the liberal state.⁷⁸ Guaranteeing that basic liberty is the state's primary end. Its secondary end is ensuring the citizenry's capacity to perform those functions essential to the state's existence. Immature citizens lack but should develop (absent infirmity or disability) the capacities to exercise the liberties and perform the functions of citizenship.

The minimum obligation of the state with respect to the future mature citizen is thus to deny all others the right to deprive immature citizens of the *ability to develop* their capacities. It must prevent during citizens' immaturity the sorts of interference that keep young citizens from developing the capacities essential for citizenship.

Once citizens have attained these basic capacities, the state has arguably achieved its minimum ends with respect to them. It cannot force citizens to employ their capacities in any particular way. The manner in which they choose to employ their capacities is ultimately up to citizens themselves.

What must the state prevent—or require—during citizens' immaturity in order to preserve their ability to make life-deciding choices? At a minimum, having the capacity to decide one's life course means that one must be reasonably aware of one's options

Parens Patriae: *The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51 (2005).

78. See *supra* Part II.A.1.

and have some reasonable ability to avail oneself of those options. One cannot “choose” without knowledge of, and ability to pursue, one’s alternatives.

Since all citizens are born into a certain social context, that context—the community’s culture, their parents’ values and beliefs, their material circumstances, etc.—will likely influence their eventual preferences and choices. As discussed above, the liberal state expects that immature citizens will experience these sorts of influences.⁷⁹ When it ensures all citizens’ liberty (its minimum end), the state allows them to pursue different conceptions of the good life. The state—which is in the business of liberty-protecting, not good-life-selecting—views the coexistence of competing conceptions of the good life as a good in itself. Pluralism not only allows citizens to live according to a given conception of the good life, it also enables citizens to choose among different conceptions or choose the best aspects of different conceptions to achieve what may be an improved conception.⁸⁰ In this way, respect for pluralism ensures individual liberty and also paves the way for social progress.

As they go about pursuing their own conceptions of the good life, citizens will form families and raise children. Expressing their identities and living according to their values usually includes instilling those values in their children and thus influencing *their* conceptions of the good life.⁸¹ But influence unchecked becomes imperative. The state must protect the immature from external influence run amok, and that includes parental influence.⁸² The state may thus legitimately restrain or constrain parents’ liberties in order to guarantee the later basic liberties of the future mature citizen.

Having identified them, state actors must next determine how to go about achieving the state’s ends with respect to the immature. The state operates within a space defined by both constitutional limits and political realities. Parents and the immature themselves have interests and protected rights that may coincide with or diverge from the state’s goals. State decision making must also account in some principled way for these interests and rights.

79. *See supra* Part II.A.1.

80. *See supra* note 65 (discussing the argument that pluralism is an ineradicable fact in the liberal state).

81. *See infra* Part III.

82. *See supra* Part II.A.1 (arguing that to achieve its basic end, the state must deny all persons the right to be other-determining).

This Part has identified the state's minimum ends with respect to both its mature and immature citizens. Parts III and IV respectively examine parents' and then immature persons' interests and constitutional rights. To better understand the trajectory of immature citizens' development to maturity and its potential implications for policymaking, Part IV also surveys research on development. Part V synthesizes the considerations of the previous three Parts into a framework comprising a set of ends to guide state decision making, and it proposes policies consistent with it.

III. PARENT CITIZENS

To be constitutional, state decisions affecting the immature must respect the rights of their parents. But they must go beyond that: to be successful, they must also heed the interests of parents.

The concept of family in the United States has always involved notions of parental entitlement, authority, and responsibility.⁸³ Under early common law, fathers had a "natural" right to control their children, and paternal authority was absolute.⁸⁴ Fathers also, though, had a duty to protect and educate their children. By performing that duty, they perfected their natural entitlement; in exchange for protecting and educating them, fathers earned rights over their children and their children's labor.⁸⁵

Parental authority itself has weakened (and is now gender-neutral), but the rhetoric of strong parental rights endures.⁸⁶ Both

83. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (acknowledging parents' rights over and duties towards their children, observing 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."); Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31, 38–45 (2006) (discussing historical concepts of paternal authority).

84. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *452–53. See also Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 *WM. & MARY L. REV.* 995, 1089–91 (1992) (discussing the historical view that children "belong[ed] to parents").

85. See BLACKSTONE, *supra* note 84 (describing children as the property of their fathers, who had a presumptive entitlement to their custody, labor, and earnings in exchange for providing for their care and education). See also Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 *YALE L.J.* 293 (1988) (arguing as well that the notion of exchange was central to historical conceptions of parents' rights and obligations, stating that "[s]ince the earliest days of the modern liberal state, parenthood has been expressed in terms of exchange: Parents have rights with respect to their children in exchange for the performance of their parental responsibilities.").

86. See *infra* Part III.B.

the natural rights and exchange views of parental rights persist.⁸⁷ The natural rights justification in particular, however, appears infrequently.⁸⁸ This decline likely reflects increasing respect and concern for children as persons. Some scholars would extend that respect and concern further. James Dwyer, for example, contends that granting any individual a “right” to control the life of another contravenes the legal and moral commitments of the liberal state.⁸⁹

Illiberal qualities notwithstanding, today two basic arguments in support of strong parental rights predominate. The first is deontological: autonomy is the primary good, and parental rights further parental autonomy. Those who espouse it tend to assume that shaping one’s children’s lives is central to one’s self-determination, and that it is legitimately so.⁹⁰ The second argument for strong parental rights is instrumental, or utilitarian: it maintains that deference to parental rights advances children’s welfare.⁹¹

This Part examines both parents’ interests in and rights to childrearing. First, Part III.A addresses parents’ interests. While the state has adopted an increasingly child-centered and thus instrumental view of parents’ rights, many parents view strong child-rearing rights as facilitating what is also for them an enduring act of

87. See, e.g., Woodhouse, *supra* note 84 (arguing the persistence of the notion of parental ownership of children); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2404 (1995) (arguing that “[t]he contract metaphor makes explicit what is implicit in contemporary family law: parental ‘rights’ are granted as *ex ante* compensation for the satisfactory performance of voluntarily assumed responsibilities to provide for the child’s interests.”).

88. But see Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 961–62 (1996) (making the “self-evident” argument that “the child belongs to its parents. The child owes its conception to sexual intercourse between its mother and father, and its birth to the reproductive labor of its mother As against the rest of the world, the child is its parents’ ‘own’”).

89. See, e.g., James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CAL. L. REV. 1371 (1994) [hereinafter Dwyer, *Parents’ Religion and Children’s Welfare*]. Dwyer suggests that parenting should be a privilege, not a right at all. Part V.C.2, *infra*, considers these arguments.

90. Gilles, *supra* note 88, at 962–63.

91. See, e.g., JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 6–8 (1973) (“To safeguard the right of parents to raise their children as they see fit, free of government intrusion, . . . is to safeguard each child’s need for continuity.”); Emily Buss, *Parental’ Rights*, 88 VA. L. REV. 635, 636 (2002) (arguing for strong constitutional protection for parents’ child rearing authority, driven by an “assessment of its value to children”); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 864 (2000) (arguing that parents’ rights derive from children’s interests).

self-expression. Part III.B next analyzes the constitutional jurisprudence of parental rights. This analysis reveals that the scope of parents' actual authority is weaker than the Supreme Court's rhetoric of strong parental rights suggests.⁹² This Part concludes by assessing the implications of parents' interests and rights for state decision making with respect to the immature. It argues that parents' rights as currently conceived impose few constraints on the state's ability to act to secure its ends. Parents' interests, on the other hand, pose a potential challenge but also a potential opportunity. Parents overwhelmingly care deeply about parenting and can wield significant influence over their children, and the state should endeavor to accommodate their interests where possible. Such accommodation engages them as partners in a collaborative child- and future-citizen-rearing endeavor.

A. Parents' Interests

Individuals generally consider forming and raising a family to be essential aspects of their lives and self-identities.⁹³ Stephen Gilles asserts that “[t]he project of parenting—having, nurturing, and educating one’s children—is central to our conception of human flourishing.”⁹⁴ And even in the compulsive context of legal academic writing, Gilles—surely because it is so intuitive as to be virtually self-evident—cites no authority to support this proposition. Along the same lines, some political theorists consider parenting to be one of the core freedoms in the liberal state, because parenting represents

92. The Supreme Court most recently reiterated the rhetoric of “fundamental” parental rights while simultaneously circumscribing parents’ rights in *Troxel v. Granville*, 530 U.S. 57 (2000). See David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711 (2001) (arguing that *Troxel* limited rather than expanded parental rights by failing to subject the challenged statute to strict scrutiny).

93. See CHARLES FRIED, *RIGHT AND WRONG* 150–52 (1978) (“[T]he right to form one’s child’s values [and] one’s child’s life plan . . . are extensions of the basic right not to be interfered with in doing these things for one[’s] self.”). The Supreme Court has acknowledged as much. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (“[It is] plain beyond the need for multiple citation that a natural parent’s desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right.” (citations omitted)). See generally ARCHARD, *supra* note 72 (summarizing arguments advanced to justify natural parents’ entitlement to raise their children, including parents’ interests).

94. Gilles, *supra* note 88, at 962.

one of the “central meaning-giving tasks” of life.⁹⁵ Eamonn Callan, for example, asserts that:

[T]he freedom to rear our children according to the dictates of conscience is for most of us as important as any other expression of conscience, and the freedom to organize and sustain the life of the family in keeping with our own values is as significant as our liberty to associate outside the family for any purpose whatever.⁹⁶

For parents themselves, then, parenting is much more than an instrumental endeavor; it is also an exercise in self-expression. Another political theorist, William Galston, has elaborated pointedly on the expressive aspects of parenting.⁹⁷ He argues that parents’ expressive interests in raising children in accordance with their values are “not reducible to their fiduciary duty to promote their children’s interests.”⁹⁸ Without eliding the importance of that fiduciary duty, Galston reasons that parents’ self-expressive interests merit consideration too, because through the “intimate particularity of the parent-child bond, . . . [one’s] child is in part (though only in part) an extension of ourselves.”⁹⁹

It thus seems safe to conclude that parents’ primary interest with respect to the immature is to raise their children as they themselves—as opposed to the state—deem best. For most parents, this means instilling their own values and beliefs in their children.¹⁰⁰

B. Parenting as a Constitutionally Protected Right

The U.S. Supreme Court has repeatedly recognized the existence of a substantive right to parent that shields parents’ childrearing decisions from unwarranted state interference. The magnitude and contours of that right, however—like those of other rights relating to

95. EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* 146–47 (1997).

96. *Id.*

97. William A. Galston, *Parents, Government, and Children: Authority Over Education in the Liberal Democratic State*, in *CHILD, FAMILY, AND STATE*, NOMOS XLIV 211, 223–32 (Stephen Macedo & Iris Marion Young eds., 2003) [hereinafter Galston, *Parents, Government, and Children*]. See WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* *passim* (2002).

98. Galston, *Parents, Government, and Children*, *supra* note 97, at 226–27.

99. *Id.*

100. See Gilles, *supra* note 88, at 965 (“[L]oving and nurturing a child cannot sensibly or practically be divorced from shaping that child’s values.”).

family life—are notoriously indistinct.¹⁰¹ What is clear is that the right to parent is weaker than the Court’s rhetoric suggests.¹⁰² Although the Court regularly describes the right as fundamental, it has employed something like true strict scrutiny only in cases where state action has gone so far as to threaten the existence of the parent-child relationship itself.¹⁰³ The singular exception has been *Wisconsin v. Yoder*, where the Court required the state of Wisconsin to exempt Amish students from compulsory school attendance laws.¹⁰⁴ In *Yoder*, however, parents’ childrearing rights combined with their First Amendment free exercise claim to elevate the level of scrutiny to which the Court subjected the state’s action.¹⁰⁵

The following Parts briefly address the origins of the Court’s parental rights jurisprudence, and then survey cases where the Court evaluated state actions that interfered with parents’ childrearing rights. This survey demonstrates that the Court subjects to strict scrutiny state action that threatens to sever the parent-child relationship altogether (Part III.B.2), but that it subjects to lesser scrutiny state action that poses a lesser threat to that relationship (Part III.B.3). Part III.C concludes by identifying the coherence within the Court’s jurisprudence of parents’ rights, then assessing the implications of those rights and of parents’ interests for state decision making affecting the immature.

101. See David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 529 (2000) (“The Court’s family privacy cases have left pointedly unclear both what sorts of private conduct are deserving of heightened protection and what form that protection should take.”).

102. See *id.* at 546 (arguing that in most parental rights cases, “the Court seems to apply a more free-form ‘reasonableness’ test to government actions that impede a parent’s child-rearing authority”); Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 988–89 (1988) (suggesting that early parental rights cases *Meyer*, *Pierce*, and *Yoder* provide little deference to parents’ rights *per se*; instead, parents’ rights receive fundamental protection only when combined with other constitutional rights, like parents’ free exercise claims).

103. See *infra* Part III.B.2–3.

104. 406 U.S. 205 (1972) (applying strict scrutiny but implying that constitutional interests other than the parents’ childrearing rights, namely their free exercise rights, justified the application of that standard of review).

105. *Id.* See also McCarthy, *supra* note 102 (suggesting that it was only because parents’ rights in *Yoder* were tied to their free exercise claims that they were elevated to true fundamental right status).

1. Origins

The right to parent originates from a source most familiar in constitutional law. It begins with the Due Process Clause of the Fourteenth Amendment: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.”¹⁰⁶ A strict reading of this text suggests that the Amendment offers procedural protection but permits any deprivation of life, liberty, or property, so long as the deprivation is accompanied by “due process of law.” The Supreme Court, however, has rejected that strict reading. It has instead interpreted the Due Process Clause to protect certain substantive liberties from state interference.¹⁰⁷

During what is known as the *Lochner* Era, extending from the late 1890s to the late 1930s, the Supreme Court adopted a broad view of constitutionally protected liberty interests and subjected even economic legislation to “exacting review.”¹⁰⁸ The Court’s holdings in those cases repeatedly overturned legislation and constrained legislative power.¹⁰⁹

In two *Lochner*-Era cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the Court for the first time interpreted “liberty” in the Fourteenth Amendment’s Due Process Clause to provide substantive protection for family autonomy.¹¹⁰ The cases did not centrally concern parents’ liberty interests in childrearing, however; parents did not join as parties in either case, and the Court focused as much on the contractual liberty of educators as on the childrearing liberty of parents.¹¹¹ In *Meyer*, the Court invalidated state legislation

106. U.S. CONST. amend. XIV.

107. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 70 (2006).

108. See, e.g., *Moorehead v. Tiplado*, 298 U.S. 587 (1936); *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923); *Coppage v. Kan.*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); *Muller v. Oregon*, 208 U.S. 412 (1908); *Lochner v. New York*, 198 U.S. 4 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). But see *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934); *Nebbia v. New York*, 291 U.S. 502 (1934). See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* *passim* (1993).

109. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 500–03 (15th ed. 2004).

110. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 798 (3d ed. 2006).

111. See David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1130–31 (2001); William G. Ross, *The Contemporary Significance of*

restricting the teaching of foreign languages in public and private elementary schools.¹¹² In *Pierce*, the Court invalidated state legislation requiring that all children be educated in public schools.¹¹³

Although the Court later repudiated the economic due process cases of the *Lochner* era, *Meyer* and *Pierce* remain good law, and the Court invokes them as the foundations of its modern substantive due process jurisprudence, which includes protection for parental rights.¹¹⁴ The Court reads the two cases as having established “that the ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ and . . . ‘to direct the upbringing and education of children under their control.’”¹¹⁵

The Court in both *Meyer* and *Pierce*, while holding that states had overstepped their bounds, also discussed the significance of the state’s countervailing interest in its child citizens. The *Meyer* Court observed “[t]hat the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally.”¹¹⁶ In *Pierce*, the Court similarly noted the expansive right of states to regulate children’s educations, emphasizing that “[n]o question is raised concerning the power of the State reasonably to regulate all schools, . . . to require that all children of proper age attend some school, . . . [and to require] that certain studies plainly essential to good citizenship must be taught . . .”¹¹⁷ It thus made clear that its holdings left intact states’ power to mandate school

Meyer and Pierce for Parental Rights Issues Involving Education, 34 AKRON L. REV. 177, 178 (2000).

112. *Meyer*, 262 U.S. at 390. The same day it decided *Meyer*, the Supreme Court decided *Bartels v. Iowa*, in which it invalidated Iowa, Ohio, and Nebraska statutes requiring that all school instruction be conducted in English (the Nebraska statute had replaced the statute at issue in *Meyer*). 262 U.S. 404 (1923).

113. *Pierce*, 268 U.S. at 510.

114. See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (citing *Meyer* and *Pierce* as having established the right of parents to establish a home and direct the upbringing and education of their children). See also Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & FAM. STUD. 71, 72–73 (2006).

115. *Troxel*, 530 U.S. at 65 (quoting both *Meyer* and *Pierce*). See also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (reading *Meyer* and *Pierce* as having established a “private realm of family life which the state cannot enter,” but upholding state legislation restricting guardian’s right to permit her child to engage in street proselytizing).

116. 262 U.S. at 401.

117. 268 U.S. at 534.

attendance and to dictate (at least to some extent) the content of children's education.

The Court next addressed a parental rights claim in *Prince v. Massachusetts*.¹¹⁸ Though it is regularly cited to demonstrate the Court's respect for parental rights,¹¹⁹ *Prince* upheld the enforcement of state child labor laws against a child's guardian who asserted both First Amendment freedom of religion and Fourteenth Amendment parental rights and equal protection claims.¹²⁰ The Court in *Prince* acknowledged that "the custody, care and nurture of the child reside first in the parents" but held that the state's power to protect children's welfare could, and in that case did, trump parental authority.¹²¹

2. Modern treatment: threats to the existence of the parent-child relationship

The Supreme Court has applied its most searching level of scrutiny only when state action has threatened to end the parent-child relationship altogether.¹²² The Court has emphasized both the potential significance and finality of such action,¹²³ distinguishing it from lesser interferences with the parent-child relationship, including removal of a child from a parent's custody.¹²⁴

The cases in which the Court applied strict scrutiny have concerned procedural violations of parental rights. In *Stanley v. Illinois*, for instance, a state law placed the children of an unmarried mother in the state's care after her death, removing them from their father's care.¹²⁵ The Court held the law unconstitutional, requiring

118. 321 U.S. 158 (1943).

