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In Loco Reipublicae

ABSTRACT. The Supreme Court has long held that children enjoy a range of constitutional rights and has emphasized the critical importance of many of these rights to children's development as democratic citizens. At the same time, the Court has been resolute in its protection of parents' near-absolute authority to control the upbringing of children. Indeed, the Supreme Court's steadfast commitment to broad parental rights under the Due Process Clause effectively diminishes, if not outright nullifies, the Court's stated protections for children as rights-bearing citizens. The stakes for children have only heightened as parents increasingly seek to exercise their authority to shield their children from certain ideas, such as ideas about racial injustice or gender inequality, that are essential to their development as full citizens in a pluralistic, democratic polity.

This Article offers a new framework for children in constitutional law, one that elevates children's rights as developing citizens by recognizing parental duties to respect those citizenship rights. The *in loco reipublicae* framework positions parents as standing in place of the state with constitutional duties to ensure children's acquisition of the knowledge and skills needed for citizenship in our democratic polity. Parental *in loco reipublicae* duties are rooted in a potent constitutional mixture of parents' unique custodial authority over children and children's own citizenship rights. While children's free speech rights are not the only constitutional rights that protect children's citizenship interests, they are a powerful exemplar of parental duties to ensure children's access to ideas outside the home. In articulating a theory of children's citizenship rights and parents' corresponding duties, the *in loco reipublicae* framework aims to fortify the parent-child relationship while, at the same time, respecting children as developing democratic citizens in their own right.

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INTRODUCTION

The United States Supreme Court has long held that children possess free speech rights under the Constitution. As early as 1943, in *West Virginia State Board of Education v. Barnette*, the Court held that the First Amendment barred the State of West Virginia from requiring school children to salute the flag.[1] The Court's most famous pronouncement of the principle that children have free speech rights came two decades later in *Tinker v. Des Moines Independent Community School District*, where the Court declared: "It can hardly be argued that [students] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2] Affirming the right of students to wear black armbands in protest of the Vietnam War, the *Tinker* Court held that, as long as children's speech does not disrupt the learning environment or invade the rights of others, children are constitutionally entitled to express their views in school.[3]

One of the great contributions of the Supreme Court's *Tinker* decision to the constitutional law of children was its full-throated recognition of children as independent rights-holding citizens. Prior to *Tinker*, the Court had largely accepted the then-prevailing view that children were vulnerable dependents in need of care and concern rather than rights.[4] The *Tinker* case heralded a new era in constitutional law that viewed children as independent persons entitled to the enjoyment of certain rights guaranteed by the Constitution.[5] Among the most prominent of those rights was children's right to free speech under the First Amendment.[6]

A less heralded, but no less significant, contribution of the *Tinker* decision was its assertion that children's freespeech rights in school foster their development as democratic citizens. *Tinker*'s protection for children's right of free speech in school situated children as developing citizens in a pluralistic, often contentious democracy. In the *Tinker* Court's view, the public-school classroom is "peculiarly the 'marketplace of ideas'" where "leaders [are] trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a

1. 319 U.S. 624, 642 (1943).
2. 393 U.S. 503, 506 (1969).
3. *See id.* at 514; Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044 (2021).
4. *See* Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 278-80 (1995); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1459-61 (2018).
5. *Tinker* was the second of two cases that ushered in this new era of children's rights. *See infra* note 40.
6. For a comprehensive and in-depth overview of children's constitutional rights in school, see generally JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND (2018).

multitude of tongues.'"[7] Notably, the Court's affirmation of children's free speech rights *in* school rested on the presumption that children possess free speech rights *outside* of school. In its oft-quoted passage, the *Tinker* Court declared that students do not *shed* their First Amendment rights at the schoolhouse gate.[8] The implication was clear: in school, children's free speech rights may be restricted to prevent children from disrupting the learning environment or violating the rights of others.[9] Outside of school, the Court implied, children enjoy greater expressive freedoms.

But *Tinker* had it backwards. Children in fact *acquire* their free speech rights at the public schoolhouse gate. Outside of school, children may exercise their free speech rights only at the pleasure of their parents—which is to say they effectively have few or no actual expressive freedoms.[10] The Court's presumption of out-of-school rights, while narrowly true to the doctrine of state action, nevertheless ignores the reality that all children live under the near-absolute, constitutionally granted authority of parents. Parents can prevent their children from speaking and can punish them for speech that does take place. They can cut off children's access to friends, isolate them in the home, deprive them of money, advertise their sins to the world, or physically punish them. Parents can restrict children's access to books, ideas, and the internet. If children try to evade parental restrictions by running away or otherwise disobeying their parents, the state will step in on the side of parental authority. The police will either return runaway children to their parents or take the "incorrigible" youths into state custody. In fact, public school is one of the few places where children may claim the right to express themselves free from direct parental oversight and restrictions.

Parental authority over children is not simply a matter of state family law but has century-old roots in constitutional law. Parental rights have long been a cornerstone of the Court's substantive due process jurisprudence, protecting parents' authority "to direct the upbringing and education of children under their control."[11] Even those who question the legitimacy of the Court's recognition of unenumerated rights nevertheless make room for parents' constitutional right

7. *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

8. 393 U.S. at 506.

9. Over time, the Court has increasingly limited students' free speech rights in school on the ground that school presents special circumstances justifying those limitations. For discussion of this retrenchment, see *infra* Section I.A.

10. *See* Mary-Rose Papandrea, *The Great Unfulfilled Promise of* Tinker, 105 VA. L. REV. ONLINE 159, 161 (2019).

11. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925). The Court has underscored that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000).

to raise their children free from state intervention.[12] Established wisdom therefore has it wrong: children's free speech rights actually come into being only when children *enter* the public schoolhouse gate. Outside of school, children's free speech rights are only as free as parents want them to be.

In constitutional terms, parents, like children, "are different."[13] The Fourteenth Amendment has been held to bestow upon parents unique and near-absolute powers of control over other persons, namely their children. It is this constitutional grant of near-complete custodial power that sets parents apart. No other private actor has such far-reaching, constitutionally sanctioned control over another's life, including control over what that other person can say and hear. Moreover, parents' custodial powers bear on the very foundation of children's place in the constitutional order: their right to become adult democratic citizens. Of course, parents are not state actors, and, doctrinally speaking, private actors are not generally subject to constitutional imperatives. But, as explained in this Article, while parents do not violate the First Amendment when, for example, they tell their children to quiet down at the dinner table, parents' unique custodial powers over children do have legal implications. In particular, these custodial powers, including parents' power to control what their children say and hear, are of serious constitutional consequence.

That consequence is this: constitutional law governing parents and children must be reframed to reflect the fact that parents have more than rights; they also have duties to respect the citizenship rights of children in their custody. Citizenship rights are rights held by children as developing citizens; these rights serve to equip children with the knowledge and skills required of independent, self-governing democratic citizens. Citizenship rights are broad, but well defined. The category includes children's First Amendment rights of free expression,[14] but also much more. As *Brown v. Board of Education* emphasized, children's right to equality in education is critical to fostering their future citizenship as full and equal members of the democratic polity.[15] Children's right of association facilitates their democratic socialization by exposing children to the views of others

12. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022). *But see Troxel*, 530 U.S. at 91-93 (Scalia, J., dissenting).

13. *See* Miller v. Alabama, 567 U.S. 460, 471 (2012) ("[C]hildren are constitutionally different from adults for purposes of sentencing."); *see also infra* note 137 (discussing additional cases holding that children are constitutionally different from adults).

14. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

15. *See* 347 U.S. 483, 493 (1954); *see also* Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that the state may not exclude undocumented immigrant children from public schools).

and by giving them the opportunity to engage in political activities.[16] Children's due process right to maintain relationships with parental caregivers is essential to the development of the democratic skills of deliberation and choice.[17] Children's right to religious freedom ensures children's developing beliefs are of their own choosing.[18] Even children's criminal-procedure rights reflect not only respect for children as independent persons but also a concern with modeling procedural fairness for developing citizens.[19] In all these areas, children's rights protect and promote their socialization into full adult citizens of our democratic polity.[20]

This Article offers a new framework for children in constitutional law oriented around children's core citizenship rights rather than parental rights of control. The framework recognizes parents' fundamental constitutional duties to respect children's rights as developing democratic citizens while still protecting the integrity of the parent-child relationship. When combined with children's unique custodial status, children's citizenship rights give rise to what this Article terms parental *in loco reipublicae* duties. Parents' *in loco reipublicae* duties are rooted in two antecedent constitutional principles: that children are in the constitutionally mandated custody of parents, and that children have citizenship rights that ensure their development as democratic citizens. This powerful constitutional fusion of parents' custodial power and children's citizenship rights produces duties on the part of parents to ensure children's opportunity to acquire the knowledge and skills of democratic citizenship.

The term *in loco reipublicae* conveys the idea that parents stand in place of the state with respect to children's development into adult democratic citizens outside of school.[21] The term inverts the state's familiar *in loco parentis* duty to care

16. *See* City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989) ("[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984))). Curfew laws, for example, implicate children's right of association. *See* Nunez v. City of San Diego, 114 F.3d 935, 951 (9th Cir. 1997).

17. *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 434-35 (2006); Chesa Boudin, *Children of Incarcerated Parents: The Child's Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 79 (2011).

18. *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944); Lee v. Weisman, 505 U.S. 577, 596 (1992).

19. *See* New Jersey v. T.L.O., 469 U.S. 325, 373-74 (1985); Roper v. Simmons, 543 U.S. 551, 569-70 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 567 U.S. 460, 471 (2012).

20. Resident noncitizen children also have rights as potential adult citizens. *See, e.g.*, *Plyler*, 457 U.S. at 221-24.

21. The term *reipublicae* is a blend of the Latin *res* and *publica*; while in classical Latin, they may often have appeared as separate words, both the two-word form and the blended form are

for children in state custody, thus invoking a well-settled template for shared parent-state responsibilities to children. The designation *in loco reipublicae* is meant to capture the idea that, as children's custodians, parents have vital constitutional duties to ensure that children acquire the knowledge and skills of democratic citizenship.

The concept of parental duties to children is not entirely foreign in constitutional law. Almost a century ago, the Supreme Court affirmed that "those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[22] More recently, in *Wisconsin v. Yoder*, the Court clarified that "[t]he duty to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."[23] And, in *Bellotti v. Baird*, the Court further explained that "[t]his affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens."[24] These cases and others lay the foundation for a constitutional jurisprudence that recognizes parents' obligations to respect and further children's rights as developing citizens.

In elaborating the *in loco reipublicae* framework, the Article focuses on a constitutional right at the heart of children's democratic development: their First Amendment right of access to ideas. The First Amendment protects not only children's right to speak, but, more importantly, their right to receive ideas.[25] Access to ideas promotes children's democratic upbringing in four distinct ways: access to ideas provides the opportunity for children to acquire the knowledge that alternative ways of life exist and that, as adult democratic citizens, they will be free to live lives of their own choosing; it promotes children's deliberative skills; it serves to inculcate the democratic values of equality, pluralism, and tolerance; and it gives children the tools with which to develop and express their own values and beliefs as full citizens. The *in loco reipublicae* framework recognizes that, as the constitutional custodians of their children, parents have duties

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acceptable. *See* Email from Christina Kraus, Thomas A. Thacher Professor of Latin, Yale Univ., to Anne C. Dailey, Ellen Ash Peters Professor, Univ. of Conn. Sch. of L. (Apr. 25, 2023, 10:42 PM) (on file with author).

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

23. 406 U.S. 205, 233 (1972) (quoting *Pierce*, 268 U.S. at 535).

24. 443 U.S. 622, 638 (1979).

25. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866-68 (1982) (plurality opinion); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975); Mark Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L.F. 746, 752 (1976). *See generally* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 224 (1999) (describing the "emerging claim" that "minors have a right to receive information in some circumstances, regardless of the limitations imposed by their parents").

to respect children's right of access to ideas. The core of these duties concerns parents' obligation to allow children meaningful exposure to ideas outside the home, including ideas that might conflict with parental beliefs and values.

To be clear, parents' *in loco reipublicae* duties do not require them to give children free expression in the home nor to expose their children to democratic values around the dinner table. The *in loco reipublicae* framework recognizes the importance of a life without significant governmental interference in day-to-day family decision-making for both children and parents; it also respects parents' own free speech interests. Instead, *in loco reipublicae* duties are oriented toward children's engagement in the world outside the home. Parents are the primary influence in a child's life and are free to inculcate their own values in whatever way they wish. Yet, the *in loco reipublicae* framework shows us that, while parents are free to teach their children that their own way of life is the one true way, they are not free to raise their children to believe it is the *only* way of life. Parents may seek to inculcate their beliefs in their children, but they cannot deprive children of the basic knowledge that other belief systems exist, a knowledge critical to developing the skills of democratic life. Parents are not obligated themselves to instill democratic norms, or agree with them, but they are obligated to respect and facilitate children's opportunity to become democratic citizens by exposing children to the world of ideas outside the home.

The enforcement of *in loco reipublicae* duties will entail bold new thinking about children's relationship to parents in constitutional law. The primary avenue for enforcing parental *in loco reipublicae* duties is through courts and legislatures setting limits on parents' rights to prevent children from acquiring the knowledge and skills of democratic citizenship. In the First Amendment context, for example, enforcement would involve limiting parents' rights to shield children from exposure to ideas outside the family.[26] Thus, the *in loco reipublicae* framework would prevent parents from homeschooling children in ways that isolate children from activities and people outside the family. Parents would also be prevented from opting children out of classes on the history of racial injustice or discussions about gender identity; from denying children access to information about sexual health or contraceptives; and from refusing children relationships with important caretakers and peers outside the home.

A second avenue for enforcing *in loco reipublicae* duties entails recalibrating the state's authority over children: on the one hand, by restricting the state's

26. Enforcement of parental duties in this context does not include giving children the right to sue their parents for failing to carry out their constitutional duties. The practical obstacles to such suits are daunting given that most children do not have the opportunity or funds necessary to access the judicial system. But more importantly, direct suits by children against their parents would undermine children's well-being in a host of ways, including damaging the stability and attachment that children need from their caregivers.

authority to endorse and expand parental control of children and, on the other hand, by affirming state authority to enforce parental duties to children outside the home. With respect to restrictions on state authority, the framework would prevent the state from passing laws that give parents a veto power over children's exercise of their citizenship rights, such as laws that require parental consent before children may engage in expressive freedoms. Some states have passed laws that require parental consent before a child can access social media and provide parents with access to any content a child sees or writes.[27] As this Article explains, the *in loco reipublicae* framework would deny states the power to restrict children's exercise of their citizenship rights by anointing parents as children's constitutional gatekeepers. Conversely, the *in loco reipublicae* framework would permit states to pass laws that support and enforce parental duties to respect children's citizenship rights.

Two further avenues exist for enforcing *in loco reipublicae* duties. The first involves recognizing children's independent decision-making authority in certain contexts. For example, judicial-bypass opportunities might be set up to allow older children to make important decisions regarding issues critical to their democratic development. These bypass opportunities have long existed in the context of a minor's right to abortion.[28] For example, such bypass procedures might be created to ensure children's access to important people and activities free from parents' unilateral control. Children themselves might be allowed to mobilize politically for changes to school curricula or to act free from parental control in certain contexts. Children might take legal steps to require the state to enforce parental duties, as some former students educated in very restrictive private schools have done.[29] A final avenue of enforcement would be to provide parents with the support they need to fulfill their *in loco reipublicae* duties. As explained here, in an ideal world, Congress might establish a Children's Rights Bureau to support parents financially and in other ways. The Bureau might also receive petitions from children challenging systemic failures on the part of the state to either fulfill its own educational duties or to support parents' *in loco reipublicae* duties.

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27. *See infra* Section III.B.

28. *See Bellotti*, 443 U.S. at 647.

29. *See Uneducated: Substantial Equivalency and Hasidic Yeshivas*, YOUNG ADVOCS. FOR FAIR EDUC. (Apr. 2021), https://yaffed.org/wp-content/uploads/2021/04/Uneducated_-Substantial-Equivalency-and-Hasidic-Yeshivas-Report.pdf [https://perma.cc/5VXT-EL23]; *cf.* Nomi M. Stolzenberg & David N. Myers, *Private Religious Schools Have Public Responsibilities Too*, ATLANTIC (Sept. 18, 2022), https://www.theatlantic.com/ideas/archive/2022/09/private-religious-schools-have-public-responsibilities-too/671446 [https://perma.cc/H32B-PZPL] (arguing that Hasidic parents have not only the right to pass on their traditions to their children but also the duty to prepare them for democratic citizenship).

Some might argue that children's citizenship rights are not an effective avenue for securing their citizenship interests. This critique of rights is well taken in many contexts.[30] A discourse of constitutional rights can be abstract and formalistic and detract from real political change. Yet, children in particular do not have the luxury of dispensing with rights. While adults may have other avenues for pursuing their fundamental interests, children do not. It is true that children are increasingly engaged in political activism,[31] but the fact remains that children cannot vote or hold office, and nothing guarantees that adults will adequately represent their interests at the ballot box. Letting go of children's rights while, at the same time, enforcing near-absolute parental authority means accepting a system of family governance under which children have no independent existence apart from their parents. The *in loco reipublicae* framework respects children as persons in their own right, aiming to eradicate the current system of near-absolute parental control that effectively denies children rights of democratic citizenship.[32]

The Article proceeds in three Parts. Part I sets forth the Court's most important cases recognizing children's place in a democratic polity and the duty of the state to provide children with the knowledge and skills of democratic citizenship. Part I then details two critical shortcomings of the current framework: its disregard of the implications of parents' unique and near-absolute custodial authority for children's citizenship rights, and its failure to consider parental duties as well as parental rights as part of our constitutional culture. Part II presents the *in loco reipublicae* framework, which recognizes parents' constitutional duties to respect and further children's citizenship rights. This Part illustrates the *in loco reipublicae* framework by examining children's core right of access to ideas and parents' corresponding duties. This Part ends by addressing two possible concerns: that the *in loco reipublicae* framework will unduly amplify the state's power to intervene in family life and that the framework imposes secular duties on conservative religious parents in ways that will burden their religious freedom. Finally, Part III proposes four main avenues for enforcing parents' *in loco reipublicae*

30. For a recent critique of rights, see generally JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).

31. Recently, children have been at the forefront of political and legal activism relating to climate change and gun control. *See* Andrew Marantz, *The Youth Movement Trying to Revolutionize Climate Politics*, NEW YORKER (Feb. 28, 2022), https://www.newyorker.com/magazine/2022/03/07/the-youth-movement-trying-to-revolutionize-climate-politics [https://perma.cc/F5EK-PGCE]; Emily Witt, *From Parkland to Sunrise: A Year of Extraordinary Youth Activism*, NEW YORKER (Feb. 13, 2019), https://www.newyorker.com/news/news-desk/from-parkland-to-sunrise-a-year-of-extraordinary-youth-activism [https://perma.cc/6CD3-B4ZX].

32. *See* Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 85-96 (2021).

duties. These avenues include limitations on both parental rights and state authority, as well as opportunities for children themselves to exercise their citizenship rights free from parental control. Concrete support for parents and children is critical to ensuring that all parents have the resources to fulfill their *in loco reipublicae* duties.

The Supreme Court may not be inclined at the present time to acknowledge parents' *in loco reipublicae* duties, but that fact should not deter efforts to frame a new constitutional vision of children's citizenship rights and parents' corresponding duties in constitutional law. State courts and legislatures can implement the *in loco reipublicae* framework pursuant to state constitutional or *parens patriae* powers.[33] Moreover, the framework provides an impetus for children's political engagement, as well as the state's provision of opportunities for children to mobilize on their own behalf. Even in the absence of specific enforcement mechanisms, the recognition of children's citizenship rights can inspire and shape youth-led social movements. This Article offers a constitutional vision of children as developing citizens in preparation for the day when a future Supreme Court may decide to make that vision a reality.

I. CHILDREN'S CITIZENSHIP RIGHTS

Democracy requires something of its citizens, and a democratic society must work to ensure that its citizens are equipped to assume those civic responsibilities. As the Supreme Court has emphasized, "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[34] In case after case, the Court acknowledged the importance of children acquiring the skills needed for democratic self-government.[35] Democratic theorists share the Supreme Court's concerns for children's democratic socialization, with debate properly focused on the skills of democratic citizenship and how best to nurture them in young children.[36]

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33. For work that advocates developing state constitutional law, see generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2008).

34. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

35. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973) ("[Democracy] depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.").

