Allocating Developmental Control among Parent, Child and the State

Emily Buss

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Allocating Developmental Control Among Parent, Child and the State

Emily Buss

We know that children change dramatically between birth and adulthood, and we know they are subject to influence during the course of that development. We know much less, however, about how that development is influenced, let alone what the ideal outcomes of that development might be. This uncertainty counsels humility in allotting developmental control among individuals and institutions, and particularly cautions against centralizing and ossifying that control in the state. There are, however, certain aspects of development that the state is especially qualified to shape. After considering the relative competence of parent, child, and state to influence the various aspects of development over which they may compete, this Article considers a special form of developmental influence available only to the state. As the single entity with authority to impose its influence on all citizens, the state has the unique ability to facilitate development by withholding certain forms of state action routinely imposed on adults.

If we knew absolutely nothing about the pathways of developmental influence, or had no reason to prefer some developmental outcomes over others, we would be wise to leave the upbringing of children entirely to private actors. Such an approach would comport with our commitment to pluralism by allowing one generation to perpetuate its own diversity, and even expand upon it, in the next generation. Such an approach would also be well designed to maximize child-welfare. Those with the greatest direct stake and investment in a child would oversee that child’s development. Moreover, the diversity of experience would pro-

---

¹ Professor of Law, The University of Chicago Law School. Thanks to Brian Rubens for his excellent research assistance, to Adam Samaha for his insightful comments, and to the Freida and Arnold Shure Research Fund for its financial support.

¹ In most cases, private control over child development would mean that one or both biological parents would exercise near-complete control over their children while young and relatively compliant, and decreasing control as their children gained views of their
duce a natural experiment from which future generations could learn.

But we do not claim total ignorance in matters of child development, and nearly all believe that we, as a society, should impose some constraints on how children are raised, both for their own benefit and to meet the ongoing needs of our society. Because these state-imposed constraints disserve the values of pluralism and experimentation, and qualify the authority of those with the greatest investment in the child, we should undertake them with caution, and only when the benefit to child or society is especially clear.

Discussions of the state’s role in influencing children’s development tend to disregard certain opportunities for influence that are unique to the state. These opportunities arise in contexts where the state’s focus is not on child development, but rather on its treatment of citizens more generally. In these contexts, the state is sometimes in a position to exert a positive developmental influence by exempting children from whatever state action it imposes on adults. Because the action at issue is in the exclusive domain of the state, we need not worry about competition with private competitors, or about the threat to the values served by deferring to those private actors.

State abstinence, where children are involved, has both a general and specific value. The general value is in defining a period of childhood during which children can freely remake themselves, as they grow and learn. The specific value comes from shielding them from potentially negative influences to which individuals are particularly vulnerable as children. In most cases, the state’s choice to abstain would be a policy choice aimed at encouraging children’s healthy development. In at least one context, however, that of state invocations of religion, that abstention may well be constitutionally required.

This Article first considers contexts in which the state competes with private individuals, particularly parents and children, for developmental control (Part I). It then goes on to consider

---

2 This symposium volume offers a welcome opportunity to bring consideration of many issues of children’s and parents’ rights together in one place and, particularly, to cast the issues in developmental terms. To do this comprehensively, I necessarily repeat some arguments made in earlier articles. Throughout the Article, I will make these re-
the state's special opportunity to influence development in areas where it has no competitors (Part II A). The Article concludes with a more detailed consideration of the constitutional challenge to the religious language in the Pledge of Allegiance, to demonstrate how an attention to developmental influence alters the analysis (Part II B).

I. THE COMPETITION FOR CONTROL

A. Limiting the Competitors to Parent, Child, and State

The competition for developmental control of a child is classically framed as a competition between parent and state. This framing oversimplifies the field of potential competitors considerably. Most noteworthy is the exclusion of other private parties competing with parents for some or all control over a child's upbringing. While the law is paying increasing attention to these claims, it has, thus far, continued to subrogate these claims to some combination of state and parental control. Thus, a grandparent who seeks involvement with her grandchild must obtain the permission of either the parent or the state to do so, and the central legal battle is over whether parent or state has ultimate authority to grant or deny that permission.

3 See, for example, Elizabeth S. Scott and Robert E. Scott, Parents as Fiduciaries, 81 Va L Rev 2401, 2414-18 (1995) (describing the balancing of parental and state interests in "promoting child welfare" as the central feature of both legislative policy and constitutional interpretation relating to family law for the past century).

4 See, for example, Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 Va L Rev 879, 961-63 (1984) (concluding that the law should adapt to recognize nonexclusive parenthood when the child has developed child-parent relationships outside the traditional nuclear family). Compare David D. Meyer, The Paradox of Family Privacy, 53 Vand L Rev 527, 586-87 (2000) (arguing that the state's interest in maintaining children's ongoing relationships with extended family members justifies compromising parents' decisionmaking authority).

5 See Troxel v Granville, 530 US 57 (2000) (finding that a Washington state court's order granting visitation rights to a child's grandparents violated the mother's parental rights and leaving open the larger question of whether, and when, the state might intervene to foster children's associations with others against the wishes of their parents). Similarly, The American Law Institute's recently adopted Principles of the Law of Family Dissolution, which call for the recognition of "Parents by Estoppel" and "De Facto Parents" in court disputes over custodial and decisionmaking authority, contemplate the
While the limits imposed on non-parents' ability to control children's development derive from a strong common law tradition of parental control, contemporary pragmatic considerations support the same result. Fragmenting authority among multiple parental figures not committed to cooperating will proliferate child-rearing disputes among them, creating considerable instability for the child and an increased demand for judicial intervention. Of course, parents are free to expand the range of people who exercise some control over their children's development, but as long as this involvement occurs with parental consent, it can be viewed as a manifestation of parental control.

Similar pragmatic concerns limit the field of individuals who control the assignation of parental identity to some combination of genetic parents and the state. Here, again, the legal challenges regarding parental identity focus on the allocation of authority between genetic parents and the state in assigning that identity. Of course, all of these questions are contentious, and some scholars advocate an expansion of the number of private individuals with equal authority to control children's development. For purposes of discussion here, however, we can treat all disputes among parents and parent-like figures as subrogated to the dispute between parent and state.

There is another, often overlooked, private competitor for developmental control whose claims have not always been subrogated to those of parent and state: the child, in asserting the right to make choices for herself, asserts a claim for developmental control. While children's rights claims themselves are rarely state's involvement in any decision shifting authority from the legal parent to other private individuals.


7 These problems also likely arise when parents separate, prompting some to call for a single parental authority (or a clear primary authority) at the time of separation. See Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies 230-33 (Routledge 1995) (calling for preferred treatment by the state for a family unit defined by caretaking and consisting of dependents and caregivers).

8 See Michael H. v Gerald D., 491 US 110 (1989) (rejecting a biological father's parental identity claim, deferring, instead, to the state's authority to choose among parental claimants, where those claimants—mother, husband, and biological father—were in conflict).

