A Constitutional Jurisprudence of Children's Vulnerability

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The Unites States Supreme Court identified "the peculiar vulnerability of children" as one of the "three reasons" for differentiating the treatment of children under the Constitution from that of adults. Yet, although explicit and implicit characterizations of children as vulnerable abound in the Court's opinions and scholarly commentary, there has been little analysis of how the construct of vulnerability mediates children's relationship to the Constitution.

This Article examines the Court's analytic uses of constructions of children's vulnerability. Informed by legal scholarship and empirical findings on human vulnerability emerging from the field of bioethics, philosophy, psychology, and developmental neuroscience, the Article deconstructs the concept of children's vulnerability and proposes five categories derived from the Court's constitutional jurisprudence and interdisciplinary scholarship: harm-based vulnerability; influence-based vulnerability; capacity-based vulnerability; status-based vulnerability; and dependency-based vulnerability. It applies the classification to representative cases from among the approximately one hundred relevant cases decided by the U.S. Supreme Court. The Article contextualizes the analyses of constitutional jurisprudence and children's vulnerability with discussions of relevant social history and developmental science. It then critically examines the Court's use of vulnerability constructs in a narrower subset of cases, exploring the relationship between these constructs and relevant empirical knowledge.

In conclusion, the Article critiques the often-tenuous relationship between the state of scientific knowledge and the Court's characterizations of children's vulnerability. The Court frequently relies upon these constructs when determining constitutional questions. This Article contends that when the Court makes "factual" assertions about children's characteristics of functioning—assertions that are the subject matter of developmental science—these assertions should rest on the best available evidence. The Article recommends continued scholarly attention to, and scrutiny of, judicial reliance on notions of children's vulnerability in constitutional analysis.

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TABLE OF CONTENTS

INTRODUCTION

"[C]hildren are constitutionally different from adults. . . ."[1] A U.S. Supreme Court majority voiced this assertion in *Montgomery v. Louisiana*,[2] a recent addition to the remarkable line of Eighth Amendment decisions that began in 2005 with *Roper v. Simmons*.[3] Few would disagree with the notion that children differ from adults in many ways.[4] Yet, there is substantially less agreement as to the implications of those distinctions for constitutional jurisprudence relating to childhood. Although *Montgomery* and its precedents focused on constitutional distinctions "for purposes of sentencing,"[5] the question of whether matters affecting children's welfare, rights, or interests require child-specific constitutional approaches, and if so, what those approaches should be, has been debated by the members of the Court in an exceptionally broad range of cases.[6]

The Court identified "three reasons" for treating children differently under the Constitution in its 1979 decision in *Bellotti v. Baird*.[7] It cited "the peculiar vulnerability of children; [children's] inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing," in justifying the constitutionality of state limitations on minors' access to abortion that would be unconstitutional if applied to adults.[8] In recent decades, rich bodies of

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1. Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016) (quoting Miller v. Alabama, 567 U.S. 460, 471 (2012) (citing Roper v. Simmons, 543 U.S. 551, 569–70 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010))).

2. *Montgomery*, 136 S. Ct. at 733.

3. *See Roper*, 543 U.S. at 569 (holding unconstitutional the imposition of the death penalty on minors, *rev'g* Stanford v. Kentucky, 492 U.S. 361 (1989)); *see also Graham*, 560 U.S. at 68 (holding unconstitutional sentences of life without parole for nonhomicide offenses for crimes committed by minors); *Miller*, 567 U.S. at 465 (holding unconstitutional mandatory sentences of life without parole for homicide offenses committed by minors).

4. The term "children" is used here to refer to all persons under the age of eighteen, in that eighteen is the age at which persons in the United States typically attain majority in most jurisdictions and for most purposes. *See, e.g.*, CHILDREN AND THE LEGAL SYSTEM 109–10 (Samuel S. Davis, Elizabeth S. Scott, Walter Wadlington & Lois A. Weithorn eds., 5th ed. 2014). Clearly, therefore, the limits of generalizations about differences between adults and children become immediately apparent, in recognizing, as Hillary Rodham did in 1973, that older adolescents, such as seventeen year olds, may have more in common based on maturational levels with legal adults aged eighteen than they do with newborns. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 488–89 (1973). Indeed, as I have noted elsewhere, "[t]he physiological and psychological immaturity of many minors is undeniable, as is the dependency upon adults intrinsic to this immaturity and our social structure. Yet, the ages of 18 and 21 delineating majority are arbitrary and stem from currently irrelevant historical concerns such as sufficient physical strength to bear heavy armor." Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, *in* CHILDREN'S COMPETENCE TO CONSENT 235, 239 (G.B. Melton et al. eds., 1983) [hereinafter Weithorn, *Involving Children*].

5. *Montgomery*, 136 S. Ct. at 733.

6. *See infra* notes Part I.B.

7. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

8. *Id.* In *Bellotti*, however, the Court did not allow the Massachusetts statute requiring parental

scholarship have explored the latter two factors cited by the Court. In particular, substantial commentary has examined the constitutional significance of children's decisionmaking capacities and maturity[9] and of the relative roles and authority of parents, state, and children in matters affecting minors' welfare.[10] By contrast, although explicit and implicit characterizations of children as *vulnerable* abound in the Court's opinions, there has been comparatively little analysis of how the construct of vulnerability mediates children's relationship to the Constitution.[11]

Most commonly, images of children as vulnerable make their way into the Court's opinions in the context of constitutional challenges to allegedly child-protective governmental policies that limit the exercise of children's or adults' constitutional rights. Notions of children as vulnerable are most commonly employed to justify the constitutionality of differential treatment of children and adults. Sometimes, however,

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consent for minors' access to abortion to stand without modification. The Court held unconstitutional parental consent statutes that grant parents exclusive veto power over their minor daughters' access to abortion. It concluded that minors' unique needs, characteristics, and status under the law required an alternative that balanced the competing interests and concerns. The judicial by-pass procedure approved by the Court in *Bellotti* governs in most states, although some jurisdictions, such as California, allow minors direct access to abortion, independent of parental or court involvement. *See, e.g.*, Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 800 (Cal. 1997).

9. *See, e.g.*, Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOL. 583 (2009); ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE (2008); Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2006); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003); YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert Schwartz eds., 2003); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL., PUB. POL'Y, & L. 3 (1997); CHILDREN'S COMPETENCE TO CONSENT (Gary B. Melton et al. eds., 1983); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (1982); Lois A. Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions*, 5 CHILD & YOUTH SERVS 85 (1982).

10. *See, e.g.*, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS (2010); Anne C. Daily, 91 IOWA L. REV. 431 (2006); Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27 (2004); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

11. *But see* Deanna Pollard, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777 (2011). Many scholars have acknowledged or discussed notions of children's vulnerability relevant to the Court's decisions in the context of related analytic works. *See, e.g.*, Elizabeth Scott, Thomas Grisso, Marsha Levick, & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 679 (2016) (analyzing the Court's reliance on notions of children's vulnerability to influence by others and reduced ability to control their environment; Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 502–09 (2000) (discussing the role of notions of children as vulnerable to harm in free speech cases).

vulnerability constructs are used to challenge the constitutionality of policies that treat minors and adults similarly. Other analytic uses of these constructs appear as well.[12]

These characterizations of children as vulnerable (or not) are assertions about aspects of the psychological or physiological nature of children that are endorsed or rejected by the Justices. As such, they represent the Justices' conclusions about certain *facts* relevant to the constitutional cases they are deciding.[13] Because these vulnerability constructs concern *general* phenomena (that is, children's characteristics, needs, or responses to certain situations, stimuli, or influences more generally) rather than information specific to the parties in the litigation, the constructs have been referred to as *legislative facts*[14] or—using Monahan and Walker's formulation—*social authority*,[15] when judges offer them as reflecting the true state of the world.

One might wonder about the sources of the Justices' conclusions about children's vulnerability, or more broadly, where judges get the "facts" about children's development (or any phenomenon relating to human behavior or functioning) that they cite in resolving constitutional

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12. For a survey of some of the ways in which vulnerability constructs are used by the litigants and the Court, *see infra* notes 96–160.

13. In the past thirty years, a rich body of scholarship has provided theoretical frameworks for analyzing and appraising judicial use of "facts" in constitutional and other legal decisions. *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986) [hereinafter Monahan & Walker, *Social Authority*] (asserting that social science research should be treated by courts more like legal precedent, or "social authority," than pure facts); David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991) [hereinafter Faigman, *Normative Constitutional Fact-Finding*] (discussing the role that empirical research has played in analyzing and interpreting constitutional issues); DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008) [hereinafter FAIGMAN, CONSTITUTIONAL FICTIONS]; John Monahan & Laurens Walker, *Twenty-Five Years of Social Science in Law*, 35 L. & HUM. BEHAV. 72 (2011) (discussing the changes over time in how courts have used and relied on social science research). For application of the work of these and others to judicial constructs of children's vulnerability in constitutional analysis, see *infra* notes 14–20, 203–211 and accompanying text.

14. "[L]egislative facts are those facts that transcend the particular dispute and have relevance to legal reasoning and the fashioning of legal rules." Faigman, *Normative Constitutional Factfinding*, *supra* note 13, at 552 (citing Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942)). Legislative facts can be distinguished from adjudicative facts, which are particular to the dispute before the court. *Id.* Thus, for example, facts relating to the developmental maturity of minors for the purpose of fashioning an age-based rule regarding the constitutionality of death sentences in *Roper v. Simmons*, 543 U.S. 551 (2005), are legislative facts. FAIGMAN, CONSTITUTIONAL FICTIONS, *supra* note 13, at 50. By contrast, adjudicative facts or the "facts of the case," are "the who/ where/ why questions that should ultimately go to a jury or fact finder." Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1256 (2012).

15. Monahan and Walker reframe Davis' concept of "legislative facts" using the characterization "social authority," "argu[ing] that courts should treat social science research relevant to creating a rule of law as a source of authority rather than as a source of facts. More specifically, we propose that courts treat social science research as they would legal precedent under the common law." Monahan & Walker, *Social Authority*, *supra* note 13, at 488.

questions.[16] To the extent that relevant methodologically rigorous empirical research addressing the developmental vulnerabilities of children exists, one would hope that the Justices would become sophisticated consumers of such scientific work and apply that science faithfully.[17] While this does occasionally occur,[18] more frequently the Justices rely on unsupported or unsubstantiated assumptions about the phenomena at issue.[19] In some of these instances, Justices explicitly or implicitly eschew the need for scientific data, offering notions about children's nature as statements of reality, sometimes asserting that the facts are too well-established to require empirical support. In still other cases, the Justices recognize the need for empirical data, but observe that the database is inadequate to resolve the questions before the court.[20] Where the Justices make assertions as to children's functioning or characteristics in the real world—such as constructs of children's vulnerability—and rely on those constructs in analyzing and deciding a case, the constructs should be measured against the state of relevant scientific evidence. While constitutional cases must be resolved through

16. *See generally Judicial Notice of "Facts" about Child Development*, *in* REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 232, 232–247 (Gary B. Melton ed., 1987) [hereinafter *Judicial Notice of "Facts"*] (discussing the problematic role that judicially noticed social facts play in children's cases); *see also* Gail S. Perry & Gary B. Melton, *Precedential Value of Judicial Notice of Social Facts:* Parham *as an Example*, 22 J. FAM. L. 633 (1983–84). For in-depth analyses of these issues as they relate to social science evidence (and scientific evidence) more generally, see Faigman, *Normative Constitutional Fact-Finding*, *supra* note 13; FAIGMAN, CONSTITUTIONAL FICTIONS, *supra* note 13; Larsen, *supra* note 14; Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014); Monahan & Walker, *Social Authority*, *supra* note 13; Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).

17. *See, e.g.*, Monahan and Walker, *Social Authority*, *supra* note 13; FAIGMAN, CONSTITUTIONAL FICTIONS, *supra* note 13, at 159–81, which provide guidelines for how such social authority or legislative facts might be presented to and reviewed by courts.

18. The U.S. Supreme Court's use of empirical research in *Maryland v. Craig*, 497 U.S. 836, 868 (1990), as discussed *infra* at notes 305–16 and accompanying text, and of developmental science in *Roper v. Simmons*, 543 U.S. 551, 569–70, 617 (2005), *Graham v. Florida*, 560 U.S. 48, 62–68 (2010), *J.D.B. v. N.C.*, 564 U.S. 261, 272 (2011), *Miller v. Alabama*, 567 U.S. 460, 470–72 (2012), and *Montgomery v. Louisiana* 136 S. Ct. 718, 733 (2016), reflect reliance on research about child development by the Court that is both appropriate and relatively sophisticated.

19. *See Judicial Notice of "Facts," supra* note 16, at 239 (noting that the Court has characterized many of its asserted "facts" about child development as derived from ordinary "human experience,"); Perry & Melton, *supra* note 16, at 636–45 (discussing the evolution of judicial notice of social facts); FAIGMAN, CONSTITUTIONAL FICTIONS, *supra* note 13, at 17 (arguing that unsupported judicial pronouncements as to the state of the empirical world, or "fact-finding by fiat," erodes the legitimacy of the Court).

20. Monahan and Walker note that that when "no research, or inadequate research, exists to support empirical assumptions," courts may rely on their "experience and intuition, along with whatever information may be available," to develop "working hypotheses" as to the phenomena in question. John Monahan & Laurens Walker, *Empirical Questions Without Empirical Answers*, 1991 WIS. L. REV. 569, 579–81 (1991). Yet, importantly, the authors emphasize that "judicial candor about the role of empirical assumptions and the speculative nature of their resolution" keeps the door open to doctrinal evolution as the data base informing it evolves. *Id.* at 581.

application of constitutional principles, if the Court integrates "facts" relating to children's vulnerability into its analyses—as it often does when scrutinizing state purposes asserted to justify child protective legislation—those facts should ideally reflect the best available knowledge regarding children's functioning and development.

This Article commences an examination of the Court's analytic uses of constructions of children's vulnerability. Part I deconstructs the concept of children's vulnerability and proposes five categories derived from the Court's constitutional jurisprudence and interdisciplinary scholarship: (1) *Harm-Based Vulnerability* (that is, vulnerability as greater susceptibility to physical or psychological harm from exposure to certain stimuli or situations); (2) *Influence-Based Vulnerability* (that is, vulnerability as greater susceptibility to influence, pressure, coercion by others); (3) *Capacity-Based Vulnerability* (that is, vulnerability arising from immature decisional and self-protective capacities); (4) *Status-Based Vulnerability* (that is, vulnerability arising from legal, social, and situational concomitants of minority status and subordination to the authority and control of others); and (5) *Dependency-Based Vulnerability* (that is, vulnerability arising from greater dependence or reliance on others to meet one's basic needs).

In Subpart A, I define and distinguish these categories. Legal scholarship informs the definitional and classification process, as do theoretical insights and empirical findings on human vulnerability emerging from the fields of bioethics, philosophy, psychology, and developmental neuroscience. In Subpart B, for the purpose of clarifying the categories and the distinctions among them, I apply the classification to representative cases from among the approximately one hundred relevant cases decided by the U.S. Supreme Court.[21]

Part II contextualizes the discussions that precede and follow it. Subpart A embeds this Article's analyses in the social and historical antecedents of modern constructs of children's vulnerability. Subpart B provides essential understandings from developmental science to inform, and create a backdrop for, subsequent Parts. It first highlights the need to distinguish between generality and specificity in legal responses to perceptions of children's vulnerability. It then underscores two important themes relating children's vulnerability: children's status at any given moment in time as *not-yet-fully-developed* persons; and children's nature as persons undergoing a biologically driven, environmentally responsive, and exceedingly rapid *process* of maturation, unparalleled when compared with other stages of development in the effects experiences may have on future functioning.

21. The discussion of cases within this format is selective to best illustrate the themes discussed.

Each of these facets introduces the potential for distinct—although overlapping—vulnerabilities.

Part III considers how the Court uses constructs of children's vulnerability, and in particular, the relationship between the constructs offered by the Court and relevant empirical knowledge. In doing so, it examines selected cases within the first of the five vulnerability subtypes: *Harm-Based Vulnerability*.[22] Subpart A considers constructs of children's vulnerability as alleged or potential victims of abuse in cases relating to prohibitions on child pornography and laws developed to accommodate the perceived needs of alleged child abuse victims testifying in court. Section B focuses on constructs offered to support limitations on speech asserted to have a detrimental impact on children's well-being. It examines selected cases restricting children's access to sexual content, "indecent" speech, communications by child speakers in school settings, and video games with violent content.

In its analysis of selected cases involving judicial constructions of children's vulnerability, this Article considers the support, or lack thereof, for constructs about children's vulnerability offered by the Justices. It observes that, in some instances, whether in the presence or absence of purported empirical support, the Court's use of vulnerability constructs appears highly pretextual. At times, notions of children's vulnerability are strategically manipulated, allowing the Court to sidestep the provision of a more credible account of the reasoning leading to its result.

The analysis of constructs of children's vulnerability deserves continued attention by legal policymakers, jurists, and scholars. Policy decisions as to the roles of government in protecting children, regulating parental discretion, and restricting constitutional rights of children or others will be the subject of ongoing debate. Not every policy affecting children's welfare demands scientific examination. But, to the extent that policies are justified, in part, by assertions about children's psychological, physiological, or social vulnerability—that is, matters within the purview of developmental science—we must honestly assess the degree to which the factual assumptions and premises underlying any such polices are empirically supported. Scrutiny of the Court's constructs about children's vulnerability, their analytic roles, and their congruence with the state of scientific evidence may promote greater fidelity to the science employed and greater honesty in the legal reasoning employing it. [23]

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22. Subsequent scholarship will further examine and analyze cases falling within the other four vulnerability subtypes.

23. This point has been effectively made by others in related contexts. *See, e.g.*, FAIGMAN, CONSTITUTIONAL FICTIONS, *supra* note 13, at 155–58; *Judicial Notice of "Facts," supra* note 16, at 240–41. *See infra* notes 203–11 and accompanying text for further discussion of their insights.

I. CONSTRUCTING CHILDREN'S VULNERABILITY

Constitutional litigants, amici, and judges rely often on constructs of children as vulnerable to bolster their arguments as to the asserted need (or lack thereof) for child protective laws facing constitutional scrutiny. In addition, in some instances, vulnerability constructions are used to argue that children are sufficiently different from adults to justify—indeed mandate—that certain policies not accounting for such differences be held unconstitutional. Depending on the constitutional provision at issue, the precise question before the Court, and the applicable standard of review, vulnerability constructs may be mobilized in service of a wide range of showings regarding alleged "facts" about children's psychological or physiological functioning.

In Subpart A, I deconstruct the concept of children's vulnerability, proposing, defining, and distinguishing five categories culled from the U.S. Supreme Court's constitutional jurisprudence, aided by scholarship and empirical work in law, bioethics, philosophy, psychological science, and developmental neuroscience. The typology includes the following subtypes of vulnerability, to be elaborated upon below: (1) *Harm-Based Vulnerability* (that is, vulnerability as greater susceptibility to physical or psychological harm from exposure to certain stimuli or situations); (2) *Influence-Based Vulnerability* (that is, vulnerability as greater susceptibility to influence, pressure, coercion by others); (3) *Capacity-Based Vulnerability* (that is, vulnerability arising from immature decisional and self-protective capacities); (4) *Status-Based Vulnerability* (that is, vulnerability arising from legal, social, and situational concomitants of minority status and subordination to the authority and control of others); and (5) *Dependency-Based Vulnerability* (that is, vulnerability arising from greater dependence or reliance on others to meet one's basic needs). These subtypes are not wholly independent; there exist overlaps and interrelationships. I propose this classification as an initial step in clarifying the themes and variables that relate to vulnerability constructs used by the Court. In Subpart B, I provide illustrative examples of the Court's references to children's vulnerability, applying these typologies.

Vulnerability constructs play any of a variety of roles in the Court's decisions. Characterizations of minors as vulnerable may be cited to justify *more narrowly defined constitutional rights for minors* than adults and greater oversight over minors' lives by parents or the state. Thus, for example, the Court has rejected minors' claims for constitutional parity with adults in decisionmaking regarding abortion, and has held that the Constitution does not guarantee the right to a trial by jury in juvenile court, noting in both contexts that "the State is entitled to adjust its legal system to account for children's vulnerability" and

special needs for protection and concern.[24] The Court has also held constitutional certain school-based drug testing policies not generally permissible with adults, relying in part on its findings that the "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[25]

The Court has also relied on vulnerability constructs to justify extension of *broader constitutional protections to minors* than adults. It has held that certain penal sentences cannot constitutionally be imposed on minors. Here, children's vulnerability renders them inappropriate subjects of the harshest criminal punishments, such as the death penalty and in some circumstances, life sentences without parole.[26]

At times, the Court employs constructs of children's vulnerability to support *limitations of the constitutional rights of others*. Thus, for example, the Court has held that the state's interest in "'safeguard[ing] the physical and psychological well-being of child victims [of abuse] by . . . minimizing the emotional trauma [of] testifying'" sometimes justifies modification of procedures for defendants' confrontation of witnesses under the Sixth Amendment.[27] The Court has also held that the First Amendment rights of some speakers and prospective audience-members may be limited where the speech, or its creation, allegedly endangers minors' well-being.[28]

Notions of children's vulnerability also may be associated with *broader or more robust constitutional protections for others*. Most notably, views of children as needing parental protection combine with other justifications to support parents' constitutionally grounded claims

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24. Bellotti v. Baird, 443 U.S. 622, 635 (1979) (citing McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (plurality opinion)). In *McKeiver*, the Court determined that the Constitution did not require that the Sixth Amendment right of trial by jury be extended to juvenile court proceedings.

25. Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 661–64 (1995) (citing empirical research indicating that the effects of drugs on "[m]aturing nervous systems . . . are lifelong and profound"); Bd. of Educ. v. Earls, 536 U.S. 822, 834–37 (2002) (relying on the findings set forth in *Vernonia* and evidence of the prevalence of teen drug use).

26. *See generally* Roper v. Simmons, 543 U.S. 551, 569 (2005) (characterizing minors as more vulnerable than adults, in part because "juveniles have less control, or less experience with control, over their own environment"); Graham v. Florida, 560 U.S. 48, 68 (2010) (observing a "greater capacity for change'" and that "a child's character is not as 'well-formed' as an adults'; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable[e] deprav[ity].'"); Miller v. Alabama, 567 U.S. 460, 466, 471 (2012) (same) (quoting *Graham*, 560 U.S. at 68 and *Roper*, 543 U.S. at 570).

27. Maryland v. Craig, 497 U.S. 836, 852–57 (1990) (quoting Wildermuth v. State, 530 A.2d 275, 286 (1987)) (holding constitutional Maryland's policy allowing minor child abuse victims to testify via closed-circuit television under certain circumstances).

28. *See, e.g.*, Fed. Commc'ns Comm'n v. Pacifica Found., 438 U.S. 726, 749 (1978) (holding constitutional a Federal Communications Commission sanction following a daytime radio broadcast of a comedic monologue containing language referring to "excretory or sexual activities or organs"); N.Y. v. Ferber, 458 U.S. 747, 749, 774 (1982) (upholding a New York statute that criminalized the knowing promotion of "sexual performances by children under the age of sixteen by distributing materials that depicts such performances").

of authority. Thus, for example, in upholding Utah's requirement that physicians notify parents of a minor seeking an abortion, the Court relied on a view that the "particularly" "serious" and potentially "traumatic and permanent" "medical, emotional, and psychological consequences of an abortion" when patients are minors may be mitigated where parents are informed.[29]

A. DEFINING AND CLASSIFYING VULNERABILITY

What does the Court mean when referring to children as vulnerable in the context of constitutional jurisprudence? It has provided only limited illumination of the meanings it ascribes to the concept of vulnerability. For instance, it has never explained its choice of the modifier "peculiar,"[30] in describing children's vulnerability in *Bellotti v. Baird*. Common use of the term "peculiar" suggests distinctiveness and atypicality.[31] Some features of children's vulnerability are indeed distinctive, such as those related to the natural patterns and pace of children's physiological and psychological development, or to the unique role of parents in minor children's lives.[32] At the same time, the commonalities between children's vulnerability and that of others in society[33] help inform our understanding of the term's relevance in constitutional analyses involving children.

For a concept used so frequently in both lay and scholarly discourse, there is remarkably little written to elucidate the nature of the concept of vulnerability as it relates to human beings.[34] And, unfortunately, when

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29. H.L. v. Matheson, 450 U.S. 398, 411–13 (1981).

30. Bellotti v. Baird, 443 U.S. 622, 634 (1979) (citing "the peculiar vulnerability of children").

31. The Merriam-Webster Dictionary provides the following definitional alternatives for the word "peculiar:" "1. [C]haracteristic of only one person, group, or thing: distinctive . . . . ; 2. different from the usual or normal: (a) special, particular[;] (b) odd, curious [;] (c) eccentric, queer . . . ." *Peculiar*, MERRIAMWEBSTER, https://www.merriam-webster.com/dictionary/peculiar (last visited Nov. 21, 2017).

32. *See* Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 824 (2009); notes 162–67, 216–37 *infra* and accompanying text.

33. *See generally* Martha Albertson Fineman, *"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71 (2012) [hereinafter Fineman, *"Elderly" as Vulnerable*] (discussing the need for state and social institutions to consider the vulnerabilities of the elderly population); Martha Albertson Fineman, *Equality and Difference—The Restrained State*, 66 ALA. L. REV. 609, 621–23 (2015) [hereinafter Fineman, *Equality and Difference*] (emphasizing that a formal equality approach to implementation of laws ignores the structural disadvantages that certain groups face).

34. Ironically, there appears to be more systematic investigation and analysis of the meaning(s) of the term in the fields concerned with environmental hazards and the effects of climate change. *See, e.g.*, BEN WISNER ET AL., AT RISK: NATURAL HAZARDS, PEOPLE'S VULNERABILITY, AND DISASTERS 11–16 (2d ed. 2004); *see also* Christina Zarowsky et al., *Beyond "Vulnerable Groups": The Contexts and Dynamics of Vulnerability*, 20 GLOBAL HEALTH PROMOTION SUPPL. (2013); Susan L. Cutter, *Vulnerability to Environmental Hazards*, 20 PROG. HUM. GEOGRAPHY 529 (1996) (reviewing a range of definitions and concepts of vulnerability). The conceptual struggles in that field bear some resemblance to the analyses ongoing in other fields. *See infra* notes 45–76 and accompanying text.

the term is used, it is rarely defined, and frequently used interchangeably with the conceptually distinct term "risk."[35] In this section, I begin to clarify the terms as I use them in this Article, with the help of those who have thought through these issues before me.

The terms "vulnerable" and "vulnerability" are commonly used in everyday parlance. Their ordinary meaning provides a useful starting point. One dictionary defines the term "vulnerable" as "capable of or susceptible to being wounded or hurt physically or emotionally"; or "susceptible to temptation or corrupt influence."[36] These two threads—susceptibility to physical or emotional harm and susceptibility to coercion or other external sources of influence—also sit at the core of many philosophical, scientific, and legal formulations. Other concepts of vulnerability, such as those relating to dependence on others or socially imposed restrictions on freedom, also appear in jurisprudence relating to childhood. Of course, all persons are, to some extent, vulnerable under either of the above definitions. Thus, to the extent that the law requires constitutionally relevant distinctions between children and adults to justify differential treatment, the Court must consider whether differences in vulnerability between children and adults exists, and whether such distinctions permit differential treatment under the law.