36. The literature on democratic education is voluminous. *See, e.g.*, AMY GUTMANN, DEMOCRATIC EDUCATION 29-30 (1987); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP,

It is beyond the scope of this Article to present a full theory of children's democratic upbringing in constitutional law and the developmental theories that must inform a thick description of children's democratic socialization.[37] Instead, this Article focuses more narrowly on the skills and information children need to engage in reasoned deliberation over the norms of shared life in a pluralistic society.[38] To be clear, not all democratic theories emphasize the value of free and open democratic deliberation.[39] But our constitutional jurisprudence governing children does. For the most part, the Supreme Court's decisions touching upon children's democratic upbringing reference the capacities of critical thinking, reasoned deliberation, and tolerance for other points of view. As this Part aims to show, the Supreme Court's open, deliberative, participatory view of children's democratic upbringing offers a powerful model for securing children's citizenship in a pluralistic democratic polity.

This Part first lays out the rights that children currently enjoy as developing citizens, focusing on a core citizenship right: children's right of access to ideas under the First Amendment. The Part then describes two less praiseworthy aspects of the Court's existing jurisprudence: first, the ongoing failure to acknowledge the ways in which parental power effectively nullifies children's citizenship rights and, second, the neglect of parents' constitutional duties to the children in their custody. This discussion of both the strengths and shortcomings of the existing framework sets the stage for the *in loco reipublicae* framework presented in Part II.

Virtue, and Community in Liberal Constitutionalism 268-69 (1990); Bruce A. Ackerman, Social Justice in the Liberal State 154 (1980); Rob Reich, *Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling*, *in* Moral and Political Education: Nomos XLIII 275, 286-94 (Stephen Macedo & Yael Tamir eds., 2002). For a recent overview that identifies the differences among competing theories, see generally Edda Sant, *Democratic Education: A Theoretical Review (2006-2017)*, 89 Rev. Educ. Rsch. 655 (2019). For the foundational modern theory, see generally John Dewey, Democracy and Education: An Introduction to the Philosophy of Education (1916).

37. In other work, I have undertaken this effort with respect to children's right to caregiving. *See* Dailey, *supra* note 17, at 469.

38. In this vein, John Dewey developed a theory of democratic education that emphasized teaching children "how to think" rather than "what to think." Melvin J. Dubnick, *Nurturing Civic Lives: Developmental Perspectives on Civic Education—Introduction*, 36 Pol. Sci. & Pol. 253, 253 (2003). *See* Emily Buss, *Developing the Free Mind*, *in* The Oxford Handbook of U.S. Education Law 81, 87-88 (Kristine L. Bowman ed., 2021) ("Critical to the successful functioning of our democracy is the development, in our citizens, of the ability and inclination to share their views with one another . . . to fulfill the 'political duty [of] public discussion.'" (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring))).

39. William A. Galston, Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State 254 (1991) ("As a political matter, liberal freedom entails the right to live unexamined as well as examined lives—a right the effective exercise of which may require parental bulwarks against the corrosive influence of modernist skepticism.").

A. Developing Democratic Citizens

Tinker v. Des Moines Independent Community School District is often cited as one of the two Supreme Court decisions that launched the modern children's-rights era in constitutional law.[40] The *Tinker* case established children's right to express themselves in public school so long as they do not disrupt the learning environment or intrude on others' rights. As the Court stated, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[41] The holding was quite radical for its time. Although *West Virginia State Board of Education v. Barnette* had ruled that the state cannot force students to salute the American flag, that case involved government-compelled speech.[42] *Tinker*, on the other hand, was a case about children's right to speak for themselves, a much bolder proposition.

The *Tinker* decision burst upon the constitutional stage with a powerful affirmation of children as rights-bearing democratic citizens and public schools as the place where children are educated in the art of democracy.[43] Justice Fortas's opinion for the majority offered a clear vision of the importance of free speech rights to children's democratic development. In particular, the Court noted, exposure to the marketplace of ideas ensures that students are not "regarded as closed-circuit recipients of only that which the State chooses to communicate."[44] Describing the classroom as a marketplace of ideas, the Court emphasized that schools will have to tolerate uncomfortable or difficult speech because "our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this . . . often disputatious society."[45] *Tinker*'s bold affirmation that children are constitutional-rights-holders in school cemented the idea that children's free speech rights help to prepare them for the responsibilities of democratic citizenship.

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40. 393 U.S. 503 (1969). The other case is *In re Gault*, which famously proclaimed that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U.S. 1, 13 (1967). Over the ensuing decades, the Court came to recognize children's free exercise rights, association rights, privacy rights, and criminal-procedure rights. *See* Minow, *supra* note 4, at 268-78.

41. *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

42. 319 U.S. 624, 631 (1943).

43. For a comprehensive overview of children's free speech rights in school, see generally DRIVER, *supra* note 6.

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

45. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion) (quoting *Tinker*, 393 U.S. at 508-09).

The *Tinker* decision was not the first to ground children's constitutional rights in their status as developing citizens. The Court's *Barnette* decision in 1943 had already given voice to the importance of the state respecting children's First Amendment freedoms as critical to their democratic socialization. As Justice Jackson wrote then, "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[46] Eleven years later, the Supreme Court, in *Brown v. Board of Education*, grounded children's right to be free from state-sponsored segregation under the Equal Protection Clause in "the importance of education to our democratic society" and the public school's place as the "foundation of good citizenship."[47]

1. *Rights to a Democratic Upbringing*

As used here, "children's citizenship rights" are those rights that foster children's development as democratic citizens.[48] What are these citizenship rights then? While *Barnette* and *Tinker* highlighted the importance of free expression to children's democratic socialization, the class of citizenship rights goes well beyond free speech. As noted earlier, *Brown*'s recognition of children's equality rights in school under the Equal Protection Clause rested in large part on ensuring children's upbringing as democratic citizens. Children's citizenship rights are not limited to the school context, although school is obviously a central place for children's democratic socialization.[49] Children's due process rights to maintain relationships with parents and other important caregivers fortify the adult capacities for critical thinking and deliberation as well as expose children to the views and beliefs of others.[50] Children's right of association under the First Amendment serves to ensure children's opportunity for political engagement

46. *Barnette*, 319 U.S. at 637.

47. 347 U.S. 483, 493 (1954); *see also* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 344-48 (2006) (describing the relationship between educational adequacy and equal citizenship in *Brown* and beyond).

48. It is not only citizen children who have citizenship rights. Even undocumented noncitizen children living in the United States enjoy rights as potential future citizens. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 226 (1982) ("An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen.").

49. *See generally* MICHAEL A. REBELL, FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION (2018) (analyzing the causes of schools' failure to prepare students to be capable citizens).

50. *See* Dailey & Rosenbury, *supra* note 32, at 150.

and expression outside the home.[51] Relatedly, some constitutional rights serve children's citizenship interests indirectly. For example, children's Fourth Amendment rights protect children's privacy interests but also operate to ensure that school officials model democratic values for developing citizens.[52] Even children's right to religious freedom under the First Amendment can be tied to their status as developing citizens with the freedom to choose their own religious way of life, or none at all.[53]

The Supreme Court's commitment to children's citizenship rights may at times today seem more rhetoric than reality.[54] For example, *Tinker* affirmed the importance of free speech rights to children's development as citizens, but the Court has subsequently upheld the state's power to censor student speech in school where the speech is viewed as lewd, endorsing drug use, or school-sponsored.[55] And, despite the Court's affirmation in *Brown v. Board of Education* of the close tie between educational equality and democracy, later cases have undercut *Brown*'s ideal in many ways.[56] Nevertheless, rhetoric does matter in this

51. *See supra* note 16 and accompanying text.

52. *See* New Jersey v. T.L.O., 469 U.S. 325, 373-74 (1985) (Stevens, J., concurring in part and dissenting in part); *id.* at 353-54 (Brennan, J., concurring in part and dissenting in part).

53. *See* Prince v. Massachusetts, 321 U.S. 158, 168 (1944); Buss, *supra* note 38. Children's citizenship rights are not static but evolve over time as children grow. For this reason, children's citizenship rights—like almost all rights enjoyed by children—are transitional rights. They both change over time and, eventually, either evolve into adult rights or terminate altogether. For a fuller explication of this argument, see generally Anne C. Dailey, *Children's Transitional Rights*, 12 Law, Culture & Humans. 178 (2016).

54. *See* Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 Geo. L.J. 529, 532 (2023).

55. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988); Morse v. Frederick, 551 U.S. 393, 405 (2007). One might see this as the "taming" of *Tinker*'s vision of children's free speech rights. *See generally* Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise (2016) (telling the story of how an early twentieth-century radical labor vision of civil liberties was ultimately tamed). Even in these cases rejecting children's free speech rights, the Court has extolled schools as the cornerstone of democracy. *See Fraser*, 478 U.S. at 683 (1986) (describing "[t]he process of educating our youth for citizenship in public schools"); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion) ("We have also acknowledged that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'"(quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979))). More recently, the Supreme Court in *Mahanoy Area School District v. B.L.* upheld a student's freedom of expression, emphasizing that "America's public schools are the nurseries of democracy." 141 S. Ct. 2038, 2046 (2021).

56. *See* Millat, *supra* note 54, at 550-51; Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 723 (2007); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2225-26 (2023) (Sotomayor, J., dissenting) ("Today, this Court stands in the way and rolls back decades of precedent and momentous progress."). Notably, however,

context. The Court's stated vision of children's democratic citizenship is a powerful starting point for building a new framework for children's place in the constitutional order, one that promotes their status as full and equal citizens. The *in loco reipublicae* framework harnesses the rhetoric of *Barnette*, *Brown*, *Tinker*, *Yoder*, and other canonical children's rights cases to build a constitutional jurisprudence genuinely committed to children's democratic development.[57]

2. *The Core Right of Access to Ideas*

This Article views children's right of access to ideas under the First Amendment as a central, if not *the* central, right of developing citizens.[58] The *Tinker*

while the Supreme Court has never expressly recognized a fundamental right to education or equality in educational funding, the Court has never expressly denied it either. *See infra* pp. 454-455.

57. While the Court has set limits on children's rights, its recognition of children as rights-holding citizens in school still stands. Lower courts continue to affirm students' rights to express themselves. *See* Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 675 (7th Cir. 2008) (prohibiting a school from censoring a student's "Be Happy, Not Gay" t-shirt without reasonable forecast that it would provoke incidents of harassment of homosexual students or poison the educational atmosphere); Guiles v. Marineau, 461 F.3d 320, 322 (2d Cir. 2006) (permitting student t-shirt of a photograph of George W. Bush with the phrase "Chicken-Hawk-In-Chief"); Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 252 (4th Cir. 2003) (permitting a student to wear an NRA t-shirt bearing images of Columbine-like sharpshooters). Lower courts have also affirmed procedural protections for students before being disciplined. *See* Newsome v. Batavia Local Sch. Dist., 842 F.2d. 920, 928 (6th Cir. 1988) (holding that the procedural due process rights of public-school students subject to expulsion include being informed of the evidence against them by school officials during administrative hearings); Colvin v. Lowndes Cnty. Sch. Dist., 114 F. Supp. 2d 504, 512 (N.D. Miss. 1999) (holding that the expulsion of a student pursuant to a "zero-tolerance" policy violated the student's due process rights where there was no independent consideration by the school board of the relevant facts and circumstances surrounding the student's case); Waln v. Todd Cnty. Sch. Dist., 388 F. Supp. 2d 994, 1003 (D.S.D. 2005) (holding that due process entitled a student, at a minimum, to a hearing prior to the conversion of his short-term suspension into a long-term suspension). They have also affirmed students' freedom from some forms of state-sponsored racial and gender discrimination. *See* Nabozny v. Podlesny, 92 F.3d 446, 460 (7th Cir. 1996) (finding that a school district had infringed on a gay student's equal protection rights on the grounds of combined gender and sexual-orientation discrimination); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020) (finding that a school violates a transgender student's right to equal protection when forced to use the restroom assigned to their biological sex); Fricke v. Lynch, 491 F. Supp. 381, 387 (D.R.I. 1980) (protecting the right of a student to bring a same-sex date to a high school dance).

58. The relationship between adult First Amendment rights and democracy is well accepted. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121-65 (1993) (contending that free speech is a "precondition" for democracy); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-21 (1971) (arguing that freedom of speech is central to "democratic organization"); Robert Post, *Participatory Democracy*

Court famously described the public-school classroom as "peculiarly the 'marketplace of ideas'" where "leaders are trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues."[59] While perhaps flawed in other respects,[60] the marketplace-of-ideas metaphor does capture a core dimension of the value of free speech rights for children's democratic education: their exposure to the diverse world of ideas outside the home.[61]

With respect to adults, the Supreme Court has recognized that the First Amendment protects the right of access to ideas in a variety of contexts.[62] In *Martin v. City of Struthers*, the Court held that an adult woman distributing religious literature had a First Amendment right to do so.[63] Justice Black explained that the First Amendment "embraces the right to distribute literature, and necessarily protects the right to receive it."[64] In 1969, the same year that *Tinker* was decided, the Court held in *Stanley v. Georgia* that adults have the right to possess sexual material.[65] Here, too, the Court affirmed that, even with respect to pornography, "the Constitution protects the right to receive information and ideas."[66] The right of access to ideas has also had a place in the area of commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court held that the First Amendment protects the right to information about prescription-drug prices.[67]

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and Free Speech, 97 VA. L. REV. 477, 482 (2011) (arguing that democratic legitimation occurs "specifically through processes of communication in the public sphere").

59. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

60. *See* Mary-Rose Papandrea, *The Missing Marketplace of Ideas Theory*, 94 NOTRE DAME L. REV. 1725, 1727 (2019) (setting out criticisms).

61. *See* Buss, *supra* note 38, at 88 ("As impoverished and malfunctioning as the celebrated 'marketplace of ideas' may increasingly be for adults, schools offer the opportunity for genuine engagement in a thriving marketplace for young people that can have some impact on their future abilities and expectations." (footnote omitted)).

62. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) ("[W]e have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'" (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969))); David L. Hudson, Jr., *First Amendment Right to Receive Information and Ideas Justifies Citizens' Videotaping of the Police*, 10 U. ST. THOMAS J.L. & SOC. POL'Y 89, 91 (2016).

63. 319 U.S. 141 (1943).

64. *Id.* at 143 (citations omitted).

65. 394 U.S. at 568.

66. *Id.* at 564.

67. 425 U.S. 748, 757 (1976). More recently, some have argued that the principle of access to ideas should also protect the right to film police officers carrying out their official duties. *See* Hudson, *supra* note 62, at 92.

With respect to children, the Court has been clear that they, too, enjoy the right of access to ideas, although for modified reasons. *Board of Education, Island Trees Union Free School District v. Pico* is the most well-known case to so hold.[68] The case concerned a school board that had removed nine books from its school libraries.[69] Justice Brennan, writing for a plurality, held that the First Amendment protects children's right of access to ideas: "Our precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.'"[70] After canvassing the cases establishing adult individuals' right of access to ideas, Justice Brennan went on to explain that access to ideas is critical to children's future citizenship. "[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[71]

Pico does not stand alone. In *Erznoznik v. City of Jacksonville*, the Supreme Court struck down a municipal ordinance that made it a crime for a drive-in movie theater to exhibit films containing nudity.[72] The ordinance was justified in part as an exercise of the city's police power to protect vulnerable children. In an opinion by Justice Powell, the Court held that "minors are entitled to a significant measure of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."[73] The Court emphasized that "the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."[74] In a later case, *Brown v. Entertainment Merchants Association*, the Court struck down a state prohibition on the sale

68. 457 U.S. 853, 871 (1982).

69. *Id.* at 856. The nine banned books included several by African American writers, such as *Best Short Stories of Negro Writers*, edited by Langston Hughes and *Black Boy*, by Richard Wright. The Board had issued a press release defending its decision on the ground that the removed books were "anti-American, anti-Christian, anti-Sem[i]tic , and just plain filthy." *Id.* at 857.

70. *Id.* at 866 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)).

71. *Id.* at 868. Lower courts have also emphasized the importance of children's First Amendment right of access to ideas to their democratic development when addressing controversies over school curricula. *See* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027-31 (9th Cir. 1998); *cf.* Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1068 (6th Cir. 1987) (emphasizing that public schools serve to teach fundamental democratic values).

72. 422 U.S. 205, 205 (1975).

73. *Id.* at 212-13 (internal citation omitted).

74. *Id.* at 214.

of violent video games to minors.[75] In holding that the statute violated the First Amendment, Justice Scalia, writing for the majority, emphasized children's right of access to ideas and echoed Justice Powell's language in *Erznoznik*.[76] The Court explained that the state may protect children from harm, but "that does not include a free-floating power to restrict the ideas to which children may be exposed."[77]

Democratic theorists have also emphasized the importance of children's access to ideas as critical to their democratic upbringing. Amy Gutmann argues that a democratic education must expose children to ideas outside the home as a way of sustaining a polity in which citizens can reconcile differences.[78] In Gutmann's view, parents are not fully empowered to shape the education of their children, for children must have the opportunity to develop "the intellectual skills necessary for rational deliberation."[79] As she writes, "It is one thing to recognize the right (and responsibility) of parents to educate their children as members of a family, quite another to claim that this right of familial education extends to a right of parents to insulate their children from exposure to ways of life or thinking that conflict with their own."[80] To the contrary, a state will "make[] choice meaningful by equipping children with the intellectual skills necessary to evaluate ways of life different from that of their parents."[81] Other commentators, too, emphasize children's exposure to ideas as vital to their development as democratic citizens. Anne Alstott has noted that "[a] liberal education ideally would prepare children to choose among diverse visions of the good; such an education should, among other things, foster the capacity to reason and provide cultural opportunities that differ from the child's family background."[82] Laura Rosenbury has identified the places beyond schools where children's need for exposure to diverse ideas may be met.[83]

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75. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 805 (2011).

76. *Id.* at 794 (quoting *Erznoznik*, 422 U.S. at 212-13) (citation omitted).

77. *Id.*

78. GUTMANN, *supra* note 36, at 11.

79. *Id.* at 29.

80. *Id.*

81. *Id.* at 30.

82. Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 7-8 (2008). Caitlin Millat has similarly emphasized that "students need to understand the lived experiences of those other than themselves and the causes of modern economic, social, and political inequality to effectively participate in democratic systems." Millat, *supra* note 54, at 542; *see also* Dailey & Rosenbury, *supra* note 4, at 1493-96 (discussing children's interest in being exposed to the world of ideas).

83. *See* Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 837 (2007); *see also* Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2117 (2011) (arguing

Both the Supreme Court and commentators have thus affirmed that a democratic education entitles children not only to express ideas but also to receive them.[84] Part II explains in greater detail how access to ideas furthers children's democratic socialization in four ways: by cultivating free thought, inculcating critical-thinking skills, modeling democratic values, and enriching identity formation. The value of children's access to ideas informs several important citizenship rights such as children's right to equality in education under the Equal Protection Clause, to association under the First Amendment, and to relationships with important persons under the Due Process Clause. In a pluralistic society, a democratic upbringing must presume that children as developing citizens will know and understand the diverse world of ideas.

B. Current Constitutional Shortcomings

The Supreme Court's affirmation of the importance of children's democratic development is a powerful vision of children's place as developing citizens in the constitutional order. But the current framework for children's citizenship rights is dramatically undercut by two countervailing constitutional principles: the protection for near-absolute parental rights and the denial of parental duties. As explained in this Section, these two constitutional principles threaten children's citizenship rights and the promise of children's democratic upbringing.

1. Near-Absolute Parental Authority

The most important constitutional doctrine affecting children is not children's right to liberty or procedural justice or any other right held by children themselves; the most important constitutional doctrine affecting children is the Constitution's broad protection for the rights of their *parents*. This Section explains why this is so and the implications of broad parental rights for children's democratic upbringing.

In a multitude of cases over the last century, the Court has affirmed parents' rights "to direct the upbringing and education of children under their control."[85]

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that constitutional law posits "critical learning and exposure to ideas [as] the main features of the educational enterprise").

84. *See also* U.N. Convention on the Rights of the Child art.13, Nov. 20, 1989, 1577 U.N.T.S. 3 ("The child shall have the right . . . to receive and impart information and ideas of all kinds . . . .").

85. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); *see also* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . . ."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and

The Supreme Court has described parental rights as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[86] The foundation for the modern doctrine of parental rights was laid in two cases from the Progressive Era that established parents' constitutional authority to control children's education.[87] Since that time, the Court has decided scores of cases that confirm broad parental rights as among the most favored of the Constitution's liberty rights.[88]

Parental rights are unique in modern constitutional law: they are rights of control over other individuals.[89] Constitutional protection for the rights of enslavers was finally abolished in 1865 with the passage of the Thirteenth Amendment. Nowhere today do we see constitutional support for such near-absolute power by some persons over others. While some constitutional rights—such as

management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (citation omitted)); Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); Troxel v. Granville, 530 U.S. 57, 65 (2000) (emphasizing the fundamentality of parents' interest in "the care, custody, and control of their children").

86. *Troxel*, 530 U.S. at 65.