9 Bartlett, 70 Va L Rev at 879-83 (cited in note 4) (arguing that legal recognition of nonexclusive parenthood when the nuclear family has failed would best serve the interests of children in maintaining continuous child-parent relationships).
framed in developmental terms, the courts' analysis of those claims is always so framed. Indeed, it is precisely children's ongoing development that justifies courts' special treatment of their claims.\textsuperscript{10}

This Part begins with a consideration of the competing claims of parent and state for developmental control. It goes on to weigh the claims of both of those competitors against the child's interest in controlling her own development. In both discussions, an assessment of the various parties' relative competence drives the analysis.

Competence, in the area of development, is a complex concept. It includes expertise about the child in question, not simply in the present, but also in the future, for certain nascent traits and abilities of the child will affect the success of any particular developmental design. Developmental competence will also hinge on the level of investment the contender makes in the child, for successful developmental influence depends as much on follow-through, and continuity in vision and attention, as it does on the choices made at any one point in time. While this conception of competence justifies parental control over a vast array of development-affecting choices, it also suggests some limits to that control.

B. Competition between Parent and State for Developmental Control

I have argued elsewhere, as have others, that parents are generally more competent than the state at assessing, and acting on, their children's best interests.\textsuperscript{11} This is in part because they know their children better, in part because they care about them more, and in part because their own interests are tied more tightly to the interests of their children. All choices made on behalf of children have developmental implications, and we might speculate that parents' superior competence is particularly sali-

\textsuperscript{10} In \textit{Bellotti v Baird}, 443 US 622 (1979), the Supreme Court set out three developmentally based justifications for interpreting children's rights differently from the rights of adults: "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature, manner; and the importance of the parental role in child rearing." Id at 634.

\textsuperscript{11} Emily Buss, \textit{Adrift in the Middle: Parental Rights after Troxel v. Granville}, 2000 S Ct Rev 279, 284-90. See also Scott and Scott, 81 Va L Rev at 2415 (cited in note 3) (arguing that "the state is not well suited to substitute for parents in the job of rearing children").
ent in considering these implications. Only the parents see (and are charged with overseeing) the whole picture—the vast array of experiential, associational, emotional, and informational details that together shape the person a child becomes.

This is not to say that every parent is particularly good at shaping her child's development. There are better and worse parents, and easier and harder children to raise. In any particular case, however, we can expect the heavily invested parent to do a better job than the state would do, and under most circumstances, we will have no way of knowing when this will not be so. Moreover, an assessment of developmental competence must take into account the claimant's ability to integrate various aspects of developmental control with the rest of the child's life experiences. Unless we are radically to restructure familial ordering and parental duties, even the less competent parents will bear ultimate responsibility for the child's overall care. However flawed their approach to a particular aspect of development in isolation, these parents are likely to be in a far better position than the state to shape that aspect of development in harmony with the rest of the child's life.

While parents' developmental competence should, in most circumstances, be presumed to be superior to the state's and, even if only equal, should be favored in the interest of pluralism and experimentation, parental control over development should not be absolute. When parents' behavior clearly indicates their developmental incompetence, or when the state has special expertise, the state is justified in taking some control.

In fashioning the exceptions to the general rule of parental deference in developmental control, we should focus again on relative competence. As I have discussed elsewhere in somewhat more detail, the state has two sorts of special developmental competence that can guide our articulation of exceptions. First, the state has special competence in shaping children to become citizens capable of meeting the demands of a successfully functioning society. It is the state, and not any individual parent, that can best assess what is necessary to ensure achievement of a successful democratic government, a healthy economy, and a safe society. Second, the state has special competence to assess societal consensus about child-harm. Through its democratic lawmaking process, the state can identify behavior that the ma-

---

Allocating Developmental Control

Majority of citizens consider harmful to children, no matter what the circumstances. The first sort of expertise justifies the exercise of some affirmative developmental control by the state. The second only authorizes the state to impose some negative limits on the parents' exercise of developmental control.

A competence-based allocation of developmental control would limit the state's affirmative control to those aspects of development in which the state has a direct stake. Thus, the state has no superior competence to determine how to maximize an individual child's wellbeing, but it does have such competence to determine what is required of its citizens to produce a healthy democracy and economy. This suggests that the state's influence should be greatest over matters of formal education, and weakest over matters with predominantly private effects. Thus the constitutional cases affording parents great decisionmaking control over matters relating to education, such as Pierce v Society of Sisters, and Wisconsin v Yoder, may have afforded parents too much protection. Conversely, the cases considering parental claims to control children's choices with minimal public implications, such as religious leafleting in Prince v Massachusetts and intimate associations in Troxel v Granville, did not protect parents enough.

As a general matter, the more private the developmental stakes, the less competent is the state to shape that development. The state does, however, have a role to play in policing against harmful conduct by parents, even where that harm is largely limited to the individual child. But the "harm" the state is qualified to identify and prevent must be something more than simply falling short of some developmental ideal. Rather, the child-harm subject to state regulation must be limited to the suffering of serious and demonstrable detriment. Moreover, because the state will lack the parents' child-specific expertise, the state's

---

13. 268 US 510 (1925) (striking down a state law requiring that all children attend public schools).
14. 406 US 205 (1972) (allowing parents to withdraw their children from school, for religious reasons, two years prior to the end of the compulsory schooling period).
15. 321 US 158 (1944) (approving of state action preventing a custodian from allowing a child to engage in religious proselytizing, with leaflets).
16. 530 US at 73 (striking down a law authorizing third party visitation claims, but suggesting a more narrowly tailored law might survive constitutional scrutiny).
17. See Buss, 2000 S Ct Rev at 302-16 (cited in note 11) (arguing that the Court did not go far enough in protecting parents' authority against the competing claims of third parties).
regulation of harmful conduct should be limited to contexts where the harm is conceived as universal (such as child abuse), rather than child-specific (as it is in the relational context).  

These articulations of relative competence and the implications for developmental control that they suggest do not, of course, produce simple answers. Distinguishing public from private stakes is itself a murky business, and working out the details of any such sharing of control is murkier still. Nevertheless, an appeal to relative competencies offers considerable guidance in allocating developmental control between parent and state. It justifies strong parental deference, generally, but also suggests a basis for carving out some exceptions to that deference.

C. The Child as a Third Developmental Competitor

Complicating matters further still is the child herself, who has a strong interest in exercising control over her own development. To a large extent, she exercises that control, whether she likes it or not, simply by being the developmental subject. She reacts when parents, the state, or anyone else, acts in an attempt to shape her development, and she reacts to the host of environmental and cultural forces that exist without regard to her development. As she matures, the child will become increasingly interested in making her own choices about how she is educated, with whom she spends time, which activities she pursues, and other matters with important developmental effects. In some circumstances, this interest in self-governance is articulated in rights terms: a child asserts a right to make some choice herself, even if her parents, the state, or both oppose those choices.