119. See, e.g., *Troxel*, 530 U.S. at 65 (citing *Prince* as "confirm[ing] that there is a constitutional dimension to the right of parents to direct the upbringing of their children").

120. 321 U.S. 158.

121. *Id.* at 165–66. The Court stated that "[a]cting 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." *Id.* at 166.

122. See, e.g., David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 838–45 (1999) [hereinafter Meyer, *Family Ties*].

123. *Lassiter v. Dep't of Soc. Servs. of Durham City*, 452 U.S. 18, 39 (1981) (describing "termination of parental rights [as] both total and irrevocable").

124. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) ("In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is 'irretrievabl[y] destructi[ve]' of the most fundamental family relationship." (alterations in original; internal citations omitted)).

125. 405 U.S. 645 (1972).

the state to show parental unfitness before terminating parental rights.¹²⁶ In *Santosky v. Kramer*, the Court held that the government must meet an elevated burden of proof—that of clear and convincing evidence—before terminating parental rights.¹²⁷

3. *Modern treatment: lesser threats to parental authority*

The Court distinguishes less drastic intrusions into parents' rights, generally subjecting to something less than strict scrutiny state interference that stops short of extinguishing those rights. In doing so, it treats the right to parent in a way similar to the way it treats the fundamental right to marry. With respect to the latter, the Court has stated that:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, *reasonable regulations that do not significantly interfere* with decisions to enter into the marital relationship *may legitimately be imposed*.¹²⁸

Yoder is probably the most prominent of the twentieth century parental rights cases, though the importance of free exercise of religion to its outcome clouds its place in the parental rights firmament. Amish parents challenged a state statute requiring that all children attend school until the age of sixteen.¹²⁹ The Supreme Court held in favor of the parents primarily because the statute infringed on their free exercise rights, not because it infringed their right to control the education of their children.¹³⁰ Chief Justice Burger emphasized this in his opinion for the Court:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if

126. *Stanley*, 405 U.S. 645.

127. 455 U.S. 745 (1982). *But cf. Lassiter*, 452 U.S. 18 (finding that the state was not required to provide a government-appointed lawyer for indigent appellants in all parental rights termination proceedings).

128. *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978) (citing *Califano v. Jobst*, 434 U.S. 47, n.12 (1977)) (emphasis added).

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

130. *Id.* at 215–16. *See also* *McCarthy*, *supra* note 102, at 988–89. *McCarthy* argues that dicta in the *Yoder* opinion “indicate the view of Chief Justice Burger and others that the parental right to control the education of his child should have minimal deference when it is not tied to some other constitutional right.”

it is based on purely secular considerations . . . [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, . . . their claims would not . . . arise to the demands of the Religion Clauses.¹³¹

The Court also elected weaker scrutiny of state interference with parents' educational decisions in *Runyon v. McCrary*, dismantling private, racially segregated schools and holding that parents' right to provide their children with a private school education was subject to "reasonable governmental regulation."¹³² The Court had earlier—and strikingly—undercut parents' influence in the schoolhouse by affirming without opinion a lower court decision upholding a state statute that permitted schools to corporeally punish children over the objection of their parents.¹³³

In the only modern case presenting it with the opportunity to clarify the constitutional right of parents to control the upbringing of their children, *Troxel v. Granville*, the Supreme Court instead muddied the waters by declining to apply strict scrutiny.¹³⁴ In *Troxel*, a parent challenged a state third-party visitation statute that permitted "any person" to petition a court for visitation rights with a child "at any time."¹³⁵ Even if a parent objected, the court could order visitation under the statute if it found that "visitation would serve the best interests of the child."¹³⁶ The Court invalidated the statute, but the case fractured the Court, leading to six separate opinions.¹³⁷ A concurring opinion by Justice Thomas (the most protective of parents' rights) and a dissent by Justice Scalia (the least protective) bookended the other approaches taken by the Justices. Justice Thomas criticized the Justices of the plurality for recognizing

131. 406 U.S. at 215–16.

132. 427 U.S. 160, 178 (1976).

133. *Baker v. Owen*, 423 U.S. 907 (1975), *aff'd* 395 F. Supp. 294 (1975).

134. 530 U.S. 57, 65–66 (2000) (holding that Fourteenth Amendments' Due Process Clause provides "heightened protection" against state's interference with parents' right to make decisions as to care, custody, and control of their children). *See also* Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279 [hereinafter Buss, *Adrift in the Middle*].

135. Wash. Rev. Code § 26.10.160(3) (1996).

136. *Id.*

137. *Troxel*, 530 U.S. at 57.

the fundamental right to parent but failing to apply the appropriate standard of review. He wrote that he “would apply strict scrutiny to infringements of fundamental rights.”¹³⁸ Scalia, at the other extreme, argued that there was no fundamental right to parent and would have upheld the statute under a deferential standard of review.¹³⁹

The remaining seven Justices, in four opinions, employed language endorsing a fundamental right to parent, yet the Court found the statute unconstitutional without reaching the scope of the parental due process right, and without subjecting the statute to strict scrutiny or a similarly heightened standard of review.¹⁴⁰ Justice O’Connor, writing for a plurality, instead found the statute unconstitutional as applied, not because the state court had intervened in the family, but because when it did so, it “failed to accord the determination of Granville, a fit custodial parent, any material weight.”¹⁴¹

Justices Stevens and Kennedy dissented, indicating that a best-interest-based standard for third-party visitation cases could sufficiently protect parents’ interests.¹⁴² Justice Kennedy emphasized the changing nature of the modern family, rejecting “the assumption that the parent or parents who resist visitation have always been the child’s primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child.”¹⁴³ Justice Stevens emphasized the importance of balancing a parent’s interest against not only the state’s interest as *parens patriae*,

138. *Id.* at 80 (Thomas, J., concurring).

139. *Id.* at 91–93 (Scalia, J., dissenting).

140. *Id.* Custody and visitation cases involving children’s natural parents do not usually raise constitutional issues. When they do—such as when aspects of a custodial determination implicate a parent’s First Amendment free exercise right, courts frequently adopt a “harm” standard. This standard is more protective of parents’ rights than the typical “best interests of the child” standard. It requires that a court decline to intervene unless its inaction will lead to definite and concrete harm to the child. See Lauren D. Freeman, *The Child’s Best Interests vs. the Parent’s Free Exercise of Religion*, 32 COLUM. J.L. & SOC. PROBS. 73, 81–84 (1998). When the harm standard applies in the third-party visitation context, a court would decline to award such visitation unless it found that failing to do so would result in harm to the child. See, e.g., *Williams v. Williams*, 501 S.E.2d 417, 418 (1998) (interpreting Virginia third-party visitation statute to authorize entry of visitation order only upon finding that child would be harmed absent such order).

141. *Troxel*, 530 U.S. at 72 (plurality opinion).

142. See *id.* at 85–91 (Stevens, J., dissenting); *id.* at 97–100 (Kennedy, J., dissenting).

143. *Id.* at 98 (Kennedy, J., dissenting). Justice Kennedy observed that the “conventional nuclear family . . . is simply not the structure or prevailing condition in many households.” *Id.*

but also against the child's own interest in preserving relationships.¹⁴⁴ He further noted that "to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation."¹⁴⁵

Together, then, eight Justices of the Court declined to provide parents significant protection from state intervention.¹⁴⁶

Making doctrinal sense of the Court's parental rights jurisprudence thus requires some work. When addressing parents' right to the care, custody, and control of their children, a majority of the Court seems to use the "fundamental right" to parent as a reassuring trope. Yet its retention of fundamental rights rhetoric signals little more than the presumptive right of parents to direct the upbringing of their children. State action that interferes with parents' authority yet stops short of threatening the existence of the parent-child relationship has yet to trigger explicit, true strict scrutiny review by the Supreme Court.¹⁴⁷

Despite the Court's obfuscation, there is a simple coherence to the variable nature of the parental right. When its very existence is endangered, it is at its strongest. But when the state interferes with it to any lesser degree, it is treated with far less deference.

C. Implications: Parents' Interests, Parents' Rights

The implications of the Supreme Court's parental rights jurisprudence for state actors formulating policies affecting the immature are clear: "[T]he state may do much, go very far, indeed"¹⁴⁸ to advance its ends before being considered to have infringed parents' rights.

The implications of parents' interests for state decision-making are less clear. Parents do care deeply about childrearing—so much so that for many raising their children is an activity that is self-defining. State actors may safely draw from this generalization two conclusions. The first is a cautionary one: Policies affecting children that fail to respect or account for their parents' interests in

144. *Id.* at 88 (Stevens, J., dissenting).

145. *Id.*

146. *Id.* at 57. See also Buss, *Adrift in the Middle*, *supra* note 134, at 284.

147. See Meyer, *Family Ties*, *supra* note 122, at 841.

148. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

childrearing have little chance of success. Parents have the opportunity, as their children's primary caregivers and those with the most access to their children, to thwart state policy goals. The state should avoid giving them a motive to do so. The second conclusion, though, is more optimistic: State policies can, and should, take advantage of parents' preexisting tendencies to invest in their children's well-being. Parents' nurturing can further and complement the state's ends. Identifying the most effective way in which parents and the state might divide, or share, responsibility for children that respects parents' interests and achieves the state's ends is the state decision maker's challenge.

IV. IMMATURE CITIZENS

Part II identified the state's ends with respect to its citizens generally, and the immature in particular. Part III first examined parents' interests, which the state *should* consider and account for when making decisions affecting the immature, and then parents' rights, which the state *must* consider and account for when doing so. This Part explores the interests and rights of the immature themselves, and the changes to both wrought by the course of their development to maturity.

Part IV.A examines the interests of the immature. Part IV.B surveys the contours of their constitutional rights. Part IV.C reviews research in cognitive development to gain a better understanding of the course of their developmental processes. This review discusses behavioral and biological aspects of development, how external factors can influence its course, and insights this research affords into the capacities and deficiencies of the young as they develop to maturity. It begins (in IV.C.1) with significant aspects of development in infancy and early childhood, then discusses (in IV.C.2) those of adolescence and young adulthood. Part IV.C.3 concludes by discussing those implications of this research that ought to be of special concern to state decision makers, laying the groundwork for the Article's later contention that state actors in judicial and legislative contexts should become better informed about, and take better account of, development.

A. Interests

All citizens, including the immature, have a minimum entitlement to liberty, and it is the state's duty to guarantee it.¹⁴⁹ This Part goes beyond this basic entitlement, identifying interests that the immature may have that do not necessarily impose corresponding duties on the state or on other persons. As it is with parents' interests, it is nonetheless important to identify the interests of the young, so that the state may consider them in its decision making. The next Part surveys those specific interests that have received special constitutional status and protection.

The interests of the young change dramatically as they develop to maturity. But they can be said to have two basic categories of interests: welfare interests and autonomy interests.¹⁵⁰ Welfare interests pertain to their well-being, irrespective of any affirmative or rational choice they make. Autonomy interests refer to their interests in making self-determining choices and having the freedom to exercise the liberties of which they are capable.¹⁵¹

The immature have three basic welfare interests: First, they have an interest in receiving care appropriate to the level of their dependency; second, they have an interest in acquiring those prerequisites necessary to attain their mature capacities—i.e., the abilities required for them to exercise their basic, life-deciding liberty; and third, they have an interest in being protected from their own deficiencies.¹⁵²

Their autonomy-related interest is even more straightforward, at least conceptually: The immature have an interest in exercising those specific liberties of which they are capable. Determining which liberties they are capable of exercising, however, can present any number of difficulties—even where researchers have identified

149. *See supra* Part II.B.1.

150. This nomenclature borrows from the language of rights. Theorists generally take the view that rights derive from and protect either rational choice or autonomy only (the "Will Theory of Rights"), or persons' important interests or welfare more generally, independent of choices they make (the "Interest Theory of Rights"). *See* DWYER, *supra* note 70, at 291–94. *See also* LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 315 (2002) (characterizing children's rights as comprising welfare claims and autonomy claims).

151. DWYER, *supra* note 70, at 291–94.

152. One might view this as part or derivative of their interest in dependency-appropriate care. I note the third interest separately, however, to emphasize the possibility of immature citizens' welfare interests conflicting with their subjective autonomy interests.

normative capacities, for example, there will be individuals whose capacities vary from the norm. Part IV.C begins to address these questions.

As it weighs policies, the state should consider and account for the interests of the immature; but it must respect their rights. A brief discussion of those of their rights addressed by the Supreme Court thus follows.

B. Constitutional Rights

The state considers the immature to be rights-holders. “Constitutional rights,” according to the Supreme Court, “do not mature and come into being magically only when one attains the state-defined age of majority.”¹⁵³ Though it has addressed children’s rights under the Constitution in relatively few cases, when it has done so the Court has consistently declared children to be “persons” generally “protected by the same constitutional guarantees against governmental deprivations as are adults.”¹⁵⁴ The Court has also consistently asserted, however, that children’s rights are not coextensive with those of adults, due to “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in childrearing.”¹⁵⁵ Whereas, for example, children have protected speech and free exercise rights in public schools,¹⁵⁶ those rights are not identical to those afforded adults in other contexts. Instead, the

153. *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

154. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (holding that minors’ right to abortion requires statutes imposing parental consent requirements also contain judicial bypass provision allowing minor to seek judicial approval for procedure without first notifying her parents). *See also Danforth*, 428 U.S. at 74 (stating that “[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights.”); *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (interpreting the Due Process Clause to require notice of charges and opportunity to be heard prior to suspension from public school).

155. *Bellotti*, 443 U.S. at 634. *See also, e.g., Bethel Sch. Dist.*, 478 U.S. at 682 (noting that the First Amendment rights of students in the public schools “are not automatically coextensive with the rights of adults in other settings” (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340–42 (1985))).

156. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that the First Amendment protected students’ right to wear to school black arm bands in protest of the Vietnam War without being subject to discipline); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (holding that the First Amendment prohibited state from compelling students to salute the flag in contravention of students’ religious beliefs).

Court gives significant weight to the state's countervailing interests in maintaining control of the educational environment.¹⁵⁷

Because of children's less-than-competent decision-making abilities, their parents have presumptive authority to make decisions on their behalf, such as deciding their medical care.¹⁵⁸ The Court has implicitly recognized that even during their immaturity, however, minors can acquire decision-making competence that entitles them to some decisional autonomy. The Court has thus extended them a right to privacy with respect to their intimate lives, enabling them to access contraception and obtain abortions without having to notify or obtain the consent of their parents.¹⁵⁹ States wanting to require minors to obtain parental consent to an abortion may impose such a requirement only if they also provide an alternative procedure for the minor to obtain authorization.¹⁶⁰ The Court thus acknowledges parents' authority and interests in childrearing, but it withholds from them an entitlement to veto the minor's decision.¹⁶¹

In the juvenile courts, accused youthful offenders receive many of the procedural protections guaranteed adults in the criminal justice system.¹⁶² But whereas the Supreme Court implicitly

157. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393 (2007) (holding that school's interest in preventing the promotion of illegal drugs outweighed students' speech rights); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (finding no First Amendment violation when public school prohibited students' use of "vulgar and offensive terms in public discourse"); *Ingraham v. Wright*, 430 U.S. 651 (1977) (finding due process did not require prior notice or hearing before public school officials sanctioned student by beating with a paddle).

158. *See Parham v. J.R.*, 442 U.S. 584 (1979) (holding that due process requires only informal review by a neutral physician prior to a child's being committed to a psychiatric hospital based on application made by his parent).

159. *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977) (holding unconstitutional statute prohibiting distribution of contraceptives to persons under sixteen); *Danforth*, 428 U.S. at 74 (prohibiting state from conditioning minors' access to abortion on parental consent).

160. *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Bellotti*, 443 U.S. 622. The Court has stated that a "bypass" option should permit an adolescent to obtain an abortion without parental consent or notice if she establishes that she is mature enough to make the decision independently, or if the decision maker determines that an abortion would be in her best interests. *Id.* at 643-44.

161. *See Bellotti*, 443 U.S. at 643. *See also* Kathryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALB. L. REV. 1119, 1131-32 (1999).

162. The Court has held that states must provide children procedural rights necessary to ensure the "fundamental fairness" guaranteed by the Due Process Clause. *In re Gault*, 387 U.S. 1, 30-31 (1967) (citing *Kent v. United States*, 383 U.S. 541 (1966)). The Court in *Gault* required that juveniles charged with committing delinquent acts receive basic due process protections, including the privilege against self-incrimination, rights to counsel, notice of charges, and ability to confront and cross-examine adverse witnesses. *Gault*, 387 U.S. at 10,

recognizes adolescents' decision-making *abilities* in the context of decisions affecting their intimate lives, it explicitly recognizes their continuing cognitive and decision-making *deficiencies* in the context of their delinquent and criminal conduct. Thus in *Roper v. Simmons*, the Court prohibited imposition of the death penalty for juveniles younger than eighteen.¹⁶³ In support of its decision, the *Roper* Court reviewed and cited research in developmental psychology describing typical characteristics of adolescents. These characteristics—including immaturity, susceptibility to external pressure, and still-developing identities—mitigate adolescents' criminal culpability, compared to adults.¹⁶⁴ The research relied on by the Court demonstrates that adolescents are different from adults in ways that directly bear on the regulation of crime and juvenile justice policy.¹⁶⁵ The Court later relied on *Roper's* assessment of the lesser culpability of adolescent offenders when it decided *Graham v. Florida*, in which it prohibited

13. See also, *In re Winship*, 397 U.S. 358, 368 (1970) (interpreting the Due Process Clause in juvenile delinquency cases to require the “beyond a reasonable doubt” standard of proof); *Haley v. Ohio*, 332 U.S. 596, 600–01 (1948) (holding that persons under eighteen prosecuted in the adult criminal justice system retain basic constitutional rights in those proceedings). But see *Schall v. Martin*, 467 U.S. 253, 265 (1984) (holding that pretrial preventive detention of juveniles does not constitute punishment, in part because “juveniles, unlike adults, are always in some form of custody”); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (holding that right to jury trial not required by Due Process Clause during the adjudicative stage of juvenile proceedings).