One frequently cited definition of vulnerability focuses on those factors that predispose one, or heighten the possibility of, deleterious consequences arising from some exposure or situation: "Vulnerability refers to an individual's predisposition to develop[, or the] susceptibility to negative developmental outcomes that can occur under high-risk conditions."[37] The potential sources of vulnerability are many, and may include genetic, temperament, health or disability status, or other factors that we might view as characteristics of the individual.[38] Those factors need not be unique to the individual. For example, one's age, developmental stage, or gender—characteristics that one shares with other group members—may render one vulnerable in some situations. Feminist philosophers Catriona Mackenzie and colleagues label sources of vulnerability attributed to such factors as *inherent* or *intrinsic*,[39] while behavioral scientists might refer to these sources as *endogenous*

35. Rick E. Ingram & Joseph M. Price, *Understanding Psychopathology: The Role of Vulnerability*, *in* VULNERABILITY TO PSYCHOPATHOLOGY: RISK ACROSS THE LIFESPAN 3, 5, 11 (R.E. Ingram & J.M Price eds., 2d ed. 2010).

36. *Vulnerable*, THE RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 1997).

37. Marc A. Zimmerman & Revathy Arunkumar, *Resiliency Research: Implications for Schools and Policy*, 8 SOC. POL'Y REP.: SOC'Y FOR RES. IN CHILD DEV. 1, 2 (1994).

38. *Id.*

39. Catriona Mackenzie, Wendy Rogers, & Susan Dodds, *Introduction: What is Vulnerability and Why Does It Matter for Moral Theory?*, *in* VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY 1, 7 (Catriona Mackenzie et al. eds., 2014).

factors.[40] Yet, "vulnerability processes within the individual are viewed as being in a dynamic interaction with environmental systems throughout the lifespan . . . . This dynamic interaction, or transaction, is reciprocal in nature, allowing vulnerability processes to both influence and be influenced by environmental conditions."[41] In other words, while vulnerabilities can be static and enduring, they are also potentially modifiable as a person continues to grow and develop. And, to the extent that factors relating to immaturity, youth, and developmental processes render a person vulnerable, maturation alters the nature and degree of that person's vulnerabilities.

Mackenzie and colleagues also speak of *situational* sources of vulnerability, such as the "personal, social, political, economic, environmental situations of individuals or social groups," and note that such factors can be short-term, intermittent, or enduring.[42] Thus, loss of a job or health insurance, the experience of penal incarceration, or enforcement of a discriminatory policy against a minority group are examples of such sources. Behavioral scientists may also focus on the role of external or situational sources as *risk factors* where there are statistically demonstrated relationships between the existence of such factors and a predisposition to negative developmental outcomes.[43] Recognized developmental risk factors include, for example, exposure to domestic violence perpetrated against one's parent, or growing up in poverty. The term "risk . . . signifies an *elevated probability* of a negative outcome," and "risk factor" is a "measurable characteristic in a group of individuals or their situation that predicts a negative outcome on a specific outcome" criterion.[44] Thus, both vulnerability and risk factors can increase the probability of such a negative outcome, and arguably interact with each other in the developmental process.[45] These concepts lead to identification of the first subtype of vulnerability found in the

40. Endogenous factors are those sources perceived to be residing "within the person," as contrasted with external or situational factors. Ingram & Price, *supra* note 35, at 8, 28.

41. Joseph M. Price & Jennifer Zwolinksi, *The Nature of Child and Adolescent Vulnerability: History and Definitions*, *in* VULNERABILITY TO PSYCHOPATHOLOGY: RISK ACROSS THE LIFESPAN 18, 28–29 (R.E. Ingram & J.M Price eds., 2d ed. 2010).

42. Mackenzie, Rogers, & Dodds, *supra* note 39.

43. *See, e.g.*, Margaret O'Dougherty Wright et al., *Resilience Processes in Development: Four Waves of Research on Positive Adaptation in the Context of Adversity*, *in* HANDBOOK OF RESILIENCE IN CHILDREN 15, 16–17 (S. Goldstein & R. B. Brooks eds., 2013).

44. *Id.* at 16–18.

45. Ingram & Price, *supra* note 35, at 11. Carl Coleman points out that vulnerability "is not a stand-alone concept." In other words, it is relative to some stress, adversity, influence, or exposure. Carl H. Coleman, *Vulnerability as a Regulatory Category in Human Subject Research*, 37 J.L. MED. & ETHICS 12, 14 (2009). The assertion that "children are vulnerable" or are "more vulnerable than adults," is only meaningful when we elaborate upon the exposures or experiences in which vulnerability is triggered or manifested. Thus, while some of the discussion set forth in this Article speaks in generalities about certain developmental phenomena and trends, it then strives for greater specificity, focusing on identified contexts and exposures.

Court's jurisprudence and elaborated in scientific and theoretical scholarship: *susceptibility to physiological or psychological harm through exposure to certain stimuli or situations*. The first category of vulnerability is central to many of the Court's constructions of children and is grounded in the notion of vulnerability as susceptibility to negative developmental outcomes under high-risk conditions or in the face of stressors or other adversity.

The field of bioethics and law has incorporated the concept of vulnerability into its regulatory and scholarly analyses of and proposals for policies governing involvement of human participants in research. A brief review of some of these analyses and proposals provides some foundation for an elucidation of three additional subtypes of vulnerability that appear in the Court's opinions involving children, and thus are reviewed here: *influenced-based vulnerability, capacity-based vulnerability,* and *status-based vulnerability*.

The emphasis on these vulnerability themes is understandable, when one considers the history of modern bioethics. The field arose initially from the need to develop systematic principles, guidelines, and legal regulation governing participation of human beings in research. The early efforts at regulating such activities followed the horrific abuses of Holocaust victims by Nazi physicians in the name of medical research, and of human research participants in the United States in subsequent decades.[46] With these events in mind, concepts of vulnerability focused on factors that interfered with one's ability to exercise autonomous choice in decisions whether to participate.[47] Thus, incorporation of notions of vulnerability into regulatory proposals and schema sought to promote free and voluntary choice and to protect against coercive influences and exploitation of those whose choices were limited due to incapacity or status.

The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research was established by Congress in 1974 under the National Research Act,[48] following increasing public awareness of abuses of human participants in research in the United States in a series of studies that exposed institutionalized, ill, disabled, poor, uneducated, and otherwise disadvantaged persons or groups to substantial risks.[49] The National Commission provided guidance in the

46. For an excellent review of historical events influencing the development of the field of bioethics, see, e.g., ALBERT R. JONSEN, A SHORT HISTORY OF MEDICAL ETHICS 99–120 (2000).

47. As noted below, the risks (or potential harms), of the research endeavor were also factored into ethical analyses, but as a separate consideration, to be weighed against prospective benefits of participation. They were not considered relative to prospective participants' vulnerability. *See infra* note 63 and accompanying text.

48. Pub. Law 93-348, Title II, Part A, 88 Stat. 342 (1974).

49. For a summary of these studies, see, e.g., CARL H. COLEMAN, JERRY A. MENIKOFF, JESSE A. GOLDNER, & NANCY NEVELOFF DUBLER, THE ETHICS AND REGULATION OF RESEARCH WITH HUMAN

development of regulations to protect human participants in the U.S. In its 1979 Belmont Report, the National Commission highlighted the notion of vulnerability as a consideration relevant to inclusion of, and protections for, human participants in empirical research studies.[50] The concept was raised in a discussion of the cornerstone requirement of "voluntariness" of research participation, with the National Commission noting that "especially vulnerable" prospective participants may be particularly susceptible to "undue influence" when making the participation decision.[51] The concept appeared again in the discussion of research studies' risk-benefit ratios. The National Commission implied that risks to "vulnerable populations" must be assessed with particular care, suggesting that persons in such populations may be at greater risk than are others when exposed to the same stimuli.[52] Finally, in elaborating some of the concerns regarding "justice," that is, the principle grounded in "moral requirements" that there be fairness in the selection of research subjects,[53] the Commission noted:

> One special instance of injustice results from the involvement of vulnerable subjects. Certain groups, such as racial minorities, the economically disadvantaged, the very sick, and the institutionalized may continually be sought as research subjects, owing to their ready availability in settings where research is conducted. Given their dependent status and their frequently compromised capacity for free consent, they should be protected against the danger of being involved in research solely for administrative convenience, or because they are easy to manipulate as a result of their illness or socioeconomic condition.[54]

SUBJECTS 31–50 (2005).

50. *The Belmont Report*, OFFICE FOR HUMAN RESEARCH PROTECTIONS, (Apr. 18. 1979), https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report.

51. *Id.* The notion of voluntariness is one of the core principles of the doctrine of informed consent more generally. *See, e.g.*, TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOETHICAL ETHICS 77–90 (7th ed. 2013).

52. *The Belmont Report*, *supra* note 50.

53. This principle would prohibit unjust distribution of the burdens and benefits of research participation within society, avoiding unfair burdens on those groups that experience greater disadvantage in society. *Id.*

54. *Id.* The National Commission's recommendations ultimately led to the exclusion or reduction of certain groups from research participation. As the years passed, however, this guidance has been criticized, in part because certain groups were deprived of the benefits of research participation or the findings of scientific studies. *See, e.g.*, Holly A. Taylor, *Implementation of NIH Inclusion Guidelines: Survey of NIH Study Section Members*, 5 CLINICAL TRIALS 140 (2008) (discussing the National Institutes of Health policy to promote increased inclusion of children in scientific research on questions important to their welfare); NAT'L INST. OF MED., COMM. ON ETHICAL CONSIDERATIONS FOR RESEARCH INVOLVING PRISONERS 1, 113–136 (Lawrence O. Gostin et al., 2007) (proposing guidelines to allow for increased inclusion of prisoners in certain types of research). *But see generally* Osagie Obasogie, *Prisoners as Human Subjects: A Closer Look at the Institute of Medicine's Recommendations to Loosen Current Restrictions on Using Prisoners in Scientific Research*, 6 STAN. J. C.R. & C.L. 41 (2010) (criticizing the National Institute of Medicine recommendations).

Thus, although the National Commission never explicitly defined vulnerability, it implied that vulnerability derives from greater susceptibility to influence, possibly due to characteristics of the persons (such as impaired capacities), but perhaps also to situational or structural factors, such as discrimination, institutionalization, economic disadvantage, or dependency. The federal regulations ultimately promulgated by the Department of Health and Human Services[55] refer to vulnerable *groups*, but do not provide further elucidation on the meaning of the term "vulnerability."[56] Several commentators have critiqued the field of bioethics' essentialist reliance on arguably over-inclusive and under-inclusive categories and groups as vulnerable, without conceptual clarity as to the factors that define vulnerability.[57]

One of the most thoughtful analyses of vulnerability in the context of research participation appeared in the National Bioethics Advisory Commission ("NBAC") Report on Ethical and Policy Issues in Research Involving Human Participants.[58] The Report's emphasis in addressing vulnerability in this context is the recognition that some persons may be less able to protect themselves from inappropriate involvement in research than are others. Thus, the Report defined vulnerability as follows: "a condition, either intrinsic or situational, of some individuals that puts them at greater risk of being used in ethically inappropriate ways in research."[59] It recognized that vulnerability may be manifested as "difficulty providing voluntary informed consent arising from limitations in decisionmaking capacity (as in the case of children) or situational circumstances (as in the case of prisoners), or because they are especially at risk for exploitation (as in the case of persons who belong to undervalued groups in society)."[60]

The Report identified the following subtypes of vulnerability: *incapacitational vulnerability* (that is, limitations in the ability to

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55. 45 C.F.R. § 46.101 (2009).

56. *See, e.g.*, Carl H. Coleman, *Vulnerability as a Regulatory Category in Human Subject Research*, 37 J.L., MED., & ETHICS 12, 12 (2009) (discussing the federal regulations' reference to specific groups as examples of "vulnerable populations," without defining vulnerability).

57. *See, e.g.*, *id.* at 14; Carol Levine, Ruth Faden et al., *The Limitations of "Vulnerability" as a Protection for Human Research Participants*, 4 AM. J. BIOETHICS 44, 46–48 (2004) (referring to the concept of vulnerability as both "too broad and too narrow").

58. NAT'L BIOETHICS ADVISORY COMM'N, 1 ETHICAL AND POLICY ISSUES IN RESEARCH INVOLVING HUMAN PARTICIPANTS 85–92 (2001) [hereinafter NBAC REP. 1]. A more detailed version of the vulnerability analysis, which was authored by Kenneth Kipnis, was provided in Volume II, which contained the commissioned papers. Kenneth Kipnis, *Vulnerability in Research Subjects: A Bioethical Taxonomy*, *in* NAT'L BIOETHICS ADVISORY COMM'N, 2 ETHICAL AND POLICY ISSUES IN RESEARCH INVOLVING HUMAN PARTICIPANTS G-1 (2001). Kipnis subsequently separately published a slightly revised version, focusing solely on children as research subjects. Kenneth Kipnis, *Seven Vulnerabilities in the Pediatric Research Subject*, 24 THEORETICAL MED. 107 (2003) [hereinafter Kipnis, *Seven Vulnerabilities*].

59. NBAC REP. 1, *supra* note 58, at 85.

60. *Id.*

"comprehend information, deliberate, and make decisions regarding participation in a proposed research study");[61] *institutional vulnerability* (that is, being "subject to the formal authority of others who have independent interests in whether the prospective participant agrees to enroll in the research study," as in the case of persons in prisons or the military, or college students who must take part in a study as part of a course requirement); *deferential vulnerability* (that is, like institutional vulnerability, these persons are situated so as to be subject to the authority of others with independent interests, but here the influence is informal rather than the product of formal hierarchies, as when patients generally defer to their doctors, or in response to inequalities in class, race, or gender); *medical vulnerability* (that is, when individuals with serious health conditions are drawn to research participation because there are no other satisfactory treatment options, a scenario that can affect one's willingness to accept certain risks); *economic vulnerability* (that is, when "individuals are disadvantaged in the distribution of social goods and services such as income, housing, or health care" which may increase the risk of exploitation through participation); and *social vulnerability* (that is, when persons belong to "undervalued social groups . . . which includes stereotyping and can lead to discrimination.").[62]

As noted above, none of the vulnerability categories cited by the NBAC incorporate *susceptibility to harm*. Rather, the focus is on vulnerability as related primarily to concerns about whether prospective participants can render voluntary decisions regarding participation, free from coercion or undue influence. The framework discussed by the NBAC, which is consistent with that embedded in the current federal regulations governing human research participation, analyzes potential for harms to participants as a result of research involvement separately, focusing on the *risks* posed by research studies as a distinct consideration.[63] The term vulnerability is not used, however, to address whether some participants may be more susceptible than others to experiencing harm when exposed to the risks of research participation.

Consistent with these emphases, the federal regulations impose duties on Institutional Review Boards ("IRBs")—local panels empowered to determine when, and under what conditions, studies can go forward—

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61. *Id.* at 88–90. I chose the term "incapacitational vulnerability," used by Kipnis in his separate publication, Kipnis, *Seven Vulnerabilities*, *supra* note 58, at 110, rather than the term "cognitive or communicative vulnerability," used in NBAC REP. 1, *supra*.

62. NBAC REP. 1, *supra* note 58, at 88–90.

63. The federal regulations empower Institutional Review Boards ("IRBs") with the authority to determine the ethicality and permissibility of research proposals under the current federal regulatory structure. 45 C.F.R. §§ 46.101–46.109 (2017). Under that structure, IRBs must consider the *risks* posed by the research project, the relationship between the risks and possible benefits, informed consent procedures, and other factors. 45 CFR § 46.110–46.111.

relative to groups identified as "vulnerable populations" (specifically "children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons").[64] IRBs must ensure that adequate "safeguards have been included in the study to protect the rights and welfare of these subjects" "[w]hen some or all of the subjects are likely to be vulnerable to coercion or undue influence."[65] They also instruct IRBs to "be particularly cognizant of the special problems of research involving" persons in those groups identified as vulnerable.[66] Three separate subparts of the regulations provide for special protections for (1) pregnant women, human fetuses, and neonates, (2) children, and (3) prisoners.[67] The specific references to the reasons for inclusion of these groups focus on vulnerability to "coercion and undue influence," and the potential for exploitation through inequitable selection of participant groups by researchers.

Yet, the inclusion of pregnant women is puzzling here, as pregnant women do not constitute a group that is regarded—at least in modern decades—as having greater vulnerability to coercion or undue influence. Nor do they comprise a group that experiences the same social disadvantage or exploitation in the context of the research enterprise as have, for example, many economically disadvantaged or incarcerated groups. Indeed, the characterization of pregnant women as less able to provide voluntary informed consent for research participation seems misplaced and patronizing.[68] Subsequent guidelines and scholarship suggest that, when drafting the regulations, the Department of Health and Human Services ("DHHS") was concerned with the heightened physiological sensitivity of pregnant women (and the fetuses they carry) to certain substances and stimuli when identifying vulnerability as one basis for a more protective approach toward pregnant women, even though this definition of vulnerability is not cited explicitly by DHHS in the regulations. This concern invokes notions of *vulnerability as greater susceptibility to harm*. And indeed, vulnerability as greater susceptibility to harm is one factor in modern thinking about the need for special safeguards for pregnant women as research participants.[69]

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64. 45 C.F.R. § 46.111(b).

65. *Id.*

66. 45 C.F.R. § 46.111(a)(3) (addressing equitable selection of research participants). Vulnerable groups or populations are also mentioned in the regulations in sections dealing with composition of IRBs. 45 C.F.R. § 46.107(a).

67. *See* Subparts B, C, and D respectively.

68. For a thoughtful analysis and critique of the characterization of pregnant women as vulnerable research participants, see Verina Wild, *How Are Pregnant Women Vulnerable Research Participants?*, 5 INT'L J. FEMINIST APPROACHES TO BIOETHICS 82 (2012).

69. *See, e.g.*, AM. C. OBSTETRICS & GYNECOLOGY COMM'N ON ETHICS, ETHICAL CONSIDERATIONS FOR INCLUDING WOMEN AS RESEARCH PARTICIPANTS (2015), https://www.acog.org/-/media/Committee-Opinions/Committee-on-Ethics/co646.pdf?dmc=1&ts=20170312T1821081805; Mary C. Blehar et al., *Enrolling Pregnant Women: Clinical Issues in Research*, 23 WOMEN'S HEALTH ISSUES 39 (2013).

Carol Levine and colleagues critique the *absence* of susceptibility to harm as a dimension of vulnerability under the federal regulations and subsequent analyses in an analysis of the use of the concept of vulnerability in the context of protections for human research participants.[70] They assert that "[w]hile consent is surely a serious concern, the root of the concept of vulnerability lies in the possibility of physical harm. . . . In contemporary bioethical discourse, one can be vulnerable to being harmed or being wronged."[71] Carl Coleman articulates similar critiques, and suggests that vulnerabilities in the context of research participation be classified as falling into three primary categories: consent-based vulnerabilities, risk-based vulnerabilities, and justice-based vulnerabilities.[72] Here, risk-based vulnerabilities would consider whether certain characteristics of the individuals "may enhance the level of risks associated with the subjects' participation in a study," which in the research participation context would require the investigators and IRB to assess potential risks and the risk-benefit ratio with particular care and attention to those factors.[73]

The Council for International Organizations of Medical Sciences ("CIOMS"), in its 2016 revision of *International Ethical Guidelines for Health-Related Research Involving Humans*,[74] became the first influential group to incorporate into its concept of vulnerability a harm-based notion. A pertinent portion of the commentary to the relevant guideline reads:

> According to the Declaration of Helsinki, vulnerable groups and individuals "may have an increased likelihood of being wronged or of

70. Levine et al., *supra* note 57, at 46–48.

71. *Id.* at 47. More recently, the Presidential Commission for the Study of Bioethics, in a module on Vulnerable Populations intended as a resource for instructors and others, adopted much of the language and the taxonomy set forth by the NBAC. However, it expanded the initial definition of vulnerability as follows: "Vulnerability means that an individual or groups of individuals lack the ability to fully and independently protect their own interests and so *are vulnerable to being harmed* or wronged." *Vulnerable Populations Background*, PRESIDENTIAL COMM'N FOR THE STUDY OF BIOETHICAL ISSUES (Sept. 30, 2016), https://bioethicsarchive.georgetown.edu/pcsbi/node/4035.html (emphasis added). Yet, even this expansion does not fully envelop the concept of Harm-Based Vulnerability, in that it focuses on vulnerability as inability to protect one's own interests rather than vulnerability as resulting from an organism's greater susceptibility to harm from the interventions or exposures that occur during research participation. For further discussion of these problems, as well as a summary of other definitions in the context of research ethics, see Dearbhail Bracken-Roche et al., *The Concept of "Vulnerability" in Research Ethics: An In-Depth Analysis of Policies and Guidelines*, 15 HEALTH RES. POL'Y & SYS'S 1 (2017).

72. Coleman, *supra* note 45, at 15.

73. *Id.*

74. COUNCIL FOR INT'L ORGS. OF MED. SCI., INTERNATIONAL ETHICAL GUIDELINES FOR HEALTH-RELATED RESEARCH INVOLVING HUMANS 57–59 (2016), https://cioms.ch/wp-content/uploads/2017/01/WEB-CIOMS-EthicalGuidelines.pdf [hereinafter CIOMS]. This document was developed in collaboration with the World Health Organization.

> incurring additional harm." This implies that vulnerability involves judgments about both the probability and degree of physical, psychological, or social harm, as well as a greater susceptibility to deception or having confidentiality breached. It is important to recognize that vulnerability involves not only the ability to provide initial consent to participate in research, but also aspects of the ongoing participation in research studies.[75]

The 2016 CIOMS report clearly goes beyond vulnerabilities as relating solely to the consent process, adopting a notion of vulnerability as greater susceptibility to "physical, psychological, or social harm" arising both from direct involvement in the ongoing research, and from concrete and relational effects of breaches of confidentiality by the research team or exposure to deception as a feature of the experimental design. These harm-based notions of vulnerability are integrated by the CIOMS report into a more comprehensive catalog of dimensions of vulnerability, which encompasses substantially similar principles as the NBAC, but combines both capacity-related and influence-related themes:

> In some cases, persons are vulnerable because they are relatively (or absolutely) incapable of protecting their own interests. This may occur when persons have relative or absolute impairments in decisional capacity, education, resources, strength, or other attributes needed to protect their own interests. In other cases, persons can also be vulnerable because some feature of the circumstances (temporary or permanent) in which they live makes it less likely that others will be vigilant about, or sensitive to, their interests. This may happen when people are marginalized, stigmatized, or face social exclusion or prejudice that increases the likelihood that others place their interests at risk, whether intentionally or unintentionally . . . .[76]

Applying the analyses in this Part to the concepts of children's vulnerability that appear in the Court's opinions, three additional subtypes of vulnerability can be identified: vulnerability as susceptibility to influence, pressure, or coercion by others (influence-based vulnerability); vulnerability arising from immature decisional and self-protective capacities (capacity-based vulnerability); and vulnerability arising from legal, social, and situational concomitants of minority status and subordination to the authority and control of others (status-based vulnerability). I will distinguish and elaborate upon these three subtypes, and their relationship to the foregoing themes.

Clearly, a predominant theme in bioethical formulations and regulatory guidelines is a concern about the role of vulnerability in impairing an individual's opportunity or ability *to make choices*. Indeed, in their classic treatise on *Principles of Bioethics*, Beauchamp and

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75. *Id.* at 57.
76. CIOMS, *supra* note 74, at 57.

Childress characterize the field's concerns about vulnerable persons as relating to perceived limitations in such persons' capacities to "protect[] their own interests because of sickness, debilitation, mental illness, immaturity, cognitive impairment, and the like. . . . Those who are easily susceptible to intimidation, manipulation, coercion, or exploitation are commonly classified among the vulnerable."[77] One can further subclassify this set of ideas by distinguishing between impairments of one's opportunity or ability to make choices due to the influence or pressure of others or due to limitations in one's opportunity or ability to understand, process, analyze, or exercise judgment about information (including, but not limited to, the potential risks and benefits of particular courses of action). While there are unquestionably some intersections between these concepts, one emphasizes a more *influence*-based dimension of vulnerability while the other a more *capacity*-based dimension of vulnerability.

The legal and ethical doctrines of informed consent, which regulate health care decisionmaking as well as research participation decisions, require that a person's decision be made *voluntarily* as well as *competently*.[78] Formulations of voluntariness identify the aspiration that health care decisionmaking be relatively free from coercion, manipulation, or unfair inducements.[79] Formulations of competence emphasize the ideal that health care decisions be made with understanding of the information material to their decision (such as potential risks, benefits, and probabilities of various outcomes), with the ability to reason about that information, and with an appropriate degree of judgment or appreciation of the nuances of the decision for them, given their situation.[80]

The second subtype of vulnerability found in the Court's jurisprudence and elaborated in scientific and theoretical scholarship therefore is *influence-based vulnerability,* which emphasizes children's purported *susceptibility to influence, pressure, or coercion of others* as a basis for differential constitutional treatment of minors and adults. In our dictionary definitions above, this form may be defined as

77. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 89 (6th ed. 2009). Beauchamp and Childress caution against the potential for stereotyping and overprotection with classification of an entire group as vulnerable. *Id.* at 90. Beauchamp and Childress also recognize vulnerability as susceptibility to harm. *Id.* at 89, 254.

78. BEAUCHAMP & CHILDRESS, *supra* note 77, at 117–35; *see also* Alan Meisel, Loren H. Roth, & Charles W. Lidz, *Toward a Model of the Legal Doctrine of Informed Consent*, 134 AM. J. PSYCHIATRY 285 (1977).

79. BEAUCHAMP & CHILDRESS, *supra* note 77, at 132–33; Meisel et al., *supra* note 78, at 286.

80. Several of these concepts are central to modern notions of competence to provide informed consent. *See, e.g.*, Paul S. Appelbaum, *Assessment of Patients' Competence to Consent to Treatment*, 357 N. ENG. J. MED. 1834, 1835–36 (2007) (as applied to adults); Weithorn, Developmental Factors and Competence to Make Informed Decisions, *supra* note 9, at 88–95 (as applied to measurement of children's competence).

"susceptib[ility] to temptation or corrupt influence."[81] It captures notions of vulnerability as greater susceptibility to influence, pressure, or coercion by others. This category focuses on influence-based vulnerability related primarily to *inherent* or *intrinsic* factors, as identified by Mackenzie, above.[82] Thus, some individuals, due to age, stage of development, or other psychological or endogenous characteristics, may be more susceptible to influence, pressure, or coercion by others. They may be more likely to conform with the directives or expectations of others, or be more susceptible to role modeling by others. In addition, in specific situations, they may defer to respected, trusted, or powerful others' preferences, due to any of a range of relational and interpersonal processes and dynamics. Indeed, this phenomenon may be analogized to the NBAC's notion of *deferential vulnerability*, which recognizes the subtle impact of relationships, including hierarchical relationships, on the choices one makes in those situations when one is provided with the opportunity to elect options.