87. In the first of these cases, *Meyer v. Nebraska*, the Court struck down a requirement that prohibited the teaching of foreign languages in early grades but nevertheless affirmed that the state has a legitimate interest in "foster[ing] a homogeneous people with American ideals prepared readily to understand current discussions of civic matters." 262 U.S. at 402. In a similar vein, the Court, in *Pierce v. Society of Sisters*, rejected a state law requiring that children attend public school, but nevertheless endorsed "the power of the State . . . to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." 268 U.S. at 534-35.

88. *See, e.g.*, *Troxel*, 530 U.S. at 65; Parham v. J.R., 442 U.S. 584, 602 (1979); *Stanley*, 405 U.S. at 651; *see also* Dailey & Rosenbury, *supra* note 4, at 1459 ("Although the doctrine of absolute parental power has now been abandoned, the law nevertheless retains a strong commitment to parental rights." (footnote omitted)); Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 29 ("While the law is paying increasing attention to these claims [of other private parties for control over a child's upbringing], it has, thus far, continued to subrogate these claims to some combination of state and parental control."). For recent defenses of broad parental rights, see generally Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020); and RESTATEMENT (FIRST) OF CHILDREN AND THE LAW, "Introduction" (AM. L. INST., Tentative Draft No. 1, 2018).

89. For recent critiques of parental rights, see generally LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139 (2023); and Dailey & Rosenbury, *supra* note 32.

the right to property—also allow for the exercise of private power over others,[90] no other right comes close to the kind of plenary authority we give to parents.[91] In any other context, such plenary legal power over other persons would directly contravene basic constitutional principles of personal liberty. Parental rights call to mind the kind of "imperium" over persons that Morris Cohen described almost a century ago.[92] We can treat parental rights as rights of personal liberty only by repressing the fact that they are rights that allow one class of persons to dominate another.[93]

How are we to understand this exceptional category of constitutional rights? Any defense of broad parental rights would begin with the basic constitutional proposition that "children are different."[94] Because children are dependent in manifold respects—physically, emotionally, and cognitively—they do not enjoy constitutional protections of personal liberty or equal citizenship. Instead, children are treated as legal dependents under their parents' loving control. Nevertheless, however necessary to children's well-being, and however close and loving the relationship between parents and children, children's legal status cannot be viewed as anything other than one of legal subjugation.

Of course, constitutional protection for parental rights serves children's caregiving and citizenship interests in certain critical ways. Parents undeniably provide the foundation for children's sense of security and their growth into healthy, well-adjusted persons. Without a strong, stable relationship with caring parents, children can suffer lifelong emotional and even physical difficulties.[95] Parental caregiving also lays the foundation for the skills of adult citizenship.[96] The

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90. *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (holding that property owners have a right to exclude third parties from their land, "'one of the most treasured' rights of property ownership" (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 435 (1982))).

91. For related concerns in the area of property rights, *see infra* notes 186-188 and accompanying text.

92. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 13 (1927).

93. For an illuminating study of the mutual construction of freedom and oppression in the United States, see generally JEFFERSON COWIE, FREEDOM'S DOMINION: A SAGA OF WHITE RESISTANCE TO FEDERAL POWER (2022).

94. Miller v. Alabama, 567 U.S. 460, 480-81 (2012).

95. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); Ginsberg v. New York, 390 U.S. 629, 642 n.10 (1968). *See generally* Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. 2363 (2022) (arguing for a "psychological parent principle" as a guiding principle in family law given the importance of the parent-child bond for healthy development).

96. *See* ACKERMAN, *supra* note 36, at 140-43; GUTMANN, *supra* note 36, at 50; Alstott, *supra* note 82, at 19; Dailey, *supra* note 83, at 2104; Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765, 772 (1973).

relationship with a "good-enough" caregiver, one who is able to provide an emotionally attuned, responsive, and stable environment for the child, fosters the mature cognitive and emotional skills required of adult democratic citizens.[97] Moreover, parental caregiving nurtures the capacity for meaningful attachments to people and communities beyond the family.[98] Children's attachment to early caregivers lays the foundation for their future connections to others. Paradoxically, the early relationship with caregivers is the source of both our deepest cultural and political identities and attachments, as well as our capacity, upon reaching maturity, to choose other ways of life.

Constitutional protection for parental rights thus plainly serves children's broad interests, including their citizenship interests. But *near-absolute* parental rights—rights that confer on parents broad control over almost every aspect of children's lives—do not. Protection for broad parental rights is justified on the ground that children are dependent and parents will generally act in the best interests of their children.[99] This justification supports the idea that parental power does not in fact interfere with children's democratic upbringing because parents will act to ensure that their children's citizenship interests are respected.[100] Yet, this presumption of parent-child unity suppresses the fact that the very sentiments that make parents good caregivers—the deep devotion to and identification with their children—can lead parents to disregard the ways in which their children may have important interests of their own, including their interests in acquiring the knowledge and skills required to become democratic citizens.[101] Indeed, parents heavily invested in their children's lives may well have

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97. *See* Dailey, *supra* note 17, at 434.

98. *See id.*

99. While parental rights once were grounded in notions of children as property, this traditional property-based model of parental rights has given way to modern justifications focused on children's well-being. *See* RESTATEMENT (FIRST) OF CHILDREN AND THE LAW, "Introduction" (AM. L. INST., Tentative Draft No. 1, 2018); Huntington & Scott, *supra* note 88, at 1414. Parental rights also serve parents' own interests in raising children. *See* Colin M. Macleod, *A Liberal Theory of Freedom of Expression for Children*, 79 CHI.-KENT L. REV. 55, 73 (2004); Dailey & Rosenbury, *supra* note 4, at 1457; BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE (2008); Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property,* 33 WM. & MARY L. REV. 995, 1044-46 (1992); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 5 (1985); STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 1-17 (1988); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1139-40.

100. This presumption rests on the idea of child coverture: that *parent and child are one, and the one is the parent*. *See* Dailey & Rosenbury, *supra* note 32, at 85-86, 94 (paraphrasing 1 WILLIAM BLACKSTONE, COMMENTARIES *442).

101. *Id.* at 98.

the most difficultly separating self from other. The problem is not a lack of love, or unfitness, or ill intent. The problem is that children have interests as developing citizens that may dramatically depart from their parents' own childrearing aims.[102]

The exercise of parental control over children's expressive freedoms provides a compelling example. As we have seen, the Supreme Court has extolled the importance of children's First Amendment rights to their democratic upbringing. But the Court has also been an enthusiastic supporter of near-absolute parental rights over children as both speakers and listeners. In case after case, the Court notes that parents are free to censor—and indeed are expected to censor—material they deem undesirable for their children. We accept without critical inquiry the myriad ways in which parents control what their children say and hear outside of school, and increasingly inside school as well. Parents can punish children, remove them from school, isolate them in the home, publicly shame them on social media, and restrict their movements. Constitutional protection for relatively unrestricted parental authority over children's exposure to ideas fortifies a system of family governance that effectively negates children's right to engage with ideas outside the home.

Even in cases upholding children's free speech rights, the Court is clear that parents retain a power to control what information their children may receive. In *Ginsberg v. New York*, for example, the Court upheld a New York statute prohibiting the sale of sexual material to minors.[103] The Court began by emphasizing that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the upbringing of their children is basic in the structure of our society."[104] In the Court's view, the statute

102. A related defense of expansive parental rights is that, while parents might not always be perfect decision makers, state officials or private third parties will always be worse. In the absence of serious abuse or neglect, so this reasoning goes, unrestricted parental control is the best option for children. While there is much truth to this idea, the position ignores the fact that, under certain conditions, children's interests and parents' interests can conflict, often over predictable issues and particularly as children grow older. Existing laws already address some of the major areas of conflict. State laws protect children's rights to obtain reproductive health care without parental notification, and minors in many states may access treatment for substance use without parental consent. *See, e.g.*, MICH. COMP. LAWS ANN. § 330.1264 (West 2021) (providing that "[t]he consent to the provision of substance use disorder related to medical or surgical care" by a minor is valid); HAW. REV. STAT. ANN. § 577-29 (LexisNexis 2021) (providing that minors "fourteen years of age" and above may "consent to mental health treatment"). These laws recognize that sexual experimentation and drug use are foreseeable areas of adolescent activity in which parents may not always act to further children's interests and children may not wish to share information with parents.

103. 390 U.S. 629, 629 (1968).

104. *Id.* at 639.

at issue was justified in part because it served to reinforce parental authority.[105] Recent successful efforts on the part of parents to ban the teaching of "critical race theory" and discussion of gender identity in school suggest that parental authority extends increasingly far inside the schoolhouse gate as well. It seems clear that no aspect of children's free speech rights remains secure given parents' near-absolute rule.[106]

The Supreme Court's decision in *Mahanoy Area School District v. B.L.* exemplifies the extent to which the Court's protection for children's free speech rights remains captive to parental authority.[107] In *Mahanoy*, the Supreme Court addressed an issue that had been troubling lower courts for over a decade. The question presented was whether the *Tinker* doctrine—the rule that schools can limit children's speech on campus where the speech would disrupt the learning environment or invade the rights of others—applies to off-campus speech as well. More specifically, the issue was whether schools can restrict students' posts on social media from off campus when the posts concern school matters and are viewed by classmates.[108]

The plaintiff in *Mahanoy* was not engaging in especially high-value speech. Rather, after having failed to make the varsity cheerleading team, B.L. posted on a social media site a photo of herself and a friend displaying their middle fingers above the caption: "Fuck school fuck softball fuck cheer fuck everything."[109] In affirming that the vulgarity of speech was irrelevant,[110] the Court relied on decisions affirming adults' right to express themselves in such terms.[111] The difference here was that B.L. was a minor enrolled in public school. The Supreme Court's precedents might have suggested that B.L., as a minor, would lose. In the three cases involving children's free speech rights in school decided since *Tinker*, the Court had sided with school authorities.[112] But the Court instead upheld B.L.'s right to post her school-related frustrations on social media.[113]

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105. *Id.*

106. *See* Justin Driver, *A Cheerleader Lands an F on Snapchat, but a B+ in Court*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/opinion/supreme-court-cheerleader-brandi-levy-free-speech.html [https://perma.cc/943K-SDX9].

107. 141 S. Ct. 2038 (2021).

108. *Id.* at 2042-43.

109. *Id.* at 2043.

110. *Id.* at 2046-47.

111. *Id.* (citing Cohen v. California, 403 U.S. 15, 19-20 (1971)).

112. *See* Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

113. *Mahanoy*, 141 S. Ct. at 2046. The Court declined to set forth a broad standard governing a school's authority to regulate "off-campus" speech but instead highlighted three features of off-campus speech that "diminished" the strength of the governmental interest: (1) a school

On its face, the decision in *Mahanoy* reaffirmed *Tinker*'s fundamental protection for the free speech rights of children in school. In that regard, it was a major win for children's free speech rights, the first in over fifty years. But a closer look at the Court's reasoning reveals the dominant role that parental authority played in the case. Justice Breyer made the doctrine of *in loco parentis* a centerpiece of the Court's reasoning. He explained that schools have authority to discipline children for speech because they stand in place of the parents with respect to limiting children's vulgar speech. In the Court's view, however, schools "rarely stand *in loco parentis*" when students are off campus.[114] Instead, "[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[115] In B.L.'s case, Justice Breyer concluded that "B.L. spoke under circumstances where the school did not stand *in loco parentis*" and that "there is no reason to believe B.L.'s parents had delegated to school officials their own control of B.L.'s behavior."[116]

Properly understood, *Mahanoy* may better be described as a parental-rights case rather than a children's-rights case.[117] Parents ultimately exercise control over what their children say and hear even outside the home. This perspective was succinctly expressed in an amicus brief filed by First Amendment and education-law scholars which emphasized that "[t]he Constitution entrusts parents and guardians, not school officials, with the primary duty to oversee student cyberspeech and take appropriate corrective action in response."[118] At oral argument, the lawyer for B.L. took the position that school regulation of off-campus speech would infringe parental rights.[119] The *Mahanoy* case in effect involved the age-old battle between parents and the state over who has control over children.

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rarely stands *in loco parentis* when regulating off-campus speech; (2) a school's authority to regulate off-campus speech would mean students would never be free to express themselves free from school supervision; and (3) a school's broad power to regulate "unpopular" speech is in tension with the school's interest in training students to become democratic citizens. *Id.*

114. *Id.*

115. *Id.* at 2056.

116. *Id.* at 2047.

117. *See* Papandrea, *supra* note 10, at 163 ("One possible way of viewing *Tinker* is that it was cabined in the State's ability to interfere with parental choices, not that it was defending the rights of children themselves.").

118. Brief for First Amendment and Education Law Scholars as Amici Curiae Supporting Petitioner at 18, *Mahanoy*, 141 S. Ct. 2038 (No. 20-255); *see also* Brief for Amicus Curiae Parents Defending Education in Support of Respondents at 20, *Mahanoy*, 141 S. Ct. 2038 (No. 20-255) (noting that "B.L.'s parents decided to address her improper language . . . [a]nd that is where this matter should have ended—with the family, in the home, without the state's interference").

119. *See* Transcript of Oral Argument at 62, *Mahanoy*, 141 S. Ct. 2038 (No. 20-255) ("It would also directly interfere with parents' fundamental rights to raise their children.").

In *Mahanoy*, the parents—as they almost always do—won. Of course, most would reasonably agree that parents should attend to their children's misuse of social media, but we must also acknowledge that near-absolute parental rights give parents unduly broad control over their children's access to ideas and other dimensions of a democratic upbringing.

2. *Parental Rights but Not Duties*

The second major shortcoming of the current framework is its failure to take seriously the existence of parents' constitutional duties to children. Parents have near-absolute rights over their children but no explicitly stated duties. Two constitutional principles would seem to explain this absence of duties: the principle that the Constitution does not recognize affirmative rights and the principle that the Bill of Rights governs only state action. This Section addresses the question of affirmative rights, that is, the principle that the Constitution is a charter of negative liberties that does not recognize affirmative duties on the part of anyone. The question of state action is also addressed briefly here and in greater detail in Part II below.[120]

We are not accustomed in constitutional law to speaking about duties. Instead, we typically speak about rights: rights to liberty, rights to equality, rights to procedural fairness. Only rarely do we speak about duties, as we might when pointing out a state's duty to provide a speedy criminal trial or just compensation for the taking of property. But for the most part, the prevailing constitutional discourse is a liberal discourse of rights.[121] Most commentators agree with Judge Posner that "the Constitution is a charter of negative rather than positive liberties."[122] The denial of affirmative constitutional duties fits within a liberal legal framework that characterizes modern rights of personal liberty as a triumph over earlier repressive feudal regimes of duties.[123] We justify what might seem to be

120. *See infra* Section II.A.4.

121. There are important exceptions. *See, e.g.*, Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901 (2001); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Dailey & Rosenbury, *supra* note 4; Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059 (2019); Gary B. v. Whitmer, 957 F.3d 616 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (2020).

122. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

123. *See* Samuel Moyn, *The Modernization of Duties*, 2 LIBERTIES 51, 51 ("The conventional belief about the well-known dichotomy of duties and rights is that the former are premodern and the latter are modern.").

the harsh denial of constitutional duties by celebrating the liberal vision of individual liberty that stands in its stead.

The constitutional stance against affirmative duties was forcefully stated in a case involving the rights of a child. In *DeShaney v. Winnebago County*, a young Joshua DeShaney and his mother brought suit against the Wisconsin Department of Social Services for the Department's failure to take steps to protect the then four-year-old boy from a known abusive father.[124] Chief Justice Rehnquist, writing for the majority, made it perfectly clear in *DeShaney* that the Due Process Clause of the Fourteenth Amendment confers no affirmative obligations on the state to protect the safety or security of its citizens.[125] In the Court's view, the Framers were content to leave protection for personal safety "to the democratic political processes"—processes, it should be noted, that exclude minors like Joshua from voting.[126] The Court was adamant that the Constitution is a charter of negative liberties that does not generally impose affirmative duties on either the state or private persons to protect the interests or rights of others.[127]

Importantly, Chief Justice Rehnquist did acknowledge that the state's custodial control over persons gives rise to affirmative duties in certain limited circumstances, specifically when persons are taken involuntarily into state custody.[128] The Court described the doctrine of affirmative state duties as operating "when the State takes a person into its custody and holds him there against his will."[129] As the Court explained, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[130] *DeShaney* thus affirmed the principle that state custodial control over an individual can give rise to affirmative constitutional duties.

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124. DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189 (1989).

125. *Id.* at 195-96.

126. *Id.* at 196.

127. *See also* Harris v. McRae, 448 U.S. 297, 317-18 (1980) (no right to abortion funding); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no right to housing); Youngburg v. Romeo, 457 U.S. 307, 317 (1982) ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border.").

128. *See DeShaney*, 489 U.S. at 198 ("It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."). The Court also mentioned in a footnote that affirmative rights might arise when children are taken into foster care. *Id.* at 201 n.9.

129. *Id.* at 199-200.

130. *Id.* at 200.

While *DeShaney* has been taken to stand for the principle that the state owes no affirmative duties to anyone,[131] its recognition that custody entails duties is a major exception that opens the door to recognizing parental duties to the children in their custody. If duties arise from custodial control over a person, then parental custodial authority over children would seem, on its face, to fit the bill.

The recognition that custody can give rise to affirmative duties does not resolve the constitutional question, for parents are not state actors. Even if custody does entail duties, the state action doctrine might be viewed as an insurmountable barrier to imposing constitutional duties on private parties. Chief Justice Rehnquist underscored that Joshua suffered his injuries "while he was in the custody of his natural father, who was in no sense a state actor."[132] He elaborated: "While the State may have been aware of the dangers Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[133] The implication is clear. While parental *rights* to the care and upbringing of children are firmly established, parental *duties* cannot exist given the seemingly obvious fact that parents are private actors, and—apart from the prohibition on slavery—the Bill of Rights regulates only state action.[134] Even if duties do run with custodial authority over children, as we seem obliged to conclude, those duties must be limited to the state.

Yet, while parents are not state actors, they are not ordinary private parties either. Joshua's father was able to carry out his violent attack only because the law affords parents exclusive custodial rights over their children. Parents occupy a unique place in constitutional law as private persons with near-absolute control over other persons, namely their children.[135] This near-absolute, constitutionally enforced control means that parents as private actors are not free from constitutional duties to the children in their care. The following Part introduces the *in loco reipublicae* framework and explains in greater detail the theory of state action that supports recognizing parents' constitutional duties to ensure children's democratic upbringing.

II. THE *IN LOCO REIPUBLICAE* FRAMEWORK

This Part outlines a new framework for children in constitutional law that recognizes shared parental and state duties to safeguard children's fundamental

131. *See* Bandes, *supra* note 121, at 2273-76; Gary B. v. Whitmer, 957 F.3d 616, 656 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (2020).

132. *DeShaney*, 489 U.S. at 201.

133. *Id.*

134. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

135. *See infra* Section II.A.3.

citizenship rights. The *in loco reipublicae* framework centers on the idea that parents have constitutional duties to children arising from a unique combination of children's citizenship rights and their in-custody status in constitutional law. The Constitution not only confers rights upon children as developing citizens; it also ensures those rights are accessible to children by conferring duties on their parental custodians. This is a powerful constitutional cocktail. Either element alone might not be enough. But taken together, citizenship rights and in-custody status provide a framework for parents *in loco reipublicae* duties to children that resolves the seemingly intractable conflict between parental authority and children's citizenship rights. The *in loco reipublicae* framework safeguards children's democratic upbringing even as it respects the vital role of parents in raising children.

Parents' *in loco reipublicae* duties are defined in the context of children's specific citizenship rights. As discussed above, these rights encompass, at a minimum, children's rights to free expression and association under the First Amendment, to educational equality under the Equal Protection Clause, to relationships with parents and other important persons under the Due Process Clause, and to procedural justice in the school and criminal contexts.[136] Working out parents' *in loco reipublicae* duties in all these areas will require time and care. This Article begins that work in Part III by examining parental duties relating to children's right of access to ideas under the First Amendment, a right that lies at the heart of children's development as democratic citizens.

A. Citizenship Rights and Duties

The basic structure of the *in loco reipublicae* framework rests on the proposition that children are different by virtue of their in-custody status. This Section describes this constitutionally significant difference and explains how the existing doctrine of state *in loco parentis* duties provides a template for recognizing parents' *in loco reipublicae* duties to safeguard children's rights as developing citizens.

1. Children's In-Custody Status

The Supreme Court has frequently emphasized that children are, for constitutional purposes, "different."[137] As the Court has explained, children "generally

136. *See supra* Section I.A.