There is much to be said for affording children this sort of control. On the most basic level, there is an appeal to the dignity of the child as an individual, entitled to considerable respect in her exercise of judgments about her own wellbeing. Some of the strongest calls for children's rights are grounded on the human commonality between children and adults. But even among

---

18 Buss, 88 Va L Rev at 649 (cited in note 12) (arguing that both the private and the child-specific nature of associational choices render them ill-suited for state control).

19 See, for example, John Holt, Escape from Childhood 18-19 (E.P. Dutton 1974) (arguing for a broad range of children's rights, including the right to vote, travel, develop familial relationships, and, most basically, "the right, in any situation, to be treated no worse than an adult would be"); Hillary Rodham, Children Under the Law, 43 Harv Educ Rev 487, 507-09 (1973) (arguing that presumptions should be reversed, and that children should have the same rights as adults, absent specific findings justifying differential treatment). See also James Dwyer, Children's Relationship Rights ch 1 (unpublished
these champions of children’s rights, few contend that children should have rights identical to adults. For most children’s rights advocates, and for all children’s rights opponents, children’s ongoing development calls for a qualification of the rights afforded to children. This is in large part because children’s ongoing development is understood to compromise their ability to make good judgments on their own behalves.\textsuperscript{20} We’d rather compromise their exercises of autonomy in the short run (by, for example, compelling school attendance) than in the long run (by allowing them to grow up without a basic education).

Two other justifications for affording children rights are based on, rather than qualified by, children’s ongoing development. First, children’s experience exercising decisionmaking control will likely facilitate their development of decisionmaking skills, and hence, increase their competence as rights exercisers in adulthood.\textsuperscript{21} Second, children have considerable child-specific developmental competence in themselves. As the subject of the development in question, they are uniquely situated to perceive their emerging identities—the values and skills that will define them as adults—and in this sense are more qualified than anyone else to judge their developmental needs.

Taken together, these two developmentally based justifications for affording children rights—the value children derive from decisionmaking practice and the competence children possess to assess their own interests—suggest some standards for determining under what circumstances such rights are appropriate. As a general matter, development-serving rights should maximize the opportunity for children’s independent exercise of those rights, and should minimize the potential harm associated with their choices. The greater the independence with which children exercise choice, the more valuable the decisionmaking experience should be for the child, and the more genuine the read of the child’s own judgment about her wellbeing. The lesser the harm associated with children’s potential choices, the smaller the developmental risks associated with affording them rights.

\footnotesize{\textsuperscript{20} See, for example, Rodham, 43 Harv Educ Rev at 508 (cited in note 19) (noting that the abolition of minority the author advocates would still allow children’s “substantive and procedural rights [to] be limited or modified on the basis of supportable findings about needs and capacities at various ages”).}

\footnotesize{\textsuperscript{21} This point is argued forcefully by Frank Zimring, in Franklin E. Zimring, The Changing Legal World of Adolescence 89-98 (Free Press 1982).}
Before discussing both of these factors, and considering how they might alter our approach to children's rights, it is worth noting that this entire discussion focuses on what are often called "autonomy rights," that is, rights to make decisions for oneself. Another class of rights, sometimes called "needs-based" rights, is also frequently invoked on behalf of children. These include, for example, the right to a certain level of education, nutrition, health care, or nurturance. While such rights are straightforwardly tied to children's ongoing development, they do not implicate the child as a competitor for developmental control. Indeed, such rights return us to the division of control between parent and state discussed above.

1. **Limiting rights to the self-initiating child.**

Children should only be afforded choice-based rights when they can articulate their choices independent of adult assistance. Once adults are introduced to identify and exercise autonomy rights on children's behalf, we should have no confidence that those adults will be able to distinguish children's choices from their own. Moreover, we should not expect compelled choice (choice made at the demand of the state, a parent, or some other designated adult) to mirror voluntary choice, either in its experiential value for the child or in its ability to capture the child's authentic views. Because the distortions introduced by adult surrogates would undermine the developmental value of affording children autonomy rights, those rights should only be recog-

---


23 Id at 804-06 (distinguishing "welfare" rights from autonomy rights, and contending that the law is far more generous in affording these rights to children than to adults); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L Rev 1747 (1993) (arguing for a recognition of children's needs-based rights to nurturance and protection as distinct from their autonomy rights).

24 See Teitelbaum, 27 Hofstra L Rev at 805 (cited in note 22) (describing children's welfare rights as to "education, nutrition, shelter, and other social and personal goods").

25 For this reason, Justice Douglas's suggestion in *Yoder*—that children's rights could be protected by asking them to testify under oath, during litigation brought by their parents, as to whether they shared their parents' religious views—is problematic. 406 US at 241-49 (Douglas dissenting). I explore this problem in Emily Buss, *What Does Frieda Yoder Believe?*, 2 Pa J Const L 53, 67 (1999) (arguing that active solicitation of children's religious views by the state is unlikely to produce good information about children's genuine beliefs, and may subject them to harm).
nized where children are prepared to assert the rights on their own behalf.  

Requiring self-initiation does not limit children's rights to those cases where children can bring their claims to court by themselves, for the skills and means required to litigate do not bear directly on the developmental issues implicated in the rights exercise. The relevant action is the child's underlying conduct, or attempted conduct, that could justify rights litigation if prohibited. Thus, children who independently express their views, engage in a religious practice, or seek out an abortion from appropriate medical facilities have all self-initiated, for the purpose of this analysis. This sort of independent conduct reflects the understanding of self, and the preparedness to benefit from the decisionmaking practice, that predicts developmental value in the child's exercise of rights.

Limiting children's exercise of rights to those who can self-initiate has several important implications for the scope of children's rights. First, it suggests that we should rarely afford young children autonomy rights. This comports with capacity-based justifications for curtailing children's rights, for the younger the child, the less likely she is to engage in a rational process of decisionmaking, and the less able she is to bring knowledge and experience to bear in making choices. But this is not the primary justification for the self-initiation requirement. Rather, the requirement is tied to a different aspect of development, namely identity development, which continues into late adolescence, when the process of cognitive development is largely complete. Only after a child has developed a sense of herself as an individual with distinct views and aptitudes will she be inclined to attempt to act on choices that diverge from those made on her behalf by those "in charge."
This is not to say, of course, that children will not have views distinct from their primary authority figures earlier in life. But the decision to act on those views, to declare them publicly, and accept the consequences of those actions, reflects a maturation of those views, and, more importantly, a maturation of an understanding of self in relation to those views. Only when a child achieves this level of self-understanding can she be said to possess the competence required to justify wresting control of the decision in question from whomever would otherwise be authorized to make the decision on her behalf, whether parent or state.