By contrast, *capacity-based vulnerability, or vulnerability arising from immature decisional and self-protective capacities*, focuses primarily on the ways in which limitations in capacities for effective decisionmaking render one vulnerable. The CIOMS report characterization of vulnerability as flowing from incapacity to protect one's own interests related to reduced decisional capacities. This notion is consistent with the concept of incapacitational vulnerability laid out in the NBAC analysis, embodies a theme present in many of the Court's decisions.

It is important here to clarify the relationship between *decisional capacities* and *vulnerability*. Psychological capacity or competence for decisionmaking is usually a legal prerequisite for authority to make important decisions, such as those regarding medical treatment. Such capacity is presumed for adults, whereas *incapacity* is typically presumed for minors, subject to certain exceptions.[83]

As the Court's language in *Bellotti* detailing the "three reasons" justifying differential treatment of children and adults under the Constitution, reveals,[84] the Court views decisional capacity and vulnerability as distinct factors.[85] Yet, as the bioethics formulations by

81. *See supra* note 36 and accompanying text.

82. *See supra* note 39 and accompanying text.

83. *See generally* Weithorn & Campbell, *supra* note 9, at 1590 (finding that denying adolescents the right of self-determination in health care situations is not supported on the basis of a presumption that they lack the capacity to make meaningful health care decisions).

84. The Court cited "the peculiar vulnerability of children; [children's] inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing" as bases for differential treatment of minors and adults under the Constitution. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

85. *Id.* In *Bellotti*, however, the Court did not allow the Massachusetts statute requiring parental

CIOMS and the NBAC make clear, vulnerability may, in some instances, *arise from* reduced decisional capacity. Those whose decisional capacities are immature may be more prone to make unwise choices, and therefore, may be less able to protect themselves from potential harms or dangers present in their lives. Reduced capacity to seek or understand information, to appreciate its relevance for oneself, to perceive and weigh risks and benefits, or to exercise self-control and restrain oneself from acting impulsively, creates a greater risk of making choices that lead to negative outcomes. Research reveals differences in decisional capacities based on age, although the patterns are not always linear and do not always mesh with everyday assumptions or legal presumptions.[86]

A fourth subtype of vulnerability focuses on the structural realities of children's status as legal minors. *Status-based vulnerability arises from legal, social, and situational concomitants of minority status and subordination to the authority and control of others*. In focusing on the concomitants of legal minority for children, status-based vulnerability addresses the effects of being in a formal class whose members are typically subject to the authority of others. The concept draws, in part, from the NBAC's notions of *institutional vulnerability*. As minors, children are limited by legal, social, economic, and restrictions that reduce their freedom of choice, movement, and autonomy. Others are charged with making decisions about their custody (that is, where they go and with whom they spend time), their education, their religion, their health care, their discipline, and so on. In most cases, their opportunities to make choices and exercise freedoms are contingent on the discretion of others.

Within the legal framework that empowers adults with the supervision and control of minors in our society, we rely on adults to use this authority in a manner that is nonexploitative, ideally promoting children's welfare and positive socialization. Most adults do not abuse this power, yet the control by some adults charged with supervision and decisionmaking regarding children can create a range of risks to children. Children have limited recourse in such situations. In some instances, the Court has noted that children's lesser control over their own lives limits their choices in ways that are constitutionally relevant.[87]

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consent for minors' access to abortion to stand without modification. The Court held unconstitutional parental consent statutes that grant parents exclusive veto power over their minor daughters' access to abortion. It concluded that minors' unique needs, characteristics, and status under the law required an alternative that balanced the competing interests and concerns. The judicial by-pass procedure approved by the Court in *Bellotti* governs in most states, although some jurisdictions, such as California, allow minors direct access to abortion, independent of parental or court involvement. *See, e.g.*, Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997).

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

87. *See, e.g.*, *infra* notes 147–48 and accompanying text.

The fifth and final subtype of vulnerability—*dependency-based vulnerability—arises from children's greater dependence or reliance on others to meet one's basic needs*. Initially, it may appear that this subtype is similar to status-based vulnerability. Indeed, the law and society have created structures to formalize children's dependence on adults with statuses such as minority and parenthood. Dependency-based vulnerability focuses on minors' *functional* reliance on adults to meet their needs. Thus, while status-based vulnerability highlights the risks to minors arising out of the authority of others over them and their concomitant lack of control over their own lives, dependency-based vulnerability highlights the risks arising from children's functional reliance on adults, particularly caregivers, *to meet their essential physiological and psychological needs*.

As discussed in Part II, children's development occurs in interaction with their environments. At times, children's development is acutely sensitive to environmental experiences. Throughout a child's life, but particularly in the early years, adults control whether those experiences facilitate positive development, neglect essential needs, or introduce harmful exposures. Children, especially young children, rely almost exclusively on caregivers, teachers, and, at times, other adults to provide an environment that facilitates positive developmental trajectories and protects against environmental risks. With dependence on adults come risks due to deficits, inadequacies, or dangers presented by the care of others. It is this dependence and the attendant risks it entails that is captured by dependency-based vulnerability.

Several writers have addressed the concept of dependency-based vulnerability. Martha Fineman emphasizes the interrelationships between dependency and vulnerability more generally.[88] Philosopher Susan Dodds characterizes dependence as a form of vulnerability: "Dependence is vulnerability that requires . . . care."[89] Mianna Lotz asserts that children's unique vulnerability "arises from their particular dependency on the actions and choices of others, especially their caregivers, and from their (at least present) lack of the full complement of skills and capacities that might mitigate such dependency."[90] She points out further that it is precisely those inputs from caregivers that help develop the capacities that will ultimately allow children to exercise autonomy. Thus, the impact caregivers have on a child is lifelong. The research reviewed in Part II below underscores how important early

88. Martha Albertson Fineman *in Law and Politics*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 17–19 (Martha Albertson Fineman & Anna Greer eds., 2013).

89. Susan Dodds, *Dependence, Care, and Vulnerability*, *in* VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY 181, 182–83 (Catriona Mackenzie et al. eds., 2014).

90. Mianna Lotz, *Parental Values and Children's Vulnerability*, *in* VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY 242, 243–44 (Catriona Mackenzie et al. eds., 2014).

inputs are to social, emotional, and medical well-being throughout the lifespan, consistent with Lotz's observation that psychological and emotional relationships with caregivers are necessary for children to flourish.[91] Adults involved in raising children, such as parents, extended family, teachers, and others, have substantial influence over the course of a child's life, through formation of children's preferences and values occurring during socialization.[92]

In addition, because of their undeveloped physical selves, children are dependent on caregivers for the most basic material sustenance necessary for their survival, such as food and shelter.[93] "To be dependent is to be in circumstances in which one must rely on other individuals to access, provide, or secure (one or more of) one's needs . . . ."[94] Small children may be *physically* incapable of extricating themselves from dangerous situations created by acts of omission or commission by their caregivers. A stark example, highlighted by recent news reports, occurs when adults leave children unattended in locked cars, with lethal consequences.[95] The statistics on the rates of reported child neglect reveal that substantial numbers of children in our society may not have their basic needs for care adequately met. They and others rely on the legal system to remedy these failures.

B. CHILDHOOD VULNERABILITY CONSTRUCTS AND THE COURT: AN INTRODUCTION

In this Section, I apply the typologies developed above, illustrating the Court's use of vulnerability constructs, for the purpose of clarifying the categories and the distinctions among them.

1. Harm-Based Vulnerability

The first typology emphasizes *vulnerability as greater susceptibility to physical or psychological harm from exposure to certain stimuli or situations*. Members of the Court have invoked

91. *Id.* at 244.

92. *See generally* HANDBOOK OF MORAL DEVELOPMENT (Melanie Killen & Judith G. Smetana eds., 2d ed. 2014) (noting that the family structure plays a significant role in the way children's moral sensitivity and behavior develop); HANDBOOK OF SOCIALIZATION: THEORY AND RESEARCH (Joan E. Grusec & Paul D. Hastings eds., 2d ed. 2015) (finding that young children learn socialization skills from adult role models).

93. *Id.*; Dodds, *supra* note 89, at 183–84.

94. Dodds, *supra* note 89, at 183.

95. This phenomenon is tragically illustrated by deaths of children in fires after being left alone by their caregivers, or the all-too-common incidence of children who die after having been left strapped in a car seat on a hot day. *See, e.g.*, Gene Weingarten, *Fatal Distraction: Forgetting a Child in the Backseat of a Car is a Horrible Mistake. Is it a Crime?*, WASH. POST (Mar. 8, 2009), https://www.washingtonpost.com/lifestyle/magazine/fatal-distraction-forgetting-a-child-intheback seat-of-a-car-is-a-horrifying-mistake-is-it-a-crime/2014/06/16/8ae0fe3a-f580-11e3-a3a5-42be3596 2a52_story.html.

constructions of this subtype of vulnerability, for example, in considering the constitutionality of policies allegedly protecting children from harm, or in determining whether a classification violates the Equal Protection Clause. Part III focuses in depth on the Court's use of vulnerability constructs in a subset of cases involving the constitutionality of regulation of child labor, child pornography, modifications of courtroom procedures to accommodate children as courtroom witnesses against alleged abusers, and children's exposure to certain types of speech (such as speech communicated by peers in school and speech containing sexual images, "indecent" language, violent content).[96] Thus, in this Section, my illustrations are selected from other cases.

Harm-based vulnerability constructs abound in the adolescent abortion cases, where the Justices present dueling sets of constructs of children's vulnerability. The majority in *H.L. v. Matheson,* a case challenging a Utah parental notification provision, asserted that the "emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults" and that the "medical, emotional, and psychological consequences of an abortion are serious and can be lasting . . . ; particularly . . . when the patient is immature."[97] By contrast, the dissenters focused more on the special risks to minors of being forced to continue with an unwanted pregnancy and childbirth. Justice Marshall's dissent argued that unwed adolescents who give birth must face reduced "educational and job opportunities, as well as the more immediate problems of finding financial and emotional support for offspring dependent entirely on [them] . . . . Of course, for minors, the mere fact of pregnancy and the experience of child-birth can provide psychological upheaval."[98]

Images of children as susceptible to harm have also been employed in Equal Protection cases to emphasize the risks to children of unequal treatment. One of the most famous references to children's vulnerability in Supreme Court jurisprudence appeared in the Court's unanimous opinion in *Brown v. Board of Education*.[99] The Court cited the potentially deleterious effects of segregated educational experiences on adults, as articulated in earlier cases, and then stated that "[s]uch considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority that may affect their hearts and minds in a way unlikely ever to be undone."[100]

96. *See infra* Part III.

97. H.L. v. Matheson, 450 U.S. 398, 412–13 (1981) (citing the "potentially grave emotional and psychological consequences of [teenagers'] decision[s] to abort").

98. *Id.* at 438–39 n.38, 444 (Marshall, J., dissenting).

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

100. *Id.* at 494–95 & n.11.

While the criticisms and controversies regarding the use of psychologist Kenneth Clark's studies to support this conclusion are many,[101] the use illustrates how images of children as more susceptible to potential harms than adults make their way into the Court's opinions. The Court continued its reliance on this vulnerability theme in subsequent school desegregation cases.[102]

Race-based decisionmaking was rejected in *Palmore v. Sidoti,* where the Court determined that assertions about children's vulnerability to "social stigmatization" would *not* influence its decision.[103] The Court unanimously refused to review a custody decision, despite a father's concerns that his child might be socially ostracized if she remained in her mother's custody, given that the mother's marriage was an interracial one.[104] The Court held that race-based factors such as these were not constitutionally permissible considerations in determining custody of a child.

More recently, in *Obergefell v. Hodges*[105] and *United States v. Windsor*,[106] in expanding constitutional protections for the marital rights of same-sex couples, the Court cited the "harm and humiliate[ion]" experienced by the children of same-sex couples.[107] Referring to the potentially-painful confusion that the law's and society's rejection of their parents' relationship may create, the Court observed that children may have difficulty understanding why their families are treated as "less worthy" of formal recognition under the law.[108] The Court referred as well to harms to children of uncertainties accompanying nonmarital family life.[109]

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101. For discussions about the use of social science in this case, in particular, see e.g., DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW 101–06 (1999). Dean Faigman concludes that "the Court willingly relied on research but with little concern for its validity." *Id.* at 105. "That the factual insight was indispensable to the immediate holding in *Brown* is plain. Still, serious doubt attaches to whether the Court truly relied on the social science research for this insight. The simplest way to determine just how seriously the Court considered the factual showing is to ask whether the result would have been different if the evidence had shown the contrary." *Id.* at 102; *see also* Lois A. Weithorn, *Professional Responsibility in the Dissemination of Psychological Research in Legal Contexts*, *in* REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 253, 261–62 (Gary B. Melton ed., 1987).

102. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 287–88 (1977).

103. Palmore v. Sidoti, 466 U.S. 429 (1984).

104. *Id.* at 431–43.

105. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

106. United States v. Windsor, 133 S. Ct. 2675 (2013).

107. *Obergefell*, 135 S. Ct. at 2600–01.

108. *Windsor*, 133 S. Ct. at 2694. ("The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.*).

109. The Court also cited the tangible consequences to children if their parents are barred from the institution of marriage, in that there is a myriad of economic and social benefits of which they could be deprived. *Obergefell*, 135 S. Ct. at 2600–01; *Windsor*, 133 S. Ct. at 2695. It is noteworthy to contrast these formulations with those that had been offered by states for decades as justification for

These cases, as well as those discussed in Part III, provide examples of a larger body of cases invoking images of children as particularly susceptible to physiological or psychological harm. While concerns about protecting children from such perceived risks are the most common images of children's vulnerability appearing in the Court's constitutional opinions, the Court also relies on notions of the other four subtypes of children's vulnerability.

2. Influence-Based Vulnerability.

The second typology focuses on *vulnerability as greater susceptibility to influence, pressure, or coercion by others*. The Court has invoked (or rejected) this concept in a range of cases, including those concerning religious exercises in schools, criminal sentencing, and the *Miranda* custody inquiry.[110] For example, as early as the 1960s, the Court relied on notions of children as susceptible to the influence of peers, teachers, and the government in cases involving Establishment Clause challenges to policies allowing school prayer.

In *School District of Abington Township v. Schempp,* the Court struck down a Pennsylvania school district's prayer policy, despite an excusal provision that purportedly rendered participation voluntary.[111] The Court cited developmental research to support its conclusion that children could not be expected to flout social expectations and "peer-group norms" that favored participation in the religious exercises.[112] The Court further distinguished religious exercises in public school from those in legislative bodies, arguing that, in contrast to school children, "mature adults . . . may presumably absent themselves . . . without incurring any penalty, direct or indirect."[113] Even minors on the verge of adulthood may be susceptible to pressures from peers and authority figures, according to a 1992 opinion by the Court. In *Lee v. Weisman*, the

restrictions on same-sex couples to marry. States had frequently argued that childrearing by heterosexual parents was superior to that offered by same-sex couples, and that therefore, state sanctioning of marriage by same-sex couples would encourage formation of family types less suitable for childrearing. In addition, states asserted, and many courts accepted, notions that childrearing by gays and lesbians could be harmful to children's development and adjustment. *See, e.g.*, Hernandez v. Robles, 805 N.Y.S.2D 354 (N.Y. App. Div. 2005); Singer v. Hara, 522 P.2D 1187 (1971). *See also* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833; Lofton v. Dep't of Children & Family Servs., 358 F.3d 804, 826 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

110. J.D.B. v. North Carolina, 564 U.S. 261, 271–73 (2011) (holding that the age of a child is relevant to a determination of whether, as the subject of a police interrogation, he believed he was in police custody, therefore rendering any statements made prior to *Miranda* warnings inadmissible, because, among other factors, children "'are more vulnerable or susceptible to . . . outside pressures' than adults." (citing to Roper v. Simmons, 534 U.S. 551, 569 (2005).).

111. Sch. Dist. Of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 205 (1963).

112. *Id.* at 290–91 & n.69.

113. *Id.* at 299–301.

Court described minors as susceptible to the pressure to conform in the context of a purportedly nonsectarian prayer offered by a clergy member at a public high school graduation ceremony, even where participation in the religious exercise was presented to students as voluntary.[114] In vigorous dissent, Justice Scalia rejected the assertion that older minors, such as graduating high school seniors, are susceptible to "psychological coercion" in such situations.[115]

In *Wallace v. Jaffree*, Justice O'Connor's concurrence highlighted an aspect of susceptibility to influence that goes to the heart of Establishment Clause jurisprudence: concern about the message sent to individuals when government appears to endorse religion.[116] She distinguished the impact of prayer in governmental settings involving adults from school prayer by focusing on children's and adults' differential susceptibility to "unwilling religious indoctrination."[117] She opined: "[There is] a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs."[118] Concerns about children's impressionability and susceptibility to peer pressure were also cited by the Court in striking down a Louisiana statute requiring the teaching of "creation science" whenever evolution is taught.[119]

In a series of decisions concerning the constitutionality of imposing the harshest criminal penalties on juvenile offenders, the Court has relied on developmental science to support a number of constructs relating to children's vulnerability.[120] Although many of the decisions on these issues were published in earlier decades,[121] the Court's 2005 decision in *Roper v. Simmons*[122] enthusiastically embraced psychological and neuroscientific research when applying Eighth Amendment proportionality doctrine.

In *Roper*, which held that imposition of the death penalty was categorically unconstitutional for persons who committed their crimes as minors, the Court cited distinctions between minors and adults in three

114. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 578 (1992).

115. *Id.* at 636–37 (Scalia, J., dissenting).

116. Wallace v. Jaffree, 472 U.S. 38, 77 (1985).

117. *Id.* at 81 (O'Connor, J., dissenting).

118. *Id.*

119. Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

120. Psychological research and policy analyses appeared very influential in the Court's decisions. For example, the Court heavily cited articles developed as part of the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *e.g.*, Steinberg & Scott, *supra* note 9, as well as briefs submitted by amici curiae. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 471–72 & n.5 (2012).

121. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 361 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982).

122. Roper v. Simmons, 543 U.S. 551, 569 (2005).

areas of human functioning, one of which focused on vulnerability. The Court concluded that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[123] The Court reinforced this conclusion five years later, in *Graham v. Florida*, extending *Roper's* reasoning to hold unconstitutional statutes that permit sentences of life without parole to be imposed on minors.[124] In *Miller v. Alabama*, the Court extended this line of precedent one step further, striking as unconstitutional statutes that impose *mandatory* life sentences without parole on those who were minors at the time of commission of homicide offenses.[125]

J.D.B. v. North Carolina, decided after *Roper* and *Graham*, addressed the question of whether the age of a minor at the time of police questioning can inform a court's determination of whether a reasonable person in the defendant's position would appreciate his freedom to terminate questioning and leave.[126] The Court relied heavily in *J.D.B.* on images of children as susceptible to the influence of others, noting that even adults may confess to crimes they did not commit under the "pressure of custodial interrogation."[127] Indeed, in the context of police interrogation, which is recognized to be inherently coercive, and where waivers of one's rights must be *voluntary* as well as informed and intelligent, the Court considers whether "the suspect's free choice" or his "will to resist" have been undermined.[128] The Court in *J.D.B.* relied on constructs of children as more susceptible to influence and pressure to support its conclusion that a child's age could affect how a reasonable person perceived the freedom to leave: "That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[129] *J.D.B.* and the sentencing cases are also rich with language asserting constitutionally relevant notions of capacity-based vulnerability and status-based vulnerability, discussed in the two subsections that follow.

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123. *Id.* at 569.

124. Graham v. Florida, 560 U.S. 48 (2010).

125. *Miller*, 562 U.S. at 460.

126. J.D.B. v. North Carolina, 564 U.S. 261 (2011).

127. *Id.* at 269–71.

128. *Id.*

129. *Id.* at 271–72. The Court also observed that a child's perception of the coercive elements of situations with adults may be influenced by the reality that, children's lives are generally controlled by adults. Thus, to some extent, the default perception is that one's freedom of choice is limited by authority figures.

> A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Without asking whether the person 'questioned in school' is a 'minor,' . . . the coercive effect of the schoolhouse setting is unknowable.

Id. at 276.

3. Capacity-Based Vulnerability.

The concept of capacity-based vulnerability focuses on the risks to one's welfare that may accompany limitations of one's decisional capacities. Those with immature decisional capacities may be less able to protect themselves from potential harms or dangers. They may be less likely to perceive and understand relevant information, to weigh risks and benefits, to exercise planning, to employ forethought and deliberative decisionmaking, and to use self-restraint against impulsive action. Indeed, these are the characteristics identified by the Court in *J.D.B.* and the recent sentencing cases cited above.[130]

In *J.D.B.,* the Court summarized centuries of common law assumptions about children's nature: "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."[131] The Court has made this type of observation previously. In *Parham v. J.R.,* a case considering what Due Process protections are required before children are "voluntarily" admitted to psychiatric hospitals with parental consent, Justice Burger cited the law's presumption that children are less capable of making decisions due to developmental immaturity: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."[132] In the context of abortion, the Supreme Court's majority opined that minors "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[133] The extent to which these assumptions reflect reality across these settings, and across all minors faced with decisionmaking in these contexts, is an empirical question that has been challenged by social scientists.[134]

Focusing on minors who engage in criminal offending, the Court in *Roper* asserted that minors lacked maturity and were more likely than adults to engage in "impetuous and ill-considered actions and decisions."[135] It cited developmental research for the proposition that "adolescents are overrepresented statistically in virtually every category of reckless behavior."[136] In *Miller,* the Court went further, noting the

130. *See supra* notes 122–125 and accompanying text.

131. *J.D.B.*, 564 U.S. at 273.

132. Parham v. J.R., 442 U.S. 584, 603 (1979).

133. Bellotti v. Baird, 443 U.S. 622, 635 (1979).

134. Full analysis of the research addressing minors' decisional competencies across legal settings is beyond the scope of this Article. It is noteworthy, however, that depending on the specific legal capacities of relevance and the ages of the children whose capacities are at issue, minors' may in some instances perform in a manner comparable to adults, while in other instances, may differ significantly from adult standards. *See infra* notes 220–222 and accompanying text.

135. Roper v. Simmons, 543 U.S. 551, 569 (2005).

136. *Id.* at 569 (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 339 (1992)).

neuroscientific basis for many of its conclusions.[137] In citing an amicus brief authored by the American Medical Association for *Graham v. Florida*, the Court emphasized "fundamental differences between juvenile and adult minds" "in parts of the brain involved in behavior control,"[138] noting "adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[139] It concluded that "transient rashness, proclivity for risk, and inability to assess consequences" rendered children less morally culpable for the criminal acts in which they may engage.[140]

In a totally different context—choices minors make about use of tobacco products—the Court in *Lorillard Tobacco v. Reilly*,[141] noted that "it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use . . . ."[142] In *Lorillard*, however, the Court struck down most of the Massachusetts regulations restricting advertising of tobacco products. Despite the recognized harms of tobacco use by children and the acknowledged vulnerability of children to the influence of advertisers, the Court decided that First Amendment considerations limited the state's authority to regulate in the manner laid out by the challenged statutes. The framing of the issue in *Lorillard*, however, demonstrates the possible interplay of decisional capacity and vulnerability. In the opinion, the Court acknowledged the special risks to youth of immature choices to use tobacco products, which may then lead to long-term addiction with lifelong consequences.

4. Status-Based Vulnerability.

Status-based vulnerability arises from *legal, social, and situational concomitants of minority status and subordination to the authority and control of others*. In focusing on the concomitants of the minority status for children, this form of vulnerability addresses the *structural* effects of being subject to the authority of others. As such, it draws from the NBAC's concept of institutional vulnerability. At its extreme, institutional vulnerability considers the limits on a person's freedom when, like a prisoner, one is captive in a total institution. Most children's

137. Miller v. Alabama, 567 U.S. 460, 470 (2012).

138. *Id.* at 471–72 (citing Graham v. Florida, 560 U.S. 48, 68 (2010) (referring to Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae Supporting Neither Party at 16–24, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) (2009 WL 2247127, at *16–24).).

139. *Miller*, 567 U.S. at 472, n.5.

140. *Id.* at 472.

141. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

142. *Id.* at 570–71.

lives are, fortunately, not as confining as is institutionalization, but the restrictions on many of their choices are real.

The law governing family relations, and our society, is structured on parental discretion in most areas of children's upbringing—with some limited state involvement—an arrangement that usually serves minors' interests.[143] Ideally, adults with such authority act to promote the child's and society's interests, as well as the child's developing autonomy and self-direction, and grants of minors' freedom are somewhat commensurate with minors' acquisition of developmental capacities.

One of the implications of this legally- and socially-mandated allocation of power over minors' lives is that minors typically cannot choose where and with whom to live, and with whom to associate. In *Troxel v. Granville*, the Court reinforced parental discretion to determine the parameters of court-ordered third-party visitation of their children by grandparents. In dissent, Justice Stevens argued that just as parents have fundamental due process rights that protect their relationships with their children, children's relationships with adults deserve constitutional protection.[144] In particular, he observed that the majority's decision did not recognize a child's liberty interest in preserving particular family or family-like bonds, such as with grandparents. As such, he recognized the vulnerability of children to emotional losses from the severing of such bonds.

In his dissent in *Wisconsin v. Yoder*, a case in which the Court recognized the First and Fourteenth Amendment rights of Amish parents to remove their teenaged children from public school earlier than the statutorily determined age of school exit, Justice Douglas bemoaned the losses to the children of irreplaceable educational opportunities, as a result of their lack of freedom to choose whether to remain in school.[145] He argued that the Court's prior cases, recognizing that the Constitution applies to children as well as adults, mandated that the court should have solicited the children's choice on a matter so seriously affecting their welfare. Noting that the early termination of a child's education may have dramatic repercussions for the child's future, he impliedly emphasized the vulnerabilities inherent in certain exercises of parental discretion.[146]

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143. *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000).

144. *Id.* at 88–90 (Stevens, J., dissenting).

145. Wisconsin v. Yoder, 406 U.S. 205, 245–46 (1972) (Douglas, J., dissenting).

146. Justice Douglas opined:

> If 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. . . . If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.

Id.

In *Roper*, the Court characterized minors as more vulnerable than adults "in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[147] Children are less able to extricate themselves from homes and communities in which socialization patterns and role models promote criminal conduct. In *Miller*, the Court addressed not only the constitutionality of Alabama's policy of mandating life sentences for homicide offenders, but also the appropriateness of a life sentence for youth who had been fourteen years old at the time of the offense. In so doing, it highlighted the powerlessness of the offenders to escape the violent home situations in which they were living.[148]

In an ironic characterization of minors' lack of day-to-day control over their lives as a form of captivity, the U.S. Supreme Court in *Schall v. Martin* defended less stringent due process protections in the context of pretrial preventive detention for minors versus adults, Justice Burger stated starkly that "juveniles, unlike adults, are always in some form of custody."[149] While most of us would not liken the limitations of most minors' freedom to incarceration in a state detention facility (where one is held in locked quarters, separated from loved ones, and is vulnerable to physical and sexual assaults) the analogy provides a poignant depiction of the vulnerability potentially accompanying minority status, much like a form of institutional vulnerability.