137. *See* Miller v. Alabama, 567 U.S. 460, 471 (2012) ("[C]hildren are constitutionally different from adults for purposes of sentencing."); *see also* J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) ("[C]hildren cannot be viewed simply as miniature adults."); Bellotti v. Baird, 443 U.S.

are less mature and responsible than adults"[138] and "often lack the experience, perspective, and judgment to recognize and avoid choices that would be detrimental to them."[139] Justice Sotomayor presented the "children-are-different" position in *J.D.B. v. North Carolina*, a case that held that age is a relevant factor in the determination of whether a child is "in custody" for purposes of the *Miranda* analysis.[140] In her opinion for the majority, Sotomayor emphasized that the Court's constitutional pronouncements about children's differences are consistent with the law's general "settled understanding that the differentiating characteristics of youth are universal."[141] These developmental differences justify the law's treatment of children as primarily dependent beings in need of parental care.[142]

Children's "difference" is not only developmental; it is also a legal condition. Children are always in the legal custody of an adult. The Supreme Court has recognized this special legal condition, noting that the child's liberty interests "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody."[143] That children are always in custody is simply another way of saying that some adult always has rights of control over them. From the perspective of children, the doctrine of parental rights is a doctrine of custodial assignment. In affirming parental rights to the custody of children, the Supreme Court transforms children's actual differences into a regime of legal difference: children's in-custody legal status.

What children's in-custody status means is that they effectively cannot exercise their rights without the approval, tacit or otherwise, of their custodial

622, 635 (1979) ("[J]uvenile offenders constitutionally may be treated differently from adults."); Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (constitutionally differentiating juveniles from adults for the purpose of execution); Graham v. Florida, 560 U.S. 48, 68 (2010) (constitutionally differentiating juveniles from adults for the purpose of sentencing to life imprisonment); Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) ("I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." (footnote omitted)); Lee v. Weisman, 505 U.S. 577, 593 (1992) ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.").

138. *J.D.B.*, 564 U.S. at 272 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982)).

139. *Id.* (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion)).

140. *Id.*

141. *Id.* at 273.

142. *See* Dailey & Rosenbury, *supra* note 4, at 1457 ("[T]he emphasis on children's dependency and eventual capacity underlies the entire field of children and law, in large part because adult authority over children derives its primary legal justification from children's dependent status.").

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

caregivers.[144] Whatever one thinks of the value of negative liberty for adults, the concept simply does not apply to children in the custody of their parental caregivers. For children to be able to exercise their rights, they cannot simply be left alone. Adults must provide them with the opportunities required for the meaningful exercise of their rights and must give them permission to exercise those rights. While children may have formal rights to free speech, for example, they do not have effective enjoyment of those rights without the support of either parents or the state, or both.

Thus, even when older children have some independent ability to exercise their rights, they are nevertheless under the constitutionally protected authority of their parents, who may, at their discretion, interfere with children's exercise of their rights to the point where children have no effective enjoyment of their rights. Parents may discipline their children, isolate them from other persons who might help facilitate their rights, deprive them of funds or materials needed to exercise rights, or educate children in the home. Even in school, children are not free from parental control. The school might choose to defer to parental authority over certain school-related matters, such as sex education. And parents, if they hear of their children's expressive activities in school, are free to punish them or withdraw them from school.[145] Children's in-custody status is a residual form of child coverture that threatens children's rights, including those rights that secure a democratic upbringing.[146]

Children's in-custody status is a central feature of the *in loco reipublicae* framework. As we have seen, custody in law generally gives rise to duties on the part of the custodian. If children's citizenship rights are to be meaningful, it necessarily follows that children's adult custodians must have duties to allow and, in some instances, facilitate children's enjoyment of those rights. Children are different because, for them, negative liberty rights are not enough; their custodial caregivers and the state must provide them with opportunities to exercise their rights. The *in loco reipublicae* framework views children's in-custody status as a source not of constitutional disability, but of parental duties to respect the citizenship rights of children.

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144. Children do have certain rights in the criminal- and juvenile-justice systems and in school that exist free from parental control. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); *In re* Gault, 387 U.S. 1, 13 (1967).

145. Of course, children often defy their parents, and controlling children can be a difficult task. But parents have ultimate authority, and, if children become defiant enough, the state will take control.

146. *See* Dailey & Rosenbury, *supra* note 32, at 93.

2. *The* In Loco Parentis *Template*

The term *in loco reipublicae* deliberately references the state's *in loco parentis* duties to children. Under this doctrine, the state "stands in place of a parent" by assuming lawful custody of the child; at that moment, the state acquires duties to care for the child. Two factors stand out as critical to the state's *in loco parentis* duties: these state caregiving duties arise from children's in-custody status, and they are shared responsibilities between parents and state. These two elements of the *in loco parentis* doctrine provide a template for the inverse: the *in loco reipublicae* duties of parents standing in place of the state.

It is well accepted in the law that parents have primary caregiving rights to the care and custody of children. As explained earlier, parents have fundamental due process rights to the custody and upbringing of their children free from interference by state officials.[147] But rights are not all that parents hold: as the primary custodians of their children, parents also have primary responsibilities to care for them.

Parental duties to care for children are implicit in the Supreme Court's doctrine of parental rights. The very definition of who qualifies as a parent in constitutional law rests in part on the presumed obligations of the parental role.[148] In *Lehr v. Robertson*, for example, the Supreme Court held that nonmarital fathers must fulfill certain duties in order to claim parental rights.[149] Moreover, parents can lose their constitutionally protected rights if they fail to fulfill caregiving duties. In *Stanley v. Illinois*, the Court confirmed that parents have rights as long as they are "fit";[150] in other words, as long as they fulfill the duties of parenthood. Because the Supreme Court has never relied completely on biology as the sole marker for parental rights, the definition and scope of parental rights turns on underlying assumptions about the parental role. Increasingly, those who fulfill the role—in other words, those who assume (or intend to assume) parental duties—enjoy parental rights.[151]

While parents have primary caregiving duties, the law recognizes that the state also has obligations to care for children when parents falter or children are otherwise in state custody, as they are, for example, when they are in school, foster care, juvenile detention, or state institutions of other kinds. In these

147. *See supra* Section I.B.1.

148. *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 269, 355 (2020).

149. Lehr v. Robertson, 463 U.S. 248, 260 (1983). At the time, this duty might have focused on fathers providing financial support.

150. Stanley v. Illinois, 405 U.S. 645, 652 (1972).

151. *See, e.g.*, Alstott et al., *supra* note 95; Courtney G. Joslin & Douglas NeJaime, *How Parentage Functions*, 123 COLUM. L. REV. 319 (2023).

circumstances, we say that the state stands in the place of parental caregivers.[152] State *in loco parentis* caregiving duties have a long history in American law.[153] The doctrine of *in loco parentis* recognizes that the state can—and, in some circumstances, *must*—assume custody of children.[154] When the state exercises custodial control, the state also takes on essential caregiving duties. These duties are common-law duties, but state custody also triggers constitutional caregiving duties under the Due Process Clause.[155]

Some commentators criticize the *in loco parentis* doctrine for the power it confers on school officials to discipline children.[156] Given that parents exercise near-absolute power over children, a theory that puts the state in the position of parents would appear to risk conferring on the state unreasonably broad powers

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152. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) ("The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where children's actual parents cannot protect, guide, and discipline them.").

153. William Blackstone is most often cited as authority for the common-law "delegation theory" of *in loco parentis* disciplinary power that allowed private tutors to discipline the children in their charge on the theory that parents had delegated this disciplinary authority. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *441 ("[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis* . . . ."); *see also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *206-07 ("So the power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education."). For discussion of the history of *in loco parentis*, see Morse v. Frederick, 551 U.S. 393, 413 (2007) (Thomas, J., concurring); and Susan Stuart, In Loco Parentis *in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 972-83 (2010). For a review of the *in loco parentis* doctrine as it functions in contemporary parentage and custody law, see Joslin & NeJaime, *supra* note 151, at 322-23.

154. *See* Schall v. Martin, 467 U.S. 253, 265 (1984) ("[Children] are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.").

155. *See* Doe v. N.Y.C. Dep't of Soc. Servs., 649 F.2d 134, 141-42 (2d Cir. 1981); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 794-97 (11th Cir. 1987) (en banc). In *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989), the Court acknowledged these lower courts' holdings. *See also* Rudy Estrada & Jody Marksamer, *The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know When Working with LGBT Youth*, NAT'L CTR. LESBIAN RTS. 2 (2006), https://www.nclrights.org/wp-content/uploads/2013/07/LegalRights_LGBT_State_Custody.pdf [https://perma.cc/36Z3-3NN7] ("Since the *DeShaney* decision every court that has considered the issue has found that children in the care and custody of the state have an affirmative right to safety, which imposes a corresponding duty on the state to provide protection from harm.").

156. *See* Driver, *supra* note 106 ("The in loco parentis doctrine was in no way essential to reach the correct result in Ms. Levy's case, and its invocation could spell disaster for the constitutional rights of the more than 50 million students when they are on campus.").

over children.[157] Yet, when properly understood as a function of the state's custody over children, one need not fear expansive *in loco parentis* authority. Rather, the doctrine of *in loco parentis* captures the importance of state responsibilities to children and, when rightly understood, furthers rather than harms children's need for care. When the state stands in place of the parents, it remains a state actor subject to constitutional constraints.[158] The doctrine of *in loco parentis* duties as applied in school must be limited by the proper pedagogical and caregiving authority of the state as well as all other constitutional limits on state action.

3. *Parents'* In Loco Reipublicae *Duties*

The *in loco reipublicae* framework mirrors the template just described: parents' *in loco reipublicae* duties arise from children's in-custody status, and they are shared duties between parents and state. The framework begins with the generally accepted proposition that the state has the primary duty to ensure children receive a democratic upbringing. In this regard, all fifty states recognize their duty to provide a free public education. As already discussed, the Supreme Court has emphasized the close tie between education and children's democratic upbringing.[159] In *Plyler v. Doe*, for example, the Court noted that public schools are "a most vital civic institution for the preservation of a democratic system of government"[160] and "the primary vehicle for transmitting 'the values on which our society rests.'"[161] Public schools "provide each child with an opportunity to

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157. Justice Thomas has taken the position that the state assumes full parental powers, unencumbered by any additional constitutional limitations. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2059-60 (2021) (Thomas, J., dissenting); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (noting that school authorities acting *in loco parentis* may restrict students' speech); Morse, 551 U.S. at 413 (Thomas, J., concurring) (noting that courts have generally recognized schools' authority to discipline students under the *in loco parentis* doctrine). Because of concerns over the reach of state power, there are some who call for the elimination of the *in loco parentis* doctrine altogether. *See* Stuart, *supra* note 153, at 1005 ("To the extent that *in loco parentis* is at the root of . . . problems [wrought when the doctrine grants schools magnified discretion], it should be put to death, quickly and now.").

158. These additional constitutional limits include, among others, the Due Process Clause, the Fourth Amendment, and the Establishment Clause. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985); Lee v. Weisman, 505 U.S. 577 (1992).

159. *See supra* Section I.A; Buss, *supra* note 38, at 86. S*ee generally* Millat, *supra* note 54 (explaining that while the Court values the role of public education in promoting democracy, its decisions do not necessarily promote it).

160. Plyler v. Doe, 457 U.S. 202, 221 (1982) (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

161. *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)).

acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process" as adults.[162]

The state's duty to provide a democratic education has led some commentators and lower courts to conclude that children have a federal constitutional right to education.[163] While the Supreme Court has never held that children have an affirmative right to education under the federal Constitution, the Court has left open the possibility that a right to some minimum education exists. In *San Antonio Independent School District v. Rodriguez*, the Court declined to hold that education is a fundamental constitutional right, but the Court also expressly declined to say that it was not. Instead, when given the opportunity to state that the government has no educational duties under the Constitution, the *Rodriguez* Court did not.[164] And in *Plyler v. Doe*, the Court expressly acknowledged that, while "education is not a 'right' guaranteed to individuals by the Constitution . . . neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[165] Moreover, even if children do not have a judicially enforceable right to education under the federal Constitution, the fact remains that a democratic state (rather than families) is the primary guardian of children's democratic upbringing.

While the state has the primary duty to provide children with a democratic upbringing, the state cannot do it alone. As with caregiving, the democratic socialization of children requires both parental and state involvement. The state

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162. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973); *see* Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1068 (6th Cir. 1987); 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, 641-42 (1993).

163. *See, e.g.*, Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334-35 (2006); Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 N.W.U. L. REV. 1031, 1065 (2022) ("An affirmative right to education lies just beneath the surface of the Court's negative rights cases."); Gary B. v. Whitmer, 957 F.3d 616, 662 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020). *But see* A.C. v. Raimondo, 494 F. Supp. 3d 170, 193-94 (D.R.I. 2020) (rejecting students' claim of right to minimum civic education), *affirmed sub nom.* A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37 (1st Cir. 2022).

164. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36-37 (1973) ("Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [rights to free speech or vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short."); *see also* Papasan v. Allain, 478 U.S. 265, 285 (1986) ("As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the question[] whether a minimally adequate education is a fundamental right.").

165. *Plyler*, 457 U.S. at 221 (1982) (citation omitted). *Plyler* involved claims brought by undocumented children challenging a Texas law that allowed school districts to "deny enrollment in their public schools to children not legally admitted to the country." *Id.* at 205 (internal quotation marks omitted).

exercises primary authority for children's democratic upbringing, but parents are needed too. For example, parents have the responsibility of ensuring children can get to school. The idea of parents having citizenship duties is not entirely foreign in constitutional law. As the Supreme Court said almost a century ago, "[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."[166] The *in loco reipublicae* framework thus views parents as standing in place of the state when it comes to ensuring the democratic development of children.[167]

Parents' *in loco reipublicae* duties arise from the unique combination of parents' custodial control over children and children's citizenship rights. As we have seen, the law recognizes the close connection between custody and duties in constitutional law. The *in loco reipublicae* framework rests on this important relationship between custody and duties, and in particular the relationship between the Constitution's conferral of parental custodial power and children's citizenship rights. While the state plays a primary role in educating children to become democratic citizens, parents also have a constitutional role to play in ensuring that their children have some meaningful enjoyment of the rights central to a democratic upbringing.

The *in loco reipublicae* framework highlights that caregiving and citizenship duties are not hermetically sealed spheres; parents and state are engaged in the shared enterprise of meeting children's caregiving and citizenship needs.[168] The framework thus draws out a fundamental symmetry in the affirmative duties of parents and state: each of the two duty-holders (parent and state) operates in a dual capacity, ensuring that children are, on the one hand, safe and well cared for physically, emotionally, and morally, and, on the other hand, prepared for the obligations and freedoms of adult rights-bearing citizenship in a democratic polity. In affirming parents' *in loco reipublicae* duties, the framework recognizes the deep interrelationship between parents and state in carrying out the shared duties of raising children to become democratic citizens.

Parents' *in loco reipublicae* duties are consistent with many of the most prominent Supreme Court parental-rights cases. In *Wisconsin v. Yoder*, for example, the Court implied the existence of parental duties when evaluating Amish

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166. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he family itself is not beyond regulation in the public interest.").

167. For work exploring the connections between family caregiving and participation in society, see ACKERMAN, *supra* note 36, at 140-50; Dailey, *supra* note 17, at 462-82; Alstott, *supra* note 82, at 6-10; Barbara Bennett Woodhouse, *Ecogenerism: An Environmental Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 409 (2005) ("Families not only nurture and protect children, but they also teach them to be citizens of a larger society.").

168. *See* Dailey & Rosenbury, *supra* note 4, at 1515-27.

parents' objection to the state compulsory-education law.[169] Although the Court upheld the Amish parents' right to withdraw their children from school after the eighth grade, the Court emphasized that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[170] The Court then noted that, under the facts of the case, the parents were providing a minimum level of education. The Amish children attended public school through the eighth grade, and the Amish "learning by doing" effectively prepared them, the Court concluded, to be "capable of fulfilling the social and political responsibilities of citizenship."[171] The *Yoder* case can be read to affirm the Amish parents' *in loco reipublicae* duties to ensure that their children receive a democratic upbringing in whatever form it takes.

In *Prince v. Massachusetts*, the Supreme Court was quite explicit about parental duties to provide children with the opportunity to become adult democratic citizens.[172] The Court balanced custodial caregivers' rights against "the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[173] In holding that the state had the authority to prohibit the guardian in that case from allowing the child to distribute religious literature on the streets at night, the Court emphasized that, while "[p]arents may be free to become martyrs themselves . . . it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that decision for themselves."[174]

Of course, not every Supreme Court decision affecting children is fully consistent with the *in loco reipublicae* framework. Two cases in particular would require modification. The decision in *DeShaney*, which actually recognized a connection between custody and duties, nevertheless clearly stated that parents as private actors have no constitutional caregiving duties to their children, a position at odds with *in loco reipublicae* tenets. And the decision in *Troxel v. Granville*, while declining to establish a per se rule of parental control over children's relationships with third parties, nevertheless implied that, absent harm to the child,

169. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

170. *Id.*

171. *Id.* at 225. Indeed, the Court suggests that the Amish are in some ways the model citizens: "[T]he Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society." *Id.* at 225-26.

172. Prince v. Massachusetts, 321 U.S. 158, 166 (1994).

173. *Id.* at 165.

174. *Id.* at 170.

parents have ultimate authority to control a child's access to important people in the child's life, also a position, as we will see, at odds with the *in loco reipublicae* framework.

Because parental duties derive in part from children's in-custody status, these duties necessarily evolve over time as children's in-custody status evolves as well. Parental duties to very young children will reflect children's near-total needs for parental care and guidance. As children age, the parental role must also evolve to account for children's increasing autonomy and independent decision-making powers. Parental duties to adolescents, for example, should encompass giving children greater access to activities and people outside the home. These duties, arising in part from children's First Amendment right of access to ideas, are discussed in greater detail below.[175] The important point here is that parental duties—and children's rights, as well—must be tailored to reflect children's changing custody status.

4. The State Action Question

The *in loco reipublicae* framework might appear to be in conflict with the well-established constitutional doctrine of state action: that the Fourteenth Amendment governs governmental conduct but does not reach private behavior.[176] The idea that children's citizenship rights imply duties on the part of parents might seem to contravene the longstanding principle that private actors are not subject to the direct commands of the Fourteenth Amendment.[177]

To be clear, the *in loco reipublicae* framework does not view parents as state actors. Parents do not violate the Constitution when they search their children's belongings or refuse to let them speak at the dinner table. There is no world in which treating parents as state actors in constitutional law makes sense if doing so means subjecting parents to the full commands of the Constitution.

But it should be equally obvious that parents are not ordinary private actors under our Constitution either.[178] They are different in precisely this way: parents are vested with near-absolute, constitutionally enforced custodial authority over other individuals, namely their children. Simply put, a parent's special constitutional powers—when combined with children's citizenship rights—alter the

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175. *See infra* Section II.B.

176. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

177. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989) (stating that the state agency's failure to remove a child from the custody of his abusive father did not implicate the Fourteenth Amendment because the father was "in no sense a state actor").

178. *See* Emily Buss, *What Does Frida Yoder Believe?*, 2 J. CONST. L. 53, 65 (1999) ("A strong claim can be made that the State is implicated every time a parent restricts the exercise of a child's fundamental rights.").

constitutional calculus and give rise to constitutional duties on the part of parents. Parents stand in place of the state for purposes of safeguarding children's citizenship rights because, in their full custodial control over children's lives, parents possess extraordinary powers to ensure — or impede — children's democratic citizenship.

Parental rights are thus unique in constitutional law to the extent that they are rights of near-absolute control over individuals. It is true that individuals in other contexts also exercise authority over other persons, such as employers or property owners, and yet we do not ordinarily impose constitutional duties on them.[179] But parental rights are fundamentally different from property or contractual rights. Unlike those subject to contractual or property authority, children do not voluntarily enter and exit the state of family governance.[180] But more importantly, while the right to property does allow for the exercise of private power over others, it does not come close to the kind of plenary authority we give to parents. Parental rights confer a custodial power that gives parents near-absolute and unilateral control over children's lives. As discussed above, since the passage of the Thirteenth Amendment, no other form of constitutionally protected private governance goes so far.[181]

In light of their unique custodial control over children, parents have corresponding constitutional duties to ensure children's development as citizens of our democratic polity. The state can provide a civic education in the ways of government, cultivate the decision-making skills needed for citizenship, and establish the classroom as the marketplace of ideas. But the state cannot, on a day-to-day basis, ensure children have access to education and the enjoyment of their citizenship rights outside of school. Parents thus occupy a unique middle ground

179. Although we do impose statutory duties on them through, for example, antidiscrimination laws, which are, for the moment at least, constitutional. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250-62 (1964).

180. Of course, the distinction should not be overstated. Many employees may be theoretically free to leave their employment but are not in fact free given financial constraints. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472-73 (1923).