163. 543 U.S. 551 (2005).

164. *Id.* at 569–70 (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) [hereinafter Steinberg & Scott, *Less Guilty by Reason of Adolescence*]; Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992) [hereinafter Arnett, *Reckless Behavior in Adolescence*]. Elizabeth Scott, a professor of law, and Laurence Steinberg, a professor of psychology, have together and separately published numerous influential articles on adolescent development and the juvenile justice system. See, e.g., ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008) [hereinafter SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*]; Elizabeth Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003). Scott has also addressed adolescence itself as a legal construct. See Elizabeth Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000) [hereinafter Scott, *Legal Construction of Adolescence*].

165. See generally Arnett, *Reckless Behavior in Adolescence*, *supra* note 164; Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 164. But see generally Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89 (2009) (arguing that, despite the attention generated by the Supreme Court's discussion of adolescent brain development in *Roper*, the potential implications of the science of development for juvenile justice are, and should be, limited).

sentencing juvenile non-homicide offenders to life imprisonment without parole.¹⁶⁶

The Court may appear to contradict itself by differently assessing adolescent capacity in the privacy/medical decision-making and juvenile justice contexts. The next Part (IV.C), however, surveys research on adolescent decision-making capacities and deficiencies that supports the Court's approach.¹⁶⁷

To the extent that researchers can reliably identify certain contexts in which adolescents are likely to make competent decisions, and others in which they are less likely to do so, developmental science might usefully inform law or policy. Understanding the sorts of decisions individuals have the capacity to make, and the ages at which they develop the capacity to make them, can help ensure that young citizens get the liberties they are capable of exercising. Understanding their decision-making deficiencies may help prevent immature citizens from getting liberties that they may not yet be competent to handle. A basic understanding of the development of decision-making competence may thus better equip state actors to make specific policies or render judgments appropriate to those whom the policies or judgments will affect.

There is more to development than the acquisition of decision-making competence, however. State actors who understand developmental processes more generally may additionally find that understanding those processes (their timing, the factors that influence them, etc.) alerts them to policymaking opportunities where they might act selectively yet effectively to further the state's policy goals with respect to its developing citizens. The policies advanced in Part V respecting the parent-child relationship and education seek to achieve this sort of coherence and efficacy.

C. The Science(s) of Development

This Part discusses cognitive development, from infancy through emerging adulthood. Those who study development approach the rapidly developing field from multiple disciplines (developmental

166. 130 S. Ct. 2011 (2010).

167. See Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?, Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 6 AMER. PSYCH. 583 (2009) [hereinafter Steinberg et al., *Less Mature Than Adults?*] (describing research on psychological development that supports the Supreme Court's decisions in both *Hodgson* and *Roper*).

psychology, cognitive neuroscience, etc.)¹⁶⁸ and study developmental processes at multiple levels (behavioral, psychological, biological, etc.).¹⁶⁹ This survey accordingly draws on a range of disciplines and analytical approaches from within developmental science. While law and policy formally operate at the behavioral level, explaining developmental processes at other analytical levels can shed light on behavioral phenomena and potentially inform ways in which policy might shape it. For example, a neurobiological explanation of the experience-dependent maturational processes of early childhood might inform the most effective timing and nature of early educational interventions.

A comprehensive, technical discussion of cognitive development is beyond the scope of this Article (and the expertise of its author). Its more modest aim is to describe aspects of development that can and ought to be understood—and, where appropriate, accounted for—by those concerned with law and policy affecting the immature.

The survey gives special attention to two aspects of cognitive development: The first is the effect of external influence on development. Human development occurs, of course, not in a neural vacuum but within an environmental and experiential context. Researchers have long known that that environment and experience can enrich, or constrain, the neurobiological and cognitive development that occurs in infancy and early childhood.¹⁷⁰ But only in the last decade or so have they begun to develop a similarly sophisticated understanding of the developmental mechanisms that take place later—in adolescence and beyond—and to consider the

168. See, e.g., Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 *BRAIN & COGNITION* 160, 160 (2010) [hereinafter, Steinberg, *Adolescent Brain Development*]; James P. Byrnes, *Cognitive Development During Adolescence*, in *BLACKWELL HANDBOOK OF ADOLESCENCE* 227 (Gerald R. Adams & Michael D. Berzonsky eds., 2003).

169. Significant overlap and cross-fertilization occur among these approaches. To give just one example, in *Adolescent Brain Development*, developmental psychologist Laurence Steinberg describes advances in the developmental neuroscience of adolescence that might be “of special interest to those who study adolescent behavioral development.” Steinberg, *Adolescent Brain Development*, *supra* note 168, at 160.

170. See, e.g., William T. Greenough, James E. Black, & Christopher S. Wallace, *Experience and Brain Development*, 58 *CHILD DEV.* 539 (1987). See also, Eric I. Knudsen et al., *Economic, Neurobiological, and Behavioral Perspectives on Building America’s Future Workforce*, 103 *PNAS* 10,155, 10,155–60 (2006) (surveying studies across various disciplines concluding that early childhood experience influences later capacity for economic productivity, temperament and social development, perceptual and cognitive abilities, brain architecture, and gene expression and neurochemistry).

potential effects of experience on these later developments in brain structure and function.¹⁷¹ Understanding these effects might inform the educational or other experiences the state may wish its developing citizens to have. Whether/how to actualize its preference will then depend on the whole range of considerations that attend any policymaking decision.

The second aspect of development that will receive special attention here relates to changes over time in distinct mental capacities and deficiencies that relate to decision making, and the factors that support or hinder individuals' performance.¹⁷² As noted above, understanding the developmental trajectory of these capacities can shed light on the types of decisions otherwise-immature individuals might competently make, and the ages at which they are most likely to become capable of making them. Conversely, understanding deficiencies may prompt a reevaluation of other liberties individuals may currently exercise, despite their incapacity to do so responsibly.

Developmental mechanisms involve some combination of (1) genetically-driven neural processes, (2) the full range of environmental conditions within which development occurs, and (3) individual experiences during the course of development.¹⁷³

The following sections outline significant aspects of developmental processes, first in infancy and childhood, then through adolescence and into emerging adulthood.

171. Steinberg, *Adolescent Brain Development*, *supra* note 168, at 160–61. Steinberg observes that, in the last decade, “the developmental neuroscience of adolescence has matured from a field in its infancy to one that is now approaching its own adolescence.” *Id.* See also, Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COG. SCI. 69, 73 (2005) [hereinafter, Steinberg, *Cognitive and Affective Development*]. Researchers have begun to posit that emerging adulthood is a distinct developmental period spanning ages eighteen to twenty-five. See *infra* Part IV.C.2.

172. For discussions of the capacities employed in decision making, see *infra* Part IV.C.2; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 164, at 36. See generally NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 52–59 (2010).

173. Sharon E. Fox, Pat Levitt & Charles A. Nelson III, *How the Timing and Quality of Early Experiences Influence the Development of Brain Architecture*, 81 CHILD DEV. 28, 31 (2010); Arthur W. Toga et al., *Mapping Brain Maturation*, 29 TRENDS IN NEUROSCIENCES 148, 148 (2006).

1. Infancy and childhood

Beginning early in gestation, genetic scripts orchestrate the highly structured development of the central nervous system in a process that is relatively impervious to experience or environment.¹⁷⁴ Well before birth, the brain's basic structures and nerve cells are in place.¹⁷⁵

Following birth, genetically-driven neural development in significant respects gives way to experience-driven neural development.¹⁷⁶ Postnatal experiences that range from exposure to ubiquitous environmental information (like the constantly shifting contrasts and patterns that are the visual input from one's surroundings) to the acquisition of specific information unique to the individual's environment stimulate the physiological activity that will sculpt the still-forming brain.¹⁷⁷ Thus "extrinsic sensory cues are essential for the proper development of neural circuitry during early postnatal life."¹⁷⁸ Researchers have gained significant, though still incomplete, understanding of the processes by which early experiences influence both the structure and function of the developing brain.¹⁷⁹ A brief description of these follows.

Some of the most critical (and well-studied) changes in the brain take place in the cerebral cortex, which handles many of the brain's functions, such as vision, hearing, speech, planning, and emotional control.¹⁸⁰ Distinct cortical regions specialize in processing different

174. Fox et al., *supra* note 173, at 29–31. These mechanisms are not altogether impervious to environmental influences, however, and prenatal exposure to drugs, alcohol, toxins, etc. may disrupt the expression of genes that regulate early development. *Id.* at 30–31.

175. Susan L. Andersen, *Trajectories of Brain Development: Point of Vulnerability or Window of Opportunity?*, 27 NEUROSCIENCE & BIOBEHAVIORAL REVS. 3, 4–5 (2003); Charles A. Nelson, *Change and Continuity in Neurobehavioral Development: Lessons from the Study of Neurobiology and Neural Plasticity*, 22 INFANT BEHAV. & DEV. 415, 416–20 (1999).

176. Fox et al., *supra* note 173, at 29–31.

177. In an influential series of papers in the mid-1980s, William Greenough and colleagues first outlined these processes. *See, e.g.*, Greenough et al., *supra* note 170, at 540.

178. Steven W. Flavell & Michael E. Greenberg, *Signaling Mechanisms Linking Neuronal Activity to Gene Expression and Plasticity of the Nervous System*, 31 ANN. REV. NEUROSCIENCE 563, 564 (2008).

179. Fox et al., *supra* note 173, at 31. The genetic code thus provides the initial blueprint for brain structure, but "it must be understood as a framework upon which many environmental factors influence future structure and function." *Id.*

180. Tomas Paus, *Mapping Brain Maturation and Cognitive Development During Adolescence*, 9 TRENDS IN COG. SCI. 60, 60 (2005) [hereinafter Paus, *Mapping Brain Maturation*].

types of information.¹⁸¹ Nerve cells, or neurons, transmit information throughout the brain in the form of electrical or chemical impulses. A typical neuron consists of a cell body that develops two types of branching filaments—dendrites, which receive impulses from adjoining neurons, and an axon, which in turn transmits impulses on to the next neuron.¹⁸² The point of contact between two neurons is called a synapse. Some synapses pass electric current from the axon of one neuron to a dendrite of the next; other synapses trigger the release of chemical “messengers” (e.g., neurotransmitters) which then stimulate receiving neurons.¹⁸³

The brain initially produces an overabundance of relatively unstable synaptic connections.¹⁸⁴ When an individual then experiences stimulation from her environment, that sensory experience stimulates neuronal activity—the electrical or chemical impulses that process sensory stimuli; neuronal activity in turn activates the synaptic connections.¹⁸⁵ It is only after a synapse has been repeatedly activated that it strengthens and stabilizes.¹⁸⁶ Unused or infrequently used synapses eventually regress and disappear.¹⁸⁷ This activity-dependent process, known as “synaptic pruning,” improves the speed and efficiency of information processing and computational capacity within regional neural

181. *Id.*

182. Flavell & Greenberg, *supra* note 178, at 565–66.

183. CHARLES A. NELSON ET AL., *NEUROSCIENCE OF COGNITIVE DEVELOPMENT: THE ROLE OF EXPERIENCE AND THE DEVELOPING BRAIN* 24 (2006).

184. *See* Flavell & Greenberg, *supra* note 178, at 566 (discussing synaptic activity at the neuromuscular junction, the synapse formed by motor neurons onto muscle cells); Gert Westermann et al., *Neuroconstructivism*, 10 *DEV. SCI.* 75, 76–77 (2007) (discussing synaptic activity in areas of the primary visual cortex). *See also*, Rhoshel K. Lenroot & Jay N. Giedd, *Brain Development in Children and Adolescents: Insights from Anatomical Magnetic Resonance Imaging*, 30 *NEUROSCIENCE & BIOBEHAVIORAL REVS.* 718, 719–20 (2006). The proliferation and organization of synapses begin around the twentieth week of gestation. *Id.* at 719. Synaptic density peaks at different times in different regions of the brain. *Id.* at 719–20. In the visual cortex, for example, maximum density occurs at four months after birth; in the medial prefrontal cortex, it does not occur until age three to four. *Id.*

185. Flavell & Greenberg, *supra* note 178, at 565–67. Under experimental conditions, synaptic connections can form in the absence of physiological activity, but in general, “experience is essential for the normally occurring regulation of . . . synapse formation.” Fox et al., *supra* note 173, at 31; Toga et al., *supra* note 173, at 148.

186. NELSON ET AL., *supra* note 183, at 27.

187. Flavell & Greenberg, *supra* note 178, at 566.

circuitry (such as the visual or auditory cortex).¹⁸⁸ Synaptic pruning is a critical component of neural maturation; it “makes the brain more efficient by allowing it to change structurally in response to the demands of the environment . . . [and] results in increased specialization of brain regions.”¹⁸⁹

Neural connections that survive the pruning process typically become encased in a sheath of myelin, an insulating lipo-protein.¹⁹⁰ This process, known as myelination, significantly increases the speed of impulse transmission (as much as 100-fold) along existing neural connections.¹⁹¹ Myelination enables functionally distinct regions of the brain to efficiently integrate their functioning across a widely distributed neural circuitry, thus supporting complex behavior.¹⁹²

Synaptic overproduction and pruning and myelination are the primary processes by which neural circuits mature. The proliferation, stabilization, and pruning of synapses establish neural connections

188. Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 212, 216 (2009); Flavell & Greenberg, *supra* note 178, at 566 (noting that only “a subset of [excess] synapses are strengthened while others are eliminated. This elimination process depends on sensory experience and synaptic activity”). *See also*, NELSON ET AL., *supra* note 183, at 31; Beatriz Luna, *Developmental Changes in Cognitive Control Through Adolescence*, in ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 233, 237–38 (Patricia Bauer, ed., 2009) [hereinafter Luna, *Developmental Changes*]; Toga et al., *supra* note 173, at 148.

189. Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 217 (2009). On brain images, synapses and neural cell bodies appear as “gray matter” (and are often referred to as such), whose volume or density researchers measure to determine the course of neural maturation. *See* Nitin Gogtay & Paul M. Thompson, *Mapping Gray Matter Development: Implications for Typical Development and Vulnerability to Psychopathology*, 72 BRAIN & COGNITION 6, 7 (2010). Gray-matter density decreases to mature adult levels earliest in areas that process the most basic functions, such as sensory and motor skills. Toga et al., *supra* note 173, at 149–50. *See generally* Tomas Paus, *Growth of White Matter in the Adolescent Brain: Myelin or Axon?*, 72 BRAIN & COGNITION 26, 31–32 (2010) [hereinafter Paus, *Growth of White Matter*]. The visual cortex (located in the occipital lobe of the cerebral cortex), for example, reaches maturity by age seven; the auditory cortex (in the temporal lobe), by age twelve. Luna, *Developmental Changes*, *supra* note 188, at 237.

190. Johnson et al., *supra* note 189, at 217.

191. Toga et al., *supra* note 173, at 148.

192. Luna, *Developmental Changes*, *supra* note 188, at 238–39. On brain images, myelinated axons show up as measurable “white matter”. Paus, *Growth of White Matter*, *supra* note 189, at 7 (reporting increasing volume of white matter in a study of individuals from ages five to twenty-five years of age); Vincent J. Schmithorst & Weihong Yuan, *White Matter Development During Adolescence as Shown by Diffusion MRI*, 72 BRAIN & COGNITION 16, 19 (2010) (reporting increase in volume and density of white matter up to “young adulthood”).

within and between cortical regions.¹⁹³ Myelination significantly improves these connections, with its dramatic effects most apparent along the extensive neural circuits that connect distant cortical regions.¹⁹⁴

Synaptic overproduction and pruning occur at different, genetically-programmed times in the various regions and neural circuits of the brain. These defined periods of circuit maturation are generally referred to as “sensitive” periods, during which a circuit’s synapses are especially receptive to stabilization by appropriate external stimuli.¹⁹⁵ Connections not activated by the individual’s activity and environment during the sensitive period will likely be weakened or lost.¹⁹⁶ Thus, “[i]n the process of synaptic pruning, . . . the environment determines which synapses will be kept and which will not be needed[,] but biological mechanisms determine the times in development when different parts of the brain will be most affected.”¹⁹⁷

Studies confirm the importance of appropriate environmental and sensory experience during sensitive periods.¹⁹⁸ In landmark studies of the visual system, for example, vision occlusion in one eye shortly after birth led to the elimination of neural connections between the disadvantaged eye and the visual cortex.¹⁹⁹ When the visual occlusion extended beyond the sensitive period (after which that neural circuit had matured), the major effects were irreversible; the neural circuit did not develop normal architecture and function, even after restoration of visual input to the disadvantaged eye.²⁰⁰

193. Schmithorst & Yuan, *supra* note 192, at 27. *See also*, Toga et al., *supra* note 173, at 149–50 (discussing the use of cortical mapping to study developmental processes).

194. Paus, *Growth of White Matter*, *supra* note 189, at 7; Schmithorst & Yuan, *supra* note 192, at 27.

195. Luna, *Developmental Changes*, *supra* note 188, at 235.

196. *Id.*

197. *Id.*

198. *See* Andrea Berger et al., *Multidisciplinary Perspectives on Attention and the Development of Self-Regulation*, 82 *PROGRESS IN NEUROBIOLOGY* 256, 263–64 (2007) (discussing studies). *See generally* NELSON ET AL., *supra* note 183.

199. Fox et al., *supra* note 173, at 31–32 (discussing a series of studies conducted in the mid-1960s by Wiesel and Hubel and reported in T.N. Wiesel & D.H. Hubel, *Extent of Recovery from the Effects of Visual Deprivation in Kittens*, 28 *J. NEUROPHYSIOLOGY* 1060 (1965), and T.N. Wiesel & D.H. Hubel, *Single-cell responses in Striate Cortex of Kittens Deprived of Vision in One Eye*, 26 *J. NEUROPHYSIOLOGY* 1003 (1963)).