The Court's conclusion in *Ingraham v. Wright* was also ironic.[150] The Court held that the Constitution does not protect minors from exposure to exceptionally harsh corporal punishment, even though it acknowledged that such treatment could not legally be meted out to adults, including prison inmates.[151] In *Ingraham*, one child had been "paddled" so harshly that he suffered a "hematoma requiring medical attention and keeping him out of school for several days" and another "was struck on his arms, once depriving him of the full use of his arm for a week."[152] Justice White's dissent criticized the majority for its unwillingness to treat school children committing minor disciplinary infractions with the same protective instincts that it applied to adult prisoners.[153] The limited recourse available to minors against adults who control their lives underscores the potential vulnerability of children if

147. Roper v. Simmons, 543 U.S. 551, 569 (2005).

148. Miller v. Alabama, 567 U.S. 460, 477 (2012).

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

150. Ingraham v. Wright, 430 U.S. 651 (1977).

151. *Id.* at 671, 680 (holding that due process safeguards, such as informal hearings, were unnecessary and unduly burdensome prior to the administration of corporal punishment in the schools).

152. *Id.* at 657.

153. *Id.* at 683–92 (White, J., dissenting).

adults fail to exercise their authority in a manner that is wise, fair, and nonexploitative.

Finally, the Court in *J.D.B.* concluded that failure to consider the age of a minor in the *Miranda* custody inquiry ignores the pervasiveness of adult control over minors and the way such control is likely to shape a child's world view.[154] Calling such failure "nonsensical" and "absurd," the Court recognized the structures of adult control and attendant consequences for children's noncompliance that are a part of the child's daily experience. In other words, according to the Court, children see the world differently relative to questions of whether they are or are not in police custody and are or are not "free to go," not only because of the actual features of the situation or not-yet-fully-developed psychological capacities, but also because most facets of their lives are subject to the authority of adults. Therefore, in the language of *Schall*, they are likely to experience themselves as always in some form of custody.

5. Dependency-Based Vulnerability.

Minors of different ages manifest varying levels of capacity to meet their own basic needs. While an infant is incapable of even the most basic self-care, teens can feed, clothe, and bathe themselves, even if some may be thought not to make the best choices in executing those tasks. As noted above, dependency-based vulnerability recognizes the implicit reliance of children upon others to meet their most basic needs. Needs for material sustenance are, of course, fundamental to survival. Needs for protection from dangers—such as knives, poisons, traffic, loaded firearms—are also fundamental to survival. Yet, as decades of developmental research confirms, children also have psychological needs to be nurtured and loved, to be educated and intellectually stimulated, and to be protected from a range of abusive or brutal practices detrimental to adaptive human development.

As noted above, there are some overlaps between status-based vulnerability and dependency-based vulnerability. The inherent dependency of many minors is one of the central reasons that society has created legally recognized status differentials between minors and adults. At the same time, the status-based authority of parents and other adults over minors renders minors more dependent upon the decisions of adults for their welfare. The two forms of vulnerability differ in that status-based analyses focus on vulnerabilities due primarily to the *structural* status relationships, while dependency-based analyses focus on children's developmental needs and vulnerabilities arising out of their *functional* biological and psychological reliance on others to meet those needs.

154. J.D.B. v. North Carolina, 564 U.S. 261, 275–76 (2011).

An illustration of dependency-based vulnerability analyses can be found in *DeShaney v. Winnebago County Department of Social Services*.[155] The Justices' opinions in *DeShaney* underscore the risks to children arising from their dependence on adults. Evidence that Joshua DeShaney was being brutally abused by his father was substantial. Concerned parties reported suspicions of abuse to the Department of Social Service ("DSS"), which repeatedly failed to protect Joshua. After his father's beatings led to permanent severe brain damage, Joshua's mother sued DSS under § 1983, alleging that DSS had deprived Joshua of liberty without due process by failing to protect him.[156] Although acknowledging the "grievous harm" Joshua suffered, the Court's majority held that Wisconsin did not have an actionable duty under the federal Constitution to protect Joshua. It emphasized that the harm inflicted upon Joshua "was inflicted not by the State of Wisconsin, but by Joshua's father."[157]

In this case, the Court's majority and dissent disagreed as to whether DSS had a duty to protect a young child from the brutal violence of his father. None of the Justices appears to dispute the general premise, implicit in their opinions, that a young child is totally dependent upon the quality of care provided by those entrusted with protecting his welfare. The majority and dissent diverged on the question of who owed four year old Joshua DeShaney a duty of care in light of his total dependence on adults. Concluding that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasions by private citizens,"[158] Justice Rehnquist's decision indicates that, at least under the federal Constitution, dependents such as Joshua are owed no duties of care and protection by the state. Rather, duties of care and protection are born solely by the family as a private entity.

The dissent painted a different picture. It argued that duties owed to children in response to their dependence-based vulnerability are multifaceted.[159] While our societal default imposes primary duties on

155. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

156. *Id.* at 193.

157. *Id.* at 203.

158. *Id.* at 195.

159. Joshua's vulnerability inhered first in his dependence on his father, who subjected him to repeated assaults. The majority characterized Joshua's devastating injuries as a private matter for which the state bore no responsibility. *Id.* at 201–02. In contrast, Justice Brennan emphasized that "Wisconsin has established a child-welfare system specifically designed to help children like Joshua" to which it channels all reports by private persons and governmental agencies regarding suspicions of child abuse or neglect. *Id.* at 208 (Brennan, J., dissenting). By assuming this purportedly protective role, but failing to act, "Wisconsin's child-protection program . . . effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as [it] took such action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs." *Id.* at 210. In the dissenters' view,

parents or guardians for care and protection of their children's welfare, Justice Brennan's dissent implicitly characterized children such as Joshua as dependents of the state when the state has set up a child protection apparatus, and has begun to rescue after reliance on the private family fails.[160]

Dependency-based vulnerability constructs do not appear frequently in the U.S. Supreme Court's constitutional cases. The majority's analysis and resolution of *DeShaney* may explain why. Our Constitution is generally viewed as protecting individuals *from* government action, rather than bestowing positive rights to governmental assistance or services. Constitutional challenges, particularly after *DeShaney*, are less likely to characterize matters addressing government's role in meeting the needs of dependent persons as falling within the purview of the Constitution.

C. GENERATIVITY, PLASTICITY, AND RESILIENCE: VULNERABILITY AS CAPACITY FOR POSITIVE GROWTH, ADAPTATION, AND RECOVERY

There is a somewhat paradoxical feature of vulnerability. Martha Fineman—whose important work on human vulnerability and the law has stimulated substantial commentary—observes that vulnerability is frequently viewed negatively, characterized solely in terms of susceptibility to harm, introducing stigmatizing effects when used to speak about various population subgroups or individuals.[161] Yet, as Fineman's work suggests, while vulnerability can be associated with negative outcomes, it is a constant in the human experience, and can be "generative":

> [O]ur vulnerability presents opportunities for innovation and growth, creativity, and fulfillment. It makes us reach out to others, form relationships, and build institutions. Human beings are vulnerable because as embodied beings we have physical and emotional needs for

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the state had *enhanced* Joshua's vulnerability to the dangers of his father's actions by impliedly representing to emergency room physicians and others reporting the abuse that it would step in. *Id.* By failing to carry out its self-appointed role as protector for endangered children, according to the dissent, DSS substantially exacerbated Joshua's vulnerability to his father's brutality. *Id.*

160. This view of the state's relationship to individuals' and groups' vulnerability is a focus of the important work on vulnerability theory by Martha Fineman. Fineman, *supra* note 88, at 13. Fineman's normative analysis recognizes the role of state policies as responses to those vulnerabilities inherent in the human condition and argues "for a responsive state—a state built around recognition of the vulnerable subject." *Id.* This view is echoed in Dodds, *supra* note 89, at 189 and ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES (1985).

161. Fineman, *"Elderly" as Vulnerable*, *supra* note 33; Fineman, *Equality and Difference*, *supra* note 33.

> love, respect, challenge, amusement, and desire. This vulnerability can bring positive or negative results . . ."[162]

This perspective is of particular relevance to notions of children's vulnerability because a central and defining dimension of childhood is that children are constantly growing and developing. Arguably, this is true of all human beings. Yet, the nature, trajectory, and rapid pace of children's development distinguish childhood from other stages of life[163] and heighten myriad potential vulnerabilities: positive and negative.

Modern discussions about vulnerability in the behavioral sciences generally incorporate and are intimately interrelated with analyses of concepts of *resilience*. While behavioral science formulations of vulnerability often emphasize persons' susceptibility to negative outcomes when confronted with certain stressors or adverse circumstances, concepts of "resilience" focus on the potential for and processes of healthy development and outcomes in the face of such stressors or circumstances: "Resilience is a dynamic developmental process [referring to] an individual's attainment of positive adaptation and competent functioning despite having experienced chronic stress or detrimental circumstances, or following exposure to prolonged or severe trauma."[164] A somewhat broader definition of resilience focuses on "[t]he capacity of a dynamic system to withstand or recover from significant challenges that threaten its stability, viability, or development."[165] Research has identified a range of "protective factors": variables that bear a demonstrated empirical relationship to prediction of better outcomes,

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162. Fineman, *"Elderly" as Vulnerable*, *supra* note 33, at 96.

163. "There is general recognition that the developing nervous system is *qualitatively* different from the adult nervous system." Deborah Rice and Stan Barone, Jr., *Critical Periods of Vulnerability for the Developing Nervous System: Evidence from Humans and Animal Models*, 108 ENVTL. HEALTH PERSP. 511 (2000) (emphasis added).

164. Dante Cicchetti & Jennifer A. Blender, *A Multiple-Levels-of-Analysis Perspective on Resilience: Implications for the Developing Brain, Neural Plasticity, and Preventive Interventions*, *in* RESILIENCE IN CHILDREN 248, 249 (Barry M. Lester et al. eds., 2006).

165. Ann S. Masten, *Resilience in Children Threatened by Extreme Adversity: Frameworks for Research, Practice, and Translational Synergy*, 23 DEV. & PSYCHOPATHOLOGY 493, 494 (2011). For further discussion of the topic, see ANN S. MASTEN, ORDINARY MAGIC: RESILIENCE IN DEVELOPMENT (2014); RESILIENCE IN CHILDREN (Barry M. Lester et al. eds., 2006); Michael Rutter, *Implications of Resilience Concepts for Scientific Understanding*, *in* RESILIENCE IN CHILDREN 1–2 (Barry M. Lester et al. eds., 2006); RISK AND RESILIENCE IN CHILDHOOD: AN ECOLOGICAL PERSPECTIVE (Mark W. Fraser ed., 2d ed. 2004); Suniya Luthar et al., *The Construct of Resilience: A Critical Evaluation and Guidelines for Future Work*, 71 CHILD DEV. 543 (2000). While an early phase of empirical work focused on the role of children's own characteristics in promoting resilience, and subsequent research examined "protective" factors in children's family environments and broader social worlds (such as close, positive relationship with adult caregivers), the most recent generation of science has been investigating the processes and *mechanisms* of resilience. *See e.g.*, Luther et al., *supra* at 545, 554–555; Ann S. Masten & Jelena Obradović, *Competence and Resilience in Development*, *in* RESILIENCE IN CHILDREN 13–14, 21–22 (Barry M. Lester et al. eds., 2006); Mark F. Fraser et al., *Risk and Resilience in Childhood*, *in* RISK AND RESILIENCE IN CHILDHOOD: AN ECOLOGICAL PERSPECTIVE 13, 27–31 (Mark W. Fraser ed., 2d ed. 2004) (discussing concepts of "protective" factors).

particularly in situations of risk or adversity.[166] Protective factors can help explain manifestations of greater resilience observed in the face of stressors or adversity. Research reveals, for example, that the existence of strong, stable, and supportive relationships between parents or other adult caregivers and children serves as a protective factor that can help children cope with stressful, and even traumatic, life events and achieve more adaptive outcomes.[167]

Although many of the Court's constructs of children's vulnerability focus on the potentially negative concomitants of the perceived differences between children and adults, the Court also observes that the developmental vulnerabilities of childhood offer constitutionally-relevant potential for positive change. The view of children as malleable helped a majority of the Court justify why sentences not constitutionally prohibited for adult offenders—such as the death penalty,[168] life without parole for non-homicide offenses in *Graham,*[169] and mandatory life without parole for homicide,[170]€should be held unconstitutional for minors.[171] The Court concluded that minors have a "greater 'capacity for change'" and that "a child's character is not as 'well-formed' as an adults'; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'"[172] The Court rejected the idea, implicit in the justification for sentences such as death and life without parole, that one can easily determine whether or not a young person is "incorrigible" (that is, unable to change), and noted that most children have the potential to outgrow the tendencies that led to the serious criminal offending.[173] In *Montgomery v. Louisiana*, considering the retroactivity of *Miller*, the Court noted that "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."[174]

Thus, while much of the discussion by the Court, and therefore in this Article, focuses on vulnerability as creating risks and potential challenges to children's well-being, these vulnerability themes are conceptually intertwined with those addressing children's *plasticity*

166. Wright et al., *supra* note 43, at 17.

167. *Id.* at 20.

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

169. Graham v. Florida, 560 U.S. 48, 49 (2010).

170. Miller v. Alabama, 567 U.S. 460, 470 (2012) (citing *Graham*, 560 U.S. at 60–61 and *Roper*, 543 U.S. at 569).

171. For further discussion of these cases and this perspective on children's vulnerability, *see supra* notes 122–125, 135–140, 147–148 and accompanying text.

172. *Id.*

173. *Miller*, 567 U.S. at 473.

174. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

more broadly—that is their capacity to change in response to experience[175]—and therefore their potential for positive growth as well.

II. CHILDREN'S VULNERABILITY IN CONTEXT

This Part seeks to place our examination of judicial constructs of children's vulnerability in context. Subpart A recognizes that societal concerns about children's vulnerability are not of recent origin. Indeed, they have been present in our society's discourse about children for some time. Over time, the sources of the harms and deleterious influences purported to endanger children have changed. Yet, concerns about children's vulnerability are nothing new. Subpart A provides a brief analysis of some of the historical and social trends. Subpart B touches on some of the insights that developmental science may bring to bear on inquiries about children's vulnerability. It identifies some of the general principles relevant to thinking about vulnerability, as well as some of the challenges inherent in studying vulnerability and applying scientific findings to judicial decisions.

A. SOCIAL AND HISTORICAL ANTECEDENTS OF MODERN CONSTRUCTS OF CHILDREN'S VULNERABILITY

Historians suggest that Americans became increasingly concerned about the welfare of our nation's children in the 19th and 20th centuries. Barbara Finkelstein noted that, although prior generations "were aware of childhood vulnerabilities and believed that children required protection and supervision," social developments—such as immigration and industrialization—and new ways of thinking about childhood combined with other forces to lead to a more self-conscious approach to socializing and protecting the nation's youth.[176] Those new ways of thinking "reflected a growing consciousness of children as learners, vulnerable to the force of circumstance."[177] A range of social innovations, such as compulsory school attendance and institutions for the care and control of children, developed to facilitate the socialization process.[178]

Michael Grossberg noted a "fundamental tension in American beliefs and policies toward the young," as we are "torn between a fear for children and a fear of children."[179] Many of our societal efforts to affect

175. DAVID R. SHAFFER, DEVELOPMENTAL PSYCHOLOGY: CHILDHOOD AND ADOLESCENCE 620 (6th ed. 2002).

176. Barbara Finkelstein, *Casting Networks of Good Influence: The Reconstruction of Childhood in the United States, 1790–1870*, *in* AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK 111, 117 (Joseph M. Hawes & N. Ray Hiner eds., 1985).

177. *Id.*

178. Lois A. Weithorn *Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1437–42 (2005).

179. Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, *in* A CENTURY OF JUVENILE JUSTICE 3 (Margaret K. Rosenheim et al. eds., 2002).

children's lives reflect our dual, and often inextricably intertwined, goals of promoting children's welfare for children's own benefit (that is, *parens patriae* goals) and for the benefit of society at large (that is, police power goals). The convergence of *parens patriae* and police power[180] justifications for the most influential policies for governing childhood, such as compulsory school attendance and prohibitions on child labor, reveals this relationship between altruistic benevolence on the one hand, and social control and engineering, on the other, that our society's legal regulation of children typically entails. In the 19th century, social leaders began to structure policies to "immerse [children] in networks of good influence," while eliminating what they perceived to be noxious or debasing influences.[181] These trends persist today, as demonstrated by many of the statutes at issue in the cases reviewed within this Article.

The Progressive Era introduced a variety of new perspectives about children's capacities, development, and the ways in which parents, educators, and society could promote and enhance children's functioning and well-being.[182] Philosophers, scientists, physicians, psychologists, educators, and penologists offered theories, many of which remain with us today. The most influential themes of this era emphasized stage-based notions of child and adolescent development and a robust debate pitting the roles of genetics and experience in determining the type of person one becomes.[183]

Indeed, child psychology emerged as a discipline in the Progressive Era, and with it, clearer notions of childhood and adolescence as stages of life distinct from adulthood.[184] Psychologist G. Stanley Hall had a significant impact on Progressive thinking, particularly with the

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180. As discussed in greater detail below, *parens patriae* and police power interests are the most common justifications for state authority to regulate the lives of children or the lives of others for the benefit of children. *See infra* notes 244–254 and accompanying text. In particular, *parens patriae* justifications focus on regulatory goals targeting benefits to the group regulated (*for example*, compulsory school attendance promotes children's own well-being), while police power justifications emphasize benefits to the general welfare (*for example*, compulsory school attendance by children benefits society as a whole).

181. Finkelstein, *supra* note 176, at 117.

182. Hamilton Cravens, *Child Saving in Modern America 1870s–1990s*, *in* CHILDREN AT RISK IN AMERICA: HISTORY, CONCEPTS, AND PUBLIC POLICY 4 (Roberta Wollons ed., 1993). Cravens referred to "[o]rganized child saving" as "institutionalized concern for children as members of, and participants in, the social order." *Id.*

183. For a discussion of the history of the "nature-nurture" debate in psychology, see Gregory A. Kimble, *Evolution of the Nature-Nurture Issue in the History of Psychology*, *in* NATURE, NURTURE, & PSYCHOLOGY 3–15 (Robert Plomin & Gerald E. McClearn eds., 1993); *see also* Ronald D. Cohen, *Child-Saving and Progressivism*, *in* AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK 273, 290–91 (Joseph M. Hawes & N. Ray Hiner eds., 1985); Hamilton Cravens, *Child-Saving in the Age of Professionalism, 1915–1930*, *in* AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK 417–18 (Joseph M. Hawes & N. Ray Hiner eds., 1985).

184. William Kessen, *The American Child and Other Cultural Inventions*, 34 AM. PSYCHOLOGIST 815, 816 (1979); *see also* Cravens, *supra* note 183, at 415, 423.

publication of his two-volume work on adolescence.[185] Hall's work was heavily influenced by the writings of Charles Darwin and, like Darwin, he viewed behavior as the "joint result of pressures of the environment and events occurring within the organism itself."[186] Hall's theories also reflected the perspective that human development progressed in sequential and biologically predetermined stages, during each of which the organism confronts distinct physiological and psychological tasks, with environmental inputs critically affecting developmental outcomes.[187] He characterized adolescence as the period during which individuals prepare for adulthood, and identified some of the developmental changes.[188] Other influential writers, such as John Dewey,[189] and Arnold Gesell,[190] asserted that children's intellectual, social, and moral development progressed in a stage-based fashion *and* could be highly influenced by appropriate environmental inputs at these stages.[191] At one end of the nature-nurture continuum, behaviorists like John Watson went so far as to imply that humans are, to a significant extent, no more than the sum total of their life experiences.[192]

These new ideas raised the stakes for those concerned with promoting the welfare of children for the benefit of the children and for the welfare of society. The more receptive children were to exposures and influences, the more vulnerable they were as well. As John Dewey suggested in his 1916 book, *Democracy and Education*, children can be said to have an inherent "plasticity" and the "power to grow . . . and to

185. G. STANLEY HALL, 2 ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION, AND EDUCATION (1904). For discussions of Hall's influence, see, for example, Cohen, *supra* note 183, at 291–292; Cravens, *supra* note 183, at 423–26; JOHN DEMOS, PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY 93–96, 105, 107 (1986); John Modell & Madeline Goodman, *Historical Perspectives*, *in* AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 93, 101–102 (S. Shirley Feldman & Glen R. Elliott eds., 1990).

186. HOWARD GARDNER, DEVELOPMENTAL PSYCHOLOGY: AN INTRODUCTION 148–149 (2d ed. 1978).

187. Cravens, *supra* note 183, at 424.

188. Modell & Goodman, *supra* note 185, at 102. Writers frequently attribute to Hall a significant role in the delineation of adolescence as a discrete stage in child development. Cohen, *supra* note 183, at 290–92.

189. JOHN DEWEY, THE SCHOOL AND SOCIETY: THE CHILD AND THE CURRICULUM (1899).

190. ARNOLD GESELL, THE NORMAL CHILD AND PRIMARY EDUCATION (1912).

191. Cravens, *supra* note 183, at 429. *See, e.g.*, David Bakan, *Adolescence in America: From Idea to Social Fact*, 100 DAEDALUS 979, 979 (1971); Hugh Cunningham, *The History of Childhood*, *in* IMAGES OF CHILDHOOD 27–35 (C. Philip Hwang, Michael E. Lamb, & Irving E. Sigel, eds., 1996); Arlene Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Contex*t, 39 L. & CONTEMP. PROBS. 38, 45–46 (1975).

192. JOHN WATSON, BEHAVIORISM 124 (1924):

> Give me a dozen healthy infants and my own specified world to bring them up in, and I'll guarantee to take anyone at random and train him to become any kind of specialist I might select—doctor, lawyer, artist, merchant-chief, and yes, even beggar and thief, regardless of his talents, penchants, tendencies, abilities, vocations and race of his ancestors.

learn from experience."[193] Thus, the importance of providing the proper experiences and reducing potentially deleterious ones became paramount. Progressive Era criminologists drew connections between the deleterious conditions of urban environments and the development of criminal behavior.[194] Optimism about our ability to prevent, interrupt, and repair "damage" caused by inadequate, improper, and destructive life experiences provided an important foundation for 20th century policies governing children and families.[195]

Thus, despite our nation's historical cautiousness about broad-based state authority over citizens' lives, there was a sense of urgency that propelled increasing governmental regulation of the lives of children and families, which picked up dramatically during the Progressive Era.[196] Some historians suggest that social reforms of this era were motivated by a kind of "moral panic," that is, fear "that urbanization, industrial capitalism, and massive immigration were undermining the nation's homes and thus, the republic itself."[197] "Adults worried about children—everyone's children, not just their own—for their own sake and also out of fear for the country's future."[198] The efforts of reformers focused initially on those children viewed as more vulnerable, and therefore at greatest risk: children who were orphaned, ill, or impoverished; children of immigrants or other underclasses; and children viewed as inadequately supervised or poorly socialized.[199]

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193. JOHN DEWEY, DEMOCRACY AND EDUCATION 44–46, 52–53 (1916).

194. Anthony M. Platt, The Child Savers: The Invention of Delinquency 41 (2d ed. 1977).

195. "Nativis[tic]" assumptions about differences among individuals and societal subgroups, supported by "scientific" theories such as biological determinism also prevailed during this period, as did notions that certain racial and ethnic groups were superior to others. *See, e.g.*, Cravens, *supra* note 183, at 421; Cohen, *supra* note 183, at 289–291. Thus, whereas some Progressives might attribute perceived differences among population subgroups to environmental causes, such as "poverty, poor health, inadequate nutrition, or insufficient education . . . others employed the language of contemporary natural science and attributed conduct to Mendelian unit characters, racial traits, instincts, and other evidences of original human nature." Cravens, *supra* note 183, at 418–19. Reliance on notions of inherent differences also fit neatly within Progressive intervention strategies, which often targeted different approaches to different subgroups within society. Thus, for example, lower-class, impoverished, and immigrant youth would be more likely than middle- and upper-class and nonminority youth to fall under the jurisdiction of the juvenile justice system, with its attendant discretion over all facets of the lives of its charges, its substitution for parental authority, and its institutional settings. For the rest of society's children, compulsory schooling served as the primary socialization strategy.

196. Historians have generally referred to the period of time between 1885 and 1915 as the Progressive Era. During these years, "reformers" expressed pervasive concerns about social and economic conditions in the United States, particularly those that affected children, and sought comprehensive social and legal change. For a thoughtful and balanced historical analysis of this era, see Cohen, *supra* note 183, at 273; Cravens, *supra* note 182, at 3–31.

197. Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890–1900*, 28 IND. L. REV. 273, 275 (1995).

198. Cohen, *supra* note 183, at 274.

199. In the early 20th century, the establishment of the juvenile court was the most dramatic

Eventually, however, the policies reached all of the nation's children.[200] The ideology of this era and the language of humanitarianism made it almost impossible to disentangle the myriad of functions served by the expanding governmental regulation of children's lives.

Concerns about dangers to America's children persisted throughout the 20th century, and of course continue today. Over time, society has changed its perception about many of the identified sources of danger as our images of childhood change and our experience with and knowledge about certain phenomena thought to affect children evolve as well.[201] Yet, just as in the Progressive Era, the social goals and functions served by images of children as vulnerable today are plentiful and diverse. It can be difficult to disentangle these goals and functions when constructs of children's vulnerability appear in the Court's opinions as well. Evaluation of those constructs, however, against what we know about children from existing developmental science helps discern whether the constructs relied upon by the Court bear any relation to empirically verifiable facts in the real world. To the extent that these concepts are inconsistent with existing knowledge, greater skepticism as to their uses by the Court may be warranted.

B. DEVELOPMENTAL SCIENCE AND CHILDREN'S VULNERABILITY: THE BASICS

1. Generality and Specificity in Child Development

Developmental science generally supports the notion that exposures or experiences during childhood can have profound and enduring effects on an individual's development, often to a greater degree than during

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developments in social policy targeting a subgroup of youth. As Weithorn observed:

> While the establishment of the juvenile court was an extension of the organized child welfare and child reform interventions commenced in the prior century, it was, in many ways, more far-reaching. The child welfare movement, with its proliferation of orphanages, was the product of private, nonprofit organizations and societies, which operated with tacit legal approval. By contrast, the juvenile court at once consolidated legal authority over all children perceived to be in need of some extrafamilial intervention in one *state* agency. Beginning with the initiation of the first juvenile court in Illinois in 1899, the juvenile justice movement formalized state intervention in the lives of troubled and troublesome youth and their families. . . . The numbers of children institutionalized in child welfare and juvenile justice facilities under the authority of the juvenile court mushroomed during the twentieth century.

Weithorn, *supra* note 178, at 1441–42.

200. *See generally* Finkelstein, *supra* note 176.