The requirement of self-initiation would also affect the nature of the rights we recognized. Associational rights claims, now commonly asserted by interested adults such as grandparents on behalf of young children, would be rare if limited to instances in which children took some form of affirmative action to express their associational choices. Speech rights, in contrast, would be commonly asserted, for, even at an early age, children are often inclined to speak their minds. Procreative rights would also commonly be asserted at children’s own initiative, because the decisionmaking demands of pregnancy are readily apparent to most teenagers.

The current form of children’s associational rights claims—claims asserting the right of children to develop relationships with grandparents and other interested adults—offers a prime (and timely) example of the sort of rights claim that a requirement of self-initiation would routinely bar. These claims generally involve very young children who have neither the wherewithal nor, in many cases, the inclination to take independent action to foster a relationship with the adults in question. Associational rights claims are, however, routinely asserted on their behalf by the adults who desire the association.\(^\text{30}\) Allowing...

\(^{29}\) For a general discussion of the child’s development of a sense of self in relation to others, and how this affects the child’s ability to take positions in litigation, see Emily Buss, *Confronting Developmental Barriers to Child Empowerment*, 84 Cornell L Rev 895 (1999).

\(^{30}\) See, for example, *Smith v Stillwell-Smith*, 969 P2d 21, 39 (Wash 1998), affd as *Troxel v Granville*, 530 US 57 (2000) (explaining that Washington’s grandparent visitation law “recognizes that it is primarily ‘the right of the child to... know her grandparents’ which is being protected and not the interests of the grandparents”); *Roberts v Ward*, 493 A2d 478, 482 (NH 1985) (framing a grandparent visitation claim as the assertion of “the child’s rights to know and associate with her grandparents”); *In Re Louis Santoro and Carole Santoro for Visitation*, 578 NW2d 369 (Minn App 1998) (noting that any burden imposed on parental autonomy by the grandparent visitation statute was done to “facilitat[e] the exercise of the associational rights of grandparents and children”).
grandparents, and other interested adults, to assert associational rights on children's behalf in no way facilitates children's competence as rights exercisers. Instead, it simply displaces their parents' judgment about the relative value of various associations with the judgment of some combination of the state and other adults. This trade, again, takes us back to the competition between parents and the state, in a context where the developmental implications are heavily private, and thus within the special competence of the parent.31 The self-initiation requirement might, however, bring a different sort of associational rights claim into currency: namely, an adolescent's claim to associate with others, most predictably peers, whose association the parent opposes. Where the parent relies upon its state-given authority to prevent contact or, more starkly, relies upon direct state support through police and courts to enforce that authority, children's rights of association are implicated.

There are other rights contexts in which children's independent views commonly inspire them to engage in rights-asserting conduct. Children's independent inclination to express their own views through speech is a prime example. Schools offer endless opportunities, formal and informal, for children to espouse views before a sizeable audience of their peers and relevant authority figures. By adolescence, much of development is built around the staking out of expressive positions distinct from those of authority figures, whether through clothes, body piercings, choice of language, or points of views. As with adults, the initial expression is often not designed as an assertion of right, though it may be designed to provoke a reaction. But, again as with adults, once a child encounters censorship, the interest in expression is commonly perceived (and pursued) in rights terms.32

31 I make this point at considerably greater length in Emily Buss, Children's Associational Rights?: Why Less is More, 11 Wm & Mary Bill of Rts J 1101, 1115-16 (2003) (concluding that parents will "do at least as well as the various alternatives called into action by the establishment of associational rights").

32 Claims that children's free speech rights were violated, particularly by school policies, are frequently filed with the courts. See, for example, Scott v Sch Bd, 324 F3d 1246 (11th Cir 2003) (challenging, on First Amendment grounds, a school's suspension of a student for displaying a confederate flag); Walker-Serrano v Leonard, 325 F3d 412 (3d Cir 2003) (challenging, on First Amendment grounds, a school's refusal to allow a third grade student to circulate a petition opposing a trip to the circus); Canady v Bossier Parish Sch Bd, 240 F3d 437 (5th Cir 2001) (challenging a school uniform policy on First Amendment grounds).
Adolescents also frequently assert the right to elect an abortion. This fact derives from the obvious immediacy and importance of the choice to the minor and the state's constitutional authority to impose at least some obstacles on the minor's access to an abortion. In sanctioning "judicial bypass" mechanisms, whereby minors seeking to obtain abortions without their parents' consent must pursue some form of state review and authorization, the Supreme Court has endorsed a mechanism through which minors are screened aggressively for self-initiation. The problem with this mechanism, however, is that the initiative required is not closely associated with the right in question. Self-initiation, in the context of the abortion right, should mean a minor's taking independent action to seek the abortion itself. A minor who goes to a reproductive clinic, or her doctor, seeking an abortion, has demonstrated her identity competence as well as her affirmative involvement in (and, hence, practice with) the decisionmaking process. Requiring her to take the additional step of pursuing the bypass procedure raises the bar beyond that required to screen for developmental gains, threatening to prevent some rights-qualified minors from obtaining desired abortions.

In limiting the recognition of children's rights to those contexts in which children self-initiate, we will dramatically reduce the number of instances in which rights are asserted. The younger the child, the less likely she is to self-initiate; even older children will only self-initiate if they have a high level of conviction (and perhaps sophistication) about the exercise of the right. Even among those prepared to self-initiate, however, the harm associated with certain choices may outweigh the twin developmental benefits of affording decisionmaking practice and exploiting child-specific expertise. Children's exercise of rights, then, can appropriately be curtailed to try to minimize harms that will, themselves, have developmentally destructive effects.


34 Bellotti, 443 US at 643-44 (requiring states that mandate parental consent to establish an alternative mechanism by which a court can consent to a minor's election of an abortion).
2. Limiting the potential for harm.

In determining the scope of children’s rights, we should consider the degree of potential harm caused by a child’s choices. This is partly because children’s incomplete development may compromise their decisionmaking capacity and limit the experience available to inform that decisionmaking process, however well developed. It is also because the ongoing process of identity development, which continues through adolescence, compromises the extent to which it is appropriate to bind an individual at Time 2 to the choices made by that individual, as a child, at Time 1. In adulthood, our identities become relatively (though certainly not completely) fixed. Until this occurs, however, we should be slow to put decisionmaking control over matters with long-term consequences into the hands of someone with only short-term identity competence.

The harm qualification, like the self-initiation qualification, would have the effect of favoring some rights over others. Again, speech rights should receive considerable protection, for the harms to speakers (and to child-listeners) associated with bad speech choices are likely to be relatively minor and short-lived. Abortion rights might be viewed as problematic under this standard, but not if the harms to a child of choosing abortion are viewed as minimal when compared to the harms associated with becoming a resistant teen parent. In contrast, a harm-based limitation counsels against affording children strong parental rights, for they are likely to suffer serious, long-term harm from their choice to become parents in adolescence. As I have argued elsewhere, allowing children to exercise free choice in deciding whether to assume parental responsibilities over their offspring (as opposed to whether or not to have an abortion) is difficult to justify in terms that serve the interests of the minor parent.