200. Berger et al., *supra* note 198, at 263.

Relevant sensory experience during sensitive periods thus supports, and its absence constrains, normal development.²⁰¹

Developmental scientists study the trajectory of development at different analytical levels. At the cognitive level, the development of basic sensory and motor skills precedes the maturation of higher-order executive skills and association processes (which include attention and language processes and sensorimotor integration).²⁰² The higher-order processes continue to develop into adolescence.²⁰³

Development at the neurobiological level parallels the course of cognitive development. Thus, within a given neural hierarchy, the neural circuits that process lower level or more basic information mature before those that process higher-level information. In the visual neural hierarchy, for example, the low-level circuits that analyze color or motion mature before the high-level circuits that analyze faces.²⁰⁴

Normal development of the low-level circuits supports development of higher-level circuits. To give another example from the visual system, studies found that when congenital cataracts caused early visual deprivation, subtle but permanent deficits remained in the later-developing ability to process faces—even when the cataracts were removed in the first months of life.²⁰⁵ The later-developing perceptual processes thus build on the earlier normal development of the basic visual system.²⁰⁶ The process where initial learning can constrain later learning, referred to as entrenchment, also occurs in the development of other systems, including speech.²⁰⁷

201. Fox et al., *supra* note 173, at 32. Another well-studied example of a complex cognitive ability shaped by early experience is language acquisition. Young children readily acquire native proficiency in a second language, whereas adults acquire a second language only with great effort—and the level of proficiency is never as fluent or complete as with early-acquired language. Knudsen et al., *supra* note 170, at 10157–59.

202. Schmithorst & Yuan, *supra* note 192, at 17, 19. See also, Luna, *Developmental Changes*, *supra* note 188, at 238. In the visual cortex, for example, synaptic pruning is complete by preschool age, whereas in the medial prefrontal cortex, substantial pruning does not occur until mid- to late-adolescence. Evidence also suggests that synaptic pruning occurs into adolescence in “association areas” that connect different regions of the brain and, like myelination, support complex integration of function. Luna, *Developmental Changes*, *supra* note 188, at 238–39.

203. Luna, *Developmental Changes*, *supra* note 188, at 237–38.

204. *Id.*

205. *Id.* at 32.

206. Fox et al., *supra* note 173, at 32.

207. *Id.*

The genetic and neurobiological bases of sensitive periods, along with the hierarchical development of neural circuits that leads to entrenchment, help explain the importance to an individual's development of environment and experience, and the importance of receiving appropriate experiences at developmentally appropriate times.

Direct observations of the long-term effects of early experiences typically occur at the behavioral level.²⁰⁸ For example, studies of the long-term effects of high-quality early intervention programs for disadvantaged children—variously including high-quality foster care, day care, and early childhood education programs—found dramatic increases in intelligence quotients and other positive social and economic outcomes later in life.²⁰⁹ Researchers have posited that “[l]ow-level circuits whose architecture was shaped by healthy experiences early in life provide high-level circuits with precise, high-quality information. High-quality information, combined with sophisticated experience later in life, allows the architecture of circuits involved in higher functions to take full advantage of their genetic potential.”²¹⁰

Developmental neuroscientists studying later-occurring brain maturation have discovered that significant growth and change continues throughout adolescence and into early adulthood.²¹¹ The following Part discusses both behavioral and neurobiological characteristics of this later period of development.

2. Adolescence and emerging adulthood

Adolescence is the developmental period between childhood and adulthood and is commonly characterized as spanning ages twelve to seventeen.²¹² Universal characteristics of adolescent behavior include increased risk taking, sensation seeking, and impulsivity.²¹³ During

208. *Id.* at 34–35.

209. *Id.* (citing study in which children institutionalized at birth were placed in high-quality foster care before the age of two years); Knudsen et al., *supra* note 170, at 10155–56 (citing studies in which disadvantaged children were placed in different intervention programs, either at preschool age or approximately four months).

210. Fox et al., *supra* note 173, at 35.

211. Johnson et al., *supra* note 189, at 216; Steinberg, *Cognitive and Affective Development in Adolescence*, *supra* note 171, at 69–70.

212. Geier & Luna, *supra* note 188, at 212.

213. Johnson et al., *supra* note 189, at 218.

this period, a host of undesirable behavior patterns—alcohol and substance abuse, criminal activity, reckless driving, smoking, etc.—tends to make its unfortunate debut.²¹⁴ Adolescents and young adults are more likely than adults over twenty-five to binge drink, engage in violence, commit crimes, have casual sex, and suffer serious or fatal automobile accidents, most of which they cause by driving under the influence of alcohol or engaging in other risky driving behaviors.²¹⁵

Developmental scientists argue that the emergence of these sorts of adolescent behaviors makes “perfect evolutionary sense,” since sensation seeking and risk taking have presumably long motivated adolescents of all cultures and species to leave their natal environments and seek out mates.²¹⁶ Scientists acknowledge that in today’s society, however, the behaviors that express this developmental pattern, despite having been selected for by evolution, “may be deemed inappropriate.”²¹⁷ Whatever their origins, public health experts today agree that reducing adolescent risk-taking behaviors would improve society’s overall well-being.²¹⁸

Behavioral decision models initially posited that adolescents’ cognitive deficiencies led them to misperceive risks and disregard the long-term consequences of their behavior.²¹⁹ Accordingly, state interventions sought to correct their misperceptions by educating adolescents about commonly encountered risks. These education efforts often included skills components, in which adolescents learned practical methods for dealing with situations presenting risk

214. Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 PSYCHOL. SCI. PUB. INT. 1, 8 (2006). *See also*, Michael Windle and Rebecca C. Windle, *Alcohol and Other Substance Use and Abuse*, in BLACKWELL HANDBOOK OF ADOLESCENCE 450–63 (Gerald R. Adams and Michael D. Berzonsky eds., 2003) (reporting empirical studies on initiation and escalation of substance use among adolescents).

215. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REVIEW 78, 79 (2008) [hereinafter Steinberg, *Adolescent Risk-Taking*].

216. Steinberg, *Adolescent Brain Development*, *supra* note 168, at 161; B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 70 (2008).

217. Casey et al., *supra* note 216, at 70. Authors of a review of adolescent risk taking eschew the understatement that characterizes Casey et al.’s characterization of the contemporary effects of risk taking, observing that the “decisions that are encouraged by evolution appear to make people stupid in the modern world, . . . and they encourage unhealthy risk taking rather than discourage it.” Reyna & Farley, *supra* note 214, at 4.

218. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 79. *See also*, Reyna & Farley, *Risk & Rationality*, *supra* note 214, at 8.

219. Reyna & Farley, *Risk & Rationality*, *supra* note 214, at 33.

(e.g., role playing ways in which to reject proposed sexual activity).²²⁰ Studies of these well-intended interventions, however, have found them to be largely ineffectual in changing adolescent behavior.²²¹

The early behavioral models, moreover, have failed to find empirical support. Researchers have sought to identify cognitive differences between adolescents and adults that could explain their different propensities for risk-taking behavior. Examples of such differences could include, for example, higher levels of irrationality among adolescents, lower levels of risk aversion, or deficiencies in either information processing or risk perception relative to adults.²²² None of these efforts, however, has borne empirical fruit.

To the contrary, researchers have consistently found that “[t]he logical reasoning and basic information-processing abilities of 16-year-olds are comparable to”²²³ or “essentially indistinguishable”²²⁴ from those of adults. General cognitive capacity—i.e., the abilities to process information, understand and reason from facts, and assess and appreciate the nature of a given situation—improves into mid-adolescence.²²⁵ By age sixteen, these basic cognitive abilities are mature.

Researchers have thus reached the counterintuitive conclusion that adolescents engage in higher rates of risky, seemingly irrational behavior than do adults *despite* being “as knowledgeable, logical, reality-based, and accurate in the ways in which they think about risky activity . . . as their elders.”²²⁶ Cognitive deficiencies thus do

220. *Id.*

221. *Id.* at 33 (citing studies).

222. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 80.

223. *Id.*

224. *Id.* See also, R. MURRAY THOMAS, COMPARING THEORIES OF CHILD DEVELOPMENT 298–99 (3d ed. 1992); Steinberg, *Cognitive and Affective Development*, *supra* note 171, at 70; June Carbone, *Age Matters: Class, Family Formation, and Inequality*, 48 SANTA CLARA L. REV. 901, 911–12 (2008); Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 OHIO ST. J. CRIM. L. 321, 324 (2006); Beatriz Luna et al., *Maturation of Cognitive Processes from Late Childhood to Adulthood*, 75 CHILD DEV. 1357 (2004); Scott & Steinberg, *Blaming Youth*, *supra* note 164, at 812–13.

Compared to children and preadolescents, adolescents develop increased cognitive abilities, including improved executive function, which refers to the higher-order cognitive system that manages other cognitive functions such as abstract thinking, planning (e.g., thinking through the likely consequences of actions), and inhibiting (or executing) behavior. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 164, at 44.

225. Steinberg et al., *Less Mature Than Adults?*, *supra* note 167, at 590–92.

226. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 80.

not account for adolescents' propensity for risky and impulsive decision making, with studies confirming that adolescents have the cognitive competence to make rational decisions about risks.²²⁷ Why, then, do they frequently fail to do so?

Behavioral scientists have examined more closely the real-world contexts in which adolescents make decisions, and in so doing they have gained valuable insights into differences between adolescent and adult decision-making processes. Their findings do not challenge adolescents' competence to make rational decisions about risks—at least when that decision making occurs in the relatively ideal conditions of the research laboratories in which adolescents complete tasks involving minor, symbolic risks.²²⁸ The real world seldom presents ideal conditions, however, and researchers have found that the real-world contexts in which adolescents make decisions can drastically affect the quality of their decision making.²²⁹

Contexts found to predictably compromise adolescent decision making include those requiring them to make decisions “in the heat of passion, in the presence of peers, on the spur of the moment, in unfamiliar situations, . . . [and] when behavioral inhibition is required for good outcomes.”²³⁰ In other words, adolescents tend to make bad decisions in emotionally charged or pressured situations, and they struggle to control impulses that lead to undesirable behavior. Studies of their decision making have more generally shown that, even though they do not generally misperceive risks (if anything, studies have tended to show that adolescents and adults both overestimate risk), adolescents tend to weight and value benefits more heavily than risks, as compared to adults.²³¹

Developmental scientists are rapidly gaining a better understanding of neurobiological aspects of adolescent development

227. Reyna & Farley, *supra* note 214, at 2.

228. *Id.*

229. *Id.* at 1; Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCH. 625, 625 (2005).

230. *Id.* See also, Eric Amsel et al., *Anticipating and Avoiding Regret as a Model of Adolescent Decision-Making*, in THE DEVELOPMENT OF JUDGMENT AND DECISION MAKING IN CHILDREN AND ADOLESCENTS 119, 120 (Janis E. Jacobs & Paul A. Klaczynski eds., 2005). Researchers of cognitive ability have referred to this as the “competence-performance distinction.” Jennifer L. Woolard et al., *Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts*, 20 LAW & HUM. BEHAV. 219, 220 (1996) (internal citations omitted).

231. Reyna & Farley, *supra* note 214, at 1.

that have the potential to explain its most confounding behavioral aspect—the increase during adolescence in *both* irrational risk-taking behavior *and* rational decision-making capacity.²³² Developmental psychologist Laurence Steinberg has recently emphasized importance—to all disciplines within developmental science—of research in developmental neuroscience, suggesting that this research has the “potential to structure a new, overarching model of normative . . . adolescent development.”²³³

Scientists have thus begun developing a neurologically-based model primarily oriented around the development in two neural systems: that associated with cognitive control, and that associated with socio-emotional maturity. The core insight of this model, which some call the “dual systems model,” is that the neural systems associated with cognitive control on the one hand, and those associated with socio-emotional maturity on the other, develop along different timelines.²³⁴ This temporal disjunction has the potential to explain (1) adolescents’ risk taking and poor decision making despite their improved cognitive ability, (2) other aspects of adolescent psychology and behavior, such as heightened susceptibility to peer influence, and (3) the developmental trajectory of all these over the course of the adolescent’s transition to adulthood.²³⁵ An overview of the model’s features follows.

The first neural system of the dual systems model is what some researchers refer to as the *socio-emotional* system; it includes neural circuitries across regions of the brain implicated in aspects of social

232. Casey et al., *supra* note 216, at 63 (discussing cognitive and neurobiological hypotheses that fail to adequately account for adolescent decision-making behavior).

233. Steinberg, *Adolescent Brain Development*, *supra* note 168, at 162. *See generally* Steinberg, *Adolescent Risk-Taking*, *supra* note 215.

234. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 97–98. *See also*, Laurence Steinberg, Dustin Albert, Marie Banich, Elizabeth Cauffman, & Sandra Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCH 1764, 1764 (2008) [hereinafter Steinberg et al., *Sensation Seeking & Impulsivity*] (noting that [n]eurobiological evidence in support of the dual systems model is rapidly accumulating”).

235. *See infra* notes 236–50, and accompanying text. For slightly different versions of the dual systems model, *see* Casey et al., *supra* note 216; Geier & Luna, *supra* note 188. *See also*, Catherine Sebastian et al., *Social Brain Development and the Affective Consequences of Ostracism in Adolescence*, 72 BRAIN & COGNITION 134, 138 (2010) (discussing aspects of the dual systems model).

information processing and reward seeking/processing.²³⁶ The second neural system is the *cognitive control* system. Cognitive control refers to the abilities to voluntarily coordinate and engage in goal-directed behavior. This system includes the prefrontal cortex, which is involved in executive function, decision making, and self-regulatory functions, and “association” areas, which connect different regions of the brain and thus support the complex integration of function.²³⁷

In the socio-emotional system, the neurotransmitter dopamine modulates the neural reward circuitry.²³⁸ (Recall that when stimulated by a chemical impulse, certain neurons trigger the release of neurotransmitters that then chemically stimulate the next neuron in the circuit.)²³⁹ The mechanisms underlying dopamine neurotransmission continue to mature during adolescence. Dopaminergic activity peaks rapidly and dramatically in early adolescence, around the time of pubertal maturation.²⁴⁰ Researchers believe that this peak in activity makes adolescents experience a potentially rewarding stimuli as even more rewarding than would be the case during either childhood or adulthood.²⁴¹ The resulting heightening of reward salience leads to increased sensation seeking—a tendency to seek out novel, varied, and highly stimulating experiences, coupled with a willingness to take risks in order to attain them.²⁴² Consistent with this theory, studies show that sensation

236. The socio-emotional system includes the amygdala, nucleus accumbens, orbitofrontal cortex, medial prefrontal cortex, superior temporal sulcus. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 83.

237. *Id.* at 93–94. The cognitive control system also includes parts of the corpus callosum, which connects the left and right hemispheres. *Id.*

238. Geier & Luna, *supra* note 188, at 216.

239. NELSON ET AL., *supra* note 183, at 24.

240. Steinberg et al., *Sensation Seeking & Impulsivity*, *supra* note 234, at 1764–66; Geier & Luna, *supra* note 188, at 216–17. Although the increase in dopaminergic activity tends to coincide with puberty, evidence suggests that it occurs independent of puberty. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 89–90. Oxytocin, another neurotransmitter that operates within the socio-emotional network, however, is more directly linked to the rise in pubertal hormones. Oxytocin’s functions include regulating sensitivity to social stimuli. Gonadal steroid release at puberty leads to changes in oxytocin receptors. Studies have confirmed adolescents’ sensitivity to emotional and social stimuli, heightened awareness of others’ opinions, and feelings of self-consciousness. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 89–90.

241. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 85.

242. Steinberg et al., *Sensation Seeking & Impulsivity*, *supra* note 234, at 1765; Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 85.

seeking, risk preference, susceptibility to deviant or anti-social peer influence, and reward sensitivity all follow a curvilinear, “n”-shaped trend; they begin to increase at age ten, peak around ages fourteen to fifteen (depending on the study and measure used), then decline.²⁴³

The cognitive control system follows a more gradual and linear developmental trajectory than does the socio-emotional system.²⁴⁴ Three structural changes in the brain characterize the maturation of cognitive control during adolescence:

First, the synaptic pruning that began in childhood accelerates in the prefrontal regions of the brain, with the prefrontal cortex maturing in mid-adolescence.²⁴⁵ This correlates with the maturation of basic cognitive processes by age sixteen. Second, myelination, which improves neural connectivity, continues within the regions of the cortex and between the different cortical regions through adolescence and into the twenties.²⁴⁶ This change correlates with observed behavioral improvements in higher-order and executive functions (future orientation, planning, response inhibition, spatial working memory) associated with the integrated functioning of multiple prefrontal regions.²⁴⁷ And third, myelination also continues between the cortex and other regions of the brain, including connections between regions involved in social and emotional information-processing, and those involved in cognitive control

243. Steinberg, *Adolescent Brain Development*, *supra* note 168, at 163; Sindy R. Sumter et al., *The Developmental Pattern of Resistance to Peer Influence in Adolescence: Will the Teenager Ever Be Able to Resist?*, 32 J. ADOLESCENCE 1009–10 (2009). *See also*, Steinberg et al., *Adolescent Risk-Taking*, *supra* note 215, at 89 (ages thirteen to sixteen). *See also*, Steinberg et al., *Sensation Seeking*, *supra* note 234, at 1774 (ages twelve and fifteen).

244. Steinberg et al., *Adolescent Risk-Taking*, *supra* note 215, at 93.

245. Gogtay & Thompson, *supra* note 189, at 7; Toga et al., *supra* note 173, at 149–50; Paus, *Mapping Brain Maturation*, *supra* note 180, at 62. There is also some evidence of synaptic pruning in the association areas (areas throughout the brain connecting its different regions and supporting the complex integration of inter-regional function). Luna, *Developmental Changes*, *supra* note 188, at 238.

246. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 94–96; Geier & Luna, *supra* note 188, at 216; Paus, *Growth of White Matter*, *supra* note 189, at 26; Luna, *Developmental Changes*, *supra* note 188, at 237–41; Gogtay & Thompson, *supra* note 189, at 7. Because myelination involves the gradual enhancement of established connections (as opposed to the initial establishment of such connections), the changes in white matter represent a refinement of executive control processes that are in place earlier in development. Luna, *Developmental Changes*, *supra* note 188, at 239–40.

247. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 94–96.

processes (especially the prefrontal regions).²⁴⁸ The increased connectivity between these regions correlates with coordination of affect (the external expression of emotions) and cognition; the result is that emotional regulation and impulse control both improve through the mid-twenties.²⁴⁹ Strategic planning, anticipation of future consequences, and resistance to neutral (as opposed to anti-social) peer influence and peer influence in general all follow the same trajectory, increasing linearly from preadolescence through late adolescence and early adulthood.²⁵⁰

In summary, adolescents' basic cognitive abilities are mature by age sixteen, giving them the capacity to process information and make rational decisions. But the heightened sensitivity to rewards that increases and peaks around mid-adolescence inclines them towards risk taking, sensation seeking, and impulsivity; these inclinations may dominate or overwhelm their cognitive processes and shape their behaviors, especially in situations triggering heightened emotion or pressure.²⁵¹ Their susceptibility to these confounding influences on their decision making begins to decline after mid-adolescence, however, while their abilities to exercise cognitive control increases, ultimately reaching mature levels in their twenties.²⁵²

While adolescence technically ends at age eighteen or nineteen, former adolescents do not reach adult levels of neurobiological or behavioral maturity immediately.²⁵³ Brain development continues well into the mid-twenties, both through synaptic pruning, especially

248. *Id.* at 94–98. Important social and emotional information-processing regions of the brain include the limbic and paralimbic regions. *Id.*

249. *Id.*

250. *Id.* See also, Sumter et al., *supra* note 243, at 1016 (reporting a steady increase in reported resistance to general peer influence with age). See generally Luna et al., *What has fMRI Told Us About the Development of Cognitive Control Through Adolescence?*, 72 BRAIN & COGNITION 101, 101 (2010) [hereinafter Luna et al., *Development of Cognitive Control*].

251. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 97–98; Luna, *Developmental Changes*, *supra* note 188, at 257.

252. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 97–98; Luna, *Developmental Changes*, *supra* note 188, at 257.

253. Some scholars suggest that United States and most Western cultures view adolescence as extending into the early 1920s. See, e.g., Glen R. Elliott & S. Shirley Feldman, *Capturing the Adolescent Experience*, in *AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 1* (S. Shirley Feldman & Glen R. Elliott eds., 1990). Researchers rarely include subjects older than eighteen in studies involving adolescents, however, see, e.g., Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 476 (2000) [hereinafter Arnett, *Emerging Adulthood*].

in the frontal cortex, and myelination.²⁵⁴ Higher-order executive function, emotional regulation, and impulse control also improve through the mid-twenties.²⁵⁵ Emerging adults aged eighteen to twenty-two demonstrate increased levels of risk taking in the presence of peers, compared to older adults (though they are less subject to peer influence than are adolescents—in one study, peer presence doubled risk-taking among adolescents, increased it by fifty percent among emerging adults, and had no effect on adults aged twenty-five and older.).²⁵⁶ The continuation of developmental processes into the post-adolescent period thus provides neurobiological and behavioral support for treating early adulthood as a distinct period of development.²⁵⁷

Professor Jeffrey Arnett, whose study of adolescence was cited by the Supreme Court in *Roper*, has also studied the period immediately following adolescence. Arnett and others now characterize ages eighteen to twenty-five as a distinct developmental period, which they call “emerging adulthood.”²⁵⁸ Arnett argues that while a traditional definition of adolescence followed neatly by adulthood may be expedient, it fails to capture the complex reality of this period of life.²⁵⁹ Emerging adults themselves seem to agree and tend to

254. See *supra* notes 245–46 and accompanying text.

255. See *supra* notes 245–50, and accompanying text.

256. Steinberg, *Adolescent Risk-Taking*, *supra* note 215, at 90–91; Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOLOGY 625 (2005).

257. Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819 (2001).

258. Arnett, *Emerging Adulthood*, *supra* note 253, at 469. See generally JEFFREY JENSEN ARNETT, *ADOLESCENCE AND EMERGING ADULTHOOD: A CULTURAL APPROACH* (4th ed. 2010); *EMERGING ADULTS IN AMERICA: COMING OF AGE IN THE 21ST CENTURY* (Jeffrey Jensen Arnett & Jennifer Lynn Tanner eds., 2006); JEFFREY JENSEN ARNETT, *EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES* (2004); *READINGS ON ADOLESCENCE AND EMERGING ADULTHOOD* (Jeffrey Jensen Arnett ed., 2002).

259. THOMAS P. GULLOTTA ET AL., *THE ADOLESCENT EXPERIENCE 17* (4th ed., 2000). G. Stanley Hall, who initiated the scientific study of adolescence, began at the beginning of the twentieth century with the publication of his two-volume work on the psychology of adolescence; he viewed adolescence as extending from age fourteen to age twenty-four. See also G. STANLEY HALL, *ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATION TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION, AND EDUCATION* (1904). Hall likely chose a range bounded by the average ages of the initial changes of puberty and of entry into marriage and parenthood. Today researchers view adolescence as starting and ending earlier. This may be partly because on one end, the onset of puberty occurs earlier than it did in 1900,

regard themselves as neither adolescents nor adults, but instead in between the two.²⁶⁰

At the behavioral level, Arnett characterizes emerging adulthood as a time for identity exploration, free from defined social roles and expectations. Several of the risky behaviors that emerge during adolescence peak during this time, including unprotected sex, substance abuse, and high risk driving behaviors (including driving at high speeds or while intoxicated).²⁶¹ Steinberg has argued that increases in these behaviors do not necessarily reflect an increasing propensity towards risk taking during late adolescence/emerging adulthood, but instead the increased opportunities to do so that come with aging. After high school, for example, approximately one-third of emerging adults attend college and spend the next several years in a period of semi-autonomy. They assume some of the responsibilities of independent living but, they also continue to rely on adults for others.²⁶² Approximately forty percent of all emerging adults leave their parents' home but later move back at least for a period of time over the course of their late teens and twenties.²⁶³

The next Part considers possible implications of this research.

3. *Conclusions from the science of development*

Research in the various disciplines that study cognitive development has advanced tremendously in the last decade or so. Some of its insights have already influenced state decision making affecting the young.²⁶⁴ Others have significant potential for doing so. Yet state actors considering the implications of development for state decision making should proceed with care (as they should whenever they rely on specialized knowledge from fields outside their expertise). With respect to the science of cognitive development in

and on the other because many more people share a significant social transition—high school graduation. In 1900, for example, only ten percent of people ages fourteen to seventeen attended high school; by 1985, that percentage had risen to ninety-five percent. *See also*, Arnett, *Emerging Adulthood*, *supra* note 253, at 476.

260. Jeffrey Jensen Arnett, *Learning to Stand Alone: The Contemporary American Transition to Adulthood in Cultural and Historical Context*, 41 HUM. DEV. 295 (1998).

261. Arnett, *Reckless Behavior in Adolescence*, *supra* note 164, at 339.

262. Arnett, *Emerging Adulthood*, *supra* 253, at 471. Other emerging adults, though, leave home not to attend college but instead to live independently and work full-time. *Id.*

263. *Id.* (citing F. Goldscheider & C. Goldscheider, *Leaving and Returning Home in 20th Century America*, 48 POPULATION BULL. 1 (1994)).

264. *See, e.g.*, *Roper v. Simmons*, 543 U.S.

particular, state actors must remain aware that development is an organic process. As developmental scientists emphasize, the timing and pace of normal development varies according to the individual.²⁶⁵ Age is only an imperfect proxy for development.²⁶⁶ Policy making, on the other hand, often requires definite, clearly bounded categories. Developmental science may usefully inform but cannot determine these.²⁶⁷ It is the state actor who must consciously decide the chronological direction in which potential line-drawing errors will lie.²⁶⁸

Keeping these cautions in mind, several conclusions have already emerged from the scientific literature which may have significant salience for state actors:

First, it appears that education and experience may be as important in adolescence as they have long been understood to be in early childhood.²⁶⁹ Given that the synaptic pruning that occurs during early childhood is experience-dependent, there is reason to believe that the later-occurring synaptic pruning is likewise

265. See, e.g., Sumter et al., *supra* note 243, at 1017; *Graham v. Florida*, 130 S. Ct. 2011 (2010). But see Maroney, *supra* note 165, at 94 (“[A]dolescent brain science has had, is likely to have, and should have only moderate impact in the [juvenile justice] courts.”).

266. *Id.* See also, Steinberg et al., *Sensation Seeking & Impulsivity*, *supra* note 234, at 1776 (cautioning that “[i]t is important to remember . . . that individuals of the same age vary in their sensation seeking and impulse control and that variations in these characteristics are related to variations in risky and antisocial behavior.”).

267. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, AM. PSYCHOLOGIST, Nov. 2009, at 739, 747 (concluding that “[a]ny system of boundary drawing that relies on science for guidance, whether neuroscience or behavioral science, is bound to be imperfect, but it will nevertheless sit on a stronger foundation than one that is ignorant about development.”); Maroney, *supra* note 165, at 145–56 (discussing inherent constraints of developmental neuroscience’s utility in juvenile justice cases, emphasizing its inability to inform individual assessments).

268. In other words, state actors must evaluate a given context and decide whether it is preferable to mistakenly include individuals in the relevant category (e.g., a category that presumes the competence of twelve-year-olds to drive will include *A*, a twelve-year-old who has not yet attained driving competence) or mistakenly exclude them from it (e.g., the category that presumes the competence of thirteen- but not twelve-year-olds to drive will exclude *B*, a twelve-year-old who has attained driving competence).

269. Anne Dailey, for example, has examined the research on the importance of early caregiving to psychological development and the implications for constitutional law. Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431 (2006). Dailey argues that the centrality of early caregiving relationships to healthy development supports increased constitutional protection for caregiving relationships. *Id.*

experience-dependent.²⁷⁰ Steinberg observed that, if this synaptic activity is activity- and experience-dependent, the brain plasticity characteristic of this period of adolescence would represent “a time of considerable opportunity for intervention.”²⁷¹ The importance of synaptic pruning to development seems to find support in one longitudinal study, which found that the developmental trajectory of gray matter in children with higher intelligence quotients demonstrated higher levels of plasticity, with a “particularly vigorous phase of cortical thinning.”²⁷² Without rich educational experiences during adolescence, brain development may stall, with the young person’s cognitive potential remaining unrealized.

Second, the ability to reason reaches mature levels by mid-adolescence, around age sixteen. Psychosocial maturity improves throughout adolescence but does not reach mature levels until the twenties. The heightened vulnerability to risk taking that peaks in middle adolescence before declining is normative; to the extent that it has a neurobiological basis, efforts to reduce risk taking through education will have limited success. While adolescents have the cognitive capacities to make rational decisions, real-world contexts and stressors will continue to confound their capacities and impede their decision-making. So far, only aging (and, presumably, the neural development that attends it) reliably and significantly correlates with decreases in adolescent risk taking. As a result of this ongoing development, adolescents’ decision-making abilities will be both age dependent and context specific.

Finally, it appears likely that emerging adults do not reach full cognitive maturity until their early- to mid-twenties. Indeed, some of the decision-making deficiencies and other characteristics typically observed in adolescence persist into this stage of life.

A discussion of the policy implications of this and the previous two Parts follows.

270. The authors of one study argue that “[r]ich early experience must be followed by rich and more sophisticated experience later in life, when high-level circuits are maturing in order for full potential to be achieved.” Fox et al., *supra* note 173, at 35.

271. Steinberg, *A Behavioral Scientist*, *supra* note 168 at 161. *See also* Luna, *Developmental Changes*, *supra* note 188, at 268 (suggesting that adolescent experience may guide synaptic pruning and thus help determine the specialization of neural circuitries that support task ability and response state, which refers to the ability to orchestrate cognitive demands).

272. Gogtay & Thompson, *supra* note 189, at 7.

V. DEVELOPING CITIZENS

The previous three Parts have explored the interests and rights of parents and the young, and the state's minimum ends with respect to its citizens generally. This Part outlines a set of policies that I argue best accounts for these interests and rights. Again, at the core of state actions respecting the immature is citizens' liberty, which is the minimum basic end of the liberal constitutional democratic state. The dual goals of safeguarding immature citizens' current liberty and their future liberty ground a framework around which to build a set of policies that together form a coherent whole. The framework defines the primary goal, and the policies enable their realization. They in turn should be informed by and account for the interests of those most affected by them—parents and young citizens themselves.

To be clear, these are not the only policies that might flow from the analyses of the previous Parts. Rather, they demonstrate that a body of policies can be derived from common principles to form a transparent, effective, and coherent whole.²⁷³

Part V.A begins by briefly recapitulating the objectives of the state, and the interests and rights of parents and the immature. Part V.B weighs and synthesizes all these, deriving from them four ends that state policies affecting young citizens should aim to achieve. Parts V.C and V.D then recommend (and address potential objections to) numerous policies that advance those ends, from infancy through emerging adulthood.

273. This approach is consistent with that recently advocated by Emily Buss, at least in some respects. In *What the Law Should (and Should Not) Learn from Child Development Research*, Buss criticizes a law-making approach that, informed by developmental science, would focus on children's acquisition of capacities in extending to them specific rights and responsibilities. Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009) [hereinafter Buss, *Child Development Research*]. Such an approach, Buss argues, underestimates the complexity involved in determining "capacity;" takes an idealized, caricatured view of adult "maturity" that is at odds with actual adult functioning; mistakenly assumes that children's capacities are consistent across various contexts; and, by treating children's capacities as ascertainable at any given point in their development, elides the law's potential to shape their development in a direction consistent with society's goals. *Id.* It is my goal to avoid these pitfalls. Other arguments raised by Buss are less salient here, or I leave their consideration to those involved in decision- and policy-making processes. For example, Buss discusses the inevitable mismatches between developmental categories (which cannot establish bright lines) and legal categories (which often must do so). I contend that these are context-specific assessments that must simply be made at that level. Weighing, for example, the potential harms involved by overestimating adolescent capacity in a given context against that involved in underestimating that capacity, can help state actors determine where the risk of error ought to lie.

*A. Parents, the Young, and the State, Redux:
Interests, Rights, and Ends*

The state's most basic end is citizens' liberty; its secondary end is its citizenry's performance of those functions essential to its continued existence.²⁷⁴ To ensure citizens' basic liberty during their immaturity, the state must withhold from others absolute authority over them. To ensure their basic liberty upon reaching maturity, it must prevent others from depriving immature citizens of the ability to develop the basic capacities of citizenship.²⁷⁵

Parents' interests include the liberty to raise their children as they deem best, with as little state interference as possible. Parenthood is a highly valued status, and many parents consider forming families and childrearing to be part of their self-identities.²⁷⁶ Constitutional jurisprudence validates their sentiments by recognizing the right to parent as an aspect of parents' *individual* liberties. But that same jurisprudence restricts the illiberal tendencies of recognizing an other-determining liberty by providing it relatively weak protection.²⁷⁷

The needs and abilities of the young change dramatically as they develop, and their interests change accordingly. The young require care appropriate to the extent of their dependency. They have a liberty interest in exercising the rights of which they are capable and a welfare interest in being protected from their deficiencies. They should receive the experiences and education necessary for them to develop the capacities of citizenship, so that they may choose how and whether to exercise those capacities once they reach maturity. And they should receive the experiences and education necessary for them to ultimately choose the courses their lives will take.²⁷⁸

Their legal status as minors in some instances narrows the scope of their constitutional rights, but it does not altogether deny them constitutional rights or protections. Some of their liberty and welfare interests have received constitutional protections. For example, minors are entitled to independently make decisions within their competence affecting intimate aspects of their lives. A state that

274. *See supra* Part II.A.1–2.

275. *See supra* Part II.B.1–2.

276. *See supra* Part III.A.

277. *See supra* Part III.B.

278. *See supra* Part IV.A.

presumes minors' incapacity in this context and thus seeks to restrict their decisional autonomy (by requiring, for example, parental notification or consent before a minor may obtain an abortion) must also provide affected minors the opportunity to demonstrate their capacity—i.e., individualized determinations of the minor's decision-making competence.²⁷⁹ Conversely, minors' interests in being protected from their deficiencies requires states to presume and account for demonstrated decision-making deficiencies that render minors more susceptible to committing criminal offenses, and less culpable for those actions.²⁸⁰

*B. Synthesis: Framework to Guide State Decisions
Affecting the Immature*

This Part sets out a four-part framework comprising the ends that policies affecting the immature should further. It briefly explains the way in which each end advances or sacrifices the various objectives summarized above and justifies the proposed balance.

First, the state should afford parents the liberty to form and raise a family. Doing so furthers parents' interests in childrearing and the state's obligation to ensure citizens' (here, parents') liberty. By encouraging and respecting parental commitment, however, parental deference also aims to further the state's obligation to ensure the welfare of the immature.²⁸¹ Deference to parents admittedly risks restricting the current and future liberty of the immature. Some parents, for example, may exercise greater control during their children's immaturity than is justified by their dependency, or may endeavor to control and thus constrain their children's future liberty. The next part of the framework guards against these risks.

Second, then, notwithstanding the presumption of parental deference, the state must withhold from parents and others absolute authority over the immature. The state's minimum obligation to its young citizens—ensuring their basic liberty—precedes its commitment to ensuring parents' specific childrearing liberty and thus limits the extent of parental noninterference. The state may

279. See *supra* Part IV.B.

280. See *id.* For a critique of the analytical and expressive aspects of the Court's recent jurisprudence relating to juvenile punishment, see Buss, *Child Development Research*, *supra* note 273, at 42–47.

281. See *infra* Part V.C.1. Noninterference with parenting choices also respects a secondary value of the liberal state—pluralism. See *supra* note 65 and accompanying text.

safeguard the basic liberty of immature citizens by exercising its *parens patriae* power. At a minimum, it must prevent others from interfering with the young in a way that conclusively decides the course of their lives.