201. *See, e.g.*, VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1994); CHILDREN AT RISK IN AMERICA: HISTORY, CONCEPTS, AND PUBLIC POLICY (Roberta Wollons ed., 1993); Gary B. Melton, *The Clashing of Symbols: Prelude to Child and Family Policy*, 42 AM. PSYCHOLOGIST 345 (1987); STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992).

adulthood.[202] Yet, while statements about children's greater vulnerability than adults may be true in some instances, such broad generalizations tell us nothing about how children and adults differ with regard to each of the countless variables related to children's vulnerability on which such distinctions may be of interest. These statements also do not tell us about the nature and quality of differences between children and adults or about the role that age (within childhood) and a host of individual, environmental and other factors play in determining one's vulnerability. The concept of vulnerability is, in the real world, only meaningful when we focus the inquiry and ask, for example, "vulnerability to what, by whom, and under what circumstances"? In Part III, I examine the Court's use of more specific notions of children's vulnerability as relevant to certain constitutional questions. In this Section, however, I step back and examine two more general themes related to children's development that provide some context for examining these more focused questions.

Before proceeding, I make some observations on the distinction between generality and specificity as relevant to this inquiry. First, as noted above, in order to be relevant to legal policy, constructs about children's vulnerability must move from general assertions such as "children are more vulnerable than adults" to greater specificity as to the particular exposures, experiences, or stimuli viewed as creating special risks (for example, the asserted coerciveness of prayer in schools or, the purported messages of inferiority sent to African-American children through state-mandated school desegregation). Second, greater specificity is required as to the child "outcomes" sought to be avoided (for example, predictions that a child may feel coerced to comply with prayer exercises in the school setting or that African-American children will develop poorer senses of self-worth as a result of messages of racial inferiority conveyed through state-mandated school desegregation policies). To the extent empirical research can inform questions about children's vulnerability relevant to legal questions, those questions must be framed with some degree of specificity.

Even where scientific findings are not introduced in court and subject to the rules of evidence, the findings must relevant to the question at hand[203] and obtained through methods and principles consistent with

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202. *See, e.g.*, Jianghong Liu & Gary Lewis, *Environmental Toxicity and Poor Cognitive Outcomes in Children and Adults*, 76 J. ENVTL.. HEALTH 130, 133 (2014) ("Due to the fact that children are continuously undergoing neurological and physical changes, they may be more susceptible to the harmful effects of toxins. This is in contrast to adults, whose nervous systems are more mature and developed, and therefore more resistant to injury.").

203. *See* David L. Faigman, John Monahan, & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 428 (2014) [hereinafter Faigman et al., *Group to Individual*] (citing Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 591 (1993) (emphasizing the importance of the "fit" between the proffered evidence and the factual question at issue)).

the field of scientific inquiry in order to be meaningful in informing the courts.[204] A MacArthur Foundation-sponsored group has been devoting substantial attention to systematic analysis of a problem that has plagued the application of scientific findings in the courts for decades: The challenges of applying research findings about general group trends to cases concerned with factual questions about individuals.[205] The authors refer to this type of inference as "group to individual," or "G2i."[206] While the constitutional cases described in this Article do not require the Court to adjudicate issues relating to the vulnerability of a particular individual, the general framework still holds conceptual relevance.

Legislative facts about childhood used in the adjudication of constitutional issues necessarily constitute generalizations about childhood. The generalizations may not hold true for all children, and may also be true for adults who are, under the policy in question, treated differently than children. The Court can fashion general rules, requiring for example, age-based distinctions that are necessarily over- and under-inclusive, as in *Roper v. Simmons*, in holding unconstitutional statutes that permit imposition of the death penalty on persons who committed offenses as minors. Or, the Court can uphold age-based bright lines in the legislative or regulatory provisions it reviews.[207] Alternatively, the Court can require case-by-case determinations of a child's vulnerability by decisionmakers below in individualized hearings. This approach was taken by the Court in *Miller v. Alabama*, which struck down mandated life without parole sentences for persons who committed homicide offenses as minors, opting instead for judicial discretion in sentencing.[208] In *Craig v. Maryland*, the Court approved case-by-case determinations of the need for certain modifications of the traditional courtroom confrontation of witnesses when children testify against their alleged abusers.[209] The rationales for choosing bright-line age-based *per se* rules versus case-by-case application of discretionary standards by decisionmakers are many.[210] In the context of constitutional

204. *Id.* at 428–31. For more in depth analyses of the issues and debates regarding the use of scientific evidence in the courts, see, e.g., JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW (7th ed. 2010); DAVID L. FAIGMAN ET AL., 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 1–129 (2013–2014 ed.).

205. *See* Faigman et al., *Group to Individual*, *supra* note 203; David L. Faigman, Christopher Slobogin, & John Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 110 NW. U. L. REV. 859 (2016) [hereinafter Faigman et al., *Gatekeeping Science*].

206. Faigman et al., *Gatekeeping Science*, *supra* note 205, at 419.

207. *See, for example*, *infra* notes 324–334 and accompanying text for discussion of Ginsberg v. New York, 390 U.S. 629 (1968).

208. Miller v. Alabama, 567 U.S. 460, 465 (2012).

209. *See infra* notes 18–27 and accompanying text.

210. *See, e.g.*, Michael N. Tennison & Amanda C. Pustilnik, *And If Your Friends Jumped Off a Bridge, Would You Do It Too?: How Developmental Neuroscience Can Inform Legal Regimes*

adjudication of questions that appear to turn, at least in part, on notions of children's vulnerability, the choice between these legal mechanisms for addressing the asserted differences between children and adults may reflect the challenges of generalizations about children in the particular context or the Court's interpretation of how it must apply the constitutional standard of review in the case before it.[211] These themes of generality versus specificity resurface in Part III, in the analysis of the Court's use of vulnerability constructions in select cases.

The subsections immediately below address two key aspects of children's vulnerability: (1) the reality that, on some dimensions, children are not yet fully developed *and* (2) that children's physiological and psychological systems are continually undergoing major developmental shifts. In other words, I observe that children's present state of immaturity as children, *and* the nature of the dynamic developmental process of human maturation each create *inherent* vulnerabilities.[212] As noted above, however, these vulnerabilities, while creating potential risks to children also create potential opportunities.[213] In addition, these vulnerabilities have led to the formation of social and legal structures, such as the authority of parents and institutions (for example, schools, the child welfare system, the juvenile justice system)

Governing Adolescents, 12 IND. HEALTH L. REV. 533, 535–42 (2015); Annette R. Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137, 1143–71 (2013); Emily Buss, *What the Law Should (and Should Not) Learn from Developmental Research*, 38 HOFSTRA L. REV. 13, 37–41 (2009); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 919–20 (1999).

> Developmental psychology does not offer what lawyers would most like: definitive, fixed information upon which to ground simple, age-based rules. What the discipline does offer is a general picture of how we change as we grow up. We then can use this general picture to assess what we might reasonably expect of children and how we might enhance certain valued capacities in specific contexts for specific children. It is then our place as lawyers to determine when bright-line rules are justified despite the lack of developmental clarity, when society is better off with discretionary standards that defer to the decision maker's assessment of an individual child's capacity, and to what extent extradevelopmental considerations also should be given weight.

Id.

211. To the extent that the Justices perceive individual and situational variables to be more significant in determining a person's vulnerability than the dichotomous distinction between juveniles and adults, case-by-case inquiries may best satisfy the requirements of the standard of constitutional review applied in the case. On the other hand, where the Justices have concerns about the fairness or administrability of discretionary determinations, age-based bright-lines may best promote those goals.

212. Philosophers Mackenzie, Rogers, and Dodds identify "inherent vulnerability," or "ontological vulnerability that is inherent in the human condition," as one *source* of vulnerability. Mackensie et al., *supra* note 39, at 7. These authors suggest that "extremes of age exaggerate the everyday vulnerabilities of embodiment in proportion to the capacity of the individual to meet her everyday physical needs. Inherent vulnerability also varies depending on a person's resilience and capacity to cope." *Id.* Furthermore, other limitations, such as disability, ill health, or other factors may also increase an individual's inherent vulnerability. *Id.*

213. *See supra* Part I.C.

over children's lives, generating *situational vulnerabilities*, as well as myriad protective factors.[214]

The general trends summarized in this Section do not speak to the accuracy of assumptions by members of the Court as to whether children are more vulnerable than adults to *specific* asserted harms or influences related to the contexts or fact patterns presented by cases before it. Rather, the scientific concepts and findings presented below indicate that, as a *general* proposition, children may be more vulnerable than adults with respect to one or more of the typologies in the face of certain exposures. Focused investigations of carefully tailored research questions are necessary to determine, however, the effects of specific experiences on particular subsets of children under particular circumstances.[215]

2. Children as Not-Yet-Fully-Developed Persons

Children are in the formative or early stages of development in the human life cycle.[216] "*Development* refers to systematic continuities and changes in the individual that occur between conception . . . and death. By describing the changes as 'systematic,' we imply that they are orderly, patterned, and relatively enduring."[217] As such, their capacities in a wide range of areas of functioning have not reached adult levels of maturity. Although all human beings continue the developmental process throughout their lives, children have not yet achieved certain target levels of functioning we think of as "adult-like."[218] Many disciplines, such as psychology, neuroscience, and a range of specialties of the biological and health sciences are devoted to studying the developmental trajectories of human beings, and seek to expand our knowledge about the vulnerabilities and capacities that characterize various ages and phases of development.

Many of dimensions of physical or psychological development on which children have not yet reached species-typical adult levels are relevant to the vulnerability typology proposed in Part I. At the most

214. Mackenzie et al. contrast inherent vulnerability with "situational vulnerability," that is, "context specific" vulnerability "caused or exacerbated by the personal, social, political, economic, or environmental situations of individuals or groups." Mackenzie et al., *supra* note 39. Mackenzie et al.'s concept of "context specific" vulnerability overlaps with status-based vulnerability arising from the legal, social, and situational concomitants of minority status (including risks resulting from restriction of movement and choices, and other limitations of subordinate status), and dependency-based vulnerability (which recognizes children's dependence on others, and the impact that the conduct of others has upon the child's life).

215. I address certain relevant empirical debates in Part III of this Article.

216. SHAFFER, *supra* note 175.

217. *Id.* at 2.

218. Of course, depending upon the particular aspect of development in question, persons may reach adult-like developmental levels at different ages.

basic level, an infant's physical and psychological immaturity creates dependency-based vulnerabilities, as she is unable to feed herself or meet any of her own basic survival needs. Indeed, the complete "helplessness" of human infants sets them apart from newborns of many other species.[219] Without care from others, a newborn infant will die. Children continue to develop and grow during minority, and many of the capacities that allow individuals to become more self-sufficient mature over time. Depending on the aspect of human anatomy or functioning, the age-related patterns of development will vary.[220] Age eighteen is a relatively crude and often inaccurate point of demarcation for the acquisition of the legal and social status of adulthood. Yet, differences exist, and the Court's analyses in the cases described in Parts I and III of this Article reveal just how puzzling it can be to try to apply the general concept of "children are different" to the specific questions about children's development and functioning relevant to the cases.

Increasingly in the past several decades, researchers have attempted to study some of the developmental phenomena of interest to the Court, or to apply existing research findings to the narrower legal issues. Research has indicated that on many cognitive tasks, including some relevant to health care decisions, teens may exhibit decisionmaking capacities on a par with adults.[221] By contrast, adolescents often demonstrate immaturities "in situations that elicit impulsivity, that are typically characterized by high levels of emotional arousal and social coercion. . . ."[222] In an attempt to integrate a broad range of seemingly contradictory findings, Steinberg and colleagues observed that the answer to the questions about whether adolescents are as mature as adults depends on the aspects of maturity under consideration. By age sixteen, adolescents' general cognitive abilities are essentially indistinguishable from those of adults, but adolescents' psychosocial functioning, even at the age of eighteen, is significantly less mature than that of individuals in their mid-twenties. In this regard, it is neither inconsistent nor disingenuous for scientists to argue that studies of psychological development indicate that the boundary between adolescence and adulthood should be drawn at a particular chronological age for one policy purpose and at a different age for another.[223]

The answer to the question of whether and how children and adults differ will vary dramatically depending upon the particular aspects of functioning of interest. At a minimum, we can observe that differences

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219. *See, e.g.*, Kate Wong, *Why Humans Give Birth to Helpless Babies*, SCI. AM. (Aug. 28, 2012), https://blogs.scientificamerican.com/observations/why-humans-give-birth-to-helpless-babies/.

220. *See supra* note 218.

221. *See, e.g.*, Weithorn & Campbell, *supra* note 9; Steinberg et al., *supra* note 9.

222. Steinberg et al., *supra* note 9, at 592.

223. *Id.*

do exist, while the specifics as to their nature and degree raise empirical questions. While this subsection touched on how the particular *state* of a child's development at a particular point in time may contribute to her vulnerabilities, I briefly examine below how the *process* of development contributes to the vulnerabilities of relevance to the law.

3. Children as Organisms Engaged in Rapid Maturational Process

Children are engaged in a biologically driven, environmentally responsive, and exceedingly rapid *process* of maturation, and experiences that occur throughout this process can have highly significant and potentially lifelong effects on their functioning.[224]

> From the moment of birth, a baby is in the process of extraordinarily rapid growth and development. As they grow up, children develop cognitive, physical, social, emotional and moral capacities, the acquisition of which influences communication, decisionmaking, exercise of judgment, absorbing and evaluating information, self-directed action, autonomous decisionmaking, extending empathy, awareness of others and foresight. While people continue to develop throughout life, all societies acknowledge a period of childhood during which children's capacities are perceived as evolving rather than evolved . . . .[225]

This factor may render children both more vulnerable to potential *harm*, while also presenting them with substantial opportunities for positive growth. Indeed, several decades of theoretical and empirical research have provided insights as to a wide range of factors that place children at serious risk, that foster healthy development, and that help build resilience that promotes positive adaptation in the face of adversity.[226]

The timing of exposures can be very influential. "Developmental processes occur in phases, setting the stage of potential periods of vulnerability."[227] Notions of "critical periods" and "sensitive periods" recognize that the process of normal development presents certain windows of opportunity, during which the organism is particularly susceptible to the effects of a wide range of experiences or inputs. For example, focusing on brain development, neuroscientist Eric Knudsen explains:

> The term "sensitive period" is a broad term that applies whenever the effects of experience on the brain are unusually strong during a limited

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224. *See, e.g.*, SEBASTIAN J. LIPINA & JORGE A. COLOMBO, POVERTY AND BRAIN DEVELOPMENT DURING CHILDHOOD: AN APPROACH FROM COGNITIVE PSYCHOLOGY AND NEUROSCIENCE 32–38 (2009) (noting stages in brain development and windows of vulnerability).

225. GERISON LANSDOWN, UNICEF, THE EVOLVING CAPACITIES OF THE CHILD xiii (2005).

226. *See infra* notes 164–167 and accompanying text.

227. Lipina & Colombo, *supra* note 224, at 33.

> period in development. Sensitive periods are of interest to scientists and educators because they represent periods in development during which certain capacities are readily shaped or altered by experience. Critical periods are a special class of sensitive periods that result in irreversible changes in brain function. The identification of critical periods is of particular importance to clinicians, because the adverse effects of atypical experience throughout a critical period cannot be remediated by restoring typical experience later in life.[228]

The organism is especially sensitive to influences and exposures, positive and negative, during such periods.[229] Interferences with the normal developmental process at these times can have serious or permanent effects on the individual's ability to achieve important developmental goals. Because childhood is chock-full of such challenges—to a much greater extent than is adulthood—vulnerability is greatly enhanced. Influences or exposures that might be neutral, positive, or only mildly harmful at one point in a person's life may cause long-term difficulties if experienced at another stage of development. At the same time, other influences or exposures may have powerful positive impacts. Children's developmental vulnerability presents heightened receptivity, creating unparalleled growth opportunities for the organism. The nature and rapidity of the developmental processes that children undergo in the first two decades of life, and the heightened sensitivity accompanying these processes, clearly enhance children's vulnerability as contrasted with that of adults in a range of situations and contexts.

The last decades have provided scientists with extraordinary insights as to the long-term impacts of certain early childhood experiences. For example, it is now widely recognized in the scientific community that early adverse life experiences can have a profound effect on health throughout the lifespan. In a 2009 article in the *Journal of the American Medical Association*, Shonkoff, Boyce and McEwen observed that "[a] scientific consensus is emerging that the origins of adult disease are often found among developmental and biological disruptions occurring during the early years of life. These early experiences can affect adults in [two] ways—either by cumulative damage over time or by the biological embedding of adversities during sensitive developmental

228. Eric I. Knudsen, *Sensitive Periods in the Development of the Brain and Behavior*, 16 J. COGNITIVE NEUROSCIENCE 1412 (2004).

229. *See* Robert Siegler, Judy DeLoache & Nancy Eisenberg, HOW CHILDREN DEVELOP 110–114 (Peter Deane et al. eds., 2d ed. 2006); Lipina & Columbo, *supra* note 224, at 31–49.

periods."[230] Research on the impact of the "toxic stress"[231] engendered by adverse childhood experiences reveals that a wide array of physical and mental health disorders can follow traumatic childhood exposures.[232] Such exposures, for example, can lead to an increased risk of serious health conditions (such as heart disease, cancer, chronic bronchitis, and emphysema), premature death in adulthood, as well as problems relating to learning and educational achievement, vocational success, mental health functioning, substance abuse, and criminal justice system involvement.[233] In recent years, scientists have been learning as well about the ways in which certain deprivations, such as those that

230. Jack P. Shonkoff, W. Thomas Boyce & Bruce S. McEwen, *Neuroscience, Molecular Biology, and the Childhood Roots of Health Disparities: Building a New Framework for Health Promotion and Disease Prevention*, 301 JAMA 2252, 2252, 2257 (2009) ("[T]he origins of many adult diseases can be found among adversities in the early years of life that establish biological 'memories' that weaken physiological systems and produce latent vulnerabilities to problems that emerge well into the later adult years.").

231. The National Scientific Council on the Developing Child [hereinafter Council] and the American Academy of Pediatrics distinguish among the possible effects of different levels of stress. Comm'n on Psychosocial Aspects of Child & Family Health et al., *Policy Statement: Early Childhood Adversity, Toxic Stress, and the Role of the Pediatrician: Translating Developmental Science into Lifelong Health*, 129 PEDIATRICS e224, e227–29 (2012) [hereinafter AAP, *Policy Statement*]; Jack P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress: Technical Report*, 129 PEDIATRICS e232, e234 (2011); Council, *Excessive Stress Disrupts the Architecture of the Developing Brain*, 1 (Harvard Univ. Ctr. on the Developing Brain, Working Paper No. 3, 2005), http://developingchild.harvard.edu/resources/reports_and_working_papers/working_papers/wp3/. The Council defined "toxic stress" as "strong, frequent or prolonged activation of the body's stress management system." *Id.* at 2. "[S]tressful events that are likewise chronic, uncontrollable, and/or experienced without the child having access to support from caring adults tend to provoke these types of toxic stress responses." *Id.* Consistent with this definition, the American Academy of Pediatrics defines "toxic stress" as "the excessive or prolonged activation of the physiologic stress response systems in the absence of the buffering protection afforded by stable, responsive relationships." AAP, *Policy Statement*, *supra*, at e225.

232. Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 EUR. ARCHIVES PSYCHIATRY CLINICAL NEUROSCIENCE 174 (2006) ("The organization and functional capacity of the human brain depends upon an extraordinary set and sequence of developmental and environmental experiences that influence [genetic expression]. Unfortunately, this elegant sequence is vulnerable to . . . patterns of stress that can impair, often permanently, the activity of major neuroregulatory systems, with profound and lasting neurobehavioral consequences.").

233. *See, e.g.*, L.K. Gilbert et al., *Childhood Adversity and Adult Chronic Disease: An Update from Ten States and the District of Columbia, 2010*, 48 AM. J. PREVENTIVE MED. 345 (2015); Xiangming Fang et al., *The Economic Burden of Child Maltreatment in the United States and Implications for Prevention*, 36 CHILD ABUSE & NEGLECT 156, 162 (2012); David W. Brown et al., *Adverse Childhood Experiences and the Risk of Premature Mortality*, 37 AM. J. PREVENTIVE MED. 389, 394 (2009); Vincent J. Felitti, *Adverse Childhood Experiences and Adult Health*, 9 ACAD. PEDIATRICS 131 (2009); Robert F. Anda et al., *supra* note 232, at 174; Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 250 (1998). For a review and analysis of the research on the effects of child maltreatment on the brain, see Lois A. Weithorn, *Developmental Neuroscience, Children's Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 HASTINGS L.J. 1487, 1508–37 (2012) [hereinafter Weithorn, *Developmental Neuroscience*].

accompany neglect and poverty, affect children throughout their lifespan.[234] Children's biological blueprints offer them tremendous potential for positive growth and development, but often that potential cannot be achieved without the presence of particular environmental experiences, opportunities, and stimulation.

There are bright spots among the scientific findings. Exposure to risks can have different effects, even among children who are at similar points in development. One of the factors that distinguishes how children cope with potentially deleterious impacts is the phenomenon referred to as *resilience*.[235] Despite exposure to severe, prolonged, or chronic stressors or traumas, many children "withstand or recover from" these experiences, emerging with developmentally appropriate "positive adaptation and competent functioning."[236] As scholars continue to refine conceptual and methodological approaches, studies of resilience remind us that development of the detrimental outcomes associated with "a range of potentially harmful childhood experiences "are neither universal nor inevitable."[237]

In sum, not only are children different from adults in that they function in ways manifesting an earlier point in maturation across a wide range of domains, but they differ as well because of the nature of the developmental process. As the developmental process unfolds, children's minds and bodies are characterized by a heightened sensitivity to environmental inputs and experiences. That heightened sensitivity to inputs and exposure that accompanies the rapid developmental processes of childhood, however, not only magnify susceptibility to harm, but also foster a degree of plasticity or malleability that generates opportunities for positive development. In other words, childhood represents a point in a human being's development when he or she is unusually responsive to a range of experiences, both positive and negative.

III. JUSTIFYING CHILD-PROTECTIVE POLICIES: CHILDREN AS VULNERABLE TO PHYSIOLOGICAL OF PSYCHOLOGICAL HARM

In this Part, I consider the Court's constructions of children's vulnerability as susceptibility to physiological or psychological harm. While subsequent writings will examine the Court's jurisprudence relating to the other four vulnerability subtypes, this Part focuses on

234. *See generally* Lipina & Colombo, *supra* note 224; Stanford Center for the Study of Poverty and Inequality, *Does Poverty Get Under the Skin?: The Effects of Deprivation on Blood, the Brain, and the Body*, PATHWAYS: A MAGAZINE ON POVERTY, INEQUALITY, AND SOCIAL POLICY, Winter 2011.

235. *See supra* notes 164–165 and accompanying text.

236. Masten, *supra* note 165, at 494; Cicchetti & Blender, *supra* note 164, at 249.

237. Weithorn, *Developmental Neuroscience*, *supra* note 233, at 1512; *see also* Cicchetti & Blender, *supra* note 164, at 250, 254–57; Masten & Obradović, *supra* note 165, at 23–24.

notions of children's vulnerability articulated in a selection of cases invoking the first subtype. Specifically, I focus on concepts of vulnerability present in the Court's opinions in the context of regulations relating to child labor, child abuse, and children's exposure to certain types of speech. These cases are but a subset of the larger body of constitutional cases that fall within this first subtype of children's vulnerability. The cases below are analyzed to explore, in greater depth, the Court's use of constructs of children's vulnerability. This Part examines, as well, the nature and sources of the "facts" about children's vulnerability upon which the Justices rely.[238]

In these cases, the Court either adopts or rejects assertions about children's susceptibility to physiological or psychological harm in determining whether the state's cited regulatory purpose, which is allegedly child-protective, passes constitutional muster. The specific standard of review applied by the Court depends on the precise constitutional question at issue. When the state seeks to limit a fundamental right, as it does when restricting traditional realms of parental discretion, and the Court applies strict scrutiny, the asserted state interest must be compelling.[239] This characterization is an important—although not always dispositive—factor in the analysis of the constitutionality of a statute or its application, in that the means used by the state to achieve the interest must also be *necessary*, or *most narrowly tailored*.[240] Sometimes the Court applies a rational basis test, which requires the state to demonstrate that its goals are legitimate or permissible, and that its means are reasonable in relation to those goals. In other instances, the Court may apply a different mode of analysis, such as a balancing test,[241] or any of a myriad of tests relevant to the specific

238. I chose harm-based vulnerability for this first article, however, because of the centrality of this notion of vulnerability to the Court's formulations in a broad range of cases involving children. The specific cases were selected because, as a group, they allow for some fascinating contrasts across cases, particularly in the sources on which the Justices' purportedly rely in citing concepts of children's vulnerability.

239. Under modern jurisprudential standards, if the constitutional interest restricted by the state rises to the level of a fundamental right, strict judicial scrutiny is often applied, placing the burden on the state to demonstrate that its regulation seeks to achieve a *compelling* state interest, and that the means used to achieve this interest *are most narrowly tailored*. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 794–98 (3d ed. 2006).

240. *Id.*

241. Yet, strict scrutiny may not be applied in all such cases where fundamental rights are at issue. "For example, although one might initially expect that strict scrutiny would be applied when state laws interfere with parental authority over their children's lives, the Supreme Court has typically applied alternative modes of analysis, such as balancing tests, customized to the particular issues and constellation of parties and interests." Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 BUFF. L. REV. 881, 908–09 (2015) [hereinafter Reiss & Weithorn, *Childhood Vaccination Crisis*]. For instance, the Court applied a balancing test to its consideration of the respective interests of parents, minors, and the state in some cases, such as in *Bellotti v. Baird*, 443 U.S. 622 (1979) and

constitutional challenges raised in a case.[242] Over time, as well, the standards of review have evolved.[243] Unfortunately, the Court is at times unclear or inconsistent in its identification and application of a standard of review, leading to a confused jurisprudence that is difficult to interpret. Its cases involving children's welfare often reflect these inconsistencies.

A. PROTECTION OF CHILDREN FROM HARM AS A STATE INTEREST

Characterizations of children's vulnerability to physical or psychological harm play an essential jurisprudential role in justifying or restricting state action that may limit or expand the constitutional rights of others, such as parents, guardians, or the children themselves. At the heart of state authority to regulate children are its *parens patriae* and police power interests. *Prince v. Massachusetts,* decided almost three-quarters of a century ago, remains one of the best sources for understanding those dual goals.[244]

In *Prince,* the Court upheld an application of a provision of the Massachusetts child labor statute over the objection of a nine year old's legal guardian. The guardian—the child's aunt—claimed that the statute's application violated her First and Fourteenth Amendment rights to authorize her ward to sell religious materials on the streets.[245] The Court, in an opinion authored by Justice Rutledge, appeared to apply

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Parham v. J.R., 442 U.S. 584 (1979), which considered minors' challenges to state statutes governing consent to abortion and psychiatric hospitalization, respectively.