181. *See supra* Section I.B.1. For work on similar issues relating to property law and sovereignty, see Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927); and Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988). *See also* State v. Shack, 277 A.2d 369, 375 (N.J. 1971) (holding that an employer may not assert property rights that infringe on workers' fundamental associational rights). *But see* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (holding that a California law giving union organizers the right to access employees on a private employer's property violates the Takings Clause).

in constitutional law: clearly not state actors but nevertheless carrying out a vital, constitutionally significant public role in raising democratic citizens.[182]

Lee Teitelbaum and James Ellis have called for "a special theory for state action in connection with governmental regulation of parent-child relations."[183] They argue that children "are routinely subject to privately undertaken action authorized by state law in some sense."[184] They view *Planned Parenthood of Central Missouri v. Danforth*, which struck down a law requiring parental consent for a minor to obtain an abortion, as recognizing the "private" parental veto as a form of state action because it was authorized by law—"otherwise the due process claim could never have been reached."[185] But, as they also recognize, this theory broadly applied proves too much. Not every exercise of parental authority constitutes state action. The *in loco reipublicae* framework identifies the sphere of children's citizenship rights as critical to children's democratic development and therefore to a constitutional scheme of parental duties.

The Supreme Court has imposed limited duties on private actors in some contexts. For example, the Court has famously held that certain private-property owners have duties to persons coming onto their property. In *Pruneyard Shopping Center v. Robins*, the Court limited a privately owned shopping center's rights to exclude a group of high school students from expressing their views on the center's property.[186] And in *Marsh v. Alabama*, the Court held that Jehovah's Witnesses could not be prosecuted for distributing religious literature on the premises of a company-owned town, essentially imposing First-Amendment duties on the company.[187] In so holding, the Court emphasized that "[o]wnership does not always mean absolute dominion."[188] In the same vein, parental rights do not mean "absolute dominion" but must be defined and limited in recognition of parental duties to respect children's citizenship rights.

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182. Some have suggested social media platforms also occupy a constitutional space between public and private. *See* MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 96 (2021) ("Digital companies . . . could be seen as functioning like governments, controlling the public squares where people communicate."); *cf.* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969) ("There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.").

183. Lee E. Teitelbaum & James W. Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 158 n.13 (1978).

184. *Id.* at 157 n.13.

185. *Id.*

186. 447 U.S. 74, 88 (1980). *But see Cedar Point Nursery*, 141 S. Ct. at 2072 (holding that a state law allowing union organizers to access employees on a private employer's property was unconstitutional).

187. Marsh v. Alabama, 326 U.S. 501, 508 (1946).

188. *Id.* at 506.

Parents remain private actors while carrying out *in loco reipublicae* duties in the same way that the state, when carrying out *in loco parentis* caregiving duties, remains a state actor subject to the constraints of the Due Process Clause, the Fourth Amendment, and other constitutional provisions.[189] As noted earlier, some scholars have raised concerns that the state's *in loco parentis* power opens the door to treating the state as a private actor not limited by constitutional constraints imposed on state actors.[190] But that view misapprehends the structure of *in loco* duties. When standing in place of parents, the state exercises caregiving duties but otherwise retains its state identity. And the same is true for parents exercising *in loco reipublicae* duties. When standing in place of the state, parents possess constitutional duties but do not otherwise lose their identity as private actors in the constitutional sense of the term. They are still free to send their children to their rooms or to restrict what they say at the dinner table. But they are not free to restrict their children's lives in ways that significantly interfere with the citizenship rights that ensure children's democratic upbringing.

The *in loco reipublicae* framework unveils the permeable nature of the boundary between family and state.[191] As many have noted, the strict distinction between the public realm of citizenship and the private realm of caregiving is both descriptively wrong and normatively undesirable.[192] As a descriptive matter, the state is already deeply embedded in the family. The notion of a private sphere of family life "is belied by compulsory schooling, labor laws, marriage laws, parentage laws, child support, and child abuse laws," among many others.[193] The state's power to define parentage—who will be designated the child's legal

189. *See* New Jersey v. T.L.O., 469 U.S. 325, 336-37 ("In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.").

190. *See* Driver, *supra* note 106.

191. For work exploring the porous relationship between public and private power in other contexts, see Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Service Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145 (2017); and Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action and Private Property*, 5 TEX. A&M L. REV. 439 (2018).

192. For groundbreaking critiques of the idea of the "private" family, see Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); Janet Halley, *What is Family Law: Genealogy Part I*, 23 YALE J.L. & HUMAN. 1 (2011); and CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989). *See also* Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225 (1999) (distinguishing between models of privacy in family law); Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955 (1993) (arguing against the notion that the family is an inherently private institution).

193. Dailey & Rosenbury, *supra* note 32, at 83 n.23.

parents—is the most dramatic and far-reaching state "intervention" in the family.[194] Indeed, intervention hardly seems the right word for a legal doctrine of parentage that so deeply constitutes the family by determining who can be designated a family at law.

As a normative matter, the public-private distinction sets up a conflict between parents and state that denies their important shared role in furthering children's citizenship interests.[195] Of course, parents provide a kind of caregiving that the state cannot offer, and the state provides a kind of civic education in tolerance and pluralism that families should not be forced to deliver. And we are rightly alert to the dangers of state involvement in the moral upbringing of children; as the Supreme Court has told us, "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice."[196] The *in loco reipublicae* framework highlights the deeply interconnected roles of parents and state in the development of future adult citizens without erasing or trivializing the felt distinction between state and family. Protecting the parent-child relationship while at the same time ensuring children's democratic upbringing are the structuring aims of the *in loco reipublicae* framework.

B. Children's Right of Access to Ideas

This Section examines parental duties in the context of a specific citizenship right: children's right of access to ideas under the First Amendment. Protection of an adult's right of access to ideas arises from the common-sense proposition that free expression turns on having information from which to formulate views in the first place. As the Court explained in *Pico*, "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."[197] Protection of access to information thus

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194. *See id*. at 106.

195. The ideology of the private family also reinforces a system of privatized dependency with race, gender, and class implications. *See* Melissa Murray & Caitlin Millat, *Pandemics, Privatization, and the Family*, 96 N.Y.U. L. Rev. Online 106, 113-20 (2021); Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 Va. L. Rev. 2181, 2198-206 (1995); Laura A. Rosenbury, *Friends with Benefits?*, 106 Mich. L. Rev. 189, 193-94 (2007); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 Va. L. Rev. 385, 386-93 (2008); Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 J. Soc. Welfare & Fam. L. 426, 426-28 (2014).

196. Bellotti v. Baird, 443 U.S. 622, 638 (1979).

197. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion).

undergirds the individual's freedom to think and express their ideas freely. As adult members of a democratic polity, individuals must have access to the information "that enables people to act to advance their own and society's interests."[198] Specifically for children, however, the right of access to ideas plays a more fundamental role in their formation as democratic citizens.[199]

1. Access to Ideas for Children

While courts and commentators have recognized the importance of access to ideas for children, exactly how access to ideas furthers children's citizenship formation remains unexamined. This Section identifies four ways in which children's right of access to ideas may be critical to democratic citizenship: access to ideas helps to cultivate the capacity of free thought in developing children; it promotes the development of critical-thinking skills; it teaches the democratic values of tolerance, pluralism, and equality; and it gives children the expressive tools with which to develop their own values and beliefs in the present and as future adult citizens.

a. Cultivating Free Thought

To say that children have a right of access to ideas means that, at the most foundational level, they have a right to know about ideas different from those learned in the home. Even for young children, the right to receive ideas—to be exposed to competing points of view in a pluralistic democratic society—is an essential precondition to developing the adult capacities of free thought that nourish democratic self-government. As the Supreme Court warned in *West Virginia State Board of Education v. Barnette*, the failure to protect children's First Amendment freedoms risks "strangl[ing] the free mind at its source."[200] Exposure to competing points of view ensures that children understand that the way of life in which they are raised is not the only way of life.[201] It gives children the

198. Martha Minow, Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech 98 (2021).

199. Few legal scholars have considered the values underlying children's free speech rights specifically. For exceptions, see John H. Garvey, *Children and the First Amendment*, 57 Tex. L. Rev. 321, 335-50 (1979); and Driver, *supra* note 6, at 7-12.

200. 319 U.S. 624, 637 (1943).

201. *See* Gutmann, *supra* note 36, at 30 (arguing that children should be equipped "with the intellectual skills necessary to evaluate ways of life different from that of their parents").

knowledge that choice is possible and exposes them to the competing values and beliefs that make choice meaningful.[202]

Children's access to ideas outside the home opens their minds and teaches them that alternative beliefs and ways of life exist.[203] Exposure gives children an understanding that their worldview is not the *only* worldview, laying the groundwork for choosing—when the time comes—how to live their own lives. In opening children's minds to alternative ways of being, exposure to ideas preserves what Joel Feinberg has called children's "right to an open future."[204] Exposure does not insist that any one way of life is the correct way except to the extent it insists upon exposure itself as a necessary precondition to democratic citizenship. Exposure to ideas at an early age teaches children that choice exists, thus ensuring that, when the time comes, children will know how to participate as self-governing members of a democratic polity.

The right of access to ideas is thus an important way in which a democratic society helps to raise citizens to think for themselves, a capacity implicit in the ideal of an autonomous, self-governing citizen.[205] The right of access to ideas furthers children's formation in the most basic sense of nurturing free minds. Without exposure to alternatives, children are effectively bound to received parental orthodoxy. Borrowing from *Tinker*, access to ideas ensures that children do not become "closed-circuit recipients" of parental views.[206]

Homeschooling that isolates children from the world is perhaps the clearest example of a childrearing practice that potentially threatens the development of free minds. While every state provides a free public education in primary and secondary grades, every state also allows parents to homeschool their

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202. *See* ACKERMAN, *supra* note 36, at 162 ("[A] liberal education requires toleration—indeed, encouragement—of . . . doubts. It is only by questioning the seeming certainties of [their] early moral environment that the child can begin to glimpse the larger world of value that may be [theirs] for the asking."); Alstott, *supra* note 82, at 7-8 ("A liberal education ideally would . . . foster the capacity to reason and provide cultural opportunities that differ from the child's family background."). *But see* GALSTON, *supra* note 39, at 254.

203. For an exploration of the ways in which children can grow up to be different from their parents, see, for example, ANDREW SOLOMON, FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY 2-5 (2013).

204. *See* Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 124-26 (William Aiken & Hugh LaFollette eds., 1980) (describing a child's right "to have . . . future options kept open until he is a fully formed self-determining adult capable of deciding among them").

205. *See* Sant, *supra* note 36, at 667-68 (describing deliberative democratic theorists Seyla Benhabib, Amy Gutmann, and Dennis Thompson as emphasizing the quality of reasoned thinking).

206. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

children.[207] In many states, there is little or no effective oversight of parental homeschooling, leaving children potentially isolated in the home.[208] As discussed below, some conservative religious communities seek to educate their children entirely separate from secular society.[209] Under the *in loco reipublicae* framework, any upbringing that isolates children completely from exposure to the broader world would violate parents' duty to ensure that children have some meaningful access to ideas outside the home. Children have the right to know that competing belief systems exist and that, as they grow toward adulthood, they may choose to adopt one of those alternative belief systems as their own. Access to ideas in this very basic sense values the cultivation of free thought over *absolute* parental indoctrination.

While the designation "free thought" suggests the absence of mental coercion, raising children to think freely by exposing them to diverse ideas is indisputably itself a coercive practice. We cannot escape the fact that all childrearing is at some level a form of indoctrination. Justice Stewart suggested as much when he referred to the reality of children's "captive" status: "[A]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[210] This inescapable paradox of a democratic upbringing—that a liberal democracy requires inculcating democratic habits of mind in "captive" children—is discussed more fully below.[211] What can be said here is that providing children with a First Amendment right of access to ideas does not aim to destroy children's ties to their parents' way of life, but attempts to balance in a more nuanced way, however imperfectly, the important value of the parent-child custodial relationship and the sometimes competing value to children of their development as democratic citizens.

b. Developing Critical-Thinking Skills

Access to ideas also helps to ensure that children develop the skills of critical thinking that are central to the ideal of citizenship in a healthy democratic

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207. *See* Dailey & Rosenbury, *supra* note 32, at 128-29.

208. *See id.* at 129 ("Most states impose minimal or no requirements on homeschooling parents, and only eleven states require that parents serving as homeschool teachers have a high school diploma or its equivalent.").

209. *See infra* Section II.C.2.

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

211. *See infra* Section II.C.2; *see also* Stolzenberg, *supra* note 162, at 582-83 (discussing the history of complaints within certain "insular communities" that "liberal Western education . . . indoctrinates [their children] in tolerance").

society.[212] It is partly through the socialization of children in the ways of critical inquiry and reasoned deliberation that a democratic society sustains itself. As two commentators explain, a "democratic education requires teachers to create a political classroom in which young people develop the skills, knowledge, and dispositions that allow them to collectively make decisions about how we ought to live together."[213] Amy Gutmann writes, "Children must learn not just to *behave* in accordance with authority but to *think* critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens."[214] Cultivating critical-thinking skills through exposure to ideas helps to ensure that children will be prepared to engage in adult inquiry and deliberation, and that the democratic community will therefore flourish.

Understanding what critical thinking consists of and how it may best be fostered is itself the subject of intense debate within educational circles going back at least to John Dewey,[215] but some basic observations drawn from the legal literature can be made here. At a basic level, an education in critical thinking involves learning the skills of information processing, rational analysis, and conceptual ordering.[216] In *Mozert v. Hawkins County Board of Education*, for example, the circuit court described critical thinking as "requir[ing] the development of higher order cognitive skills that enable students to evaluate the material they read, to contrast the ideas presented, and to understand complex characters that appear in reading material."[217] Children must acquire the tools to distinguish truth from falsehood, to evaluate the strength of differing views and perspectives, and ultimately to make important decisions in a reasoned manner.

The ideal of mature critical thinking is prominent in Supreme Court decisions involving a diverse array of children's rights, including children's rights of free speech, religious liberty, criminal sentencing and procedure, and reproductive freedom.[218] In these cases, the Court emphasizes that children's capacity for

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212. *See* Garvey, *supra* note 199, at 350; Stephen Macedo, Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism 269 (1990). *See generally* Gutmann, *supra* note 36 (discussing the role of education in preparing students to participate in a democratic society).

213. Diana E. Hess & Paula McAvoy, The Political Classroom: Evidence and Ethics in Democratic Education 11 (2015).

214. Gutmann, *supra* note 36, at 51; *see* Millat, *supra* note 54, at 548-52.

215. *See* Dewey, *supra* note 36.

216. *See* Dailey, *supra* note 17, at 433.

217. 827 F.2d 1058, 1060 (6th Cir. 1987).

218. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (Establishment Clause); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (Free Exercise Clause); Roper v. Simmons, 543 U.S. 541 (2005) (criminal sentencing); J.D.B. v. North Carolina, 564 U.S. 261 (2011) (criminal

critical thinking falls far short of the ideal of the mature adult decision maker. Children's lack of psychological maturity is understood to justify denying them certain rights, such as the right to vote, the right to work, or the right to marry. In some cases, children's perceived cognitive deficits support granting them special rights, such as the right not to be sentenced to death or the right to a lesser criminal punishment. In all cases, children are viewed as lacking the critical-thinking skills of adult citizens.

Developing the skills of critical thinking is thus a central part of children maturing as responsible legal actors and democratic citizens. In *Bellotti v. Baird*, the Supreme Court identified three ways in which children's critical faculties distinguish them from adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[219] Similarly, in *Roper v. Simmons*, the Court identified three related differences relevant to children's criminal responsibility: "[a] lack of maturity and underdeveloped sense of responsibility"; greater vulnerability or susceptibility "to negative influences and outside pressures, including peer pressure"; and "personality traits . . . [that] are more transitory, less fixed."[220] Raising children to be mature, responsible citizens cannot be done without exposing them to ideas, for thinking critically presumes the ability to evaluate, contrast, and choose among an array of competing views. Access equips children to understand, test, and defend their beliefs and values against opposing views in a pluralistic democratic society.

c. Teaching Democratic Values

Relatedly, respecting children's right of access to ideas models for children some of the basic values of a liberal democratic polity. This Article does not provide a comprehensive picture of the universe of democratic values, but more narrowly asserts that a marketplace of ideas models three values associated with democratic life: tolerance, pluralism, and equality. A marketplace of ideas embodies tolerance for competing viewpoints; although any one speaker might be intolerant, the marketplace itself is structured around tolerance of divergent viewpoints. The value of pluralism, too, is on display in a system that allows diverse views to be expressed. And ideally, there is no hierarchy of voice allowing some speakers greater access to the marketplace or to drown out the voices of

procedure); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976) (reproductive freedom); Bellotti v. Baird, 443 U.S. 622 (1979) (same).

219. 443 U.S. at 634.

220. 543 U.S. at 569-70.

others. A well-functioning marketplace welcomes all speakers and listeners, *even children*.

The Supreme Court has made clear that a democratic society should rely on modeling rather than coercion as the method for teaching democratic skills and values. Justice Jackson addressed this issue in *Barnette* when he addressed Justice Frankfurter's dissenting argument that disciplining students who refuse to salute the flag is the best, and perhaps only, way to instill democratic patriotism. Jackson responded that the inculcation of democratic norms best takes place through modelling rather than authoritarian training: "Love of country must spring from willing hearts and free minds."[221] In *Tinker*, too, Justice Fortas spoke for the majority in favor of schools modeling democratic values of free speech rather than, as Justice Black advocated in dissent, disciplining students who speak out.[222] As John Garvey has observed, "[t]he most striking aspect of the *Tinker* opinion is its implicit rejection of the idea that discipline is itself one of the objectives of education."[223] It was an affirmation of modeling over coercion when the Supreme Court recognized children's right to free speech in the schoolhouse.[224]

d. Enriching Identity Formation

Protecting children's right of access to ideas respects children as persons in the present and helps children to form their own identities. Many recognize that, for adults, freedom of "expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self."[225] The same can be said for developing children.[226] As Colin Macleod has argued, "[t]he claim each child has to develop and exercise the moral powers that ultimately shape each person's distinct and independent moral personality gives rise to interests that children

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221. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943).

222. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting); *see also* Driver, *supra* note 106 (explaining the *Tinker* decision).

223. Garvey, *supra* note 199, at 340; *see also* Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (holding that public education prepares children for democratic society by "awakening the child to cultural values," "preparing him for later professional training," and "helping him to adjust normally to his environment"). Later, Justice Stevens would express a similar concern. *See* New Jersey v. T.L.O., 469 U.S. 325, 385-86 (1985) (Stevens, J., concurring in part).

224. *See Tinker*, 393 U.S. at 503; Goss v. Lopez, 419 U.S. 565, 581 (1975).

225. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

226. *See* Garvey, *supra* note 199, at 345 ("The notion that liberty of speech is a primary . . . good rests on the close connection between free expression and individual autonomy and self-realization.").

have, *qua* children, to information and to conditions conducive to independent reflection and deliberation."[227]

The process of becoming an adult citizen with a formed identity of one's own does not take place overnight. Nor does it happen spontaneously upon turning eighteen. Access to a diversity of belief systems helps this developmental process along by allowing children to explore their personal identities as they develop greater powers of independent thinking and autonomy. Even at a young age, identity formation occurs through self-expression and the taking in of ideas.[228] The traditional view of children as dependent beings subject to full parental control neglects the important ways in which children have agency even as they are dependent on their parents socially, economically, and emotionally. The recognition of children's developing agency signifies "children's power to affect the direction of their own lives even as persons who are still dependent on adults."[229] This agency within dependency can be seen from a very early age as children struggle for independence within attachments of love and dependency.

Giving children access to ideas means teaching children to understand and manage the existence of views different from their own. In a diverse society, access allows children to test and defend their values against opposing views. Ideally, a public education fulfills this role. As the Supreme Court noted in *Lee v. Weisman*, "[b]y the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these."[230] Children's exposure to diverse and sometimes opposing views is exactly that to which a democratic education aspires.

Children raised as "closed-circuit recipients" of parental views do not have the same opportunities to explore new and diverse identities. As Justice Douglas famously argued in his dissenting opinion in *Wisconsin v. Yoder*, children denied access to school "will be forever barred from entry into the new and amazing world of diversity that we have today."[231] Fostering children's independent identities and choices will help to nourish cultural diversity: some children will choose to retain their family's system of beliefs and others will adopt differing views. Contrary to received wisdom, children's access to the world of ideas can

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227. Macleod, *supra* note 99, at 57.

228. At oral argument, the lawyer for B.L. in *Mahanoy* described the "critically important interest outside of the school context that we protect free speech, give kids the breathing space they need to be able to talk candidly and honestly, to share their emotions, to share their feelings." *See* Transcript of Oral Argument, *supra* note 119, at 79.