In anticipation of the discussion, in Part II, of children’s Establishment Clause rights, it is worth briefly considering how the two factors of self-initiation and harm-avoidance affect our analysis of children’s Free Exercise rights. While litigation fre-

---

35 Adults, too, change over time in response to their education and experience, but such changes are far less rapid or universal. Of course, the precise age dividing children from adults is relatively arbitrary and culture-dependent, but, once set, has developmental effects of its own.

quently asserts these rights on behalf of children, these claims are, with rare exceptions, the claims of parents. Thus, parents claim, on behalf of themselves and their children, the right to home school,\(^{37}\) to exempt their children from certain aspects of the school's curriculum,\(^{38}\) or to engage in religious proselytizing in the schools.\(^{39}\) The courts have left largely unaddressed a child's right to exercise her religion independent of her parents' views.\(^{40}\)

The fact that children rarely assert these claims says something about the nature of children's religious development. While children commonly question their parents' faith during adolescence,\(^{41}\) they generally engage in a private testing that allows them to reflect on their religious views, without incurring the costs of public defiance. Moreover, the solidification of religious identity often comes very late, after childhood has officially ended. The self-initiation requirement thus ensures that children

---

\(^{37}\) See, for example, *Blackwelder v Safnauer*, 689 F Supp 106 (N D NY 1988) (arguing that the state's home schooling regulations violated the free exercise rights of both parents and children); *Swanson v Guthrie Independent Sch Dist No. I-L*, 135 F3d 694 (10th Cir 1994) (arguing that the school district's policy of denying part-time attendance opportunities to home-schooled children violated the constitutional rights of both parent and child).

\(^{38}\) See, for example, *Mozert v Hawkins County Bd of Education*, 827 F2d 1058 (6th Cir 1987) (claiming that requiring a child attending public school to read books that conflict with her family's religious beliefs violated the constitutional rights of both parent and child); *Boone v Boozman*, 217 F Supp 2d 938 (2002) (claiming that a school immunization requirement, violated the Free Exercise rights of both parent and child).

\(^{39}\) *Walz v Egg Harbor Township Bd of Education*, 342 F3d 271 (3d Cir 2003) (asserting the free exercise and speech rights of a kindergarten child to distribute pencils and candy canes with a religious message at the behest of his mother).

\(^{40}\) In his dissent in *Yoder*, Justice Douglas pressed the question of children's rights independent of their parents' rights. 406 US at 241-46 (Douglas dissenting) (arguing that it would violate children's rights if parents were allowed a religious exemption when children have “conflicting desires” and those desires have not been factored into the analysis). His assumption was, however, that children's views would align either with those of the parents or with those of the state. While these alignments are, indeed, the two most likely, it is conceivable that the child's view would be distinct from both the state's and the parents'. Consider, for example, the case of Walter Polovchak, a twelve-year-old who did not wish to return to the Soviet Union with his parents because he had, while in the United States, become a Baptist. In this case, the Immigration and Naturalization Service supported his claim for asylum, and, hence, his position was aligned with that of the state. *Polovchak v Meese*, 774 F2d 731, 733 (7th Cir 1985). It is easy to imagine a case, however, in which the parent wished the child to leave the United States to remain in their custody, and the United States supported the child's departure in order to avoid responsibility for the child.

\(^{41}\) See Carol A. Markstrom, *Religious Involvement and Adolescent Psychosocial Development*, 22 J Adolescence 205, 205-06 (1999) (noting that the acquisition of the ability to think abstractly, the desire to confront important questions, and the overall engagement in the process of identity formation all incline adolescents to address issues of religion and spirituality).
are not forced to take positions, prematurely, on matters of considerable importance to their individual and familial identity. For this reason, Justice Douglas's famed call in *Yoder* to recognize children's religious rights by asking them their views was misplaced.\textsuperscript{42} Compelling a child to reveal her religious views at the state's behest will give the child no valuable decisionmaking experience, nor will it likely reveal the child's genuine views. All it will do is impose the costs of the rights exercise on children before they are prepared to incur them.\textsuperscript{43}

Just as surely, children who take the initiative to assert religious rights independent of their parents should be allowed to do so. In such circumstances, the developmental value to the child gained from the experience of acting on her own important choices would be great (and the developmental implications of being denied the opportunity to act also likely great). Moreover, such a rights assertion would clearly identify an extremely important child-specific competence. A child might nevertheless be prevented from acting on her independent religious inclinations, if those actions exposed her to serious harm.

D. Resolving the Three-Way Competition

Adding children to the mix of competitors can increase the complexity of allocating developmental control. As a general matter, it makes sense to think of the child's claim as most directly in competition with that of the parent. Thus, the analysis first divides the private family competitors from the state (deferring heavily to the family, but allowing the state greater control where the state has special expertise, as in the public context), and then sorts between parent and child. The self-initiation and harm considerations can then serve to allocate authority between parent and child: the first factor will vest increasing developmental control in the child with age, and the second will allow the parents to continue exercising a protective role, even through a child's adolescence.

\textsuperscript{42} 406 US at 241-49 (Douglas dissenting) ("Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit [the parent to impose his idea of religious duty on his child] without canvassing [the child's] views.").

\textsuperscript{43} I develop this argument in Buss, 2 Pa J Const L J at 66-70 (cited in note 25) (arguing that the state's active solicitation of a child's religious views threatens to force children whose views differ from those of their parents either to lie about their beliefs, or to suffer personal trauma and family discord that they likely desire to avoid).
Introducing the child into the developmental competition can, in some cases, simplify the allocation: Where the child’s views align with either the parents’ or the state’s, the child’s position should have special developmental force. A state’s interest in having a child receive a certain form or extent of education, however strong in the abstract, becomes stronger when aligned with the expressed interest of the child in pursuing that education. Conversely, a parent’s interest in avoiding that education becomes stronger if aligned with the child’s interest in avoiding it. This is not simple math and tie-breaking. Rather, it recognizes that the interests at stake, and related expertise, in fact change with the alignments. The state is in a far better position to assess, and meet, the educational needs of a child aspiring to leave her parent’s community and join mainstream society and the national economy, than to assess and meet the needs of a child who aspires to live apart. Similarly, the child’s common interest in a certain form of upbringing can serve to legitimize the parents’ authority as the best (and most competent) assessor of the child’s developing needs.

Applying the self-initiation requirement in the context of these claimed alignments of interest is essential. Absent independent rights-asserting conduct by the child, it is impossible to tell whether the claimed common views of parents and child reflect the authentic, independent views of the child. And absent such independent rights-asserting conduct of the child, we should not allow the state to intrude on the parent-child relationship in an attempt to reveal a child’s disagreement with her parents’ views that she had chosen not to reveal on her own.