242. For example, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court determined that Congress had exceeded its authority in passing the Gun-Free School Zones Act of 1990, holding that the regulated activity *did not substantially affect interstate commerce*. *Id.* at 559–68. This Act created federal criminal liability for certain gun possession offenses within a school zone. Constructs of children's vulnerability were therefore only relevant to the constitutional analysis to the extent they informed the relationship between gun possession in school zones and interstate commerce. While the majority did not even discuss whether this association created sufficiently substantial effects, the dissent relied on a litany of empirical studies. Justice Breyer and three colleagues cited evidence of harms to children's well-being to bolster their argument that Congress could have concluded that gun violence near schools has significant effects on interstate commerce. *Id.* at 619–26 (Breyer, J., dissenting). The dissent cited the impact of gun violence on the physical and psychological welfare of children, which it concluded "significantly interferes with the quality of education in . . . schools," leading to higher dropout rates and difficulties in teaching and learning. *Id.* at 619–20. Given the relationship between education, the welfare of society, and the country's economy, Justice Breyer opined that these effects on the educational system creates a sufficient nexus between the statute and interstate commerce to provide Congress with authority to legislate, and to conclude that the presence of guns near schools is inextricably intertwined with the Nation's economy. *Id.*

243. Most constitutional scholars cite the Court's decision in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), as the beginning of differential levels of scrutiny for legislation affecting various classes of rights. Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475 (2016); Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3127 (2015).

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

245. *Id.* at 164.

a balancing test, considering the rights of parents and guardians on the one hand, and the state's *parens patriae* and police power goals on the other.[246] The Court rejected a more stringent test, as would be applied when children's welfare is not a focus of the regulation, emphasizing that: "The state's authority over children's activities is broader than over like actions of adults."[247] It then proceeded to enunciate the *parens patriae* and police power interests that justify the state's greater regulatory authority over children, and distinguish the state's relationship with children versus adults.[248]

The state's *parens patriae* power is asserted to justify protective state regulation *for the benefit of those regulated*, and is most frequently invoked relative to those perceived as vulnerable, immature, dependent, or disabled, in that such persons arguably require the heightened concern of the state as benevolent protector.[249] In a case such as *Prince*, where the legal guardian's decisions were viewed as endangering the minor, children's heightened vulnerability is cited to justify limitation of the traditional and constitutionally protected decisional discretion typically accorded parents and legal guardians.[250] At the core of the Court's analysis in *Prince* and other cases citing *parens patriae* justifications for child protective regulation, is the premise that children require greater protection from harm than do adults. In *Prince*, the Court used terms such as "crippling" in describing the possible effects of the child's activities, referring to myriad "harms," noting that the "streets afford dangers for [children] not affecting adults," and that this "difference may be magnified" under some circumstances.[251] It observed further that the child's activities:

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246. Citing the First and Fourteenth Amendment rights of parents and guardians, the Court stated: "Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end . . . ." *Id.* at 165.

247. *Id.* at 168.

248. Throughout the decades following *Prince*, the Court has repeatedly recognized governmental power to regulate the lives of children far exceeding its parallel authority relative to adults. *See* Weithorn, *supra* note 178, at 1401–07.

249. "Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Prince*, 321 U.S. at 166–67. For a discussion of the origins of, and for judicial and scholarly commentary regarding, the concept of *parens patriae* power, see Weithorn, *supra* note 178, at 1388–89; *see also* Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381 (2000); Gregory Thomas, *Limitations on Parens Patriae: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51 (2007).

250. "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Prince*, 321 U.S. at 166–67.

251. *Id.* at 169.

> may and at times [do] create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury.[252]

The state's police power interests also justify greater regulation of children's lives and intervention in parental decisions, although for the purpose of promoting the *general welfare*. Children are regulated under this theory, not for their own benefit, but for the benefit of society. The end results of children's upbringing and socialization are consequential not only for the children, but for the future of society as a whole.[253] In the frequently quoted words of the *Prince* Court: "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. It may secure this against impeding restraints and dangers within a broad range of selection."[254]

Prince has been criticized as overly intrusive in parental authority to make decisions regarding their children's welfare more generally, and about religious matters specifically. One wonders if the case might have turned out differently if the people in question were not members of an unpopular religious minority group. Yet, the result is entirely understandable, and was arguably essential, at a time when the allocation of authority between parents and the state around matters relating to compulsory education and child labor were still undergoing negotiation and refinement. Twenty years after the Court made clear in *Meyer v. Nebraska*[255] and *Pierce v. Society of Sisters*[256] that the Progressive Movement's increasing regulation of the family must give way to some level of parental discretion, *Prince* underscored that the state's interests in protecting and helping to socialize children provide limits on that discretion. While recognizing a "private realm of family life within which the state cannot enter," and that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor

252. *Id.* at 169–70.

253. *See* Weithorn, *supra* note 178, at 1403–04 (distinguishing between two subtypes of police power state interests concerning children: a public-safety oriented interest, justifying state regulation of children's lives in order to protect society from dangers presented by the children (such as, protection from exposure to a disease that might be transmitted by an unvaccinated child or protection from a lawbreaking minor's offending behavior), and a socialization-oriented interest, justifying state regulation of children's lives "to further the common good by promoting the child's healthy development into well-educated, productive, . . . well-adjusted," and healthy adults). *See, e.g.*, Clark, *supra* note 249, at 392 ("[C]hildren may be special objects of governmental coercion, not because they need the state but because they are needed by the state [as future citizens].").

254. *Prince*, 321 U.S. at 168–69 (citations and footnotes omitted).

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

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

hinder," the Court emphasized that "the family itself is not beyond regulation."[257]

Prince's legacy is enduring, and its impact magnified by the virtually-universal reliance upon it as precedent for the assertion of state interests in protecting children from physical or psychological harm in a wide range of constitutional cases, and for the concomitant broader state authority over children versus adults. That said, *Prince* can easily be criticized for what some might view as a possibly exaggerated, and perhaps alarmist, characterization of the risks facing a child in the position of Ms. Prince's ward. Indeed, given that the challenge was to an application of the statute, the Court could have considered the fact that the child was accompanied by her guardian when engaging in the prohibited activities, potentially mitigating any risks she might have faced.[258]

Not surprisingly, no sources were offered in *Prince* to support the many assertions about children's vulnerability. Arguably, however, the fields of psychology and psychiatry, and particularly developmental science, were in their infancy in 1944 when *Prince* was decided, and thus little scientific support would have been available, nor could the assertions made by the Court be easily studied. Yet, the tendency for the Court to rely on unsubstantiated assumptions about children's vulnerability as susceptibility to greater psychological or physiological harm than adults as justification for paternalistic regulation has not changed.

Commentators have observed that, in many cases, the Court fails to scrutinize an asserted legislative purpose and focuses its meaningful review on the means used to achieve the goal.[259] For example, Richard Fallon has noted that in applying strict scrutiny, "the Supreme Court [has] frequently adopted an astonishingly casual approach to identifying compelling interests."[260]

At the time *Prince* was decided, tiered constitutional review and strict scrutiny were not yet staples of constitutional analysis.[261] Thus, *Prince* did not apply strict scrutiny, and therefore did not require that the state's interests to be compelling. Subsequent cases, however, have relied on *Prince* as precedent to support the proposition that certain child

257. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

258. The Court explicitly rejected this opportunity. *Id.* at 169 n.18.

259. Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297 (1997) [hereinafter Bhagwat, *Purpose Scrutiny*]; Ashutosh Bhagwat, *What if I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL RTS. J. 671 (2003) [hereinafter Bhagwat, *Protecting Children*]; Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321–23 (2007).

260. Fallon, Jr., *supra* note 259, at 1321.

261. For a brief historical summary of the development of tiered scrutiny, see, for example, Bhagwat, *Purpose Scrutiny*, *supra* note 259, at 306–11.

protective interests are *compelling*.[262] This reliance suggests that, if decided more recently, the Court might have characterized the state's interests in *Prince* as compelling.[263]

Fallon's point is made more broadly, however, by Ashutosh Bhagwat, regarding "purpose scrutiny" across the tiers, noting a tendency of the Court to defer to the validity of the state's articulated goals, while more carefully scrutinizing the means used to achieve those goals.[264] The Court's reluctance to second-guess whether the government's asserted interests for a challenged regulation rise to the level required by the applicable constitutional standard of review is particularly flagrant where those interests are characterized as child protective: "Sometimes . . . the Supreme Court labels interests as compelling on the basis of little or no textual inquiry. Examples include cases in which the Court has found a compelling interest in protecting children from one or another purported injury . . . ."[265] Bhagwat observes that, in particular, in cases related to restrictions on sexual speech "imposed in the name of protecting children," the Court generally accepts the "government's asserted justifications with little skepticism," focusing instead on the adequacy of the tailoring of the means used.[266] Also of importance is the level of generality with which the government's interest is defined. After all, who can argue with the assertion, at the highest level of generality, that the government has a compelling interest in protecting children from harm and promoting children's well-being? By contrast, somewhat less consensus may exist on the strength and potency of the government's interest in protecting children from specific sexual or violent content.[267]

Constructs of children as vulnerable become relevant, of course, when and if the state must justify its restriction of someone's rights in order to protect children's welfare. To the extent that the government can demonstrate that children *need* the state's protection to avoid serious injury, the case for justification is more likely. The more carefully and

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262. New York v. Ferber, 458 U.S. 747, 756–57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (quoting Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 607 (1982) and introducing discussion of *Prince*).

263. I have argued elsewhere that, in those cases in which the state's *parens patriae* and police power interests concerning children's welfare converge—as they are portrayed as converging in *Prince*—the state's authority to intervene in the family to regulate children's lives is frequently treated as particularly potent. Reiss & Weithorn, *Childhood Vaccination Crisis*, *supra* note 241, at 912.

264. Bhagwat, *Purpose Scrutiny*, *supra* note 259, at 301, 319–25. Professor Bhagwat's article examines, however, the Court's "renewed interest in the previously forbidden terrain of purpose scrutiny, including a new willingness to examine, and pass independent judgment on, the reasons why the state has chosen to burden individual rights." *Id.* at 312.

265. Fallon, Jr., *supra* note 259, at 1322.

266. Bhagwat, *Protecting Children*, *supra* note 259, at 676.

267. *See infra* Part III.

specifically articulated the state's asserted interest, the more focused can be the inquiry into whether the government's help is needed, and then, of course, whether the manner of regulation meets the "means" portion of the standard of review. The failure to carefully articulate or scrutinize the governmental purpose creates a wide berth for similarly general and vague assertions about children as vulnerable. This gap opens the door wider for the armchair psychological assumptions about children's nature attributed to common sense or common knowledge that the Justices so often rely upon, as observed in several of the cases below.

B. CHILDREN'S VULNERABILITY AS VICTIMS OF ABUSE

The Court has considered the vulnerability of children who are abused in several types of cases. I focus here on two such instances: when children are used in the production of child pornography, and when children must provide courtroom testimony against alleged abusers.[268] While generally agreeing that protecting children from abuse or subsequent emotional trauma is a state interest of great importance, the Justices have disagreed on the question of *when* the potential harms to children justify certain restrictions of the constitutional rights of others.

1. Children as Subjects of Pornography

The members of the Court were virtually unanimous in agreeing that involving actual children as models in the creation of child pornography is a form of child abuse and exploitation that is "harmful to the physiological, emotional, and mental health of the child."[269] In *New York v. Ferber*, citing the state's compelling interest in "safeguarding the physical and psychological well-being" of minors, "an objective of surpassing importance," the Court easily upheld a New York statute that criminalized production, direction, or promotion of "a sexual performance by a child . . . , knowing the content and character thereof . . . "[270] Justice Brennan's concurrence explicitly invoked the "particular vulnerability of children" a theme implicit throughout the majority opinion.[271] Under the statute, the definition of "promotion" included sale,

268. Other cases involving abuse of children are not included in this discussion because they relate most directly to an alternate subtype of vulnerability, as in the case of *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189 (1989), where dependency-based vulnerability predominates (*see supra* notes 155–159 and accompanying text). In other cases involving child abuse, vulnerability constructs do not play a central role in the Court's analyses. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding unconstitutional the application of the death penalty in a crime of rape of a child which did not result, and was not intended to result, in the death of the child); Stogner v. California, 539 U.S. 607 (2003) (holding unconstitutional application of California statute that allowed prosecution of previously time-barred sex-related child abuse claims).

269. New York v. Ferber, 458 U.S. 747, 750 (1982).

270. *Id.* at 751, 756–57.

271. *Id.* at 776 (Brennan, J., concurring in the judgment).

transfer, distribution, exhibition, as well as several other means of dissemination.[272] In rejecting the First Amendment claims of the defendant bookstore owner, the Court distinguished the concerns underlying the New York statute at issue in *Ferber* (that is, protecting children from sexual victimization and exploitation) from those regulating obscenity more generally (that is, "protecting the 'sensibilities of unwilling recipients' from exposure to pornographic material").[273] As such, it noted that the states were entitled to "greater leeway in the regulation of pornographic depictions of children."[274] In *Ferber*, the Court cited a range of psychological and medical sources, as well as legislative reports, emphasizing the detrimental impact such participation has on children's development.[275]

It further stated that the harms to children exceed those experienced during the performance of the sexual activities that are depicted. It observed that the creation of a permanent record of the children's participation, and the subsequent circulation of the pornographic materials, exacerbate the harm.[276] The majority also invoked the invasion of individual privacy as a factor further compounding the potential dangers to children's well-being.[277] The *Ferber* Court's analysis has been criticized for relying on relatively weak studies, and for drawing conclusions that exceeded the studies' findings.[278] In addition, there exists substantial criticism today as to the breadth of the net in which alleged offenders may be caught, including, for example, youth who may distribute "sexted" images of themselves.[279]

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272. *Id.* at 751.

273. *Id.* at 756–61.

274. *Id.* at 756.

275. *Id.* at 758–59 n.9 & 10. Among the potential harms cited were the possibility that "sexually exploited" children may be unable to develop healthy affectionate relationships later in life, tend to become sexual abusers as adults, and are predisposed to self-destructive behavior such as drug abuse, alcohol abuse, and prostitution. *Id.* at 758 n.9.

276. Furthermore, the Court noted that the "permanent record" made of the children's participation perpetuates the harm: "the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system." *Id.* at 759 n.10 (citing David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)). In addition, the Court quoted with approval: "The victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child." *Ferber*, 458 U.S. at 760 n.10 (citing Mary Annette Horan, Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 301 (1979)). It cited also potential harms resulting from the "'fear of exposure and the tension of keeping the act secret." *Ferber*, 458 U.S. at 759 n.10.

277. *Ferber*, 458 U.S. at 758–59 n.9 & 10.

278. *See, e.g.*, *The Supreme Court, 1981 Term: E. Child Pornography and Unprotected Speech*, 96 HARV. L. REV. 141–150 (1982).

279. *See, e.g.*, Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues—Structure Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486, 551 (2010).

Yet, to the extent that the definition of child pornography focuses on "sexual conduct" involving persons under the age of sixteen, as in *Ferber*, the production of such images involves conduct that will often fall within the purview of sexual abuse.[280] Decades of research studying children who have experienced sexual abuse reveal that the victims are at a greater risk than non-abused children for a range of psychological, health, and social difficulties, many of which persist into adulthood.[281] In addition, more generally, developmental neuroscientific findings reveal that various forms of child maltreatment can have serious, long-term, and potentially devastating effects on the brain, the nervous system, and overall health that, depending upon their nature, intensity, and duration, may be experienced throughout the life span.[282]

No members of the Court dissented in *Ferber*. Concurring Justices differed from the majority primarily with respect to their concerns that certain future applications of the statute not before the Court might infringe protected First Amendment interests. Subsequent cases reinforced this split within the Court. For example, despite clear agreement that "the coercive enlistment, both overt and subtle, of children in the production of pornography is a grave and widespread evil," the Justices disagreed in *Massachusetts v. Oakes* about where the lines should be drawn between protected and unprotected speech,[283] and in *Osbourne v. Ohio* about whether individuals who merely possess child pornography bear a sufficiently attenuated relationship to the harm to children to claim First Amendment protection.[284]

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280. *See, e.g.*, CAL. PENAL CODE § 1165.1 (2016) (providing definition and examples of child sexual abuse subject to mandatory reporting requirements in California).

281. *See, e.g.*, Lucy Berliner, *Child Sexual Abuse: Definitions, Prevalence, and Consequences*, *in* THE APSAC HANDBOOK ON CHILD MALTREATMENT 215, 221–26 (John E.B. Myers ed., 3d ed. 2011); U.S. SENTENCING COMM'N, 2012 REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 108–12 (2012); CINDY L. MILLER-PERRIN & ROBIN D. PERRIN, CHILD MALTREATMENT: AN INTRODUCTION 127–39 (Kassie Graves ed., 2d ed. 2007); EVA J. KLAIN ET AL., NAT'L CTR. FOR MISSING CHILD., CHILD PORNOGRAPHY: THE CRIMINAL-JUSTICE-SYSTEM RESPONSE 10–11 (2001). As in the case of other exposures to harm, the effects vary across those exposed. Children who have experienced exposure to multiple forms of abuse, or other adverse childhood experiences, may be more likely to demonstrate negative effects, or may experience more serious consequences. Berliner, *supra*, at 221–222; *see also supra* notes 230–233 and accompanying text. Furthermore, as noted above, children's resilience in particular situations may also affect the long- and short-term impact of negative exposures. *See supra* notes 164, 230–233. The additive effect of "recurrent victimization through existence of images" has not be subjected to substantial empirical investigation and consists primarily of the opinions of experts and reports by victims. *See, e.g.*, U.S. SENTENCING COMM'N, *supra*, at 112–114.

282. Weithorn, *Developmental Neuroscience*, *supra* note 233.

283. Massachusetts v. Oakes, 491 U.S. 576, 591–93 (1989) (Brennan, J., dissenting) (asserting that while *Ferber's* restriction clearly permitted criminalization of involvement of persons under age eighteen in "live sexual performance" or acts "for the purpose of visual representation or reproduction," certain other visual depictions reached by the statute might not harm minors, and therefore deserve First Amendment protection).

284. In *Osborne v. Ohio*, 495 U.S. 103, 110–11 (1990), the Court held that the state's attempts to "stamp out [child pornography] at all levels in the distribution chain" was constitutionally permissible

Twenty years after *Ferber*, in *Ashcroft v. Free Speech Coalition*, the Court drew a clear line between what it viewed as the unequivocal and direct harms to children from participation in the creation of pornography and the potential, and arguably more speculative and indirect, harms to children related to production or distribution of materials that "appear to be" or "convey the impression of" depictions of a "minor engaging in sexually explicit conduct," but which do not use children in their creation.[285] The production and distribution of the latter types of materials were proscribed by the federal Child Pornography Prevention Act of 1996 ("CPPA").[286] Congress defined these materials as including computer-generated images (that is, virtual child pornography) or images using youthful-looking adult models.[287]

In striking down the CPPA as unconstitutionally overbroad, the Court clarified that its prohibitions against child pornography are grounded on the law's condemnation of the criminal sexual abuse of children by using real children in the production of the materials.[288] The Court rejected Congressional justifications for the restriction of speech under the CPPA. Congress had asserted that virtual child pornography and other pornographic materials that appear to picture children (even though no real children are used in their creation) can be used by pedophiles to "encourage" children to participate in sexual activity, or to "'whet their own sexual appetites,'" thereby increasing the likelihood that actual children will be abused and exploited.[289] The Court held that the "[g]overnment may not suppress lawful speech as the means to suppress unlawful speech."[290] In a separate opinion, Justice O'Connor, joined by Justices Rehnquist and Scalia, indicated that she viewed the scope of the CPPA as constitutional, in light of the asserted dangers to children of "being molested with the aid of child sex pictures."[291] Six years later, in

given the asserted harms to children of the child pornography industry. The dissenters, while concurring in the assessment of harm, concluded that the "panoply of laws prohibiting creation, sale, and distribution of child pornography and obscenity involving minors" was an appropriate response, while criminalizing possession infringed on First Amendment rights to view such materials in the privacy of one's own home pursuant to *Stanley v. Georgia*, 394 U.S. 557 (1969). *Osborne*, 495 U.S. at 141–44 (Brennan, J., dissenting).

285. Ashcroft v. Free Speech Coal., 535 U.S. 234, 240–41 (2002).

286. *Id.*

287. *Id.*

288. *Id.* at 244–45.

289. *Id.* at 241–42, 255. For a summary of empirical research on the claims of these more attenuated effects of pornographic images of children on future molestation of children, see, for example, Emily Weissler, Note, *Head Versus Heart: Applying Empirical Evidence About the Connection Between Child Pornography and Child Molestation to Probable Cause Analyses*, 82 FORDHAM L. REV. 1487 (2013); Erik Faust et al., *Child Pornography Possessors and Child Contact Offenders: A Multilevel Comparison of Demographic Characteristics and Rates of Recidivism*, 27 SEXUAL ABUSE: J. RES. & TREATMENT 460 (2015).

290. *Ashcroft*, 535 U.S. at 255.

291. *Id.* at 267 (O'Connor, J., partially concurring and partially dissenting).

United States v. Williams, the Court upheld Congress' replacement for the CPPA, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, because of the narrowing provisions added by Congress.[292] In so doing, the Court observed that "[c]hild pornography harms and debases the most defenseless of our citizens,"[293] a point about which none of the Justices appears to disagree. While observers may disagree as to many of the elements of regulatory approaches to child pornography, the jurisprudence appears relatively consistent with the current state of scientific knowledge to the extent that it recognizes children's susceptibility to experience physiological and psychological harm if involved in the production of materials depicting sexual conduct.

2. Children as Courtroom Witnesses Against Alleged Abusers

The Supreme Court has also considered two distinct constitutional questions relating to courtroom testimony by alleged victims of child abuse. In *Globe Newspaper Co. v. Superior Court*, it determined the constitutionality of excluding the press and public from a courtroom during the testimony of such a victim.[294] In *Globe*, a trial judge presiding over the prosecution of a defendant charged with raping three girls, who were minors at the time of the trial, closed the courtroom during the girls' testimony pursuant to a governing Massachusetts statute.[295] Emphasizing the important role that press and public access to criminal trials play in our democracy under the First Amendment, the Court noted that in order to limit that right, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[296] It held that "safeguarding the physical and psychological well-being of a minor" is such an interest, consistent with the Massachusetts's legislature's concern about "protecting minor

292. United States v. Williams, 553 U.S. 285 (2008). Specifically, the Act criminalizes "knowing" promotion or distribution of materials "in a manner that reflects the belief, or that is intended to cause another to believe" that the material is or contains either "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct." *Id.* at 289–90. As such, the statute "prohibits offers to provide and requests to obtain child pornography" without requiring the "actual existence of child pornography." *Id.* at 293. The Court rejected the claim that the statute criminalizes substantial protected activity by noting "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection" and both types of transactions prohibited by the statute are illegal. *Id.* at 297. For further analysis of this exception to First Amendment protection for communications soliciting a crime and its treatment of *Williams*, see Eugene Vokohl, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 993–98 (2016).

293. *Williams*, 553 U.S. at 307.

294. Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982).

295. *Id.* at 598–600.

296. *Id.* at 606–07.

victims of sex crimes from further trauma and embarrassment."[297] Yet, it struck down the statute's *mandatory* closure requirement as insufficiently narrowly tailored. The Court held that to pass constitutional muster, a First Amendment restriction of this type requires judges to make individual findings as to the necessity for closure on a case-by-case basis, considering factors such as "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives."[298]

In dissent, Justice Burger indicated that he would have upheld the statute, and in support of that position, he elaborated extensively on the state's interest in protecting children from "the severe—possibly permanent—psychological damage," of having his or her victimization publicized.[299] In so doing, he focused on children's special vulnerability to "significant trauma, embarrassment, or humiliation" by noting that the "ordeal could be difficult for an adult; to a child the experience can be devastating and leave permanent scars."[300]

The Justices therefore agreed that protecting children from the harms that might accompany testifying in *open* court justifies restriction of First Amendment rights under certain circumstances. While the majority required individualized showings of harm from press and public presence, the dissent would permit a generalized presumption of risk of harm to trigger closure for all minors. Indeed, there may be support for both positions. On the one hand, children respond and cope differently with victimization due to a range and interaction of factors, arguing for individualized determinations.[301] Furthermore, while in general, testifying in court following such trauma can indeed enhance the detrimental psychological effects, some children tolerate this experience better than others, and some might even perceive their "day in court" as empowering or cathartic.[302] Finally, it is not clear what roles an open courtroom and press coverage play in moderating or contributing to the more general impact of testifying on children's welfare. The *Globe Newspaper* majority placed reliance on trial judges' assessments regarding the needs of individual victims, seeking to minimize First Amendment restrictions.

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297. *Id.* at 607–08.

298. *Id.* at 608.

299. *Id.* at 612–20 (1982) (Burger, J., dissenting).

300. *Id.* at 617–18. Justice Burger further cited several authorities to support his contention that the courtroom experience can be "almost as traumatic as the crime itself." *Id.* at 619.

301. Children's ability to process and cope with traumatic experiences such as abuse varies significantly, depending upon the nature and circumstances of the abuse, other traumas the child may have experienced, the child's own characteristics, and the existence of family and environmental supports in the child's life. *See infra* notes 315–316 and accompanying text.

302. *Id.*

By contrast, the dissenters would have avoided risking the possibility that a given judge would fail to be sufficiently protective of any given victim. The empirical database on the effects of testifying on children suggest that child witnesses' responses to the prospect and experience of testifying vary across children and situations.[303] Thus, the model of case by case determinations regarding children's needs is not inconsistent with what we know of children's vulnerability in this context. That said, as noted below, it is unclear whether trial court judges have the expertise to make those case by case determinations, and whether, with the aid of mental health specialists, prediction of the effects can be reliably made.[304]

In *Coy v. Iowa* and *Maryland v. Craig*, the Court considered the constitutionality of state statutes that permitted modifications of the face-to-face courtroom testimony typically required to satisfy the Sixth Amendment's Confrontation Clause.[305] In *Coy*, the Court held that a statute allowing child abuse victims to testify via either closed-circuit television or behind a screen in the courtroom violated the defendant's Sixth Amendment rights.[306] Emphasizing the importance of face-to-face confrontation, it held unconstitutional the state's "legislatively imposed presumption of trauma," and failure to require individualized findings of the necessity of modified procedures for the protection of particular victims.[307] While Justice Scalia's majority opinion did not elaborate upon child abuse victims' vulnerability in the courtroom setting, Justice Blackmun, in dissent, cited to research suggesting that courtroom testimony can magnify the traumatic effects of abuse on child victims.[308]

303. *Id.*

304. *See infra* note 316 and accompanying text.

305. Coy v. Iowa, 487 U.S. 1012 (1988); Maryland v. Craig, 497 U.S. 836 (1990).

306. *Coy*, 487 U.S. at 1014–15, 1021.

307. *Id.* at 1021.

308. *Id.* at 1031–33. Some of the work cited is scientific, while other sources are grounded on clinical observations. For example, the work of Gail Goodman and colleagues typically employs rigorous empirical methods and is careful and conservative in its interpretations. While the specific source referred to in the opinion has been difficult to obtain, Professor Goodman's work is well-known. For a summary of some of the research in the article referred to by Justice Blackmun, see, for example, Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS OF THE SOC'Y FOR RES. IN CHILD DEV. v (1992). By contrast, Suzanne Sgroi's methods are grounded primarily on clinical observations and many of the assessment strategies she employs do not satisfy scientific standards. *See* SUZANNE M. SGROI, HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE (1982).