229. Dailey & Rosenbury, *supra* note 32, at 118.

230. 505 U.S. 577, 591 (1992).

231. 406 U.S. 205, 245 (1972) (Douglas, J., dissenting in part).

strengthen the cultural pluralism that is the foundation of a healthy democracy. Parents seeking to set strict limits on their children's exposure to ideas about critical race theory or gender identity in school are fully aware that children's access to ideas reinforces cultural pluralism. Respecting children's right of access to ideas serves to safeguard the free speech values of children's personal identity formation and the resulting enhancement of democratic values.

Exposing children to differing ideas thus respects children as persons in the present with potentially differing views or identities from their parents; it reassures children that they are not destined to live within a worldview that makes no room for them to be themselves. Exposure prepares children for adult citizenship by giving them the knowledge that they will be free, when the time comes, to choose their own way of life. It may be their parents' way, or it may be their community's way. But it may also be a different way.

2. *Parents' Duties to Ensure Access to Ideas*

As we have seen, children's exposure to the world of ideas outside the home is critical to their development as democratic citizens. The *in loco reipublicae* framework imposes on parents the duty, at a minimum, to allow their children access to ideas outside the home in a way that exposes children to differing values and beliefs. In addition to providing custodial care for their children, parents have constitutional obligations to ensure their children engage with ideas outside the home.

Parental *in loco reipublicae* duties to respect children's right to access ideas can be fulfilled in part by sending children to public school, which will usually expose children to a diversity of views. Homeschooling must be done in a way that ensures children are not isolated from the broader world of ideas.[232] If parents send children to private school, the school must be one that exposes children to ideas beyond those espoused by parents.[233] The state has an important role to play in enforcing these parental duties through educational requirements, school regulations, and homeschooling supervision.

Parental duties are not limited to formal schooling, however. As Laura Rosenbury has argued, a significant amount of children's development takes place "between home and school."[234] Encounters with other adults and children broaden children's exposure to ideas through relationships with important persons in children's lives. Although these persons might be de facto parents, that is, persons who have played a major caregiving role in the child's life, they might

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232. *See* Dailey & Rosenbury, *supra* note 32, at 131.

233. *See* Stolzenberg & Myers, *supra* note 29.

234. Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 834 (2007).

also be teachers, coaches, counselors, or other mentors. Peer relationships, too, expand and enhance children's knowledge and experience.[235] These relationships with other children remind us that, with appropriate protections in place, "adults are not the sole or even the primary influence on the lives of most children."[236]

In addition to education, therefore, children's relationship to persons other than parents plays an important role in exposing children to ideas outside the home. For some children, access to third parties may be critical or even lifesaving, as it can be for children struggling with gender identity issues in families where support is lacking. Although many parents of transgender children support their children's gender identity, some parents do not.[237] Exposing children to people outside the home serves children's immediate well-being by giving them reason to know that their identity is not aberrant and by providing access to those who might supply support and care.

Because of the importance of children's interactions with persons outside the home, children have some rights to those relationships, and parents have some duties to allow those relationships to flourish. We know that relationships to other adults and children are necessary for children's personal well-being, but as we have seen, they are important for children's democratic upbringing as well. Yet, in some jurisdictions, parents have the right to deny their children access to important third parties. Even in states with laws such as third-party visitation, parental wishes can carry near-dispositive weight. Under the *in loco reipublicae* framework, children would have rights to some relationship with third parties either upon reaching a certain age or with judicial approval.

Of course, parental rights to control children's associations within limits makes sense. We want and expect parents to supervise children's relationships with friends, mentors, teachers, and other adults in children's lives. But near-absolute control may go too far. Under the *in loco reipublicae* framework, states would be required to weigh children's interests in relationships with third parties as part of their rights as developing citizens. In *Troxel v. Granville*, although a plurality of the Supreme Court held that courts may not award visitation to third parties based solely on the best interests of the child, the plurality did not hold

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235. *See* MARY GAUVAIN, THE SOCIAL CONTEXT OF COGNITIVE DEVELOPMENT 59-61 (2001).

236. Donna Eder, *Peers and Peer Culture*, *in* THE CHILD: AN ENCYCLOPEDIC COMPANION 716, 716 (Richard A. Shweder ed., 2009).

237. Nicholas Ray, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness*, NAT'L GAY & LESBIAN TASK FORCE POL'Y INST. 16-18 (2006); *see* Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 372-73 (2007).

that third-party visitation is never allowed over the objection of parents.[238] For example, children should have the right to relationships with persons in certain categories, such as *de facto* parents or siblings.[239] Moreover, the state may not give parents the power to withhold consent for their children to participate in state-sponsored activities.[240]

Importantly, the existence of parental duties to respect children's right of access to ideas does *not* mean two things. First, as explained below,[241] parental duties do not require that parents allow their children access to *every* idea. What a democratic upbringing requires is a *sufficient* degree of exposure to people and activities outside the home to provide children with the knowledge that alternative belief systems exist and that they may choose to adopt a different set of beliefs as their own. Second, parental duties to respect children's right of access to ideas do not extend to speech that takes place entirely *inside the home*. Parents do have near-absolute authority to regulate what children say and hear around the dinner table. Their duties to ensure children's access to ideas govern children's lives *outside the family*. Thus, while parents may forbid their children from reading certain books in the home, parents should not be free to control what books a child reads at school. Of course, the line between home and the outside world—the line between private and public here—is only a guiding concept for determining what duties parents should have and is not a reified truth about the world. For example, children's use of social media transcends the boundary between home and the outside world and raises special concerns.[242]

Parents' duties to allow children exposure to ideas necessarily encompass a duty to help children negotiate the confusing and sometimes threatening world of ideas. Children need parents who supervise their engagement with the world, protecting them from harm and managing their exposure to ideas in an age-appropriate way. In an ideal world, parents would also help teach their children how and when to express themselves in ways that are consistent with social norms.[243] As discussed in greater detail below, parents are uniquely situated to know their children's particular capacities and vulnerabilities and to guide them

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238. 530 U.S. 57, 72-73 (2000); *see id.* at 88 (Stevens, J., dissenting) ("[I]t seems to me extremely likely 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.").

239. *See* Joslin & NeJaime, *supra* note 151, at 356-62.

240. *See infra* Section III.B.

241. *See id.*

242. Parental duties in the context of social media are discussed in Part III below.

243. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2047 (2021) ("[T]here is no reason to believe B. L.'s parents had delegated to school officials their own control of B. L.'s [vulgar speech].").

in managing the false, harmful, or simply confusing information circulating in the world.[244]

The Supreme Court has frequently referenced the guiding role of parents in supervising what children say and hear. In *Ginsberg v. New York*, for example, the Court upheld the power of the state to prohibit the sale of pornography to minors on the ground that "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression."[245] The Court specifically noted that "[t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[246] In emphasizing the importance of parental authority, the Court specifically noted that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."[247]

The Court has endorsed parental supervision even when upholding children's free speech rights. In *Brown v. Entertainment Merchants Association*, for example, the Court struck down state restrictions on the sale of violent video games to children on the ground that children have First Amendment rights to purchase the games. Nevertheless, the Court went out of its way to emphasize that, while the state may be prohibited from denying children the games, parents have the ultimate authority to control children's access to violent video games.[248] Similarly, in *Mahanoy v. B.L.*, the Court upheld B.L.'s free speech rights but made it clear that her parents had the authority—and duty—to discipline her for her "vulgarity."[249]

Nevertheless, while parental guidance is important for children's safety and development, this involvement does not extend to shielding children from the world of ideas altogether. The parental role should include guiding children's learning, sharing their own views about the ideas to which children are exposed, and protecting children against harassing, bullying, or otherwise exploitative speech. But what the parental role does not include is restricting children's access

244. *See infra* Section II.B.3.

245. FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (quoting Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).

246. *Ginsberg*, 390 U.S. at 639.

247. *Id.*

248. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 803 (2011) ("[P]arents who care about the matter can readily evaluate the games their children bring home.").

249. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2047 (2021); *supra* Section I.B.1.

to ideas as a way of protecting children's innocence or preventing exposure to differing views.[250]

The *in loco reipublicae* framework finds support in the opinions of Justices Douglas and Stevens. Both Justices believed that the Constitution sets limits on parental rights to restrict children's access to ideas. In his dissent in *Wisconsin v. Yoder*, for example, Douglas argued that withdrawing the Amish children from school after eighth grade would impair their rights as future adult citizens. He emphasized that "[i]t is the future of the student, not the future of the parents, that is imperiled by today's decision."[251] In his view,

> [i]f a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.[252]

Justice Stevens raised related concerns about denying children access to ideas in his concurrence in *Board of Education of Kiryas Joel Village School District v. Grumet*.[253] This case involved a challenge to a state law creating a special school district for a village comprised entirely of Satmar Hasidim who wished to educate their children entirely apart from the secular world. The majority held that, because the law favored a particular religious group, it violated the Establishment Clause.[254] In his concurrence, Stevens described how the Satmar parents wanted a special school district because they believed that their children suffered "panic, fear and trauma when leaving their own community and being with people whose ways were so different."[255] In response to these concerns, Stevens noted that "the State could have taken steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs. . . . The isolation of these children . . . unquestionably increased the

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250. For an examination of the racialized dimension of parental rights and children's innocence, see Clark, *supra* note 89, at 2178–89.

251. 406 U.S. 205, 245 (1972) (Douglas, J., dissenting in part).

252. *Id.*

253. 512 U.S. 687, 711 (1994) (Stevens, J., concurring).

254. *Id.* at 703 (majority opinion) ("The anomalously case-specific nature of the legislature's exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.").

255. *Id.* at 711 (Stevens, J., concurring) (internal quotation marks omitted).

likelihood that they would remain within the fold, faithful adherents of their parents' religious faith."[256]

In a dissent in *Troxel v. Granville*, Justice Stevens also voiced worries about isolating children in the home. He disagreed with the majority's decision to strike down the State of Washington's application of its "grandparent visitation statute" to a mother wishing to restrict her children's exposure to their grandparents. In Stevens's view, the Court did not adequately weigh the children's independent rights to relationships with important persons in their lives:

> [T]o 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. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.[257]

In recognizing the value of children maintaining relationships to persons besides parents, Stevens validated a critical way in which children are exposed to the world of ideas outside the home.

Parents' *in loco reipublicae* duties of necessity evolve over time. As courts and commentators have recognized, adolescents exhibit mature decision-making capabilities in many contexts.[258] As children's citizenship rights evolve with time, so, too, do parents' *in loco reipublicae* duties. With respect to children's right to access ideas, parental duties to young children revolve primarily around ensuring children's exposure to diverse ideas in school. As children grow older, parental duties expand to include giving children greater access to people and activities outside the home. The state's role in supporting children's opportunities to access ideas outside the home grows with time as well. Calibrating parental duties to children's specific age is a critical part of defining and enforcing *in loco reipublicae* duties.

3. Exposure to Harmful Ideas

To be clear, the *in loco reipublicae* framework does not envision that children's right to access ideas will result in children being exposed to *every* idea. Some

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256. *Id.*

257. Troxel v. Granville, 530 U.S. 57, 88-89 (2000) (Stevens, J., dissenting) (footnote omitted).

258. *See* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1642-60 (1992). But not in all contexts. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005).

speech is unprotected even for adults, such as obscene and libelous speech. And while the First Amendment protects a great deal of speech one might consider harmful to adults, the same need not be true for ideas that are clearly harmful to children. While exposure to ideas is critical to children's democratic development, children are also uniquely vulnerable to the destructive impact of certain ideas. Because the risks are far greater for children than adults, some oversight—by parents, other adults, or the state—is needed. Determining how to protect children from ideas deemed unreasonably harmful is the task at hand, beginning with defining what harmful means in this context.

For the purposes of this Article, harmful ideas may be understood as falling into two main categories: ideas that are exploitative, harassing, or bullying for children and developmentally inappropriate ideas that frighten or endanger children.

As a threshold matter, false ideas that are not otherwise harmful to children do not fall into the category of harmful speech, for children—like adults—will usually benefit from *more* speech, not less. For children, more speech serves the aims of a democratic upbringing, for it teaches children the critical skill of evaluating the truth or falsity of ideas. Acquiring the skills of critical thinking requires learning how to evaluate diverse and sometimes conflicting ideas in a pluralistic society. Even if we could (or would want to) shelter children from all false ideas, the result would, in fact, be adverse to children's citizenship interests. Instead, as explained here, harmful ideas for children are ideas that pose concrete dangers to their well-being or that frighten or confuse them in developmentally serious ways.

The first category—exploitative, harassing, or dangerous ideas—is relatively easy to define although certainly contestable in application. Children are uniquely vulnerable to speech that bullies and harasses because they have fewer psychological defenses at their disposal and have not yet developed the mental resiliency that usually comes with age. The *Tinker* Court first identified harassing speech as outside the sphere of protected speech in school. On the internet, hateful, bullying, or otherwise toxic speech can inflict actual harm by exposing children to inappropriate content at a time before they are able fully to protect themselves. Children are also vulnerable to online commercial speech designed to seduce and manipulate them, including advertising algorithms that target children's special vulnerabilities and impulsivity. Because children often lack the cognitive and emotional maturity to understand and manage exploitative or harassing speech, parents have an obligation to protect children from these dangerous ideas in an age-appropriate way.[259]

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259. *See* Garvey, *supra* note 199, at 346.

Relatedly, the second category of harmful speech for children concerns ideas that pose a threat to children's well-being in the form of psychological distress or trauma. This category of ideas encompasses disturbing speech that is not necessarily targeted at children, but which can prove difficult for children to understand and process at any particular age. The ideas prove psychologically overwhelming for developing minds. For example, online speech that glorifies self-harm or violence toward others can lead children to think and behave in ways that are destructive to themselves or others. Limiting children's exposure to developmentally inappropriate speech does not mean excluding the ideas altogether, but in some circumstances it means communicating the ideas to children in ways that they can understand and metabolize emotionally. For example, children can and should learn about slavery as part of a civic education in United States history, but the communication of specific details should be attuned to children's ability to process the information.

A difficulty arises when distressing ideas are part of a school's core literature curriculum. In *Monteiro v. Tempe Union High School District*, for example, parents of color brought suit on behalf of their children to prohibit the mandatory assignment of literary works containing "repeated use of . . . profane, insulting and racially derogatory" terms.[260] These works included *The Adventures of Huckleberry Finn* by Mark Twain and *A Rose for Emily* by William Faulkner. The students experienced psychological injuries and lost educational opportunities due to the atmosphere of racial hostility that ensued in the classroom. Nevertheless, the court of appeals held that the equality rights of the students were not violated in this case, concluding that the assignment of these works did not constitute discriminatory conduct under the Equal Protection Clause.[261] The *Monteiro* court failed to consider the citizenship harm resulting from the assignment of works with racist content to children too young to understand and manage the content. It may be that the decision to assign *Huckleberry Finn* to high-school seniors is not a violation of children's rights because they are old enough to apply critical-reading skills to the material, but the question of whether work promotes or impedes the acquisition of these skills at an earlier age is properly for the courts to decide. While deference to local school boards can be desirable, leaving the decision completely in the hands of local school boards, with their highly politically charged decision-making, leaves children's citizenship rights to an equal education at serious risk.

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260. 158 F.3d 1022, 1024 (9th Cir. 1998).

261. *Id.* at 1032 ("[W]e conclude that the assignment of a literary work determined to have intrinsic educational value by the duly authorized school authorities cannot constitute the type of discriminatory conduct prohibited by the Fourteenth Amendment and Title VI, regardless of the fact that the work may be deemed to contain racist ideas or language.").

Another arena of controversy is book banning. Efforts to ban books are often aimed at shielding children from information about the history and present conditions of racial and gender inequality in this country.[262] But a democratic education should not allow for broad suppression of ideas in the name of children's "innocence." Parents opposing the teaching of critical race theory in school have deployed the image of the innocent child to justify preventing children from learning about the history of racial injustice in this country. Similar appeals to children's innocence surround the opposition to the teaching of LGBTQ subjects and sex-education classes. But *childhood innocence is not a democratic ideal*. Democracy insists upon knowledge and understanding, even for our youngest citizens learning how to negotiate a diverse and sometimes disputatious world. Moreover, innocence is often a racialized ideal in this country. Many children of color do not have the luxury of an innocent childhood but instead are exposed to violent neighborhoods; food or housing insecurity; and racial violence by police, by child-welfare workers, and on the street. For them, more speech—the speech that explains their lived experiences of racial injustice—may be vital to their developing identity as full and equal citizens.

Harmful ideas are not ideas that run counter to democracy. Children can and should be exposed to ideas even if the ideas are antidemocratic, illiberal, or intolerant. Exposing children to antidemocratic ideas may seem dangerous to the democratic order, but the danger in fact inheres in attempting to shelter children from the existence of such views. For some children, sheltering them from antidemocratic ideas only denies what they already know: that many in society do not believe in democracy or share democratic values. For example, children raised by same-sex parents learn early on that their families are denigrated by some people. And parents of color in the United States do not have the luxury of shielding their children from knowledge of racial oppression and hatred, and the failure to address these ideas in school may only amplify children's sense of exclusion from the classroom and broader democratic community. However difficult and painful, educating children in developmentally appropriate ways about the reality of racist views in our society is critical to some children's safety and survival, and essential for any hope of political and social change.

Nothing prevents parents in their own homes from expressing antidemocratic views to their children. But if they do, exposure to democratic ideals of equality and tolerance *outside* the home is even more critical, for exposure allows

262. *See* Sue Halpern, *The Fight for the Soul of a School Board*, New Yorker (May 18, 2023), https://www.newyorker.com/news/dispatch/the-fight-for-the-soul-of-a-school-board [https://perma.cc/SA7S-5F4L]; *see also* Complaint at 4, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist., No. 23-cv-10385 (N.D. Fla. May 17, 2023) ("The clear agenda behind the campaign to remove the books is to categorically remove all discussion of racial discrimination or LGBTQ issues from public school libraries.").

children to acquire the knowledge and perspective needed for understanding and rejecting their parents' antidemocratic values. So long as the ideas are not harmful to a child in the ways defined above, parents must accept children's exposure to beliefs and values antithetical to their own while remaining free to teach their children why those ideas are wrong. That process of exposing children to competing ideas is exactly what good democratic childrearing looks like in our country. To teach them right from wrong, children need to know the wrong exists.

As discussed further below, democracy cannot be tolerant all the way down; in order to survive, a democratic polity requires that children receive a democratic upbringing.[263] Democracy-eroding ideas prevent children from acquiring the knowledge and skills of democratic citizenship. For example, a public school is not free to adopt a racist curriculum, for school endorsement of racist values directly violates the state's duty to provide a democratic education, which includes modeling and instilling the democratic value of racial equality. In a democratic society, exposure to ideas does not privilege any one set of ideas over another except to privilege the knowledge, values, and critical-thinking skills necessary to ensure children's rights to an education in the democratic values of equality, tolerance, and pluralism.

In any particular context, the question may arise of who decides what ideas are harmful to children's well-being and democratic upbringing. We have already seen that parents have control over the ideas children are exposed to in the home. In school, the state has authority, through elected school boards, school administrators, and teachers, to decide the curriculum and extracurricular learning that will take place. In contexts other than home and school, other adults have a role to play in overseeing children's exposure to ideas. Pediatricians, counselors, youth leaders, coaches, librarians, and other adults possess some independent authority to expose children to ideas. These adults, as with parents and school officials, may not always get it right. Some may espouse antidemocratic values, as the Boy Scouts did in the case *Boy Scouts of America v. Dale*.[264]

Conflict will inevitably arise between adults claiming final authority to decide what ideas are harmful to children. Moreover, regulation of potential harm from the internet—an increasingly important arena for children's exposure to ideas—is still to be worked out. But under the *in loco reipublicae* framework, neither parent nor state has absolute control in all areas. A democratic upbringing is best achieved in a system that divides the task of democratic socialization among parents, state, and third parties with important roles to play in children's democratic upbringing.

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263. *See infra* Section II.C.2.

264. *See* 530 U.S. 640, 660 (2000); *see also* Rosenbury, *supra* note 234, at 851, 853-56 (framing *Dale* as a case "about childrearing in one particular space between home and school").

C. *Concerns about State Power*

This Section addresses two potential concerns about parents' *in loco reipublicae* duties: that such duties will increase state intervention in the family and that these duties will unduly burden parents' religious liberty.