Three-way disagreements, while possible, are likely to be rare. There will often be only two plausible positions for the parties to take: children will either wish to continue in school in keeping with the state’s requirements or leave school early in keeping with their parents’ religious and cultural views; they will wish to associate with a non-parent against the parent’s wishes (potentially an association the state would sanction), or they will share their parents’ desire to avoid the association. In some instances the child’s position will lie somewhere between

44 Justice Douglas’s dissent in *Yoder* can be read to rely on children’s independent views to strengthen the state’s interest in a particular case. 406 US at 242 (arguing that “if an Amish child wants to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents’ religiously motivated objections”).
the state's and the parent's, or will deviate from the position of state or parent in some details. In all such cases, the court should first sort the public from the private developmental interests, and, where private interests predominate, defer to the self-initiating child, absent a finding of harm.

II. THE STATE'S DEVELOPMENTAL MONOPOLIES

Thus far, this discussion has assumed a two or three-way competition among state, parent, and child for developmental influence. There are, however, many contexts in which the state, alone, exercises influence. These are the contexts, not normally conceived of in developmental terms, in which the state exercises some form of control over all citizens. My interest, here, is in age-blind state actions that pose a special threat to children because of their ongoing development. Stated more positively, the state sometimes has a unique opportunity to bestow developmental benefits on children by abstaining from actions routinely imposed on adults.

The one context in which the developmental benefits of government abstention have been noted is the criminal justice context. After briefly addressing the abstention value in this context, I will consider its value in another context, namely government acknowledgments of religious faith. I will suggest that children's ongoing development renders them uniquely vulnerable to the influence of government establishments of religion, and that they are thus entitled to special protection against such state action under the Establishment Clause.

A. The Developmental Value of Inaction in Criminal Justice

Considerable evidence supports the conclusion that trying and punishing children in the adult criminal justice system has serious negative developmental effects on children. Such an...
approach frequently puts children in contact with hardened adult criminals, and it deprives them of the nurturance and education that adolescents need. This results in diminished and distorted cognitive, moral, and social development, with serious lifelong consequences to the child and society. Those favoring "adult time for adult crimes" do not, for the most part, dispute these developmental harms, though they may question the magnitude of the influence. Rather, they challenge the claims of developmental benefits made by those favoring a distinct juvenile justice system with a rehabilitative aim.

What this debate loses is the important middle ground. Even if the state can take no positive action that will benefit the development of juvenile delinquents, it can avoid taking actions that have negative effects. Adopting such an approach assumes that the positive influence would come from childhood itself. At its best, childhood gives children the ability to start again and to learn from their mistakes, so long as they remain unencumbered by the most oppressive consequences of those mistakes. Indeed, there is considerable evidence to suggest that many children will simply outgrow their anti-social behavior, if not corrupted by the justice system before they do so. But even absent evidence of a direct, positive effect of non-intervention, we might want to bar the state from imposing developmental harm. We might prevent the state from making children worse off, even if we are not confident that inaction itself will cause children to become better.

While the harm the state can cause to children by treating them like adults in the criminal justice system is stark and obvious, developmental harm can take a more subtle form. Where the state's actions prod children's development, even modestly, in a direction prohibited by the Constitution, we should be concerned.

negative shaming, opportunities for criminal socialization, modeling of violence) and the stigmatization and opportunity blockage that flow from a record of criminal conviction").

47 See Mark W. Lipsey, Can Rehabilitative Programs Reduce Recidivism of Juvenile Offenders? An Inquiry into the Effectiveness of Practical Programs, 6 Va J Soc Pol & L 611, 611 (1999) (noting that the trend toward tougher, more punitive, sanctions for juvenile offenders and the broader use of waivers to criminal court has been fueled, in large part, by the conclusion that rehabilitative programs do not work).

State invocations of religion offer one example of the potential for child-specific constitutional harm. Because of children's ongoing development, religious references deemed permissible for adults may well be constitutionally offensive for children.

B. Children's Special Rights of Non-Establishment

Attempts to resolve the apparent tension between the Constitution's Establishment and Free Exercise Clauses have inspired a great deal of judicial and scholarly writing. Largely missing from these attempts to reconcile the clauses is any consideration of how individuals develop as rights holders over time. A child's progression from a readily-influenced absorber of information and views to an influence-resistant adult with fairly fixed views, suggests that the relative force of the two constitutional rights might shift between childhood and adulthood. We might sensibly interpret the Establishment Clause to afford particularly strong protection to children, who are most vulnerable to the influence of authority figures and whose development has not yet produced clear religious identities of their own. Conversely, we can justify affording children thin free exercise protection, precisely because they have not yet assumed such a (relatively)50 fixed religious identity. For adults, in contrast, we might want to shift some protection away from anti-establishment and toward religious tolerance. Adults, having achieved a (relatively) fixed religious identity, have real stakes in the free exercise protection, and less vulnerability to potential offenses of establishment.

The recent challenge to the "under God" language in the Pledge of Allegiance offers an example of how children's development, and, particularly the state's potential to influence development, bears on an analysis of the religion clauses. In *Elk Grove Unified School District v. Newdow,*51 a father of an elementary school student challenged the state's requirement that the Pledge of Allegiance be recited, with the language "under God," in all public school classrooms. He originally brought the challenge on behalf of his daughter, as well as himself, asserting her

---

50 Adults, too, can change their religious views, but the change is developmentally distinct. Unlike children who are acquiring a religious identity for the first time, changes in adulthood represent a move from one established identity to another. The potential for this sort of movement does not render adults vulnerable to state religious messages in the way that children, with unformed identities, are.

right to be free of state influences in matters of religion, and his right to influence his child's religious upbringing free from government interference.\textsuperscript{52} When the child's mother challenged the authority of the father, as non-custodial parent, to bring the lawsuit either on his own behalf or on behalf of the child, the California Superior Court adjudicating the family's custody dispute enjoined the father from including his daughter in the litigation.\textsuperscript{53} The Ninth Circuit concluded that the father had standing to assert the claim on his own behalf,\textsuperscript{54} and ruled that teacher-led recitation of the Pledge violated the Establishment Clause.\textsuperscript{55} The Supreme Court granted certiorari to consider both the Pledge's constitutionality and the father's standing to assert the challenge.\textsuperscript{56} The child's distinct claim, however, was not addressed by the Court.

This omission of the child's claim was problematic, not only because it prevented a majority of the Court from reaching the merits, but also because it obscured the core of the Establishment Clause offense. It is the potential effect of the daily recitation on development that amounts to the unconstitutional establishment, regardless of whether it serves or disserves the parents' aims of religious upbringing. To a much greater extent than with adults, children's exposure to demonstrations of religiosity by the state are likely to have an effect on their emerging conception of their religious identities and of their relationship, as religious beings, to the rest of society. Whatever else the Establishment Clause does, it should surely shield children from state involvement in their religious development. Precisely because their religious identities are not yet fixed, children are entitled to special protection from religious messages coming from the state.