He stated that:

> [T]he fear and trauma associated with a child's testimony in front of the defendant have two serious identifiable consequences: They may cause psychological injury to the child, and they may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.[309]

He thus concluded "that a State properly may consider the protection of child witnesses to be an important public policy" allowing use of the modifications permitted by the statute.[310]

Two years later, Justice O'Connor wrote for a divided court in *Maryland v. Craig*. At issue in *Craig* was the constitutionality of allowing child abuse victims to testify via one-way closed-circuit television rather than in the presence of the defendant, after the trial judge makes an individualized determination that requiring in-courtroom testimony by the child would cause "serious emotional distress such that the child cannot reasonably communicate."[311] In *Craig*, the state presented expert testimony to inform the court's deliberations regarding the child's need for the alternative procedure. The majority held that the modifications permitted by the statute were necessary to further an important state interest, that is, the protection of the physical and psychological well-being of child abuse victims.[312] It relied both on its prior decisions (for example, *Prince, Ferber, Globe Newspaper*) and additional scientific authority on the "psychological trauma suffered by child abuse victims who must testify in court" to uphold the Maryland statute.[313] Justice Scalia, in dissent, was unpersuaded that Maryland's asserted interests outweighed the defendant's right to face-to-face confrontation.[314] The majority opinion closely tracks many of the conclusions of an amicus brief submitted by the American Psychological Association, relying on a compilation of the best empirical work available at that time.[315]

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309. *Coy*, 487 U.S. at 1032.

310. *Id.*

311. Maryland v. Craig, 497 U.S. 836, 840–41 (1990).

312. *Id.* at 852–53.

313. *Id.* at 852–57.

314. *Id.* at 866–68 (Scalia, J., dissenting).

315. *See, e.g.*, Brief for Amicus Curiae American Psychological Association Supporting Neither Party, Maryland v. Craig, 497 U.S. 836 (1990) (No. 89-478), 1990 WL 10013093; *see also* Gail S. Goodman et al., *Child Witnesses and the Confrontation Clause: The American Psychological Association Brief in* Maryland v. Craig, 15 L. & HUM. BEH. 13 (1991). Justice Scalia, in dissent, was more impressed with empirical research suggesting that "children are more vulnerable to suggestion than adults," thus impairing the reliability of their courtroom testimony. *Maryland*, 497 U.S. at 868. Such vulnerability would fall within the second subtype identified in Part I, *supra*: (susceptibility to) influenced-based vulnerability. In Justice Scalia's view, face-to-face confrontation reduced the likelihood of children's proffering of false testimony that could result in erroneous convictions. *Id.* at 869–70. Justice Scalia emphasized what he saw as the "value of the confrontation right in guarding against a child's distorted or coerced recollections." *Id.* at 869. Research conducted contemporaneous with *Craig* and subsequent to the decision does not bear out Justice Scalia's concerns. NATALIE R.

The scientific database identified by Justice O'Connor cited in *Craig* as a "growing body of academic literature" has continued to develop. The findings, however, while generally tracking the majority's conclusion, are complex, with a range of situation-specific and child-specific variables affecting the impact of participation in criminal courtroom proceedings on children. Thus, while the Court's holdings that individualized findings of necessity are constitutionally required in each case, trial court judges may find the array of considerations that inform the needs of each child victim to be challenging to apply on a case-by-case basis.[316]

The Court's constructs of children as needing the state's protection because of greater susceptibility to experiencing psychological or physiological harm in the cases reviewed in this Part appear to loosely track, albeit with some deviations and variability, the general state of knowledge about the phenomena addressed. Consistent with the observations of the constitutional scholars cited above, the Court requires little supplementary support to accept the state's justification for its asserted child protective purpose. Substantially more scrutiny attends its review of the means employed, particularly in the cases

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TROXEL ET AL., CHILD WITNESSES IN CRIMINAL COURT, IN CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 150, 160–62 (Bette L. Bottoms et al. eds., 2009).

316. In a comprehensive review of the literature, Quas and Goodman summarize the data:

> As mentioned, the links between testifying and adverse outcomes are complex and often depend on additional factors, including not only how many times children testify, but also such factors as corroborative evidence, maternal support, and severity of the abuse. . . . [C]hildren who testified in cases that lacked corroborative evidence and testifiers who lacked maternal support during the case were at greatest risk for adverse mental health outcomes, and . . . testifying repeatedly in cases involving particularly severe child sexual abuse was related to higher levels of subsequent problems. . . . Without caregiver support, the stress of testifying may simply overwhelm children's coping resources. Finally, severe abuse cases typically involved a closely related perpetrator and abuse that occurred over a long period of time. Pressures from the perpetrator or family members and conflictual feelings about the perpetrator are likely greatest in these circumstances, making it especially challenging for children to face the perpetrator repeatedly and answer pointed questions on the stand about their experiences.

Jodi A. Quas & Gail S. Goodman, *Consequences of Criminal Court Involvement for Child Victims*, 18 PSYCHOL., PUB. POL'Y, & L. 392, 400 (2012) (citations omitted). The researchers also note that, for some children, testifying may be helpful to the healing process, particularly in less severe cases. They hypothesize that "[p]erhaps some children need clear acknowledgment that the abuse occurred and was sufficiently wrong as to warrant public intervention. This acknowledgement may come from taking the stand." *Id.* at 400–01. Although more study of this phenomenon is needed, the authors conclude that the findings emphasize the importance of refraining from "overly simplistic" generalizations about the effects of testifying in all cases. *Id.* at 401. Finally, the research indicates that, in addition to the variables mentioned above, the age of the child may relate to the child's vulnerability to negative concomitants of providing testimony in abuse cases: "Models of development and risk . . . suggest that traumas occurring early rather than later in childhood have particularly deleterious effects on psychological functioning. Insofar as legal involvement represents a trauma" the negative impact on younger children may be more pronounced. *Id.* at 401–02. Yet, the authors note, sometimes older children are treated more harshly in the courtroom, a factor that may lead to more adverse outcomes. *Id.*

relating to courtroom testimony. The cases discussed below, invoking notions of children as vulnerable recipients of certain types of speech, demonstrate substantially less correlation between the Court's endorsement of vulnerability constructs and existing scientific understandings. Indeed, the dominant constructions of children's vulnerability in the speech cases bear little relationship to what we actually know about children.

C. CHILDREN'S VULNERABILITY AS RECIPIENTS OF SPEECH

Governmental regulation of speech based on content is typically premised on the assumption that the speech will cause some form of harm.[317] The Court has decided a range of cases that consider the constitutionality of regulations developed, at least in part, with the goal of protecting children from exposure to speech that has been asserted by the state to be harmful to children.[318] This Subpart focuses on the Court's use of vulnerability constructs to address the alleged harms to children of challenged speech.

The cases involving alleged harm to children from exposure to speech vary on many dimensions, such as the setting in which the speech is communicated, the medium by which it is communicated, the extent to which the category of speech regulated is protected by the First Amendment, whether the regulation is content-based, and importantly, whether a restriction on speech aimed at protecting children would also impair the rights of adults. For example, the government retains greater leeway in regulating the speech of minors in the school setting, even when the exposure occurs off school grounds at a school-supervised event, than it does with respect to speech occurring in a setting not falling within the purview of school authorities.[319] The Court has underscored that student speech can be limited in ways "in light of the special characteristics of the school environment."[320]

The government's authority to regulate speech sometimes varies with the medium through which the speech is communicated.[321] Thus,

317. David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 WM. & MARY L. REV. 1647, 1647 (2014). Yet, constitutional commentators have observed that First Amendment doctrine gives relatively little attention to the question of *how* the regulated speech is thought to cause the harm in question. *Id.* at 1657; *see also* Bhagwat, *Protecting Children*, *supra* note 259; Catherine Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 501–07 (2000).

318. This Part examines regulations and vulnerability constructs that focus on children as recipients of speech, rather than as speakers. In some of these cases, however, children are also speakers. *See, e.g.*, Bethel Sch. Distr. No. 403 v. Fraser, 478 U.S. 675 (1986*);* Morse v. Frederick, 551 U.S. 393 (2007).

319. *See, e.g.*, *Morse*, 551 U.S. at 396–97.

320. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

321. Fed. Commc'ns Comm'n v. Pacifica Found., 438 U.S. 726, 748 (1978).

the government's reach is greater in regulating broadcast media than many other mediums because of the "uniquely pervasive presence" of material broadcast over the "airwaves" in Americans' lives, and because "broadcasting is uniquely accessible to children, even those too young to read."[322]

Furthermore, certain types of speech receive greater protection than others. For example, the Court has held that speech characterized as "obscenity," "incitement," or "fighting words[]" is not protected by the First Amendment.[323] In addition, the Court permits legislatures greater flexibility in determining what is obscene "from the perspective of a child," thus expanding the category of what constitutes obscenity when children are the audience.[324] "Indecent" speech that is not obscene is protected by the First Amendment, but is subject to greater regulation than many other forms of speech for the purpose of shielding children from exposure.[325]

The standard of review applied to speech regulation differs, as well, depending on whether the regulation is content-based or content-neutral, since the government is expected to remain neutral in the "marketplace of ideas."[326] Thus strict scrutiny is applied to content-based regulations, while intermediate scrutiny is applied to content-neutral regulations.[327] Because of the stringency of constitutional review of content-based regulations, the determination that a particular *content* category of speech (for example, obscenity) does not merit First Amendment protection provides the government with substantial authority over regulation of that type of speech, where governmental reach would otherwise be quite constrained.[328] In a widely criticized decision discussed below,[329] *Brown v. Entertainment Merchants' Association*, the Court recently determined that because the violent content of certain video games did not fall within one of those categories of speech excluded from First Amendment protection, the content-based nature of the regulation mandated strict scrutiny review of a California

322. *Id.* at 749. The state, for example, has greater leeway in regulating the speech of minors than adults.

323. Brown v. Entm't. Merchs. Ass'n, 564 U.S. 786 (2011).

324. Ginsberg v. New York, 390 U.S. 629, 638 (1968).

325. James F.X. Petrich, *Constitutionality of Sexually Oriented Speech: Obscenity, Indecency, and Child Pornography*, 16 GEO. J. GENDER & L. 81, 87 (2015). Indecent speech, as defined by *Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. at 732, is "intimately connected to the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs . . . ."

326. United States v. Alvarez, 567 U.S. 709, 716–17 (2012); David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 368 (2015); Petrich, *supra* note 325, at 82–83.

327. Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943, 979–80 (2016).

328. Randy J. Kozel, *Precedent and Speech*, 115 MICH. L. REV. 439, 451 n.85 (2017).

329. *See infra* Part III.C.4.

statute that would have restricted minors' independent ability to purchase or rent violent video games.[330]

Finally, the impact that regulations aimed at protecting children have on adults' access to such speech plays an important role in the constitutional analysis, in light of the Court's unwillingness to reduce the level of discourse in society to what might be viewed as appropriate for children's consumption.[331] Because the government has greater reach in regulating minors, regulations affecting only children's access to speech may be more restrictive than regulations also limiting adults' access to the regulated speech.[332] Indeed, as discussed within, it appears that, at least with respect to minors' access to sexually explicit speech, rational basis review may be all that is required where a restriction leaves adults' access unaffected.[333]

1. Children's Exposure to Sexual Images

Ginsberg v. New York[334] was one of the earliest cases concerning children's access to allegedly indecent materials. A merchant who had sold two "girlie" magazines to a sixteen year old boy appealed his conviction under a New York statute forbidding sales to minors under the age of seventeen of magazines "depict[ing] [] 'nudity'" *and* "which [are] harmful to minors."[335] Although the magazines would not have been considered "obscene" under the definition applied to adults, New York argued that a child-specific definition of obscenity was appropriate to serve its child-protective goals.[336] Highlighting the state's authority to promote children's well-being, the Court relied on two sets of justifications for such regulation. First, it opined, the state has an interest in supporting parental decisionmaking authority regarding their children's welfare, including children's access to sexually explicit

330. Brown v. Entm't. Merchs. Ass'n., 564 U.S. 786, 798–99 (2011); Kozel, *supra* note 328, at 451.

331. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 875 (1997) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74–75 (1983)) ("'[R]egardless of the strength of the government's interest' in protecting children, 'the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'").

332. Martin Guggenheim distinguishes the types of regulations restricting materials for the alleged benefit of children. Martin Guggenheim, *Violent Video Games and the Rights of Children and Parents: A Critique of* Brown v. Entertainment Merchants Association, 41 HASTINGS CONST. L.Q. 707, 710–28 (2014). Guggenheim sorts the cases as follows: Category A (regulations that completely ban dissemination of particular materials on the ground that the materials are inappropriate for everyone); Category B (regulations that completely ban dissemination of particular materials on the ground that it is inappropriate for children); Category C (regulations that attempt to "restrict the time, place, or manner in which adults may have access to [particular] materials in order to reduce the risk that children will also be able to gain access"); Category D (regulations that seek to reduce children's access to particular materials without interfering in adults' access). *Id.* at 710.

333. *See infra* notes 339–340 and accompanying text.

334. Ginsberg v. New York, 390 U.S. 629 (1968).

335. *Id.* at 632.

336. *Id.* at 634, 638.

materials. A statute that bars minors from accessing such materials independently, but allows parents to access such materials for their children if they so choose, could be viewed as supporting such parental discretion according to the Court.[337] Second, the Court cited the state's *parens patriae* and police power interests in promoting children's well-being as additional, but distinct, bases for regulations of sexually explicit materials.

The Court applied rational basis review in *Ginsberg*.[338] The Court did not discuss its choice of rational basis review, an anomaly given that content-based restrictions on speech are typically strictly scrutinized. Perhaps this choice relates to the fact that the restrictions in *Ginsberg* only affected minors' access to the speech in question.[339] Even when a particular type of restriction affecting adults would warrant heightened scrutiny, the Court sometimes applies rational basis when the constitutional rights of minors are at issue because the state has greater leeway in regulating minors' lives and activities. This approach may explain the standard of review in *Ginsberg*.[340]

The Court held that the New York legislature could rationally have decided that the statute in question was necessary to safeguard minors from harm.[341] The opinion did not explicate precisely what harms were expected to follow from minors' exposure to these materials, referring vaguely to impairment of the "ethical and moral development" of youth.[342] Only in a footnote did the Court suggest that its concern focused on the possibility that exposure to these materials will "create a danger of antisocial conduct."[343] The Court acknowledged that the collective findings of scientific studies concerning the alleged harmfulness to children of exposure to obscene materials were ambiguous, at best.[344] Indeed, it stated: "It is very doubtful that [the New York legislature's]

337. *Id.* at 639.

338. *Id.* at 643.

339. *See* Bhagwat, *Protecting Children*, *supra* note 259, at 676. The limited effect of the regulation would place it in Guggenheim's Category D, *see supra* note 332.

340. *See* Interactive Dig. Software Ass'n v. St. Louis Cty., 329 F.3d 954, 959 (8th Cir. 2003) (attributing the lower standard of review in *Ginsberg* to the category of speech regulated—that is, speech falling within the modified definition of obscenity *specific to minors*).

341. *Ginsberg*, 390 U.S. at 643. As Monahan and Walker indicate, where no adequate empirical support exists for a factual proposition relevant to evaluation of statutory purpose or means, the statute is likely to be sustained under rational basis review. Monahan & Walker, *supra* note 20, at 586. This standard of review grants substantial deference to legislative findings or its empirical assumptions, rejecting them only sufficient data are marshalled to demonstrate the inaccuracy of those assumptions. *Id.*

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

343. *Id.* at 642.

344. *Id.* at 641–42.

finding [of purported harm to the ethical and moral development of youth] expresses an accepted scientific fact."[345]

In addition, the allusion to antisocial behavior implies the need to restrict minors' access as a means of social control. Invoking capacity-based vulnerability constructs, Justice Stewart, in his *Ginsberg* concurrence, suggested that children are like those in a "captive audience" upon whom obscene material is forced, because children are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[346] This formulation of minors' vulnerability illustrates the synergistic effect of heightened sensitivity to harm and more limited capacities for self-protection attendant to immature decisionmaking skills characterized by susceptibility to harm-based and capacity-based vulnerability. Notably, in the Court's discussions in the "obscenity" cases, children and unconsenting adults have been frequently grouped together and differentiated from consenting adults with respect to the states' interests in regulating obscene material.[347]

Justice Douglas, dissenting in *Ginsberg*, rejected the majority's fears about harms to children. He implied that the Court adopted the image of childhood put forward by Comstock in the late 1800's (that is, that people have an "inborn tendency toward wrongdoing").[348] While reserving judgment on whether sexually explicit literature is harmful in general, he argued that there is no evidence that the materials are *more* harmful to children than to adults: "The 'juvenile delinquents' I have known are mostly over 50 years of age. If rationality is the measure of validity of this law, then I can see how modern Anthony Comstocks could make out a case for 'protecting' many groups in our society, not merely children."[349] Ultimately, he condemned what he characterized as the role of the Court as a "censor" as well as the entire exercise of trying to judge what is obscene or harmful to others.[350] Justice Douglas referred to children's interest in reading materials of the type regulated in *Ginsberg* as the "fresh, evanescent, natural blossoming of sex," an interest Justice Douglas asserted should not be confused with "sin."[351]

The Justices' concerns about the link between sexual themes and antisocial behavior were raised in subsequent cases concerning adults' access to such materials. For example, the next year, in *Stanley v. Georgia*, in an opinion authored by Justice Marshall, the Court rejected

345. *Id.* at 641.
346. *Id.* at 649–50 (Stewart, J., concurring).
347. *See, e.g.*, Miller v. California, 413 U.S. 15, 18–19 (1973).
348. *Ginsberg*, 390 U.S. at 651 (Douglas, J., dissenting).
349. *Id.* at 654–55.
350. *Id.* at 656.
351. *Id.* at 650.

Georgia's claim that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence," citing several scientific sources and concluding that there was "little empirical basis" for Georgia's claim.[352] Yet, the Court was quick to assert that where there is the danger that obscene materials will "fall into the hands of children," the issues are quite different.[353]

The Court reiterated the theme that exposure to obscene material may "exert a corrupting and debasing impact leading to antisocial behavior" or may have a "dominant tendency [to] 'deprave or corrupt' a reader" in *Paris Adult Theatre I v. Slaton,* where it considered the constitutionality of a state restriction on theatres showing obscene films.[354] It held that a state *could* reasonably conclude that a causal connection exists between exposure to obscene material and antisocial conduct, absent conclusive scientific evidence or empirical data.[355] Even Justice Brennan, who vigorously objected to restrictions approved by the majority as they affected consenting adults, endorsed the view that juveniles needed greater protection.[356] He stated that exposure to obscene material may be "an intense emotional experience" of the nature of a "physical assault" if forced upon an unwilling person.[357]

Today, almost fifty years after the Court issued its decision in *Ginsberg*, there remains little evidence that the types of materials restricted in *Ginsberg* are psychologically or physically harmful to minors.[358] Existing studies on the impact of sexual content in media on children reveal, unsurprisingly, that the effects that such exposures on children vary, depending upon characteristics of the materials, the children, and the context. For example, research suggests that materials that incorporate violence or depict behavior or attitudes that are demeaning or degrading to women or others can have negative impacts.[359] On the other hand, media can serve as positive teaching tools, educating about contraception, sexually transmitted diseases, and

352. Stanley v. Georgia, 394 U.S. 557, 566 (1969).

353. *Id.* at 567.

354. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54–55, 63 (1973); *Id.* at 79 (Douglas, J., dissenting) (quoting Roth v. United States, 354 U.S. 476, 506 (1957) (Harlan, J., dissenting)).

355. *Slaton*, 413 U.S. at 63.

356. *Id.* at 106 (Brennan, J., dissenting). The dissenters took this position despite their view that, in general, "the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion." *Id.* at 109.

357. *Id.* at 106–07.

358. *See, e.g.*, NATIONAL ACADEMY OF SCIENCES, YOUTH, PORNOGRAPHY & THE INTERNET (D. Thornburgh & H. S. Lin eds. 2002) [hereinafter NAS, *Pornography*]; S. Liliana Escobar-Chaves et al., *Impact of the Media on Adolescent Sexual Attitudes and Behaviors*, 116 PEDIATRICS 303 (2005); ALTHEA C. HUSTON ET AL., MEASURING THE EFFECTS OF SEXUAL CONTENT IN THE MEDIA: A REPORT TO THE KAISER FAMILY FOUNDATION (1998), http://files.eric.ed.gov/fulltext/ED445363.pdf.

359. NAS, *Pornography*, *supra* note 358, at 149–55.

positive sexual behaviors.[360] The limited research available is contradictory on questions such as whether viewing media with sexual content promotes earlier initiation of sexual activity or other behaviors.[361] Conclusions from the existing data, particularly attributions of causality, must be cautious because of methodological limitations imposed by ethical constraints.[362] Overall, however, there is little support for the notion that depictions of nudity without more and exposure to many types of materials with sexual images or themes have harmful effects on a youthful audience. Critically, most relevant to the effects on children are the nature of the materials, the messages contained in them, and the context in which they are portrayed. When sexual materials incorporate violence, abuse, degradation, or other disturbing themes, the effects may be detrimental.

How important is empirical substantiation of the risks of harm to minors in *Ginsberg* and cases like it? To the extent that the state relies on factual assertions about the impact of certain experiences, exposures, or stimuli on children's development, scientific investigation of the phenomena reflects the most likely avenue to the determination of their veracity. Yet, as noted above, the *Ginsberg* Court endorsed dual justifications for state regulation of sexually explicit materials. As is often the case when multiple justifications for a law are advanced, it is not readily apparent whether either basis is analytically necessary and/or sufficient. In *Ginsberg*, are governmental regulations that enhance parental discretion regarding children's access to the regulated materials constitutional even if there is insufficient evidence that the restriction also furthers the state's independent interest in protecting children's welfare? If the answer is yes, then substantiation of assumptions about the dangers to children of exposure to the materials is unnecessary. All that must be demonstrated is that the regulation furthers parental choice.[363] Thus, unanswered questions include whether promotion of parental discretion is the weightier of the goals and whether our constitutional doctrine regulating children and the family permits or requires such an approach.[364]

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360. Am. Acad. of Pediatrics, *Policy Statement—Sexuality, Contraception, and the Media*, 126 PEDIATRICS 576, 578–79 (2010).

361. *See, e.g.*, NAS, *supra* note 358, at 154.

362. *Id.* at 155–60.

363. This role of regulations restricting minors' access to speech in promoting parental choice is revisited below, in the context of *Brown v. Entertainment Merchants' Association*. *See infra* notes 452–457 and accompanying text.

364. For an excellent analysis of free speech doctrine and children, within the context of constitutional jurisprudence of the family more generally, see Guggenheim, *supra* note 332, at 729–65.

2. Children's Exposure to "Indecent" Speech

Over a decade after *Ginsberg*, in *Federal Communications Commission v. Pacifica Foundation*, the Court upheld Federal Communications Commission ("FCC") restrictions on the broadcast of a satiric George Carlin monologue entitled "Filthy Words."[365] A man who heard the broadcast while driving in his car with his "young son" (whose age was not specified) complained to the FCC about the airing. The FCC objected to the broadcasting of the monologue during hours when children might be listening because it viewed the broadcast as "indecent," containing words referring to "excretory or sexual activities or organs."[366] The FCC's authority to license permits it to regulate broadcasts determined to be "obscene, indecent, or profane." Here, the Court upheld the FCC's action, although it did not specify what it viewed as harmful to children about such exposure beyond mentioning that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[367] The Court did not indicate how such enlargement might have harmed children, although we can assume that it would have likely greatly annoyed the children's parents and other adults within earshot of any subsequent mimicry by the children. The Court did not assert that hearing the broadcast would incline children toward performing antisocial acts beyond reciting the offensive words, nor did it argue that the speech would otherwise harm the children emotionally.

In concurrence in *Pacifica*, Justice Powell suggested that children's lessened capacity for choice may hinder their ability to "protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult."[368] Justice Powell referred to the language in the monologue "as potentially degrading and harmful to children as representations of many erotic acts."[369] By contrast, Justice Brennan, in dissent, asserted that, because the monologue was not erotic, it was not obscene, and therefore was protected speech, even with respect to children.[370] He opined that "'[s]peech that is [not] obscene as to youths . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'"[371]

365. Fed. Commc'ns Comm'n v. Pacifica Found., 438 U.S. 726 (1978).

366. *Id.* at 739.

367. *Id.* at 749.

368. *Id.* at 757–58.

369. *Id.* at 758. Ironically, the point of Carlin's monologue was to poke fun at society's inhibitions and fears about the ramifications of saying and hearing the more commonly used "dirty words." His position was that, contrary to popular myth, no harm would follow such exposures.

370. *Id.* at 767 (Brennan, J., dissenting) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 213 n.10 (1975) (citing Cohen v. California, 403 U.S. 15, 20 (1971))).

371. *Pacifica Found.*, 438 U.S. at 768 (quoting *Ernoznik*, 422 U.S. at 213–14).

The Court had the opportunity in subsequent cases to consider other challenges to the constitutionality of restrictions on broadcast media regarding sexually explicit or allegedly indecent speech alleged to be harmful to children. Most recently, the Court considered the same FCC provision at issue in *Pacifica* in *Federal Communications Commission v. Fox Television Stations, Inc*. The case was decided by the Court first in 2009 (*Fox I*),[372] and then again after remand in 2012 (*Fox II*).[373] The provision, under which Congress authorizes the FCC to sanction those who "utter[] any obscene, indecent, or profane language" over radio or television, had been interpreted relatively narrowly after *Pacifica*, with few enforcement actions in subsequent years.[374] The FCC, in addition, issued policy guidelines for broadcasters, seeking to specify what constitutes indecent material and noting that for nonliteral expletives, "deliberate and repetitive use" rather than "passing or fleeting" references would be considered indecent.[375] Yet, in responding to complaints regarding an expletive used by one award recipient at the 2002 Billboard Music Awards broadcast by Fox, and two expletives used by another award recipient at the 2003 Billboard Music Awards, the FCC determined that the language was indecent, and sanctioned the network.[376] Ultimately, the case was remanded, and the FCC's actions were held unconstitutional in *Fox II* on the ground that the networks did not have fair notice of the change in FCC policy.[377] The First Amendment issues were not reached.[378] Yet, for our purposes, language in the majority opinion in *Fox I*, authored by Justice Scalia in response to the Court of Appeals decision below challenging the lack of evidence of harm to children from the sanctioned language, is noteworthy in its concerns about children:

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action . . . because of failure to adduce empirical data that can readily be obtained. (Citation omitted.) It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word

372. Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (*Fox I*).
373. Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) (*Fox II*).
374. *Id.* at 2313–14.
375. *Fox I*, 556 U.S. at 508.
376. *Id.* at 510–511.
377. *Fox II*, 132 S. Ct. at 2317.
378. *Id.* at 2320.