Third, the state must ensure that the immature will reach maturity with their basic entitlement to liberty intact. Basic liberty entails deciding how one's life will ultimately go. The state must thus endeavor to ensure that children will learn of their basic life options, and will develop the abilities they need to pursue them. Because the state must accordingly ensure that the young receive certain educational experiences, achieving this end may interfere with parents' liberty and even the basic liberty of the young themselves. But the state rightly constrains the liberties of both during children's immaturity (e.g., by compelling their school attendance) in order to preserve to the young their later life-deciding liberty.

Fourth, the state must ensure that its citizenry will reach maturity with the capacities to fulfill the basic obligations of citizens—the ability to contribute to the state's functioning through work; the ability to participate in democratic governance; and the ability to form families and raise children and future generations of citizens. This end ensures the perpetuation of the state itself and its continued ability to preserve citizens' basic liberty. It simultaneously furthers mature citizens' liberty to choose the types of economic and civic participation in which they will engage. Like the third end of the framework, this end also requires that the young receive certain experiences; achieving it thus means that it too may interfere with both parents' and children's liberties during the latter's immaturity.

Implicit in its third and fourth ends is the notion that, once an individual attains the mature capacity to exercise a liberty, the state should endeavor to ensure that the individual in fact receives that liberty.

The following two Parts (V.C–D) commend policies that aim to further these four ends.

C. Policies—Infancy and Childhood

The fundamental policy advocated in this Part is that of minimal state interference with the liberty of parents to raise their infants and young children as they see fit. Parents should instead receive near-absolute deference during this period of their children's development, though the state should continue to withhold from

them absolute authority over their children. Parents should thus have no entitlement to interfere with their children in such a way as to ultimately decide their lives—such as withholding medical treatment from a critically ill child.²⁸² In addition, states should increase efforts to educate parents about the importance of early childhood experiences, though these efforts should stop short of mandating participation in any specific programs.

Parental deference in early childhood aims to achieve the first two of the four ends above—deferring to parents' childrearing decisions, yet preserving immature citizens' basic liberty. The following two Parts elaborate on these policies and consider objections likely to be raised to them.

1. Minimizing interference in parenting

The first form of noninterference in parenting is universal, and nearly invisible: the state permits biological parents to be the default caregivers for their infant children—an outcome that is intuitive but not inevitable.²⁸³ It secures for the young, at minimal administrative cost to the state, care provided by those most likely to be committed to their well-being.²⁸⁴ While the state acts as caregiver of last resort, it lacks the capacity to be children's default caregiver. It also lacks the resources and the capacity to identify an "ideal" caregiver for each child, if such a person exists.

Strong parental deference should continue into infancy and childhood. Noninterference allows parents to share the values and conception of the good life that will permeate their children's

282. For discussions of spiritual treatment exemptions to child abuse statutes, see Jennifer L. Hartsell, *Mother May I . . . Live?: Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499 (1999); Jennifer Stanfield, Comment, *Faith Healing and Religious Treatment Exemptions to Child-Endangerment Laws: Should Parents Be Allowed to Refuse Necessary Medical Treatment for Their Children Based on Their Religious Beliefs?*, 22 HAMLIN J. PUB. L. & POL'Y 45 (2000).

283. See, e.g., June Carbone & Naomi Cahn, *Which Ties Bind?: Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1069 (2003). Carbone and Cahn argued that biological ties are important, but so are relationships; thus, "once two parents are established on the basis of biology or acknowledgment at the child's birth, their parental status cannot be challenged or changed without consideration of the child's interests, which will ordinarily be presumed to lie with the continuation of the relationship." *Id.*

284. See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2432-33 (1995) (arguing that biological bonds, affective bonds, and informal social norms all operate as extralegal influences that reinforce parental commitment).

formative years.²⁸⁵ And though it may seem counterintuitive, in some ways noninterference in parenting decisions may be the best way to advance children's welfare interests during this time. Emily Buss is among those scholars who argue that noninterference more generally may lead to better parenting overall.²⁸⁶ Buss argues first, parents are "child-specific expert[s]" and are generally better qualified than state actors to assess and meet their individual children's needs. Second, parents who make unimpeded childrearing decisions may find childrearing more fulfilling; this may increase their enjoyment of and commitment to the task, which in turn can make them better parents.²⁸⁷ Finally, even when parents are less competent than is ideal, state intrusion and oversight create disruptions that might undermine the struggling parents' effectiveness further. Thus noninterference, even in cases of less-than-optimal parenting, can better serve children's interests.²⁸⁸

A final justification for adopting a policy of parental deference during this stage is more frankly pragmatic. Maximizing parental deference in their children's early lives may make parents somewhat more inclined to accept a greater level of interference in adolescence. During that equally crucial period, the state should universally require certain educational experiences—in particular, out-of-home comprehensive secondary education—that many parents who wish to shield their children from certain experiences will resist.²⁸⁹

285. The Supreme Court has acknowledged that the "parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (discussing implications of *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1924)) (additional citations omitted). This freedom to live out and instill in their children their values also furthers the value of pluralism.

286. Buss, *Adrift in the Middle*, *supra* note 134, at 287–96.; *see also* JOSEPH GOLDSTEIN ET AL., *supra* note 91, at 7–8 ("[P]reference for minimum state intervention and for leaving well enough alone . . . [since] law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship as that between parent and child."); Gilles, *supra* note 88, at 937.

287. Buss, *Child Development Research*, *supra* note 273, at 288–89.

288. *Id.* at 290–91. Buss acknowledges the general lack of social science research supporting these contentions, but observes that the difficulty of empirical research renders this a state of affairs unlikely to change. *Id.* at 298–99. She thus proposes that the state should interfere only in cases involving the sorts of "severe and ascertainable harm[s]" to children that fall within the state's special competence. *Id.* at 289. The state's relative competence, Buss argues, is greatest where the alleged harm relates to the child's development as a public citizen and where there is a "broad consensus" about the harm. *Id.*

289. *See infra* Part V.D.1.

In what ways would maximum parental deference differ from current policy? First, the state might give parents greater control over their children's education, even in the public schools. Currently, parents who wish to enroll their children in public schools yet exempt them from certain aspects of the curriculum are presumptively unable to do so.²⁹⁰ Parental deference could reverse this presumption. Second, state agencies that enforce child protection laws might develop protocols, particularly in situations of potential neglect, that minimize the more obvious and physical manifestations of interference.

Exceptions to a policy of parental deference would remain, and the state would retain and exercise authority necessary to preserve the current and future liberties of the immature. Presumptive parental deference would not preclude, for example, laws such as those protecting children from abuse or neglect, or denying parents the ability to withhold medical treatment from their critically ill children.

Another exception, of sorts, to a general presumption of noninterference grows out of the overwhelming evidence demonstrating the importance of basic educational experiences beginning in infancy. In light of this evidence, the state should continue or increase its efforts to ensure that infants and young children receive early experiences necessary for optimal cognitive development. Programs such as Head Start and Early Head Start recognize the importance of this period. Since their creation, its importance has become all the clearer. The federal government could expand these efforts and support others. For example, it may provide funding for states to widely disseminate and promote educational materials on the importance of early childhood learning (perhaps in hospitals and birthing centers, targeted to parents who claim child dependents on state tax forms, etc.).

Despite the importance of early experience to subsequent development, it is arguably unnecessary for states to require early education or other mandatory programs. The sorts of experiences that benefit young children's development tend to consist of activities that are well within the abilities of the average parent (e.g., engaging the very young in conversation, reading, singing, etc.), that

290. See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1058 (6th Cir. 1987).

are not dependent on specific curricular content, and that are thus unlikely to be opposed by many parents.²⁹¹

2. *Overcoming objections*

The concept of strong parental rights is something of an embarrassment—or at least an enigma—in the liberal constitutional democracy. Their dependency alone, the argument goes, does not justify vesting in others a “right” over the lives of the young. James Dwyer has critiqued what he calls this “paradox” in the state’s conception of personal liberty. Dwyer argues that vesting in parents a “right” over their children is inconsistent with the state’s core legal and moral principles.²⁹² He points out that constitutional protection for parents’ decisions “regarding children’s education and upbringing are actually a form of ‘other-determination.’”²⁹³ Parental rights are thus a singular anomaly in a constitutional jurisprudence that otherwise limits rights to self-determining individual choices and activities.²⁹⁴

Others also criticize the use of “rights-talk” with respect to family life. Barbara Bennett Woodhouse resists the notion of parental rights due to its tendency to elide the primary concept—parental responsibility—that provides some justification for parents’ power.²⁹⁵

291. Knudsen et al., *supra* note 170. One non-profit in a Mississippi community, for example, works to improve young children’s development and readiness for kindergarten by targeting their parents. It offers low-income parents weekly sessions aimed at exposing them to developmentally appropriate ways of enhancing their children’s education. Through a curriculum grounded in accepted research on early childhood cognitive and linguistic development, parents learn the significance of activities including: (1) engaging their young children in active conversations about their immediate environment; (2) involving children in ordinary activities (like folding laundry) and using those activities as educational vehicles (“the shirt has three buttons”); and (3) singing and reading to their children. See BabySteps: Empowering Parents, Program Components, http://www.takebabysteps.com/program_components.htm#Auxiliary_Program_Components (last visited Nov. 10, 2010). See also DIV. OF BEHAVIORAL AND SOC. SCIENCES AND EDUC., NAT’L RESEARCH COUNCIL & NAT’L ACADS., EARLY CHILDHOOD DEVELOPMENT AND LEARNING: NEW KNOWLEDGE FOR POLICY (2001).

292. Dwyer, *Parents’ Religion and Children’s Welfare*, *supra* note 89, at 1410.

293. *Id.*

294. *Id.* at 1373, 1406–11.

295. Woodhouse, *supra* note 84, at 1818; see also Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337 (2002) (arguing that a constitutional jurisprudence grounded in individual, autonomy-based rights is poorly suited to resolving questions of family relationships); see also Bartlett, *supra* note 85, at 298 (identifying and objecting to the view that parenthood is an entitlement that follows the acceptance of parental responsibility).

Mary Ann Glendon has argued more generally that emphasizing rights fosters self-interest instead of connection and nurturing, and is thus particularly inapt in the context of families.²⁹⁶

One must concede the validity of these critiques. In particular, a parent's deeply felt desire to influence one's children ought not—again, especially in the liberal state—create an entitlement to control one's children's lives.

On the other hand, no right is absolute, and as discussed above, the parental right is a particularly squishy one.²⁹⁷ The fact that parents' rights tend to be fundamentally protected in rhetoric only, moreover, mitigates their potential harm.²⁹⁸ States regularly intrude on these rights, and so long as their intrusion stops short of threatening the existence of the parent-child relationship and does not infringe other constitutionally protected rights, the Supreme Court all but looks the other way.²⁹⁹ Myriad health, safety, and educational regulations that constrict parents' rights are a testament to this. Viewed in this light, the “parental right” could more accurately be characterized a “parental presumption.”³⁰⁰

There is a third factor that may assuage some of the concerns raised above. As it stands, parental rights implicitly recede to some degree as children's autonomy grows. This recession is consistent with both constitutional and liberal arguments for individual rights. The next Part argues that it should happen in a more systematic and explicit way.

296. MARY ANN GLENDON, RIGHTS-TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 9–15 (1991). See generally Gretchen Ritter, *Women's Civic Inclusion and the Bill of Rights*, in GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 60, 81–82 (Linda C. McClain & Joanna L. Grossman, eds. 2009) (discussing the shortcoming of rights-based models of equality and arguing “that the republican vision of popular sovereignty expressed in the Bill [of Rights can support] . . . a more inclusive notion of equality and citizenship that draws on women's experiences in their families and communities as well as their interests as autonomous individuals,” and rejecting a politics “based on a stripped-down liberal individualism” in favor of one that addresses the “social embeddedness and community values [that] shape us all.”)

297. See *supra* Part III.B

298. See *id.*

299. As discussed above, constitutional doctrine allows states broad authority to exercise their *parens patriae* and police powers to enact legislation aimed at furthering societal interests and securing children's welfare. See *supra* Part III.B.

300. Given the importance of language itself to beliefs and attitudes, we might do well to abandon the language of rights when discussing the parent-child relationship. It is perhaps preferable to speak of “parental deference,” or as suggested by Dwyer, a “parental privilege.” Dwyer, *supra* note 70, at 1410.

D. Policies—Adolescence and Emerging Adulthood

Perhaps more so than in infancy and childhood, existing policies affecting adolescents and emerging adults fail this group of citizens. The continuing extent of parental deference, especially over adolescents' education, allows parents who choose to do so to deprive their children of the experience and knowledge they must gain if they are to have the eventual capacity to decide their own lives.

This Part thus suggests a simple yet far-reaching policy that follows, and complements, that proposed for infancy and childhood—obligatory out-of-home comprehensive education. Though such a requirement would have been regarded as unremarkable in the 1980s, it may be seen as radical today. But as Part V.D.1 argues, this policy is necessary to reliably ensure that the immature receive the basic experiences and education necessary to develop the capacities to determine their own life courses and participate in the economic, political, and social life of the state. If successful, these policies achieve the state's third and fourth ends—safeguarding immature citizens' future liberty and ensuring the citizenry's ability to perform functions essential to the state's preservation. If, after having developed these basic capacities, the now-mature citizen chooses a life of civic and social disengagement or voluntarily submits to the authority of others, the state will have nonetheless increased the likelihood that the citizen's life course was the product of choice. Part V.D.2 anticipates and addresses objections to this proposal.

Next, Part V.D.3 urges that state decision making become more cognizant of and responsive to the capacities of its developing citizens. State actors should work to ensure that adolescents have the liberty to make those self-regarding decisions of which they are capable. These are age- and context-specific liberties. The science of development should inform the state's decisions as to which liberties may be appropriate, allowing decision-makers to make some general determinations about the development of various capacities. But science cannot prescribe policy, and decision makers must also consider other factors—including the possibility and potential negative externalities of adolescents' bad choices.

In general, by mid-adolescence the young should receive authority to make for themselves those decisions which can be evaluated in a deliberate and considered manner, made outside the

presence or influence of peers, and which if mistaken, are nonetheless unlikely to cause significant negative externalities. By taking this approach to decision making, the state would better meet its obligation to ensure the basic liberty of the immature; because in these contexts, adolescents *are* in fact mature.

To illustrate, this Part suggests two decision-making contexts that it argues reliably fall within the competence of adolescents by ages fifteen or sixteen and meet the criteria outlined above: self-regarding health decisions generally—which many state decisions already recognize; and voting—which they do not.

Finally, Part V.D.4 cautions that adolescents, emerging adults, and the public should receive protection from young individuals' ongoing deficiencies. These policies recognize that there are other contexts that predictably hinder the decision making of young people, such as those where they must make quick decisions under pressure. Where the immature are likely to make poor decisions, and especially where poor decisions risk serious harm to themselves or others, the state should constrain their decision-making abilities. This caution furthers the state's third end—safeguarding immature citizens' future liberty (by increasing the likelihood that they will in fact be around to enjoy their future liberty)—and also the state's broader obligation to safeguard the liberty of all its citizens. It should thus act to safeguard both the immature—and in some of these contexts, individuals who have technically reached the age of majority but continue nonetheless to be immature—and citizenry generally from their cognitive deficiencies. Again to illustrate, this Part suggests contexts that arguably meet these criteria: driving, alcohol consumption, and combat-related aspects of military service.

1. Out-of-home comprehensive secondary education

States should make out-of-home comprehensive secondary education obligatory and require attendance through ages seventeen or eighteen.

The state must endeavor to safeguard future citizens' basic liberty.³⁰¹ Liberty at a minimum entails making one's significant life choices. Yet individuals who choose a life course without knowing the alternatives available to them make no choice at all. Rather, they are channeled into a life course that is consistent with others',

301. *See supra* Part II.B.2.

typically their parents', values and beliefs. Because their resulting life paths express others' wills rather than their own, these future citizens are denied the basic liberty that is their minimum entitlement.

Meaningful choice also requires a reasonable ability to avail oneself of various alternatives. Comprehensive education thus ensures not only that the young are exposed to the different choices available to them in modern society, but also that they are reasonably prepared to take advantage of them.

Comprehensive secondary education serves another, liberty-maximizing purpose. In addition to revealing and preserving opportunities, rich secondary education can provide the experiences necessary to individuals' achieving their cognitive potential. Research indicates that experience is an important input in the rapid-development period in which adolescents develop adult-level mental skills.³⁰² Experience leads to improved cognitive abilities, which endure throughout individuals' life and may better position them to elect various alternatives, such as postsecondary education. Comprehensive secondary education may thus help individuals realize their innate potential to pursue and excel in a variety of pursuits or occupations.

Research suggests that the sensitive periods during which the brain's development is most responsive to education and experience have largely ended by late adolescence and early adulthood. It is thus possible that delaying experience to late adolescence or adulthood, after the conclusion of these experience-dependent sensitive periods, may result in adolescents' failure to fully develop their cognitive potential.³⁰³ A comprehensive education is thus vital for cognitive development.

School curricula must be substantively comprehensive to support development and preserve citizens' future liberty. But education relates to the state's secondary end as well—a citizenry with the capacity to contribute to the state's continued functioning. In general, the education required to ensure a self-sufficient and productive citizenry overlaps with that required to preserve individual choice over one's life. Educating the young for civic and political participation, however, potentially involves transmitting values that can make this aspect of education more contentious still.