While the Supreme Court's interpretation of the Establishment Clause is diverse and changing, certain themes have become prominent in the cases addressing public displays of, and participation in, religious exercise. In these decisions, the Court has variously interpreted the Clause to prohibit coerced religious

\textsuperscript{52} Id at 483 (noting Newdow's claim that being obligated to watch her public school teacher lead the class in saying the Pledge injured his daughter).

\textsuperscript{53} See \textit{Newdow v United States Cong}, 313 F3d 500, 502 (9th Cir 2002) (describing the history of the custody proceedings).

\textsuperscript{54} 328 F3d at 485 (finding that Newdow had standing to challenge a practice interfering with his right to direct his daughter's religious upbringing).

\textsuperscript{55} Id at 487.

\textsuperscript{56} Cert granted 124 S Ct 384 (October 14, 2003). The Supreme Court ultimately rejected the father's claim on standing grounds, 542 U.S. \_\_\_ (2004).
participation\textsuperscript{57} and government endorsement of religion.\textsuperscript{58} Common to the analysis across opinions is a focus on the objector, or non-believer. Establishment is defined in terms of the offense given to someone who does not share the religious message espoused by the state.

In defining both coercion and endorsement, the Court assumes the individuals affected have relatively fixed religious identities, which are offended by the state's practices. Thus, coercion puts individuals "\textit{who objected in an untenable position,}"\textsuperscript{59} and appears "\textit{to the non-believer or dissenter to be an attempt to employ the machinery of the state to enforce a religious orthodoxy.}"\textsuperscript{60} Similarly, "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community."\textsuperscript{61} Because the endorsement approach articulated by the Court shares with the coercion test a focus on the potential offense given to those with established views distinct from those the state endorses, it is useful, for my analysis, to recast the test as one of "exclusive endorsement," or, more simply, "exclusion."

While the issues of coercion and exclusion bear on our assessment of children's Establishment Clause rights as well, these concepts are developmentally incomplete. Some children will certainly be aware of the religious identity of their families, and thus subject to the experience of coercion or exclusion. Indeed, as many of the cases note, children with this awareness are likely to be especially vulnerable on both scores.\textsuperscript{62} But for many children, their sense of religious identity will be thin or unsettled, even, 

\begin{footnotes}
\textsuperscript{57} See \textit{Lee v Weisman}, 505 US 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. . . .").

\textsuperscript{58} Justice O'Connor first articulated the endorsement test in \textit{Lynch v Donnelly}, 465 US 688, 687-94 (1984) (O'Connor concurring) (arguing that the endorsement test clarifies the Court's Establishment Clause doctrine), and this test was adopted by a majority of the Court in \textit{County of Allegheny v ACLU}, 492 US 573, 593-94 (1989) (reasoning that the endorsement test laid out by Justice O'Connor in \textit{Lynch} best embodies the Establishment Clause principle of the Court). It is unclear whether this majority has survived subsequent changes in the Court's composition.

\textsuperscript{59} \textit{Lee}, 505 US at 590 (emphasis added).

\textsuperscript{60} Id at 592 (emphasis added).

\textsuperscript{61} \textit{Lynch}, 465 US at 688 (O'Connor concurring) (emphasis added).

\textsuperscript{62} See, for example, \textit{Lee}, 505 US at 593-94 (1992) (relying on psychological research to reason that for the state to force elementary and secondary students who object to a prayer to choose between remaining silent and protesting constitutes impermissible coercion, even though the choice may not violate the Establishment Clause "if the affected citizens are mature adults").
\end{footnotes}
for some children, non-existent. For such children, the concern is not about their adverse experience as outsiders, but rather about their vulnerability to influence by perceived "insiders."

For these children (and most children will have at least some of this vulnerability), the state's religious involvement will have some influence over the formation of their religious identities, and their perception of how they fit, in religious terms, with others. Outside the religious context, this influence over who children become and their understanding of how they relate to others, is an appropriate aspect of public education. In the realm of religion, however, such influence is constitutionally offensive.

The potential for establishment through developmental influence has at least two important implications for a constitutional analysis of the Pledge. First, however strong the argument is that the Pledge fails the coercion or endorsement tests, the developmental argument strengthens the case against its constitutionality. Second, the developmental argument applies to all children, regardless of their views and those of their parents. Unlike coercion or exclusion, which posit a child who feels coerced or excluded, the developmental conception suggests the state-directed recitation of the language is problematic, even if it causes children no discomfort. Related to this, the constitutional offense does not diminish simply because the child's parents approve.

1. Establishment Clause offenses that neither coerce nor exclude.

A common argument in defense of the Pledge is that the religious language is benign "ceremonial" deism. As with opening the legislature or Supreme Court with an invocation, or printing "In God We Trust" on our money, the argument goes, saying "under God" as part of the Pledge has a solemnizing effect, without reflecting any favoritism among religions or forcing the non-religious to participate in a religious exercise. Absent such coercion or offensive exclusion, the case for constitutional prohibition is said to be weak.

---

63 See Sherman v Community Consolidated Sch Dist 21 of Wheeling Township, 980 F2d 437, 445 (7th Cir 1992) (concluding that the "under God" language in the pledge of allegiance, as a "ceremonial reference] in civic life," did not violate the Establishment Clause.) This is, in essence, the position taken by Chief Justice Rehnquist in his concurrence in Newdow, 542 U.S. 1, 10 (describing the recitation of the Pledge as a "patriotic exercise, not a religious one.")
The predictable counter to this argument, advanced by the Ninth Circuit in Newdow, is that the relationship of authority between child and school, and the nature of peer relations among children, renders the recitation of the Pledge far more coercive in the school setting. Unlike adults, whose comfort with their own religious identities enables them to negotiate such situations with relative ease, the child, unsettled in his religious identity and unsure of the rules of the game, is far more likely to feel compelled to join in. Thus, children's ongoing development increases the chance that children will, in some discomfort or even trauma, feel compelled to join in the daily recitation of the Pledge.

But even if we were to conclude that children suffered no discomfort or trauma when called upon to recite the Pledge, the potential influence of that recitation on children's development argues against its constitutionality. Whether the words "under God" strike children as troubling, important, or neither, children will get the simple message that "we" as a people, believe in God. It would be silly to suggest that the message is a strong one, or one impervious to contradiction, but just as silly to suggest that the daily chant in classrooms everywhere sends no message about religion at all.

We are comfortable compelling adults' exposure to divine references on our money, or in our legislative bodies, in large part because we think of adults' religious development as relatively complete. We can trust adults to understand the difference between these ceremonial references and more directive endorsements, because our understanding of self, and state, and our relationship to the state, has matured. Children's immaturity, in contrast, makes them far more vulnerable to a misapprehension of the state message. Indeed, it is impossible to entirely disentangle their emerging understanding of self from their interpretation of these messages from the state.