1. *State Intervention in the Family*

The *in loco reipublicae* framework recognizes the value to both children and parents of a life without significant state interference in day-to-day family decision-making. As described earlier, parents' *in loco reipublicae* duties do not require them to give children free expression in the home nor to expose children to democratic values around the dinner table. The duties are focused on ensuring that children have access to the world of ideas *beyond* the home. Yet, of course, even the minimum requirement that parents send their children to school or otherwise allow them access to the marketplace of ideas restricts the sphere of parental control. This "intervention" should not raise serious concern for several reasons.[265]

To begin, concerns about state intervention appeal to a presumption of parent-child unity that is unwarranted in many circumstances. The law remains stubbornly blind to the reality of family life, which everyone knows involves some degree of conflict between parents and children. In situations involving serious discord, which may arise when children are LGBTQ, when they reject their parents' religion, or when they become pregnant, are abused, or violate school rules, the ideal of parent-child unity is often just that: an ideal. The reality may be parents who discipline or reject their children, or children who are too frightened to let their parents know about their differing beliefs or emotional injuries. Parents and children may still love each other deeply, but the

265. The rhetoric of "intervention" is misleading; the state is already deeply implicated in family life. While advocates of broad parental rights may worry that parental duties will bring the state into the family on behalf of children, they fail to acknowledge the ways in which the state *already* intervenes in the family on behalf of parents. For critiques of the public-private distinction underlying broad parental rights, see *supra* note 192 and accompanying text. Under the *in loco reipublicae* framework, the issue is not intervention or nonintervention; the issue is what kind of family governance is consistent with the recognition of children's citizenship rights and family well-being overall. Near-absolute parental rights threaten to suppress children's independent interests and identities as well as appeal to a fictional public-private distinction that has the unfortunate effect of obscuring children's interests and leaving parents to manage on their own. The ideology of "keeping the state out" works against a constitutional framework of state and parental duties that focuses on what parents and children need to ensure children's well-being and democratic development. *See* Dailey & Rosenbury, *supra* note 32, at 110–27.

presumption of parent-child unity covers over the reality that children may have interests and values that diverge from their parents even while experiencing a strong, loving attachment to them.[266]

The Supreme Court has recognized the reality of parent-child conflict in several cases involving the scope of parental authority. In *Planned Parenthood v. Danforth*, for example, the Court held that the state may not give parents the power to veto a minor's abortion.[267] In so holding, the Court referred to parents as "third parties," emphasizing the fact that parents and children have separate interests in this context: "Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision."[268] Similarly, in *Parham v. J.R.*, while the Court affirmed the legal presumption that parents act in the best interest of their children, the Court nevertheless recognized that, in the context of commitment to a state psychiatric hospital, there might be a conflict of interest between parent and child.[269] And finally, in *Wisconsin v. Yoder*, the Court upheld the Amish parents' right to withdraw their children from public school, but importantly noted that there was no evidence in the record to indicate that the children themselves held differing views.[270] If so, the Court suggested, the outcome might have been different.

Concerns about state intervention in the family are misplaced for other reasons as well. As already discussed, parental duties do not in any way restrict parents' freedom to inculcate their own values and beliefs in their children. Parents are the primary influence in a child's life and are free to instill their own values in whatever way they wish. Indeed, a democratic polity should have it no other way, for the danger always exists, however small, that the democratic state will turn in an authoritarian direction and the family will need to be an important site of resistance. Even today, the issue is salient: parents of color who have no alternative but to send their children to public school may need to counter a racist school curriculum with teachings at home. Importantly, therefore, the *in loco reipublicae* framework does not limit parents in their own teachings. But the danger also exists that parents will seek to inculcate illiberal, authoritarian, or racist beliefs in their children. Children's exposure to democratic ideals of equality outside the home is then critical to their ability to understand and resist their

266. *See* Dailey & Rosenbury, *supra* note 32, at 94-96 (describing the law's continuing affirmation of "child coverture"); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1253 (1999).

267. 428 U.S. 52, 74 (1976).

268. *Id.*

269. 442 U.S. 584, 603-04 (1979).

270. 406 U.S. 205, 231 (1972).

parents' antidemocratic beliefs. It is through exposure to ideas outside the home that children subjected to illiberal, authoritarian, or racist parental values can learn that such views are antithetical to fundamental democratic principles of justice and equality.

Finally, concerns that parental duties to respect children's citizenship rights will undermine the parent-child relationship are also misplaced, for these duties are entirely consistent with parents' role in providing secure, consistent parental caregiving and inculcating family values and traditions.[271] Parental *in loco reipublicae* duties require that parents acknowledge and facilitate children's citizenship rights, but doing so does not threaten the basic parent-child attachment or parental caregiving. As one commentator has put it, "Rights need not vie with love and care in a relationship—they can instead shape the relationship in which love has a proper place."[272] The states "intruded" into the realm of parental authority with compulsory-education laws, for example, and parental care did not suffer any appreciable decline. Instead, parents today accept education as a necessary and beneficial part of their children's development. Even in cases where parental duties might directly clash with the parents' personal values, for example where parents strenuously object to children's exposure to certain ideas in school, there is no reason to think that the result will necessarily degrade the parent-child attachment or otherwise separate parent from child.

While a full exposition is beyond the reach of this Article, it is worth highlighting here how the *in loco reipublicae* framework reveals family separation to be a *citizenship harm* as well as an emotional harm for children. Of special concern is a history of family-regulation policies resulting in disproportionate rates of family surveillance and the forced removal of Black and Native children from their parents, often—particularly in the case of Native children—in the name of promoting children's citizenship.[273] The view that such policing inflicts citizenship harm on children opens up a new way of thinking about the long-term, devastating consequences of family separation for children. Unnecessary separation of children from their parents inflicts citizenship harm on children by

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271. *See* Alstott, Dailey & NeJaime, *supra* note 95, at 2373-79; Huntington & Scott, *supra* note 88, at 1413-14.

272. Harry Brighouse, *What Rights (If Any) Do Children Have?*, *in* The Moral and Political Status of Children 31, 34 (David Archard & Colin M. Macleod eds., 2002).

273. *See* Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World 86-122 (2022); Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, Ctr. for Study Soc. Pol'y 5-19 (Nov. 2018), https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf [https://perma.cc/T9JR-GR5N]; *see also* Huntington & Scott, *supra* note 88, at 1375 (describing "a growing acknowledgment of embedded racial and class bias in state regulation of children"); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 534-41 (2019) (describing unique harms for minority children).

depriving them of relationships central to their development not only as persons, but also as citizens of a democratic polity. Under the *in loco reipublicae* framework, any state action threatening or resulting in the separation of parent and child must be subject to the strictest scrutiny.[274] The framework sheds light on the citizenship harms of family separation and the state's fundamental duty to provide parents with the support they need to carry out their *in loco reipublicae* duties to children.

2. *Religious Parents with Secular Duties*

It may be that some conservative religious parents seeking to raise their children in isolation from the secular world will object to parents' *in loco reipublicae* duties on the ground that the imposition of such duties violates their right to raise their children in accordance with their religious beliefs.[275] The right is something of a hybrid claim at the intersection of parental custodial rights and free exercise rights.[276] For conservative religious parents, child-rearing itself is a religious practice.

The *in loco reipublicae* framework shifts our focus to the rights of the children living in conservative religious families. Children's rights in this context are also something of a hybrid, for children have both free speech rights to be exposed to ideas outside the home and their own free exercise rights. The *in loco reipublicae* framework acknowledges that, for many children, religion is a critical part of their lives as children and as future adults. Religion can bring to children a deep personal fulfillment, a feeling of connection to family rituals and history, and a sense of belonging to a larger community as well as reassurance in a world that is beyond a child's understanding or control. The question then becomes whether parents' right to raise their children in accordance with their religious values is limited by their duties to ensure children acquire the knowledge and skills of democratic citizenship.

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274. In recognition of these foundational citizenship harms, the *in loco reipublicae* framework would give heightened protection against state separation of parents and children by requiring the highest scrutiny of any state action leading to removal of children. State action that may potentially lead to parent-child separation, which includes any family-surveillance activity by the state, must be justified by clear and convincing evidence of actual or impending serious physical or emotional harm. *See* Dailey & Rosenbury, *supra* note 32, at 81.

275. Related issues may arise in communities that are not religious, as may be the case for some Native American families living on reservations. *Cf.* Brackeen v. Haaland, 994 F.3d 249, 305 (5th Cir. 2021) (citing congressional testimony to the effect that states have "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."), *aff'd in part, vacated in part, rev'd in part*, 599 U.S. 255 (2023).

276. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

The issue of parents seeking to keep their children separate from the secular world is not new. Both the Amish and the Satmar Hasidic communities have taken legal steps to insulate their children from the secular influence of a public education. In *Wisconsin v. Yoder*, the Supreme Court ruled in favor of Amish parents who had brought suit wanting to withdraw their children from school after the eighth grade in order to shield them from the secular world.[277] The Hasidic parents in *Board of Education of Kiryas Joel Village v. Grumet* sought to protect their children entirely from exposure to the outside world by establishing a religious public school. The *Grumet* Court did not rule on the parents' free exercise claims but held that the parents' attempt to create their own public school district violated the Establishment Clause.[278] Importantly, Justice Stevens in his concurrence raised concerns about "the isolation of these children" keeping them "faithful adherents of their parents' religious faith."[279]

Scholarly commentary on these issues also is not new. The "paradox" of a liberal-democratic education has bedeviled scholars for many years.[280] As Nomi Stolzenberg has described, on one side, a liberal state aims to teach children the values of tolerance and pluralism, and on the other side, religious parents claim that promoting ideals of tolerance and pluralism violates their parental rights as well as their and their children's free exercise rights.[281] Similarly, Justice Blackmun noted in *Lee v. Weisman*, a case involving prayer in school, that "[d]emocracy requires the nourishment of dialog and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation."[282] For these parents, exposure to secular ideas alone indoctrinates values of autonomy, tolerance, and pluralism at odds with their religious faith.

The point is important. We must acknowledge that "mere exposure" to secular ideas may violate deeply held religious beliefs. Moreover, the state's goal of inculcating liberal-democratic values is in many ways self-contradictory. A democratic education inevitably "convey[s] some value judgments" and "impl[ies]

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277. *Id.* at 218.

278. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 709-10 (1994); *see also* Eliza Shapiro & Brian M. Rosenthal, *In Hasidic Enclaves, Failing Private Schools Flush with Public Money*, N.Y. Times (Sept. 11, 2022), https://www.nytimes.com/2022/09/11/nyregion/hasidic-yeshivas-schools-new-york.html [https://perma.cc/VV4D-9VP4] (analyzing the government funding of failing Hasidic private schools in New York).

279. *Grumet*, 512 U.S. at 711 (Stevens, J., concurring).

280. *See* Stolzenberg, *supra* note 162, at 585; *see also* Carol Weisbrod, Emblems of Pluralism: Cultural Differences and the State 138-56 (2002) (discussing the role of state education "in a world of conflicting values and cultures").

281. *See* Stolzenberg, *supra* note 162, at 612-13.

282. 505 U.S. 577, 607 (1992) (Blackmun, J., concurring).

certain choices as to social, moral, or political values."[283] Stanley Fish has written that "[t]he name of the agenda is 'free and open inquiry' and despite that honorific self-description, it is neither free nor open because it is closed to any line of thinking that would shut inquiry down or route it in a particular direction."[284] Teaching rational inquiry, tolerance, and the free exchange of ideas expressly aims to conscript children into a democratic way of life and necessarily makes alternative modes of knowing and being difficult if not impossible.

Constitutional precedent is not silent on this impasse. In *Prince v. Massachusetts*, the Supreme Court confronted the conflict between the state's interest in protecting children's safety and parents' interest in raising children in accordance with their religious beliefs.[285] Sarah Prince, a Jehovah's Witness and the guardian for nine-year-old Betty, brought Betty with her one evening to distribute the Watchtower magazine on the street. Prince was prosecuted for violating the state child-labor laws. In affirming her conviction, the Supreme Court privileged the independent interests of the child in becoming an adult with the capacity to choose her own religious way of life: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[286] The Court specifically held that parent and child are *not* one: that parents may become martyrs themselves but are not free to bring their children with them.

As in *Prince*, the *in loco reipublicae* framework respects children's independent interests as developing citizens who may eventually develop beliefs, ideas, or identities distinct from those of their parents. To give parents the right to insulate their children is to presumptively equate *parents*' religious interests with *children's* religious interests. This presumption, while ubiquitous in law, denies children's independent identities in the name of family unity. The recognition of parents' *in loco reipublicae* duties reflects the reality of intrafamily diversity and the harms to children that can follow from absolute parental control. The framework aims to safeguard children's right to become adult democratic citizens, which includes preserving their free exercise right to choose—when they reach the proper age—their own religious affiliation, which may or may not be the one into which they were born. Or which may be no religious affiliation at all.

The *in loco reipublicae* framework thus calls for fashioning parental duties such that children's religious rights, not just the religious rights of their parents,

283. Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 84 (2002).

284. Stanley Fish, *Children and the First Amendment*, 29 CONN. L. REV. 883, 886 (1997).

285. 321 U.S. 158, 159 (1944).

286. *Id.* at 170.

are preserved.[287] Of course, the system is not perfect. Requiring parents to allow their children access to secular ideas may burden the religious interests of those children who wish to be raised in separatist religious communities. In other words, the *in loco reipublicae* framework cannot protect the religious interests of every child, for some children might prefer to be raised separate and apart from the secular world. But there is no way to identify such children, for choice by its nature requires mature decision-making skills and some autonomy from parents. It may be sensible to ask older children about their preferences, as the dissent in *Wisconsin v. Yoder* suggested.[288] But that choice will likely be meaningful only if the children have a perspective from which to assess their alternatives. And that perspective requires some exposure to the world of ideas outside the home in their younger years.

Will a constitutional doctrine that recognizes children's citizenship rights, and the parental obligations to safeguard them, threaten the flourishing or even survival of conservative religious communities? As noted earlier, exposure to the world of ideas outside the home does not prevent parents from instilling in their children the conviction that the family's way of life is the true way of life. It only prevents parents from keeping children from learning that it is not the only way of life. Most religious communities will be resilient enough to survive children's exposure to the secular world.

However, enforcement of *in loco reipublicae* duties will not be without harm to some separatist communities. How much harm will depend on the specific religious community and its beliefs and tenets. Although the risk that imposing secular duties on religious parents will destroy conservative religious communities is low, it is not zero. In protecting children's rights, we must recognize the possibility of "blood on one's own hands."[289] Imposing *in loco reipublicae* duties on some orthodox religious parents will be experienced as, and will in fact be, an exercise of legal force.[290]

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287. *See* Note, *Children as Believers: Minors' Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2226 (2002); Jeffrey Shulman, *Who Owns the Soul of the Child?: An Essay on Religious Parenting Rights and the Enfranchisement of the Child*, 6 CHARLESTON L. REV. 385, 399-402 (2012); Jonathan F. Will, *My God My Choice: The Mature Minor Doctrine and Adolescent Refusal of Life-Saving or Sustaining Medical Treatment Based upon Religious Beliefs*, 22 J. CONTEMP. HEALTH L. & POL'Y 233, 285 (2006).

288. 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part).

289. JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ & HILA SHAMIR, GOVERNANCE FEMINISM: NOTES FROM THE FIELD, at xvii (2019).

290. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (discussing the violence of legal acts in taking away one's freedoms).

Damage to religious communities, however few in number, is never an outcome to be celebrated.[291] As discussed above, religious belonging can be a gift to children and a source of their personal flourishing. But conscription of children into a way of life that does not give them the opportunity to become full democratic citizens is also not to be celebrated. If there were a way to respect children's rights to citizenship while allowing them to remain isolated from the democratic community, the problem would be solved. But there is no alternative that adequately protects children's citizenship rights while at the same time preserving a community's authority to insulate children from the broader world of ideas. As Justice Douglas wrote in his *Yoder* dissent, the Amish child "may want to be a pianist or an astronaut or an oceanographer."[292] Competing interests of the broader liberal-democratic community must also be considered. The Supreme Court has reminded us that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into maturity as citizens, with all that implies."[293] What that implies are parental duties to respect and preserve children's citizenship rights until the children are old enough to call their religion, if there is one, their own.

III. ENFORCING *IN LOCO REIPUBLICAE* DUTIES

Most avenues for enforcing parental *in loco reipublicae* duties require new ways of thinking about children in the law. While some enforcement will take place outside the law through political movements, youth advocacy, and other informal channels for change, this Part examines the legal avenues for enforcing parents' *in loco reipublicae* duties.

An important clarification about enforcement should be made at the outset: parental *in loco reipublicae* duties would not give children the right to sue their parents for failure to fulfill those duties. There are obvious practical barriers to children bringing suit, since most children have neither the knowledge nor the funds to sue their parents. But more importantly, suits by children against their

291. Of course, one must be careful not to idealize all religious communities. Some groups may have practices directly harmful to children (such as the Peoples Temple run by Jim Jones whose members committed mass suicide). And there is a history of child abuse in the Catholic Church and some polygamous Mormon sects. *See* Ed Stoddard, *Over 400 Children Taken from Texas Polygamist Ranch*, REUTERS (Apr. 7, 2008, 10:22 PM), https://www.reuters.com/article/us-usa-mormons-abuse/over-400-children-taken-from-texas-polygamist-ranch-idUSN0731079920080408 [https://perma.cc/H2UG-PNSQ].

292. 406 U.S. at 244-45 (1972) (Douglas, J., dissenting in part). Some young adults educated in private Yeshiva schools in New York City have challenged what they see as the state's failure to ensure their educational preparation for life in the secular world. *See* Shapiro & Rosenthal, *supra* note 278.

293. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

parents would undermine children's well-being in numerous ways, including risking further deterioration of the parent-child relationship. There may be some limited circumstances involving older children where direct judicial enforcement of parental duties might be justified, such as cases of severe educational neglect. But in most cases, enforcement of parental duties should happen through avenues that do not directly pit children against parents or require the intervention of the state in the everyday workings of the family.

This Part sets out four avenues by which parental *in loco reipublicae* duties might be legally enforced: limiting the scope of parental rights; recalibrating the state's power to endorse and expand parental authority outside the home; recognizing children's own agency; and providing state support for parents and children. These four avenues are discussed in the context of parental duties to respect children's right of access to ideas.

A. Limiting Parental Rights

Parental *in loco reipublicae* duties would in part be enforced through restrictions on parental rights to control the upbringing of their children in ways that deny children the opportunity to develop the knowledge and skills of democratic citizenship. In this respect, parental duties would be largely negative duties that restrain parents from interfering with children's access to ideas, including their exposure to the norms of democratic life. Yet, the line separating negative and affirmative duties is not always clear. For example, while the state provides a free public education, parents nevertheless have affirmative duties to ensure their children attend school: they must register their children, provide for transportation, and comply with many school obligations. Thus, while *in loco reipublicae* duties are primarily negative in nature, they would also necessarily impose some affirmative obligations on parents.

Public education has long been a major site of conflict over parents' right to control children's access to ideas.[294] In recent years, some conservative parents have demanded that local school boards eliminate so-called critical race theory from their children's classrooms.[295] Seized with a similar outrage, anti-LGBTQ

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294. *See, e.g.*, WEINRIB, *supra* note 55, at 146-55; Jill Lepore, *Why the School Wars Still Rage*, NEW YORKER (Mar. 14, 2022), https://www.newyorker.com/magazine/2022/03/21/why-the-school-wars-still-rage [https://perma.cc/5LZF-M72U]. For contemporary examples, see Halpern, *supra* note 262; Ellen Barry, *A Mental Health Clinic in School? No, Thanks, Says the School Board*, N.Y. TIMES (June 6, 2022), https://www.nytimes.com/2022/06/05/health/killingly-ct-mental-health-clinic-school.html [https://perma.cc/75E2-RK58]; Stolzenberg, *supra* note 162, at 582-611.

295. *See* Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (Mar. 23, 2023), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-

parents have sought to prohibit discussion of gender identity and marriage equality in schools.[296] These parents all share the belief that their parental rights entitle them to control the ideas to which their children are exposed in school. At the same time, school boards assert *their* authority to set school policy free from parental interference. Yet, lost in this dispute between parents and school boards are *children's rights* under the First Amendment to access the world of ideas.

Of course, public education should be a realm where parents and school boards engage in deliberation over school policies and curriculum reform. We should be wary of efforts to impose a uniform school policy and curriculum across the country, and we should encourage some kinds of parental involvement in school life. But this involvement does not extend to limiting their children's exposure to ideas deemed central to a liberal-democratic education. Thus, under the *in loco reipublicae* framework, for example, parents may not insist upon limiting what is taught in the classroom to ideologically distorted views about the facts of history, the science of gender identity, or the reality of family life for

attack/2021/06 [https://perma.cc/KV4E-UXNK] (reporting that over forty states since January 2021 have introduced bills or taken other steps that would restrict teaching critical race theory or limit how teachers can discuss racism and sexism in public schools). In all, since 2021, 175 bills in forty states have been introduced seeking to restrict what is taught in the classroom. Editorial, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html [https://perma.cc/Z257-PFJS]; *see also PEN America Index of Educational Gag Orders: Laws*, PEN AM., https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyro [https://perma.cc/E5Y8-332L] (listing seventeen states with laws passed since 2021 barring instruction on topics such as critical race theory); Olga Khazan, *Red Parent, Blue Parent*, ATLANTIC (Feb. 22, 2022), https://www.theatlantic.com/politics/archive/2022/02/new-partisan-fight-over-schools/622846 [https://perma.cc/QB2V-ALFF] ("Conservative attacks on school curricula are also often pitched in the language of parental control."); Hannah Natanson, *Parent-Activists, Seeking Control over Education, Are Taking over School Boards*, WASH. POST (Jan. 19, 2022, 8:50 AM EST), https://www.washingtonpost.com/education/2022/01/19/parents-school-boards-recall-takeover [https://perma.cc/5J8Y-27Y6] (reporting that the "groundswell" of the "parent rights' movement," including parent-led efforts to ban critical race theory in school, "appears to be massive").