302. See Arnett, *supra* note 164 and accompanying text; *supra* Part IV.C.2–3.

303. See *supra* Part IV.C.2–3.

Political theorists vigorously debate the sort of civic education that young citizens in the liberal democratic state ought to receive. Amy Gutmann has argued that perpetuating the liberal state requires a robust “democratic education,” which includes instilling in the young those values conducive to society’s flourishing. She thus supports teaching tolerance for opposing views and the skills necessary for rational deliberation so that immature citizens may critically evaluate different ways of life.³⁰⁴ Michael McConnell counters that “the new ideal of the liberal citizen [espoused by Gutmann] seems to conflict with the ideal believer in religion” and further maintains that “[w]hen government comes to insist that all citizens should be neutral, tolerant, and egalitarian, it ceases to be a liberal government.”³⁰⁵ Bruce Ackerman also resists instilling in the young a robust vision of liberal values, insisting instead that education in the liberal state must itself aim for neutrality in order to ensure citizens’ free choice.³⁰⁶

It is unnecessary here to weigh in on this vexing debate. To achieve the state’s minimum end, the civic education provided to students must merely ensure their *capacity* for civic participation. It may indeed be that endeavoring to instill in them certain values and a greater inclination toward civic participation would be a more successful policy. But the focus here is the minimum required by the state of its citizenry. The young should thus learn what it is the liberal democratic state requires of its citizenry generally in order for its continued functioning, and they should learn those skills necessary to meet those requirements.³⁰⁷

304. AMY GUTMANN, *DEMOCRATIC EDUCATION* 41–47 (1st prtg., rev. ed., 1999).

305. Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 5, 17–20 (Michael W. McConnell et al., eds., 2001).

306. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 139–411 (1980).

307. This proposal echoes that of William Galston, who argues that children should receive a basic civic education but would stop short of instilling in them other liberal values such as respect for diversity or rational evaluation of different ways of life. *See, e.g.*, WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 247–52 (1991). It is even less extensive, however; than Galston’s “basic civic education,” which would include “child[ren]’s acquisition of . . . the beliefs and habits that support the polity.” *Id.* at 252. The proposal here would educate children about the “beliefs and habits that support the polity” without insisting upon their acquisition. It is likely, however, that those parents who would resist the state’s actively instilling these values in their children would similarly resist their exposure to them at all. *See supra* Part III.C. (arguing that parents’ access to and influence over their children can give them the ability to thwart state goals with respect to their education, etc.).

The distinction between *instilling in* the young certain civic values and *exposing them to* the civic participation required of the democratic state's citizenry is arguably subtle, and it is perhaps that those who parents would oppose the former would also oppose the latter. There will be parents who hold certain religious or cultural beliefs—like the Amish in *Yoder*—who would resist education geared toward participation in civic life (the Amish, of course also resisted education geared toward participation in modern society). The Supreme Court held in *Yoder* that when such resistance is grounded in religious belief, it must be respected.³⁰⁸ This is a mistake, and *Yoder* should be reconsidered. The state cannot coerce its young citizens to embrace modern society or participate in civic life. But to deny them basic education tends toward foreordaining their futures and unacceptably narrows their options. If in the end, citizens wish to remain in Amish or other isolated communities and withdraw from broader civic life, they may certainly do so. But the choice must be a real one, and it must be theirs to make.

Other parents, in particular those with conservative or fundamentalist religious views, may resist other aspects of comprehensive education. They may argue that exposure to certain knowledge and values is itself antithetical to their religious or cultural beliefs. Be that as it may, they ought not be permitted to prevent their adolescent children from receiving a comprehensive education. Despite this constraint on their authority, parents' interests in this aspect of childrearing are nonetheless adequately protected, for the following two reasons:

First, as proposed in the previous Part, the state can entitle parents to near-absolute control over their infants and younger children.³⁰⁹ Parents may thus immerse their children in their value systems and religious beliefs during the early formative period in children's lives. And nothing, of course, would prevent parents from continuing to educate and transmit their values to their children at home and through extracurricular programs.

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

309. *See supra* Part V.C.1. While it may be ideal, from a child development perspective, to ensure that all young children receive optimal educational experiences, the state may reasonably choose to protect children's welfare and advance its ultimate ends by allowing parents to determine children's first experiences, with the benefit of information on the importance of early education. *Id.*

Second, their high-school-aged children have attained cognitive abilities substantially the same as those of their parents to comprehend at an abstract level the dissonances between their home education and values and their “public” education.³¹⁰ The significance of this can be illustrated by the well-known litigation of *Mozert v. Hawkins County Board of Education*, in which fundamentalist Christian parents challenged a public school’s refusal to excuse their children from a reading program that presented values and beliefs that differed from their own.³¹¹ Among the parents’ objections to the reading series were that reading the texts would confuse their children, stunt the development of their reading skills by presenting them with views with which they disagreed, and unleash their imaginations when they ought to be bounded.³¹² The parents themselves, however, could read the books without suffering these harms—as Nomi Stolzenberg observed, the “parents’ faith was taken to be unshakable; only the children were thought to be at risk.”³¹³ The Sixth Circuit rejected the parents’ objections and held that “mere exposure” to ideas did not violate the children’s, or their parents’, free exercise of religion.³¹⁴

The schoolchildren in *Mozert* were in the first through eighth grades. Under the policies suggested here, the state would have presumptively deferred to the parents’ desire to enroll their children in public school yet exempt them from exposure to the objectionable readers.³¹⁵ But if parents of high-school-aged children raised the

310. See *supra* Part IV.C.2.

311. 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

312. *Id.* See also, 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, 599 (1993) (summarizing the claims made by plaintiffs in *Mozert*).

313. *Id.*

314. *Mozert*, 827 F.2d at 1065.

315. Currently, parents who elect to enroll their children in public schools may exercise only limited control over the education provided their children in that setting. See, e.g., *Baker v. Owen*, 423 U.S. 907 (1975), *aff’g* 395 F. Supp. 294 (M.D.N.C. 1975) (regarding method of disciplining student); *Swanson v. Guthrie Indep. Sch. Dist. No. 1–L*, 135 F.3d 694 (10th Cir. 1998) (regarding ability of homeschooled student to attend public school part-time); *Immediato v. Rye Neck School Dist.*, 73 F.3d 454 (2d Cir. 1996), *cert. denied*, 519 U.S. 813 (1996) (regarding mandatory community service for student); *Brown v. Hot, Sexy and Safer Prod.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) (regarding mandatory sex education presentation); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (regarding content of assigned reading); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (same); Eric A. DeGroff,

same objection, the presumption would be reversed. This is because developmental research indicates that older children are no more likely than their parents to be confused or stunted by exposure to teachings that contradict lessons learned at home, whereas such exposure might very well confuse a younger child.³¹⁶

Finally, the state should insist that adolescents' secondary education should occur in schools outside the home, also for two reasons: First, it is doubtful that parents who themselves reject exposure to certain knowledge will effectively transmit that very information to their children. Second, homeschooling makes it possible to deny children exposure to different ideas and unlike peers, which researchers have found to be a key contributor to adolescent identity development, ability to grapple with different perspectives, and capacity to develop autonomous choice.³¹⁷

As of the early 1980s, homeschooling was prohibited in most states. It is now legal in all of them.³¹⁸ Most parents who choose to homeschool their children do so for religious reasons.³¹⁹ These parents generally seek to instill in their children certain religious and social values, and to shield them from incompatible secular values.³²⁰ Parents homeschool more than one million children, and the number of children homeschooled has been growing at a rate of ten to twenty percent per year.³²¹ Despite the increasing number of children educated at home, homeschooling regulation has become

Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years, 38 J.L. & EDUC. 83, 104–05 (2009).

316. *See supra* Part IV.C.2–3.

317. Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1234 (2000).

318. Kimberly A. Yuracko, *Education Off the Grid: Constitutional Restraints on Homeschooling*, 96 CAL. L. REV. 123, 124 (2008).

319. *Id.* at 127.

320. *Id.* Many conservative Christian parents who homeschool their children reject what they view to be relativistic moral standards, disapproving, for example, both homosexuality and premarital sex. *Id.*

321. *See* PATRICIA M. LINES, U.S. DEP'T OF EDUC., HOMESCHOOLERS: ESTIMATING NUMBERS AND GROWTH 1 (web ed. 1999), <http://www.ed.gov/offices/OERI/SAI/homeschool/homeschoolers.pdf>. Lines explains that the number of homeschooled children may be much higher, but that it is difficult to estimate accurately. Many states do not require parents to register their intention to homeschool, and many parents in states that do impose such requirements nonetheless fail to comply with them. *Id.* at 2–3; *see also* Patricia M. Lines, *Homeschooling Comes of Age*, 140 PUB. INT. 74 (2000).

increasingly lax, and half of all states require no standardized evaluation of homeschooled children.³²²

The right to homeschool, and to a lesser degree to enroll their children in all manner of private schools, grants parents considerable power to shape the outcome of their children's lives. By permitting parents such categorical control over the entire course of their children's primary and secondary educations, however, the state abdicates its fundamental obligation to safeguard their liberty, both as current and future citizens. The state also fails to advance its end of ensuring that the young will have attained the capacities required to meet the obligations of mature citizens.

Allowing parents who would prefer homeschooling the option of enrolling their children in religious or other private schools might constitute an acceptable compromise, because the state is better able to ensure the adequacy of curricular content than when children are educated at home.³²³ Some religious schools may resist adopting aspects of a comprehensive educational curricula; but public oversight could minimize and address this sort of resistance. Religious schools may share other shortcomings of homeschooling. While they expose children to peers, they are likely to attract a more homogenous community that shares religious beliefs and social values; thus, children in religious schools may lose out on the developmental benefits of exposure to unlike peers.

322. Just twenty-five states require standardized evaluation of homeschooled children, and ten states do not even require that parents who homeschool their children register their intentions. Yuracko, *supra* note 254, at 129. Mississippi, for example, has essentially deregulated homeschooling altogether. *See* MISS. CODE ANN. § 37-13-91(9) (2009). Other states impose more specific regulatory schemes, including: requiring school board approval of home education programs; imposing teaching qualifications; requiring standardized testing; and establishing oversight by certified teachers. *See, e.g.*, ME. REV. STAT. ANN. tit. 20A, § 5001-A(3)(A); N.D. CENT. CODE ANN. §§ 15.1-23-03 to -09 (2009).

323. States have the power to regulate private schools. *Runyon v. McCrary*, 427 U.S. 160, 178 (1976). *See also supra* Part III.B.3. They should oversee the quality of the education through constitutionally permissible oversight. Courts have held to be within constitutional limits state regulations requiring standardized testing and requiring that teachers in private, as well as public schools, receive state certification. *See, e.g.*, *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (requiring all children to take standardized tests); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 495 (8th Cir. 1987) (requiring private school students to be taught by certified teachers).

2. *Autonomy rights*

Upon reaching eighteen, individuals acquire virtually all of the legal rights of citizenship—the right to make medical decisions, enter into binding contracts, vote, etc.³²⁴ But despite the existence of this categorical age of majority, there are numerous contexts where law and policy recognize the decisional capacities of those who are still minors.³²⁵ Given the importance of individual liberty, this Part simply urges state decision makers to consider recognizing their capacities in other, appropriate contexts.

In general, the young should receive those liberties that they have the capacity to exercise competently.³²⁶ Put another way, in those contexts where they have achieved decision-making competence, they should correspondingly have decisional autonomy.³²⁷ The reason for this should be obvious: where one has gained the capacity to make a decision affecting one's life, the justification for allocating to another the entitlement to make that decision disappears. Cognitive scientists have emphasized the importance of identifying the contexts where the young have—and have not—achieved such competence.³²⁸ As one behavioral decision researcher has noted:

324. See, e.g., Scott, *Legal Construction of Adolescence*, *supra* note 164, at 559 (cataloguing rights attained upon reaching age of majority).

325. J. Shoshanna Ehrlich, *Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents*, 18 WIS. WOMEN'S L.J. 77, 80 (2003) (“[C]hildhood ends at different ages in different contexts.”). In tort law, for example, adolescents may be held liable under negligence and intentional tort theories. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 134 (5th ed. 1984); see also *Am. Family Mut. Ins. Co. v. Grim*, 440 P.2d 621, 626 (Kan. 1968) (holding minor tortfeasors liable for damages caused by negligence); *Redd v. Bohannon*, 166 So. 2d 362, 365 (La. Ct. App. 1964) (stating that minority is not a defense to tort liability for negligence); *Queens Ins. Co. v. Hammond*, 132 N.W.2d 792, 793 (Mich. 1965) (finding that minors as young as seven years old may be liable for both negligence and intentional torts). Courts apply a subjective variable standard of care rather than the objective reasonable person standard.

326. See *supra* Part IV.C.2–3.

327. Assessing decisions is itself a complicated business. Behavioral decision researchers note that assessing decision-making competence involves normative analysis—namely, first identifying the choice that a rational actor would make in light of individual values and goals. These values, of course, differ among individuals and can lead them to reach different decisions. Thus, while an adult might disapprove of an adolescent's decision, that decision might be rational in the sense of being consistent with the adolescent's values or goals. Researchers thus also assess individuals' values—whether individuals' values correspond to externally prescribed values, and whether they are internally consistent across choices. See Baruch Fischhoff, *Assessing Adolescent Decision-Making Competence*, 28 DEV. REV. 12 (2008).

328. E.g., Fischhoff, *supra* note 327.

High stakes ride on society's ability to assess adolescents' decision-making competence. If that competence is overestimated, then teens will face choices that are too difficult for them. If it is underestimated, then they will be kept from exercising warranted independence. If teens believe that the boundaries of their autonomy have been drawn wrongly, then they may feel unfairly restricted or unfairly left to fend for themselves.³²⁹

In light of both individual and situational, or context-specific, variability, researchers who study decision making cannot identify with precision every context where developmentally-normal citizens have decision-making competence.³³⁰ But researchers have made two critical findings: first, by mid-adolescence, individuals have the cognitive capacity to make competent decisions; and second, certain situations and factors reliably hinder the decision-making abilities that adolescents otherwise possess.³³¹

As a general rule, then, law should presume adolescent decision-making competence,³³² with certain important qualifications: First, the presumption should not apply to contexts where their performance is likely to be compromised. Second, the presumption should apply most strongly to those contexts where the adolescent's decision intimately affects the adolescent only, and least strongly where the risk is high of negative externalities stemming from a bad decision.

Two examples of contexts where adolescents should receive decision-making autonomy follow.

a. Health care decisions. In general, research suggests that adolescents capably make decisions in those contexts where they can engage in considered deliberation and where peer pressure is less likely to play a defining role. Medical decision making, according to some developmental psychologists, falls within this category, where "health care practitioners can provide information and encourage

329. *Id.* at 12.

330. *Id.* at 13.

331. *See supra* Part IV.C.

332. *See* Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1269 (2000) (arguing in favor of a "legal framework predicated on adolescent decisional ability" as consistent with contemporary social norms and as a remedy to current inconsistencies in treatment of adolescents).

adolescents to think through their decisions before acting.”³³³ Empirical studies support this conclusion.

Studies of adolescent medical decision making have found that, by age fourteen, adolescents generally wish to participate actively in and make decisions affecting their health care.³³⁴ They have the ability to understand their options and evaluate the services offered them, and they exhibit mature decision making with respect to these.³³⁵ In other studies, researchers have concluded that adolescents age fifteen or sixteen and above do not significantly differ from adults in their competence to consent to medical treatment.³³⁶

While adolescent decision making tends to suffer in stressful or unfamiliar situations, studies have found that adolescents capably make decisions affecting their health care even under less-than-ideal conditions. Researchers analyzed the decision-making processes of adolescent girls confronted with unintentional pregnancies, for example, and found that those aged “fourteen to seventeen appear to be similar to legal adults in both cognitive competence and volition . . . [and] remain competent decision makers when facing an emotionally challenging real world decision.”³³⁷

Many existing policies already reflect this area of adolescent competence and appropriately balance their interests in making decisions affecting their lives against the continuing importance of parental involvement. While default rules governing the right to consent to or refuse medical treatment usually presume the decisional incapacity of minors, many create exceptions for “mature

333. Steinberg et al., *Less Mature Than Adults?*, *supra* note 167, at 592.

334. Kenneth R. Ginsburg et al., *Adolescents' Perceptions of Factors Affecting Their Decisions to Seek Health Care*, 273 J.A.M.A. 1913, 1918 (1995); Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129 (1992); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595–96 (1982).

335. Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129 (1992); Kenneth R. Ginsburg et al., *Adolescents' Perceptions of Factors Affecting Their Decisions to Seek Health Care*, 273 JAMA 1913, 1918 (1995); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595–96 (1982).

336. Weithorn & Campbell, *infra* note 334, at 1595.

337. Ambuel & Rappaport, *infra* note 334, at 148. *See also* Ehrlich, *supra* note 325, at 93 (2003) (summarizing studies).

minors.”³³⁸ These statutory provisions permit minors found to be mature to decide the course of their health care treatment (although some give mature minors only the right to consent to, but not refuse, treatment).³³⁹

Along the same lines, the Supreme Court has held that states may not impose parental consent requirements on adolescents seeking abortions, unless those requirements contain bypass procedures in which an adolescent may instead opt to have a judge assess her decision-making maturity in an individualized hearing.³⁴⁰ Minors deemed sufficiently mature may thus consent to abortion procedures without first notifying their parents.³⁴¹ Numerous states, moreover, have gone further, declaring that adolescents have an absolute right to consent to abortion procedures.³⁴²

Medical decisions intimately concern adolescents’ lives. To the extent that negative externalities result from their choices (as in the spread of sexually transmitted diseases), these are more likely to occur when adolescents are denied decisional autonomy.³⁴³ Policies that explicitly permit adolescents to obtain medical treatment for sexually transmitted diseases without parental notification or consent not only recognize adolescents’ decision-making competence in this sphere but also arguably prevent negative externalities by making it more likely that adolescents will seek treatment.

Given evidence that by mid-adolescence they have the capacity to make mature decisions about their health care,³⁴⁴ applying the doctrine of presumed incapacity to these teens denies them decisional autonomy with insufficient justification.

338. See Hartman, *supra* note 332, at 1308–10.

339. See *id.* at 1311.

340. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 899 (1992). See also, *e.g.*, Zbaraz v. Madigan, 572 F.3d 370 (7th Cir. 2009) (upholding as constitutional parental notification statute providing for judicial bypass for mature minors or minors whose best interests would not be served by notification). See also, *supra* Part IV.B (discussing the constitutional rights of minors).