Moreover, the developmental influence in the Pledge context is likely to be significantly stronger than it would be in other contexts where the Court has tolerated ceremonial deism.\textsuperscript{65}

\textsuperscript{64} Newdow, 328 F3d at 488 ("The coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students.").

\textsuperscript{65} Note that much of this tolerance is expressed in dicta. Among all the instances of alleged ceremonial deism, the Supreme Court has only ruled directly on legislative prayer. See Marsh v Chambers, 463 US 783, 792 (1983) (holding that Nebraska's legisla-
Many of these contexts, such as the openings of legislative and court sessions, are generally invisible to children. Others, like words on money, are nearly invisible, both because children rarely read the words and because, even when they do, they may not associate money, or its message, with the state.

More important, however, is the fact that neither the divine references made by official bodies or on money call for a recitation. The connection between the spending of money and the “participation” in the money’s message is a thin one, and seems far too oblique to be appreciated by a mind just beginning to understand the relationship between individual and society in abstract terms. In contrast, the relevant aspects of the Pledge are strikingly concrete. While “allegiance to a flag” is befuddling in its illusion of concreteness, declaring the United States “One Nation under God” straightforwardly declares us a religious nation, in terms a child can readily understand. And in standing and joining in, children know they are participating in that declaration in some sense, even if they don’t understand precisely what a “Pledge of Allegiance” is.

The unique, participatory nature of the Pledge bears on the developmental analysis in two closely related respects. First, and most obviously, children’s participation engages them directly. It gives them actual experience as members of the majority group making a connection between God and country. This direct experience is far more likely to translate into identity influence than children’s mere observations, for the process of identity formation is, in large part, one of learning by doing: a child tries on attitudes and beliefs for size, and sees how it feels to espouse them to the world.

Second, participation calls students’ attention to the orchestrator of that participation, and suggests that that orchestrator...
cares what children say and think. Whatever else a child is inclined to think about the Pledge, she is likely to conclude that those who are in charge want her to believe the words recited. Thus, participation shapes identity development, not only by affecting what feels comfortable for children, but also by situating that experience within societal attitudes.

While the recitation of the words "under God" as part of a school-led Pledge are unlikely to have a dramatic effect on a child's religious development, it might well have some marginal effect on that development, particularly as it relates to a child's emerging sense of society and her place in it. The attraction of conformity will likely incline a child's development, however subtly, toward religion. But this marginal effect need not push in the direction of greater (or more standard) religiosity to be constitutionally offensive. Whether it nudges children toward mainstream religious faith, away from that faith, or causes no religious movement, the recitation of the Pledge imposes a harm of establishment if it links religious faith with civic majority status in the minds of developing children. The harm to identity development is just as great if it skewed a child's emerging perception of where she stands in society because of her religious choices as it would be if it skewed the religious choices themselves.

2. Vesting the Right in the Child.

The Ninth Circuit's opinion in Newdow addresses the risk of the state's influencing a child's religious identity development, but only from the perspective of the parent. Mr. Newdow argues that the school-led recitation of the Pledge interferes with his ability to influence his daughter's religious development, and the Ninth Circuit rested its standing decision on the injury to Mr. Newdow's right to control his daughter's religious upbringing.68 Thus, the establishment offense done to Mr. Newdow is indirect. It impairs his ability to exercise other rights, namely the rights of free exercise and parental control.69

68 Newdow, 328 F3d at 485 ("Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter.").

69 The fact that Mr. Newdow has lesser custodial authority does not undercut this point. Courts routinely recognize that non-custodial parents retain a right to exercise control over their children's religious upbringing under some combination of the free exercise and due process clauses. See, for example, Zummo v Zummo, 574 A2d 1130 (Pa Super 1990). See also In re Marriage of Minix, 801 NE2d 1201 (Ill App 2003).
In contrast, the establishment offense done to the child is direct. It is the child whose development of a religious identity is altered by the state’s actions. As citizens, children are protected by the Establishment Clause from any such developmental manipulation at the hands of the state.

Ascribing the primary right to children is not only more coherent in concept, but it also has important pragmatic implications. As the child’s right, the protection against establishment shields the child from affirmative religious influence at the hands of the state, whatever the parents’ religious agenda. The parents may have a secondary interest in avoiding the state’s interference with their own influence, but the child’s right should not be contingent on the parent’s objection to the state’s developmental establishment.

Moreover, as a right against establishment, the right runs only one way. It is a right of developmental non-influence, not a right of free religious choice. Clearly, then, the mother in Newdow, despite her superior custodial status, has no authority to waive the right on behalf of her daughter, as she attempted to do. Whether a non-custodial parent has authority to assert this one-way right on his daughter’s behalf (rather than his own) depends on the procedural rules governing litigation on behalf of children as well as the details of the custodial arrangement. Mr. Newdow’s daughter unquestionably had standing to assert her claim, but she might have lacked a proper “next friend” willing to file the suit on her behalf.

Recognizing this Establishment Clause right as a one-way right, and, in this sense, not waivable, takes us back to the category of developmental influence with which this discussion began: the right, conceived in terms of developmental effects, is the right to be shielded from some state action otherwise acceptable for adults. Because of children’s special vulnerability to influence, religious messages deemed harmless for adults raise serious constitutional questions for children. Whether children are uncomfortable with that influence, or even aware of it, is beside

---

70 313 F3d at 505 (denying the mother’s attempt to intervene on behalf of her daughter, in support of the recitation of the Pledge). She lacks the authority to intervene despite her authority to shape her child’s religious development in many other ways, including sending her to a religious school.

71 In federal litigation, Rule 17 of the Federal Rules of Civil Procedure governs the circumstances under which an adult can file an action as “next friend” on behalf of a child. FRCP 17(c).
the point, for it is the special right of the child to avoid the influence itself, however experienced.

**CONCLUSION**

Pathways of developmental influence are complex and obscure. When the law allocates control over a child’s development among individuals and institutions, it can, at best, allocate opportunities for that control. These opportunities should be given to those with the greatest child-specific developmental competence, which involves both competence in assessing and acting on a child’s developmental needs and competence in identifying and correcting “errors” made with earlier developmental missteps.

For many aspects of development, the parent’s competence is predictably the greatest. The law should, therefore, afford them near-exclusive control over the vast array of decisions made on behalf of children every day that will have largely private, and individual, effects. As those individual children’s own identities emerge, however, some of their parents’ control over their development should shift to them.

The state, too, has an essential role to play in influencing children’s development. While it lacks the child-specific competence required to justify its intervention in the subtle, private shaping of a child, it possesses special competence to shape the child’s development into a public citizen. Moreover, it can establish minimum parental standards, applicable in all cases, within which parents are left free to exercise personal choice in determining how to raise their children. Far less appreciated, but equally important, is the influence the state can have over development by differentiating its treatment of children from its treatment of adults. The greatest benefit the state can often bestow on developing children is to shield them from child-specific harms caused by its own actions. Where those developmental harms implicate constitutional rights, state abstention is required.