296. For example, the Florida legislature has passed the "Parental Rights in Education" law, which prohibits "[c]lassroom instruction . . . on sexual orientation or gender identity" up through the third grade. H.B. 1557, 89th House, 124th Reg. Sess. § 1 (Fla. 2022). *See also* Benjamin Wallace-Wells, *The Political Strategy of Ron DeSantis's "Don't Say Gay" Bill*, NEW YORKER (June 28, 2022), https://www.newyorker.com/news/the-political-scene/the-political-strategy-of-ron-desantiss-dont-say-gay-bill [https://perma.cc/QE22-FY38] (situating the bill in the broader political context); Rachel Hatzipanagos, *After Florida Passes Bill, LGBTQ Parents Ask: Which Parents' Rights?*, WASH. POST (May 9, 2022, 6:00 AM EDT), https://www.washingtonpost.com/nation/2022/05/09/lgbtq-parents-dont-say-gay [https://perma.cc/696K-DC84] (describing how the "don't say gay bill" harms LGBTQ children and families).

children in this country.[297] Under the *in loco reipublicae* framework, parents would not have the power to opt their children out of classes designed to develop children's knowledge of the values and systems of democratic life.[298] Similarly, parents would not be free to opt their children out of civic-education classes or refuse to provide a civic education themselves if they are educating children in the home.[299]

While the content and scope of a democratic education is the subject of debate, the courts have given some guidance. In *Mozert v. Hawkins County Board of Education*, for example, parents sought to pull their children out of the school's reading-textbook program on the ground that the reading series violated their free exercise rights to control the ideas to which their children were exposed.[300] In protecting children's access to ideas, the Sixth Circuit held that exposure alone, in the absence of compelled affirmation of beliefs, was not a violation of First Amendment principles.[301] Beginning with *Tinker*, the Supreme Court's recognition of children's constitutional right to participate in the classroom marketplace of ideas affirmed that being exposed to the values of tolerance, pluralism, and equality is central to a democratic upbringing. Civic education should inform children about the processes of democratic debate and deliberation as a way of training them to become adult citizens in a diverse—even polarized—polity.

Under the *in loco reipublicae* framework, a democratic polity might go further. At a minimum, a civic education should teach children to understand and manage the marketplace of ideas by engaging in civil expression and debate and by teaching children how to manage conflict and controversy through reasoned deliberation. Children's right of access to ideas should also require that children receive comprehensive training in the use and management of the internet and other technology facilitating access to information. Under the framework, parents would also be prohibited from isolating their children from important

297. *Cf.* Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987) (striking down a law requiring that creationism be taught alongside evolution as a violation of the Establishment Clause).

298. *See* Parker v. Hurley, 514 F.3d 87, 106-07 (1st Cir. 2008) (upholding the dismissal of plaintiffs' § 1983 claim that their children's exposure to material encouraging respect for gay persons violated their right to raise their children as they pleased).

299. *See* A.C. v. Raimondo, 494 F. Supp. 3d 170, 181 (D.R.I. 2020) ("[W]e may choose to survive as a country by respecting our Constitution, the laws and norms of political and civic behavior, and by educating our children on civics, the rule of law, and what it really means to be an American, and what America means. Or, we may ignore these things at our and their peril. Unfortunately, this Court cannot, for the reasons explained below, deliver or dictate the solution—but, in denying that relief, I hope I can at least call out the need for it."), *aff'd sub. nom.* A.C. v. McKee, 23 F.4th 37 (1st Cir. 2022).

300. 827 F.2d 1058, 1059 (6th Cir. 1987).

301. *Id.* at 1069.

persons in their lives. For example, a state could mandate regular visits with a pediatrician, could allow children to petition a court for access to grandparents or other caregivers, or could require homeschooled children to participate in activities with other children. To the extent the Supreme Court's decision in *Troxel v. Granville* suggested otherwise, the Court failed to consider children's citizenship right to access people outside the family, in that case the paternal grandparents.[302] As Justice Stevens wrote in dissent, "[O]ur prior cases recognizing that children are, generally speaking, constitutionally-protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel."[303] Children's access to people outside the home is an important avenue by which children are exposed to the world of ideas.

B. Recalibrating State Authority

A second avenue for enforcing parental *in loco reipublicae* duties is to recalibrate the state's authority over parents and children by restricting state power to endorse parental control over children and, at the same time, recognizing the state's power and obligation to support parental duties to children. With respect to limitations on state power, the *in loco reipublicae* framework would raise serious questions about state laws that establish parents as the exclusive gatekeepers to children's exercise of their constitutional rights. In the context of children's right of access to ideas, for example, the framework would prohibit the state from passing laws that give parents a veto power over children's access to ideas outside the home. These laws might take the form of parental-consent statutes or statutes giving parents control over what children learn in school, including laws that allow parents to opt out of curriculum designed to ensure children are exposed to diverse values and beliefs.[304]

The Supreme Court has already expressed concern about laws granting gatekeeping power to parents. In *Brown v. Entertainment Merchants Association*, Justice Scalia wrote the majority opinion holding unconstitutional a law barring children from buying violent video games on the ground that it violated their access to ideas.[305] In an exchange with Justice Thomas, who dissented on the ground that the law promoted parental authority,[306] Scalia rejected the idea that the state could require parental consent before a child could attend a political

302. 530 U.S. 57, 66-68 (2000).

303. *Id.* at 88-89 (Stevens, J., dissenting).

304. *See* Anne C. Dailey & Laura A. Rosenbury, *Beyond Home and School*, U. CHI. L. REV. (forthcoming 2024) (on file with author).

305. 564 U.S. 786, 805 (2011).

306. *Id.* at 835-36 (Thomas, J., dissenting).

rally.[307] The same point holds true here: the state cannot empower parents by giving them a veto over their children's exercise of their citizenship rights, including their right to access ideas outside the home.

The stakes for children have been heightened with the passage of laws that give parents full control over children's use of social media. Some states have adopted laws that require social-media companies to obtain the express consent of a parent or guardian prior to allowing users under eighteen to open an account as well as give parents full access to children's activity on the social-media platform, including the content of all posts. Of course, studies have shown that social media can cause anxiety and depression, resulting in self-harm, substance abuse, and suicide.[308] However, even those most concerned about the negative effects of social media acknowledge that—for some children in some contexts—social media plays a beneficial role in their lives.[309]

Moreover, studies suggest that "[m]obile apps designed to help parents keep their children safe from online predators may actually be counterproductive, harming the trust between a parent and child and reducing the child's ability to respond to online threats."[310] The irony is that, while the laws are passed in the name of furthering children's well-being, these laws can harm children by damaging the parent-child relationship. The Supreme Court has recognized the harm of parental-consent laws to the parent-child relationship in the context of

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307. *Id.* at 795 n.3 (majority opinion) ("[I]t does not follow that the state has the power to prevent children from hearing or saying anything *without their parents' prior consent*. The latter would mean, for example, that it could be made criminal to admit persons under 18 to a political rally without their parents' prior written consent—even a political rally in support of laws against corporal punishment of children, or laws in favor of greater rights for minors.").

308. *See* Jennifer A. Kingson, *Social Media's Effects on Teen Mental Health Comes into Focus*, Axios (Jan. 11, 2023), https://www.axios.com/2023/01/11/social-media-children-teenagers-mental-health-tiktok-meta-facebook-snapchat [https://perma.cc/5CWX-237X]; Adam Satariano, *British Ruling Pins Blame on Social Media for Teenager's Suicide*, N.Y Times (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/business/instagram-suicide-ruling-britain.html [https://perma.cc/9WZU-6LM7]. *See generally* Jonathan Haidt & Jean Twenge, *Social Media and Mental Health: A Collaborative Review*, https://docs.google.com/document/d/1w-HOfseF2wF9YIpXwUUtP65-olnkPyWcgF5BiAtBEyo [https://perma.cc/X4DC-VKRW] (reviewing empirical literature on the effects of social media on mental health).

309. Haidt & Twenge, *supra* note 308, at 9. The Surgeon General's Advisory identifies "connecting meaningfully with friends and family, learning a new skill, or accessing health care" as benefits for children, particularly for LGBTQ and other young people where social media may help them feel less alone and provide them with support and inspiration. Vivek H. Murthy, *Protecting Youth Mental Health: The U.S. Surgeon General's Advisory*, U.S. Dep't Health & Hum. Servs. 25 (2021), https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf [https://perma.cc/KL8D-AYL3].

310. Barbara Abney & Zenaida Kotala, *Apps to Keep Children Safe Online May Be Counterproductive*, UCF Today (Apr. 2, 2018), https://www.ucf.edu/news/apps-keep-children-safe-online-may-counterproductive [https://perma.cc/7ELY-6GJW].

abortion. The Court noted in *Planned Parenthood of Central Missouri v. Danforth* that "[i]t is difficult . . . to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit."[311] The *in loco reipublicae* framework would require that the state address the harmful effects of social media on children in ways that do not confer on parents absolute power over children's access to this social world. The state should aim to educate parents and children to use social media safely and in ways that nurture rather than harm their trust relationship.

Other examples of state statutes unduly endorsing parental power include a Florida law that requires parental permission in order for students to be excused from reciting the Pledge of Allegiance in school.[312] In upholding the statute, the Eleventh Circuit explained: "We see the statute before us as largely a parental-rights statute . . . . [T]he statute ultimately leaves it to the parent whether a schoolchild will pledge or not."[313] Even where a child wishes to recite the Pledge, a parent's request that the student not be allowed to do so will be respected despite the fact that the Supreme Court held in *West Virginia State Board of Education v. Barnette* that while the state may not directly require a child to pledge allegiance,[314] the state may indirectly confer on parents the right to do so and defer to their decision.[315]

Similarly, some states have passed laws that prohibit schools from teaching about issues of racial justice or gender identity in the primary grades.[316] These laws are a straightforward state violation of children's First Amendment right to access ideas. However, the laws are justified as supporting parental rights and, in that regard, states may defend the laws as merely endorsing parents' constitutional authority. The names given to these laws—in Florida, for example, the Parental Rights in Education Act—testify to the laws' purpose of supporting parental authority to wield absolute control over children's access to ideas. But the state cannot empower parents to act in ways constitutionally forbidden to the state: namely, to limit children's access to ideas outside the home.[317]

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311. 428 U.S. 52, 75 (1976).

312. Frazier v. Winn, 535 F.3d 1279, 1281 (11th Cir. 2008).

313. *Id.* at 1284.

314. 319 U.S. 624, 641-42 (1943).

315. *But see* Circle Sch. v. Pappert, 381 F.3d 172, 183 (2004) (striking down a Pennsylvania law requiring that schools notify parents when a student refuses to recite the Pledge of Allegiance as violating students' First Amendment rights).

316. *See, e.g.*, Parental Rights in Education Act, H.B. 1557, 89th House, 124th Reg. Sess. § 1 (Fla. 2022).

317. Another relevant area concerns children's rights to reproductive justice. With the elimination of a minor's constitutional right to terminate a pregnancy, *see* Dobbs v. Jackson Women's

With respect to expanding state power, the *in loco reipublicae* framework recognizes the importance of the state exercising its authority to ensure parents have the resources to fulfill their duties to children outside the home. As discussed below, this support should largely take the form of financial and support services to families.[318] But the *in loco reipublicae* framework would also allow the state to enforce parental duties, as already happens in the context of education. State laws that provide children with access to third parties impose on parents duties to make their children available for these interactions. Laws might also be passed that require parents to bring children to regular pediatrician appointments or to enroll homeschooled children in after-school activities with peers. These laws might also break new ground. States might consider passing laws that require parents to provide children with the opportunity to access local libraries or to attend political events.

C. Recognizing Children's Agency

While parental *in loco reipublicae* duties can be enforced through limiting parental rights and recalibrating state authority, older children may themselves claim rights to be free from parental control over the exercise of their citizenship rights. In part, children's agency is respected when the state is prevented from conferring veto rights on parents. But direct support for children's agency can be developed. For example, as children enter adolescence, their right to control their educational experience should expand, including allowing them greater exposure to ideas and greater autonomy over their activities in school.

Under the *in loco reipublicae* framework, supporting children's agency would involve ensuring that children are taught their rights as developing citizens and the duties of both parents and state to respect those rights. For example, a civic education should include informing children of their right to access ideas, people, and activities outside the home.[319] Awareness of their citizenship rights may have the benefit of motivating children to engage in political activism. Children's

Health Org., 142 S. Ct. 2228, 2242 (2022), the question arises whether, in those states that still recognize a right to abortion, parents may be given veto rights. The same question may arise with respect to a minor's right to contraceptives, which, for the moment, remains intact. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) ("[Contraceptive advertisements targeting minors] merely state the availability of products and services that are not only entirely legal, but constitutionally protected." (citations omitted)). *But see* Deanda v. Becerra, No. 20-CV-092, 2022 WL 17572093, at *12-17 (N.D. Tex. Dec. 8, 2022).

318. *See infra* Section III.D.

319. *See* A.C. v. Raimondo, 494 F. Supp. 3d 170, 175-76 (D.R.I. 2020) (dismissing lawsuit challenging deficits in civic education), *aff'd sub. nom.* A.C. v. McKee, 23 F.4th 37 (1st Cir. 2022).

movements are increasingly powerful forces for social change in the world.[320] The *Juliana v. United States* case is a recent example of youth-movement litigation that has mobilized children to think of themselves as future adult citizens with rights to a safe, sustainable world.[321] Lawsuits brought by young adults challenging their education in Hasidic schools aim to be an avenue for change.[322]

In some circumstances, parental *in loco reipublicae* duties might be enforced through judicial or administrative mechanisms that allow children to circumvent their parents' restrictions directly. The Supreme Court and state legislatures have recognized in certain contexts that parental rights must give way directly to children's own decision-making powers. For example, in *Bellotti v. Baird*, the Court held that children have a constitutional right to bypass parental authority by going to court to seek permission to obtain an abortion based on their maturity.[323] In a similar way, older children might be afforded the opportunity to go to court to maintain relationships with important people outside the home such as *de facto* parents, other relatives, and siblings. While these rights might be understood as autonomy rights under the Due Process Clause, they also further children's interests in exposure to the world of ideas outside the home. Judicial bypass might be used to give homeschooled children the right to go to court to advocate for attending public school. In extreme cases, the option of partial emancipation might be given to children as a way for them to bypass severe parental restrictions on the exercise of their constitutional rights.

D. Supporting Parents and Children

A fourth avenue for enforcing *in loco reipublicae* duties is direct state support to families to ensure parents have the resources they need to fulfill their duties to children. State and federal programs already exist to provide families with some cash payments per child, housing support, food stamps, and other social services. But the amount of support is woefully inadequate despite the fact that

320. *See* Brooke Jarvis, *The Teenagers at the End of the World*, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/interactive/2020/07/21/magazine/teenage-activist-climate-change.html [https://perma.cc/C76K-KPLL]; Witt, *supra* note 31.

321. No. 15-CV-01517, 2018 WL 9802138 (D. Or. Oct. 15, 2018); *see also supra* note 31 (providing examples of youth activism relating to climate change and gun control).

322. *See, e.g.*, *What is YAFFED?*, YOUNG ADVOCS. FOR FAIR EDUC., https://yaffed.org/ [https://perma.cc/H4S5-QHP9]; Millat, *supra* note 54, at 599 (discussing the organization TeamChild's use of a Youth Advocacy Board).

323. 443 U.S. 622, 651 (1979). After *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), it is unclear what rights pregnant minors will have in states that continue to provide abortion services but also have parental-notification or consent requirements.

raising family financial assistance has been shown to reduce child poverty.[324] The financial assistance that does exist goes only to the poorest families, and even then family separation on the grounds of neglect can seem to be the state's preferred approach to family poverty, particularly for families of color.[325]

One innovative enforcement avenue would be to create a federal Children's Rights Bureau whose central mission would be to support parents in fulfilling their *in loco reipublicae* duties to children and to support children's own efforts to engage in the world of ideas outside the home. Much would obviously need to be worked out about the status and jurisdiction of such a Bureau. Its primary purpose might be to develop programs for funding and supporting families. It might also adopt the model of the Equal Employment Opportunity Commission by receiving petitions from children regarding systemic failures on the part of the state to fulfill its own citizenship duties or its duties to support parents' *in loco reipublicae* duties. These petitions might involve, for example, school opt-out policies, prohibitions on teaching "critical race theory" or gender identity in school, or the quality of civic education. These "citizenship neglect" petitions might be appealed to federal or state court as suits against the state for failure to provide educational and social supports to children.

Critical here, too, are state efforts to support parents in carrying out their *in loco reipublicae* duties between home and school. For young children, state support of adequate daycare, after-school programs, gyms, playgrounds, and other public places where children can engage with other children and adults is a part of the *state's* duties to provide parents with the support they need to further their children's citizenship interests. For example, this support might come in the form of the Bureau providing cash stipends to families, the creation of parks or community centers, or the development of after-school programs.

The Bureau might also take the form of an ombudsperson's office, a model that exists in many states for mediating disputes between individuals and the government.[326] It might also, if the United States were to ratify the U.N.

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324. *See* Kalee Burns, Liana Fox & Danielle Wilson, *Expansions to Child Tax Credit Contributed to 46% Decline in Child Poverty Since 2020*, U.S. Census Bureau (Sept. 13, 2022), https://www.census.gov/library/stories/2022/09/record-drop-in-child-poverty.html [https://perma.cc/8VAB-BLQR] ("The new data show the significant impact the expansion of anti-poverty programs during the COVID-19 pandemic had on reducing child poverty.").

325. *See generally* Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, Iowa L. Rev. (forthcoming), https://ssrn.com/abstract=4449089 [https://perma.cc/CNP6-QZDJ] (describing the conflation of poverty and neglect and proposing reforms); Roberts, *supra* note 273 (describing how the child-welfare system harms Black families and advocating for abolition).

326. Fourteen states have children's ombudsperson offices. *See Children's Ombudsman Offices/Office of the Child Advocate*, Nat'l Conf. State Legislatures, https://www.ncsl.org/research/human-services/childrens-ombudsman-offices.aspx [https://perma.cc/NGA9-V68C].

Convention on the Rights of the Child, be the agency to oversee implementation of the treaty. At a minimum, the Bureau would ensure that adequate federal and state funds were going to support parents in carrying out their duties to respect children's citizenship rights and would be a place for children to turn to for help in exercising those rights. The Bureau would be more than a clearinghouse or recordkeeping agency; it could take a proactive approach to ensuring that families are supported financially and educationally in fulfilling their duties to children as democratic citizens.

CONCLUSION

This Article presents a new framework that centers on children's rights as developing democratic citizens and parental duties to respect those rights. The Supreme Court in *Tinker* recognized children's right to free speech as a core constitutional guarantee of children's status as developing citizens. And yet, as explained in this Article, children's citizenship rights are effectively nullified by near-absolute parental authority to control the upbringing of children.

The *in loco reipublicae* framework aims to uncover and remedy the citizenship harms of according parents constitutional, near-absolute control over children's lives. The Article argues that parents stand *in loco reipublicae* with duties to ensure that children acquire the knowledge and skills of liberal-democratic citizenship. Parental *in loco reipublicae* duties are grounded in a potent combination of children's constitutionally sanctioned in-custody status and their constitutional rights to citizenship. As children's custodians, parents are obligated to respect children's rights to acquire the skills and knowledge needed for democratic citizenship. Parental *in loco reipublicae* duties reflect the unique, constitutionally granted power that parents wield over their children as well as children's unique place as developing citizens of our democratic polity.

Clearly the family is not school, and the metaphor of the marketplace of ideas does not apply to the family dinner table. But if we take seriously the commitment to children's democratic upbringing, we must expand upon what the *Barnette* Court wrote about school officials: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[327] One might describe *in loco reipublicae* duties in just that way: parental duties to refrain from strangling the free mind at its source. The *in loco reipublicae* framework aims to make children's democratic citizenship a guiding ideal in constitutional law.

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