341. Casey, 505 U.S. at 899.

342. See, *e.g.*, Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 818–19, 831 (Cal. 1997); *In re T.W.*, 551 So. 2d 1186, 1193–96 (Fla. 1989).

343. Joshua A. Douglas, *When Is a “Minor” Also an “Adult”?: An Adolescent’s Liberty Interest in Accessing Contraceptives from Public School Distribution Programs*, 43 WILLAMETTE L. REV. 545 (2007).

344. See *supra* notes 335–37, and accompanying text; *supra* Part IV.2.3.

b. Voting. Voting also involves the sort of considered decision making that is within the competence of individuals by mid-adolescence. Elections unfold over a period of time, giving voters the opportunity to deliberate and evaluate options without undue pressure. Voting itself is done anonymously and in private, which diminishes concern that adolescents' choices will be unduly influenced by peers. And since voters self-select, taking the time and initiative to register, travel to a polling place, etc., it is likely that those adolescents who would exercise the right would not do so frivolously.

Voting, moreover, is a core right of citizenship and the means by which citizens in a democracy limit the power of the state, guarantee it remains responsive to their interests, and thus ensure their continued liberty.³⁴⁵ It is the quintessential civic activity, one that the state should encourage. Given its importance, the state should withhold the franchise from citizens only when there is a compelling justification to do so. If a group of citizens has the capacity to exercise this right of citizenship, the state violates principles of equality by denying it to them. Extending the franchise to some of those younger than eighteen (perhaps mid-adolescents aged sixteen and above) also gives greater voice to a historically underrepresented category of citizens.

Many people supported the passage of the Twenty-Sixth Amendment on the grounds that eighteen-year-olds were subject to being drafted into military service and were also held accountable as adults for criminal behavior.³⁴⁶ Since they thus shouldered the responsibilities of citizenship, many believed that eighteen-year-olds should also receive its rights.³⁴⁷ One might thus anticipate the converse argument—that those under eighteen do not shoulder the

345. Although the constitution only provides explicit protection for voting for Congressional representatives, the Twenty-Sixth Amendment prohibits the disenfranchisement of those eighteen or older. U.S. CONST. Amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."). For discussions of the historical context surrounding the Amendment's passage, see Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 294-97 (2006); Scott, *Legal Construction of Adolescence*, *supra* note 164, at 562-64.

346. WENDELL W. CULTICE, *YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA* 22-34.

347. See Scott, *Legal Construction of Adolescence*, *supra* note 164, at 563; Cunningham, *supra* note 345, at 295-96.

obligations of citizenship so are not entitled to the right to vote. This argument would not withstand scrutiny, however. The right to vote is not dependent on one's meeting other obligations of citizenship; instead, it is itself deemed a fundamental obligation, as well as a right, of citizenship.

Thus while the Twenty-Sixth Amendment prohibits states from denying those eighteen and over the right to vote, nothing—other than lack of political will on the part of older voters—prevents states from extending the vote to a broader group of its younger citizens. They should begin giving serious consideration to doing so.

3. Cognitive deficiencies

In order to safeguard their future liberty, as well as the liberties of the citizenry generally, policies should also take account of the decision-making deficiencies that characterize adolescence and emerging adulthood. States should endeavor to identify contexts where their decision making is predictably poor. Among these are situations “characterized by high levels of emotional arousal or social coercion, or that do not encourage or permit . . . consultation.”³⁴⁸ With growing evidence the neurobiological bases of risk-taking and other behavioral characteristics, efforts to improve adolescents' decision making or reduce their risk taking through education will have limited success. Instead, some researchers have simply concluded that “until adolescents are able to make better decisions, it is important to modify the environments in which they develop.”³⁴⁹ In other words, the most (or only) effective approach to reducing adolescents' poor decision making in some contexts is to withhold from them altogether decision-making opportunities. This means constraining adolescents' freedoms or extending them protections in those real-world contexts where other factors tend to confound good decision making.

One domain in which the state protects adolescents from potential consequences of their behavior is the juvenile justice system. Developmental scientists and legal scholars have studied juvenile crime extensively, including the sorts of decision-making deficiencies that tend to make adolescents more susceptible to (and

348. Steinberg et al., *Less Mature Than Adults?*, *supra* note 167, at 592.

349. Reyna & Farley, *supra* note 214, at 34.

less culpable for) criminal activity.³⁵⁰ The distinct procedures and rehabilitative goals—whether or not these are successfully realized—of the juvenile court system reflect this understanding. (And given the extent to which these have received consideration by judges and legislators alike in the criminal context, they will not be the subjects of additional focus here.)

State actors should endeavor to gain understanding, and apply that understanding, in broader contexts. Three examples of these follow.

a. Driving. Adolescents' and emerging adults' liberties may properly be constrained in those domains where their decision-making abilities remains poor—especially where poor decisions have negative externalities, such as potentially causing harm or death to the young person or others, or imposing other significant costs. Incompetent or irresponsible driving, for example, poses grave risks. And adolescents and emerging adults are notoriously bad drivers.³⁵¹

Traffic fatalities are the leading cause of death among adolescents, accounting for more than one in three of their deaths.³⁵² Teen drivers aged sixteen to nineteen are four times more likely than older drivers to crash, with a crash risk higher than that of any other age group.³⁵³ And though individuals aged fifteen to twenty-four are only fourteen percent of the population in the United States, they account for thirty percent of the total cost of motor vehicle injuries among males and slightly less—twenty-eight percent—among females.³⁵⁴

All of this is unsurprising, given what is now known about the neurobiological aspects of their development and how these likely

350. See, e.g., SCOTT & STEINBERG, *supra* note 173.

351. See generally CENTERS FOR DISEASE CONTROL AND PREVENTION, TEEN DRIVERS: FACT SHEET (2009), http://www.cdc.gov/motorvehiclesafety/teen_drivers/teendrivers_factsheet.html.

352. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTERS FOR DISEASE CONTROL AND PREVENTION, WEB-BASED INJURY STATISTICS QUERY AND REPORTING SYSTEM (WISQARS) (2008) [hereinafter WISQARS], <http://www.cdc.gov/ncipc/wisqars>.

353. INSURANCE INSTITUTE FOR HIGHWAY SAFETY, FATALITY FACTS: TEENAGERS 2005 (2006), available at http://www.iihs.org/research/fatality_facts_2005/teenagers.html.

354. ERIC A. FINKELSTEIN ET AL., INCIDENCE AND ECONOMIC BURDEN OF INJURIES IN THE UNITED STATES 139 (2006). The costs of motor vehicle injuries among adolescent boys was \$19 billion, whereas the total costs of injuries among girls was \$7 billion. *Id.*

influence commonly-observed behavioral characteristics.³⁵⁵ Though they may have the capacity to learn driving skills and comprehend traffic regulations, actual driving situations often demand near-instant risk-assessment and quick decisions—the sorts of decision-making contexts that predictably compromise the quality of adolescents’ decisions.³⁵⁶ Studies show, for instance, that adolescent drivers often underestimate or do not immediately recognize hazardous situations.³⁵⁷ Peer influence is also a factor—the crash risk for unsupervised drivers increases with the presence of teen passengers, with the risk increasing with the number of passengers.³⁵⁸

Teen driving has thus become a significant public concern, and beginning in the mid-1990s many states began taking measures to ameliorate the problem.³⁵⁹ One measure that has demonstrated some promise is the graduated driver licensing (“GDL”) system. States that adopt GDL systems initially extend to new drivers very restricted licenses, permitting them to gain driving experience under lower-risk conditions.³⁶⁰ GDL systems thus aim to strike a balance between

355. *See supra* Part IV.C.2.

356. *See id.*

357. B.A. Jonah & N.E. Dawson, *Youth and Risk: Age Differences in Risky Driving, Risk Perception, and Risk Utility*, 3 ALCOHOL, DRUGS AND DRIVING 13 (1987).

358. Li-Hui Chen et al., *Carrying Passengers as a Risk Factor for Crashes Fatal to 16- and 17-Year-Old Drivers*, 12 JAMA 1578 (2000). *See also*, Allan F. Williams & Ruth A. Shults, *Graduated Driver Licensing Research, 2007-Present: A Review and Commentary*, 41 J. SAFETY RES. 77, 82–83 (2010) (reporting that of all fatal crashes involving sixteen- or seventeen-year-old drivers in 2008, forty-one percent involved teenaged passengers with no adult in the vehicle). *See generally* Kathryn C. Monahan et al., *Affiliation with Antisocial Peers, Susceptibility to Peer Influence, and Antisocial Behavior During the Transition to Adulthood*, 45 DEV. PSYCHOL. 1520, 1520 (2009) (noting that “peer pressure has been hypothesized to be an important contributor to all sorts of deviant and risky behavior in adolescence, including . . . reckless driving.”).

359. Williams & Shults, *supra* note 358 at 77.

360. *Id.* at 83. *See, e.g.*, IOWA CODE ANN. § 321.180B (2009); D.C. CODE § 50-1401.01 (2009). States have imposed various measures, such as curfews, similarly aimed at reducing the novice driver’s crash risk. *See, e.g.*, CAL. VEH. CODE § 12814.6 (2009); MD. CODE ANN., TRANSP. § 16-113 (2009); NEB. REV. STAT. ANN. § 60-4, 120.01 (2009); LA. REV. STAT. ANN. § 32:416.1 (2009); N.C. GEN. STAT. § 20-11 (2009); S.C. CODE ANN. § 56-1-175 (2009); S.D. CODIFIED LAWS § 32-12-12 (2009). *See generally* INSURANCE INSTITUTE FOR HIGHWAY SAFETY, U.S. LICENSING SYSTEMS FOR YOUNG DRIVERS (2009), available at <http://www.iihs.org/laws/GraduatedLicenseIntro.aspx> [hereinafter U.S. LICENSING SYSTEMS] (summarizing state graduated driver licensing law); ADVOCATES FOR HIGHWAY AND AUTO SAFETY, 2005 ROADMAP TO STATE HIGHWAY SAFETY LAWS 24 (2005); Carol L. Jones, Comment, *The Unintended Consumer: Protecting Teen Drivers Through Graduated Licensing Laws*, 15 LOY. CONSUMER L. REV. 163 (2003) (discussing graduated driver licensing systems).

respecting the capacities of young people, but also protecting them (and society) from their deficiencies. Under the typical GDL system, drivers first obtain learners' permits, which allow them to drive only under supervision.³⁶¹ These permits are followed by provisional licenses, which permit unsupervised driving but impose other restrictions, such as limits on nighttime driving and prohibitions against driving with teenaged passengers in the absence of an accompanying adult.³⁶² These restrictions are then lifted as drivers gain experience, and when they mature, drivers obtain full licensure.³⁶³ Restrictions such as those imposed by GDL systems seek to strike a balance between respecting the capacities of young people, and also protecting them (and society) from their deficiencies.

GDL systems significantly reduce fatality rates, at least of novice drivers subject to supervised driving and other restrictions. One study of forty-three U.S. states found that, in those with the most comprehensive GDL systems, fatal crash rates for sixteen-year-olds were thirty-eight percent lower than in other states.³⁶⁴ Another study of U.S. and Canadian GDL systems found a nineteen percent reduction in the fatality risk of sixteen-year-old novice drivers.³⁶⁵

Little evidence to date supports longer-term benefits of GDL systems, however; and the evidence gathered so far provides little to no support for such benefits. Instead, a number of studies have found no crash reduction effect for eighteen-year-olds³⁶⁶ after the implementation of GDL programs.³⁶⁷ In California, for example, sixteen-year-old fatalities decreased significantly under the state's GDL system, but eighteen-year-old fatalities increased significantly.³⁶⁸ Critics of GDL thus argue that the systems reduce

361. RUTH A. SHULTS ET AL., NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTERS FOR DISEASE CONTROL AND PREVENTION, GRADUATED DRIVER LICENSING (2006), <http://www.cdc.gov/ncipc/duip/spotlite/GradDrvLic.htm>.

362. Allan F. Williams & Ruth A. Shults, *Graduated Driver Licensing Research, 2007–Present: A Review and Commentary*, 41 J. SAFETY RES. 77, 79–80 (2010).

363. U.S. LICENSING SYSTEMS, *supra* note 360.

364. *See* WISQARS, *supra* note 352.

365. Ward Vanlaar et al., *An Evaluation of Graduated Driver Licensing Programs in North America Using a Meta-Analytic Approach*, 41 ACCIDENT ANAL. & PREVENTION 1104, 1107–09 (2009) (reporting study).

366. At eighteen, young drivers become automatically entitled to full licensure/exempted from GDL requirements in all U.S. states except New Jersey and Maryland, which extend GDL requirements beyond eighteen. Williams & Shults, *supra* note 362, at 79.

367. *Id.* (reporting studies); Vanlaar et al., *supra* note 365, at 1107–08.

368. Williams & Shults, *supra* note 362, at 78–79.

crashes by limiting, not improving, teen driving. Researchers have only begun to study the effects of GDL programs, however. It thus remains possible that yet-to-be-completed empirical studies will contradict or qualify the findings of this first wave of studies. Even if they do not, it also remains possible that the systems could be improved so as to improve the likelihood of their having long-term positive effects.

Ideally, of course, licensing systems would have both short- and long-term effects, reducing crash rates both among novice drivers with provisional, restricted licenses, as well as among older adolescent and young adult fully-licensed drivers whose driving skills will reflect the enduring benefits of their having participated in and graduated from a GDL system. If one considers the limited success that other education-focused programs have had on reducing adolescent risk-taking, however,³⁶⁹ there is little cause for optimism in the adolescent-driver context.

To the extent that their poor driving skills are the result of normative developmental characteristics of adolescent decision making, it may be the case that the only effective means of reducing the crashes and fatalities linked to adolescent driving is to restrict, or in some cases, prohibit their driving altogether. Restrictions could vary depending on the age and experience of the driver and (like some existing restrictions) might include limiting the hours during which adolescents may drive, limiting or prohibiting other adolescent passengers, prohibiting their driving on highways where excessive speeding may be easier (and have more serious and fatal results), or raising the driving age altogether. It is unlikely that a single model would serve all states equally well, since region-specific factors should certainly be accounted for.

b. Alcohol consumption. Adolescents and emerging adults are more likely than those in other age groups to abuse alcohol, and to be involved in fatal alcohol-related car crashes. A recent National Institutes of Health report found that “[y]oung drivers ages twenty-one to twenty-four continued to have the highest proportion (39.1%) of alcohol involvement among drivers [in alcohol-related fatal traffic crashes] in all age groups.”³⁷⁰ Raising the drinking age to

369. *See supra* Part IV.C.2–3.

370. HSIAO-YE YI ET. AL., NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, TRENDS IN ALCOHOL-RELATED FATAL TRAFFIC CRASHES, UNITED STATES,

twenty-one, a condition for state receipt of federal highway funds, acknowledges the additional danger that further impairment of judgment by alcohol creates for young drivers.³⁷¹ Indeed, traffic-related driving fatalities declined when states raised their legal drinking ages from eighteen to twenty-one.³⁷²

Given the widespread cultural acceptance of alcohol use among adolescents and young adults, however, it is unlikely that raising the legal age for its consumption further would be feasible. States must consider other approaches to minimizing the most harmful effects of adolescent alcohol use.

Young drivers most dangerous in terms of alcohol involvement are those aged twenty-one to twenty-four. It is possible that for those aged twenty-four and younger, states should prohibit the consumption of alcohol before driving altogether; a young driver with any blood alcohol content would be subject to criminal sanction. Doing so might help counteract the danger that these emerging adults pose to themselves and others. States should also consider greater penalties for driving while intoxicated. As with the drinking age, the federal spending power would be an appropriate tool for implementing measures such as these.

c. *Combat*. In all branches of the armed services, seventeen-year-olds may enlist, with parental consent. Those eighteen and older may enlist at will.³⁷³ Given their continued deficiencies in decision-making, still-maturing abilities to assess risk, and inordinate risk-taking, we may want to reconsider aspects of military service—in particular, whether these adolescents and emerging adults have the capacity to make good decisions in combat situations. It may be that the duties imposed on this group of emerging adults are premature. Combat—especially the urban warfare that often characterizes modern combat—requires soldiers to make split-second decisions under great pressure. These are arguably the sorts of decisions that

1982–2004 (2006), available at <http://pubs.niaaa.nih.gov/publications/surveillance76/fars04.htm>.

371. Federal law conditions states' receipt of federal highway funds on their imposing a drinking age of twenty-one. 23 U.S.C. § 158(a)(1) (2006). The statute was upheld as a valid exercise of Congress's spending power by the Supreme Court in *South Dakota v. Dole*, 483 U.S. 203 (1987).

372. Steinberg, *Adolescent Brain Development*, *supra* note 168, at 163.

373. See *Entrance Requirements FAQ*, TODAY'S MILITARY, <http://todaysmilitary.com/faq/entrance-requirements> (last visited Aug. 1, 2009).

lie outside their competence. Research suggests, moreover, that younger soldiers respond differently than do adults to stress and may have increased vulnerability to psychopathology.³⁷⁴

Although it may not be necessary for the state to exclude young soldiers from military service altogether, it may be prudent to consider not placing them in these sorts of combat situations until they have reached full maturity. More research (or the publication of such research) would help decision makers in this context.

VI. CONCLUSION

Apart from chronological age, the essential characteristic shared by the young is neither dependence nor incapacity, but instead change—more specifically, the developmental processes through which the young develop from immaturity toward maturity. The changes wrought by these developmental processes can implicate fundamental liberty interests of the young even during their immaturity, and the experiences of the young as they develop will significantly influence the future citizens they will become. Accounting for these changes is the essential challenge faced by the state with respect to its immature citizens.

The approach proposed here is grounded in core principles of the liberal democratic state, but it aims to be useful in practice. It seeks to provide guidance to decision makers and a measure against which they and others might assess the effectiveness of their decisions. Adopting it could result in more coherent decision making that achieves the ends of the state and better furthers the interests of all of its citizens, immature and otherwise.

374. Steinberg, *Adolescent Brain Development*, *supra* note 168, at 161.