> indecent expletives. Congress has made the determination that indecent material is harmful to children . . . . If enforcement had to be supported by empirical data, the ban would effectively be a nullity.[379]

Thus, not much had changed in the Court's view of what types of speech could be restricted on broadcast media in the three decades between *Pacifica* and *Fox I*, in that bare assertions of harm to minors did not require empirical support. In addition, however, Justice Scalia's articulation of the mechanisms of harm—"that children mimic the behavior they observe"—is eerily pertinent to the Court's later decision in *Brown,* penned by Justice Scalia, and will be discussed below.[380]

3. Children's Exposure to Speech in School Settings

In four cases reviewing the constitutionality of children's freedom of expression in schools, the Court has revealed substantial inconsistency and doctrinal confusion. In 1969, in a landmark case extolling the virtues of free speech as "the basis of our national strength and of the independence and vigor of Americans," the Court upheld the right of high school and junior high school students to express a political opinion by wearing a black armband reflecting their opposition to the Vietnam War.[381] In *Tinker v. Des Moines Independent Community School District*, the Court reinforced the authority of schools to regulate the conduct of students, including restriction of student speech, where there is a "showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[382] While the case is most frequently cited for its holdings that "[s]tudents in school as well as out of school are 'persons' under our Constitution," and that "[n]either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[383] I focus now on the Court's views of students as audience members.

The Court was not concerned that the junior high and high school audience observing the silent antiwar protest would be harmed by the possibility of "discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint," or the minor interruption of the status quo (that is, the discussion among students).[384] Justice Stewart, in concurrence, citing *Ginsberg*, reminded the Court that, in some cases, although seemingly not under the circumstances of this case, "[a s]tate may permissibly determine that, at least in some precisely delineated

379. *Fox I*, 556 U.S. at 519.
380. *See infra* notes 441–445 and accompanying text.
381. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).
382. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
383. *Tinker*, 393 U.S. at 511, 506.
384. *Id.* at 509, 514.

areas, a child—like someone in a captive audience—is not possessed of that full capacity or individual choice which is the presupposition of First Amendment guarantees."[385] Justice Black's dissent in *Tinker* is perhaps one of the most interesting of the several opinions filed. While acknowledging that no substantial disruption occurred as a result of the student's silent protest, he expressed deep concern about the effects on students from the implicit permission this case provides for defiance of "orders of school officials to keep their minds on their own schoolwork."[386] He hailed the decision as "the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."[387] He continued:

> Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens . . . . Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. . . . [A]fter the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups . . . have already engaged in rioting, property seizures, and destruction. They have picketed schools . . . and have too often violently attacked earnest but frightened students who wanted an education . . . . Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. . . . [I]t is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools . . . .[388]

According to Justice Black, children are at risk of dangerous losses of self-control and flagrant disrespect for others when those supervising them are not sufficiently authoritarian in regulating expressions of individuality or independence—a risk posited as deleterious to them and to their communities. Both Justice Black, and in a separate dissent, Justice Harlan,[389] argued that the state's authority to exercise discretion in "maintaining discipline and good order in their institutions," was

385. *Id.* at 515 (Stewart, J., concurring) (citing Ginsberg v. New York, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring)).

386. *Tinker*, 393 U.S. at 515, 518 (Black, J., dissenting).

387. *Id.* at 515, 518.

388. *Id.* at 524–25.

389. *Id.* at 526 (Harlan, J., dissenting).

given short shrift by the majority. As noted below, in subsequent cases, the Court's majority did not explicitly reject the *Tinker* test, which grounded the constitutionality of restrictions of student speech on a "showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school'"[390] for a test that favors relatively unchecked deference in the hands of school personnel on matters of student free expression. But there is little evidence of *Tinker*'s influence in those latter cases.

In 1988, the Court, in *Bethel School District No. 403 v. Fraser*, considered the constitutionality of a school district's decision to discipline a student for giving a sexually suggestive speech in a high school assembly.[391] Justice Burger's majority opinion described the speech as "obscene," "vulgar," and "offensively lewd," and suggested that it was "plainly offensive," "acutely insulting to teenage girl students," and likely to be "seriously damaging" to the youngest in the audience, who were "14 years old and on the threshold of awareness of human sexuality."[392] Yet, the majority offered no support for these asserted harms, although it reported that some students felt "bewildered or embarrassed by the speech[]", others "hooted and yelled" (and therefore may have been disruptive to peers), and students lost lesson time in one class because a teacher "found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class."[393]

Without articulating a particular test or standard of review, the Court cited *Ginsberg* and *Pacifica Foundation* as support in holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."[394] Concurring in the Court's decision to defer to the judgment of the school district, Justice Brennan disputed the majority's characterization of the speech, finding it substantially more benign. In

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390. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

391. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986). The speech read as follows:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but, most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring).

392. *Id.* at 683–84.

393. *Id.* at 678. One might argue that the use of class lesson time to discuss the issues raised by the speech is as valuable, or more valuable, than following the predetermined lesson plan.

394. *Id.* at 685.

particular, he challenged the notion that this type of speech is harmful to younger students,[395] concluding that the speech was no more "'obscene,' 'lewd,' or 'sexually explicit,' than the bulk of programs currently appearing on prime time television," and that "the language . . . used does not even approach the sexually explicit speech regulated in [*Ginsberg*], or the indecent speech banned in [*Pacifica*]."[396] Justice Stevens, in dissent, argued that the assembly speaker, "an outstanding young man with a fine academic record . . . was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of . . . a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime."[397]

Yet, *Fraser* went farther, in indicating that a school need not tolerate speech inconsistent with its "basic educational mission," even where such speech is permissible outside of school. Without more, it is not fully clear what types of speech are inconsistent with that mission. Indeed, *Fraser's* rationale was not well-explicated by the Court and has been criticized on that basis.[398] The assertions that hearing the sexual allusions might be "seriously damaging" to the students is not particularly persuasive, and conveys a vision of children as highly susceptible to a range of unspecified harms from such exposures. The Court used the vulnerability images to assert that Fraser's speech was inconsistent with the school's mission, in light of its arguably exaggerated allegations of harms and disruption, since allowing speech that is harmful to students undercuts that mission.

In *Hazelwood School District v. Kuhlmeier*, the Court upheld a high school principal's decision to delete two pages of a student-authored school newspaper issue that contained stories about three students' experiences with pregnancy and an article on the impact of divorce on students.[399] Although the students had used pseudonyms to protect the confidentiality of the persons who were the subjects of the stories, the principal had concerns about identifiability. The principal "believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school."[400] The Court relied in part on *Fraser's* holding that a school need not tolerate student speech inconsistent with its educational mission, and in part on the concept that even when a school tolerates student speech, it need not

395. *Id.* at 689 n.2 (Brennan, J., concurring).

396. *Id.* at 677–78.

397. *Id.* at 692 (Stevens, J., dissenting).

398. Morse v. Frederick, 551 U.S. 393, 404 (2007). In *Morse*, Justice Roberts, writing for the majority, observed the lack of clarity as to what test the *Fraser* majority applied; *see also* Mark Strasser, Tinker *Remorse: On Threats, Boobies, Bullying, and Parodies*, 15 FIRST AMEND. L. REV. 1, 11 (2017).

399. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988).

400. *Id.*

affirmatively promote such speech through, for example, publication in a school-sponsored paper publication.[401] The Court reinforced its message in *Fraser* that certain material may be inappropriate for the level of emotional maturity possessed by some students, and assigned to the school the authority to determine whether "student speech on potentially sensitive topics" such as teenage sexuality was inappropriate.[402] In dissent, Justices Brennan, Marshall and Blackmun reminded the majority of the *Tinker* test, and emphasized the pedagogical, social, and political value of encouraging free speech in the school environment.[403] The dissenters implied that the majority's position risked strangling youth's free minds, hindering tolerance and consideration of diverse ideas and perspectives.[404]

The Court expressed concerns about speech of a different nature when holding constitutional a school district's confiscation of a banner unfurled by a student at an off-campus school-supervised function, and subsequent suspension of the student in *Morse v. Frederick*.[405] In this case, a high school senior, Joseph Frederick, participated with his class in the Olympic Torch Relay as it passed through their community in Juneau, Alaska.[406] As torchbearers and camera crews passed, he unfurled a large banner reading "Bong Hits 4 Jesus," which was seen by school authorities as "encouraging illegal drug use, in violation of school policy."[407] Writing for the majority, Justice Roberts drew on prior precedents to emphasize that children's rights in schools are not coextensive with the rights of adults, or with the rights of children outside of the school context.[408] The Court devoted substantial discussion to the harms of drug use by children, justifying the restriction on Frederick's speech by highlighting the importance of deterring and discouraging drug use in the mission of public schools.[409] It observed that "[d]rug abuse can cause severe and permanent damage to the health and well-

401. *Id.* at 266–67, 270–71.

402. *Id.* at 272.

403. *Id.* at 277 (Brennan, J., dissenting).

404. *Id.* at 285–86 ("Tinker teaches us that the state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as 'thought-police' stifling discussion of all but state-approved topics and advocacy of all but the official position. . . . Otherwise educators could transform students into 'closed-circuit recipients of only that which the State chooses to communicate.'"). In *Tinker*, the Court observed that because schools are "educating the young for citizenship," their failure to protect "Constitutional freedoms" could "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

405. Morse v. Frederick, 551 U.S. 393 (2007).

406. *Id.* at 397–98.

407. *Id.* at 398.

408. *Id.* at 406.

409. *Id.* at 407–08.

being of young people," and citing its own prior decision in a case involving drug testing in the schools, it emphasized:

> School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.[410]

The Court cited data from the National Institutes of Health detailing the prevalence and some of the potential harms of illicit drug use by teens, and further noted that "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use," backed by "billions of dollars to support state and local drug-prevention programs."[411] It then concluded that "[s]tudent speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse."[412]

Yet, the Court failed miserably in demonstrating a relationship between the state's purpose and the means used to achieve that purpose. Without explicitly indicating what role such a relationship plays in the constitutional analysis, the Court's majority relied on constructs of children as susceptible to the physiological and psychological harms of drug abuse, and to influence or pressure from others, to provide the nexus between Frederick's speech and the harms of drug abuse. The Court asserts that "peer pressure is perhaps 'the single most important factor leading schoolchildren to take drugs,'" and that "students are more likely to use drugs when the norms of school tolerate such behavior."[413] The Court desperately needed an analytic device of this type to try to demonstrate that children are specifically vulnerable to influence from messages such as those of Frederick, or from the school's lack of formal condemnation of Frederick's speech.

In dissent, however, Justice Stevens was not persuaded that the Court had connected the dots between Frederick's speech and the harms to children to be avoided.[414] He questioned that Frederick's classmates were as susceptible to influence by him as the majority suggested. Indeed, Justice Stevens suggested that students would likely see Frederick's message as "dumb" and that it is highly "implausible" that the

410. *Id.* at 407 (quoting Vernonia School Dist. 473 v. Acton, 515 U.S. 646, 661–62 (1995)).

411. *Id.* at 407–08.

412. *Id.* at 408.

413. *Id.* at 408.

414. *Id.* at 441 (Stevens, J., dissenting) (noting that it is necessary to show that the speech by Frederick "stands a meaningful chance of making otherwise-abstemious students try marijuana").

message on the banner would persuade a student to change behavior regarding drug use.[415]

Justice Alito, in concurrence, suggested an alternative test for the Court in these school speech cases. In so doing, he made even more explicit the reliance on vulnerability constructs as the centerpiece of the analysis. He proposed that the authority of the school to censor speech derived from some "special characteristic" of the school setting, which here is "the threat to the physical safety of students."[416] He characterized schools as "places of special danger," where students are expected to remain "at close quarters with other students who may do them harm."[417] In this case, that special danger was posed by "[s]peech advocating illegal drug use," he concluded, which in turn justified the ban of such speech in schools. This dark image of students in captivity with dangerous others while in the custody of schools focuses on dangers inherent in the status of minority, including being subject to the authority and custody of others (that is, status-based vulnerability).

The test emerging from the school speech cases permits limitations on student's speech when the restricted speech is determined to interfere with an aspect of the school's educational mission. Any alleged harm that is asserted to emanate from the restricted speech is treated as sufficient to limit student speech. It is difficult to argue with the Court's statement in *Frederick* that deterrence of drug use by school children is "'an important—indeed, perhaps compelling' interest,"[418] and that children are especially vulnerable to the harms attending drug use. Justice Roberts observed that children are more likely to become addicted, and that their nervous systems are more likely than adults' to be harmed by use of drugs—perhaps permanently—because of the ongoing developmental processes that characterize the maturational trajectory. Yet, the employment of this construct as a justification for restricting Frederick's silly sign bears all of the indicia of a pretextual reliance on constructions of children's vulnerability to avoid articulating the Court's true rationale.

Although the Court employs multiple vulnerability constructs to justify restricting student speech in the school setting, the assertions ring hollow. The likelihood of actual harms to students arising from the challenged speech across these cases seems *de minimus* at best, supported only by highly speculative causal assumptions about the relationship between the speech and the alleged harms. At the heart of the Court's concerns, by contrast, is the reinforcement of the authority of the school administration to regulate student conduct perceived to be

415. Morse v. Frederick, 551 U.S. 393, 444 (2007).
416. *Id.* at 424 (Alito, J., concurring).
417. *Id.*
418. *Id.* at 407.

inappropriate, particularly when students challenge such authority in as public a manner as did Fraser and Frederick.[419] Yet, in light of the remaining vestiges of *Tinker's* precedential influence, the Justices may assume that a test grounded primarily on deference to school administrators' discretion regarding student speech would not pass constitutional muster. By contrast, couching restrictions in concerns about the welfare of allegedly vulnerable students invokes both *parens patriae* and police power interests in preventing objectionable student speech from interfering with the state's mission to create a safe environment to educate and socialize the nation's youth.[420]

The message underlying the Court's rulings in *Fraser* and *Frederick* are reminiscent of the dissenting opinions of Justices Black and Harlan in *Tinker*, and ring truer to the themes expressed in those dissents than with the need to protect children from the articulated dangers. In his *Tinker* dissent, Justice Black emphasized the importance of "school discipline" in "training our children to be good citizens . . ."[421] He expressed the concern that student protests and the disregard for authority that they reflect is the first step in loss of control by the school administration.[422] Justice Harlan opined that "school officials should be accorded the widest authority in maintaining discipline and good order in their institutions."[423] Although the Court does not formally adopt these positions, their rulings in *Fraser, Kuhlmeier,* and *Frederick* conform to this view, in that they rely on the asserted vulnerability of children to the cited harms in response to the suppressed speech. Whether the Constitution permits school administrators greater discretion in restricting student speech than *Tinker* appeared to suggest, perhaps for the reasons cited by Justices Black and Harlan, is a question worthy of debate. Yet, the Court's misplaced focus on concerns about the vulnerability of the student audience sidetracks such an analysis. The Court's asserted justifications, grounded in vulnerability constructions, are ultimately unpersuasive.

Thus far, the cases discussed in this Part reveal images advanced by the Court of children as vulnerable to a range of harms affecting physical

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419. *Id.* at 408.

420. Indeed, the Court cites language in *Tinker* warning that "schools may not prohibit student speech because of 'undifferentiated fear or apprehension of disturbance,'" or a "'mere desire to avoid the discomfort or unpleasantness that always accompany an unpopular viewpoint,'" Morse v. Frederick, 551 U.S. 393, 408 (2007) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969) and stating that "[t]he danger here is far more serious and palpable.").

421. *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

422. *Id.* at 524–26.

423. *Id.* at 526 (Harlan, J., dissenting). In conclusion, he offered a purported "workable constitutional rule": that those complaining of a school action in student speech cases bear "the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant option."

or psychological well-being—some clearly specified and some not—from exposure to certain types of speech. Departing dramatically from this protective approach, the Court rendered its 2011 decision in *Brown v. Entertainment Merchants Association*.[424]

4. Children's Exposure to Violent Content

In 2005, California passed a statute that restricted the sale or rental of violent video games to persons age eighteen or older, and required that the products be labeled "18" to signify that they are not to be sold or rented to persons under that age.[425] Parents or other adults would not be restricted in purchasing or renting these products, either for their own or their children's use. "The Act covers games 'in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being.'"[426] The law was challenged by associations of companies that create and distribute the computer programs as an unconstitutional restriction of their First and Fourteenth Amendment rights.

Researchers had been studying the effects of these types of video games on children for over a decade preceding the Court's decision in *Brown*. Yet, for many decades prior to the *Brown* decision, psychologists had studied the effects of children's exposure to violent media, such as films and television programs.[427] Although, as the opinions in *Brown* reveal, there is ongoing debate in the relevant research communities as to the effects of video games with violent content,[428] none of the prominent scientific associations considers the question of whether these products have detrimental effects on children to be a close call.

For example, the American Psychological Association's recent report by its Task Force on Violent Media concluded: "The research

424. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).

425. *Id.* at 789.

426. *Id.*

427. *See, e.g.*, L. Rowell Huesmann, *The Impact of Electronic Media Violence: Scientific Theory and Research*, 41 J. ADOLESCENT HEALTH S6 (2007); L. Rowell Huesmann et al., *Longitudinal Relations Between Children's Exposure to TV Violence and Their Aggressive and Violent Behavior in Young Adulthood: 1977–1992*, 39 DEVELOPMENTAL PSYCHOLOGY 201 (2003); NAT'L INST. OF MENTAL HEALTH, TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES 36–44 (1982).

428. *See, e.g.*, Barbara J. Wilson, *Media Violence and Aggression in Youth*, *in* HANDBOOK OF CHILDREN, MEDIA, AND DEVELOPMENT 237 (Sandra Calvert & Barbara Wilson eds., 2011); Craig A. Anderson & Wayne A. Warburton, *The Impact of Violent Video Games: An Overview*, *in* GROWING UP FAST AND FURIOUS 56 (Wayne Warburton & Danya Braunstein eds., 2012); Mark Coulson & Christopher J. Ferguson, *The Influence of Digital Games on Aggression and Violent Crime*, *in* THE VIDEO GAME DEBATE: UNRAVELING THE PHYSICAL, SOCIAL, AND PSYCHOLOGICAL EFFECTS OF DIGITAL GAMES 54 (Rachel Kowert & Thorsten Quandt eds., 2016); *see also What's in a Game? Regulation of Violent Video Games and the First Amendment: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 2 (2006).

demonstrates a consistent relation between violent video game use and increases in aggressive behavior, aggressive cognitions, and aggressive affect and decreases in prosocial behavior, empathy, and sensitivity to aggression."[429] In 2015, the American Psychological Association issued a Resolution in which it adopted the Task Force's findings, noting among its conclusions that "all existing quantitative reviews of the violent video game literature have found a direct association between violent video game use and aggressive outcomes," and that "[t]he link between violent video games exposure and aggressive behavior is one of the most studied and best established."[430] While acknowledging the areas of need for continuing research, both the Task Report and the Resolution emphasize the strength and consistency of the data base revealing negative impacts on children from use of these games.

The American Academy of Pediatrics has also concluded that the scientific literature demonstrates that "[e]xposure to violence in media, including television, movies, music, and video games, represents a significant risk to the health of children and adolescents. Extensive research evidence indicates that media violence can contribute to aggressive behavior, desensitization to violence, nightmares, and fear of being harmed."[431] The American Academy of Child and Adolescent Psychiatry likewise concurred.[432]

Although ethical restrictions limit the methodologies that can be employed to demonstrate causation between violent media and such efforts, the evidence for the links between these games and negative effects on children appears to be stronger than is the relationship between negative effects and any of the other types of speech that the Court has determined can be permissibly limited where minors are concerned.

The most recent positions taken by these scientific and professional associations based on the empirical research followed *Brown*, and were

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429. *See, e.g.*, APA TASK FORCE ON VIOLENT MEDIA, TECHNICAL REPORT ON THE REVIEW OF THE VIOLENT VIDEO GAME LITERATURE 11 (2015), http://www.apa.org/pi/families/violent-media.aspx.

430. AM. PSYCHOLOGICAL ASS'N, RESOLUTION ON VIOLENT VIDEO GAMES (2015), http://www.apa.org/about/policy/violent-video-games.aspx.

431. Am. Acad. of Pediatrics, *Policy Statement—Media Violence*, 124 PEDIATRICS 1495, 1495 (2009); *see also* Am. Acad. of Pediatrics, *Policy Statement on Virtual Violence*, 138 PEDIATRICS 1298 (2016).

432. *Video Games and Children: Playing with Violence*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (2015) https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-and-Video-Games-Playing-with-Violence-091.aspx (noting that "[s]tudies of children exposed to violent media have shown that they may become numb to violence, imitate the violence, and show more aggressive behavior"); *see also TV Violence and Children*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (2014) https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-And-TV-Violence-013.aspx (noting that watching violent content on television can lead children to become numb or "immune" to the horrors of violence, to accept violence as a way to solve problems, and to imitate some of what they watch on television).

not available to the Justices when deciding the case. Yet, earlier versions of these organizations' statements were available, as was much of the research that guided those associations' positions, and were cited by Justice Breyer in his *Brown* dissent.[433] The Court's majority, however, in an opinion authored by Justice Scalia and joined by Justices Ginsburg, Kagan, Kennedy, and Sotomayor, struck down the California statute. It held that only three areas of speech were not protected by the First Amendment—obscenity, incitement, and fighting words—and that because the violent content of the games fell outside of these categories, it constituted protected speech.[434] Determining that the games fell within the gamut of the First Amendment, it characterized the California statute as a content-based regulation (that is, limiting distribution of these games to minors because of the games' violent content), requiring strict scrutiny review.[435] Against this standard, Justice Scalia assessed the evidence advanced by California to demonstrate that the statute was justified by a compelling state interest, and that the regulation was necessary to achieve that interest. He concluded that the evidence was insufficient absent proof of a *direct causal link* between violent video games and harm to minors.[436] Indeed, the burden the majority placed on California's shoulders for marshalling definitive and unequivocal proof that "violent video games *cause* minors to *act* aggressively" was unusually rigorous, even in the context of strict scrutiny.[437]

One critique of the majority's decision is its departure from applying a more deferential standard of review when regulating *minors'* exposure to allegedly harmful speech *when there is no concomitant restriction on adults' access to that speech*.[438] California analogized the restriction of sales and rentals to minors of violent video games in *Brown* to *Ginsberg's* restrictions on access to sexually explicit magazines to minors. As contrasted with cases in which adults' access would be restricted by a regulation justified by the impact of the speech on minors,[439] the statutes

433. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 851–55, 858–72 (Breyer, J., dissenting). In his dissent, Justice Breyer included two appendices of scientific articles—those "supporting the hypothesis that violent video games are harmful . . . and those not supporting/rejecting the hypothesis that violent video games are harmful." *Id.* at 858.

434. *Id.* at 786.

435. *Id.*

436. *Id.* at 798.

437. *Id.* at 800.

438. *See supra* notes 339–340 and accompanying text.

439. *See, e.g.*, Butler v. Michigan, 352 U.S. 380 (1957). In this case, the Court struck as unconstitutional a Michigan statute that criminalized the possession, publication, sale, or other distribution of any materials that contained certain sexual or other language or images "tending to the corruption of the morals of youth ..." with respect to adults and minors alike. *Id.* at 381–82. It held that the legislation was not sufficiently narrow, stating that the law would "reduce the adult population of Michigan to reading only what is fit for children." *Id.* at 383; *see also* Sable Commc'ns of California, Inc. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126–29 (1989).

in both *Brown* and *Ginsberg* left adults' access to the restricted materials unaffected. The analogy to *Ginsberg* would have led to a rational basis analysis of the restriction on minors' access to materials asserted to be harmful to them. Justice Scalia relied instead on a narrow interpretation of *Ginsberg* as limited solely to obscenity. He rejected the analogy to the government's interest in protecting minors from speech that might be harmful to children, even when the Constitution doesn't permit restricting adults' access.[440] He stated:

> No doubt a State possesses legitimate power to protect children from harm, . . . but that does not include a free-floating power to restrict the ideas to which children may be exposed. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[441]

The Court's decision to distinguish *Brown* from *Ginsberg* may have been determinative of the outcome. Once the rigors of strict scrutiny were applied to the state's regulation, the burden was difficult to overcome. Arguably, no database could have satisfied Justice Scalia. Yet, the rejection of *Ginsberg* and reliance instead on *United States v. Stevens*, a case decided the prior year that involved restriction of minors' *and adults'* access to materials that depicted animal cruelty for commercial gain,[442] was not required, and has been criticized by scholars.[443]

Although Justice Scalia's opinion in *Fox I* applied a different standard than *Brown*—because *Fox I* addressed regulation of broadcast media[444]—Justice Scalia's views about how children are affected by what they watch, and about the role of empirical studies to support regulatory choices, provide a stark contrast with *Brown*. In *Fox I,* he had concluded that in the case of "propositions for which scant empirical evidence can be marshaled," such as "the harmful effect of broadcast profanity on children," governmental action should not be struck down "because of failure to adduce empirical data that [is] unobtainable."[445] He continued

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440. *Brown*, 564 U.S. at 794–95.

441. *Id.* (citing Erznoznik v. Jacksonville, 422 U.S. 205, 213–14 (1975)).

442. United States v. Stevens, 559 U.S. 460 (2010).

443. *See, e.g.*, Guggenheim, *supra* note 332; Martha Minow, *The Big Picture: Justice Breyer's Dissent in* Brown v. Entertainment Merchants Association, *in Essays in Honor of Justice Stephen G. Breyer*, 128 HARV. L. REV. 416, 469 (2014). *But see* Erick D. Reitz, *Children and Categorization: Maintaining A Standard for Recognizing Speech Categories in* Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729 (2011), 91 NEB. L. REV. 998 (2013).

444. The government is permitted substantially greater leeway in regulating broadcast media to shield children and others from allegedly inappropriate content. "The justification for this differentiation is that publicly available broadcast media is easily transmitted into the private realm of the home and has the potential to be consumed by unsupervised children with access to radios and televisions, as well as to offend non-consenting adults who have not been warned about the indecent content of the programming." Petrich, *supra note* 325, at 92–93.

445. Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (*Fox I*).

in Fox I: "*Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives.*"[446] To the extent that Justice Scalia's reasoning in *Fox I* has merit, one might speculate as to the possible impact of repeated perpetration of virtual violence against others via the video games regulated by California.

In *Fox I,* Justice Scalia described minors as highly suggestible. He implied that they are vulnerable because of their tendency to learn through imitation, making them susceptible to the influence of whatever they view on television, including repetition of indecent or lewd language. In *Fox I,* Justice Scalia suggested that this phenomenon was so fundamental and obvious to the Court that it need not look to social science for confirmation. His opinion for the majority in *Brown* rejected the premise that minors are particularly vulnerable to media influences in the form of violent video games. This conclusion persisted, even in the face of an empirical research base demonstrating a strong relationship between violent video games and undesirable effects on minors.[447] This juxtaposition casts substantial doubt on the sincerity of Justice Scalia's rhetoric about the role of science in testing legislative and regulatory assumptions about children's development, and on the fairness of his assessment of the research presented by both sides in *Brown*.

In his *Brown* concurrence, Justice Alito indicated he would strike the statute as impermissibly vague, yet criticized the majority's reliance on *Stevens* rather than *Ginsberg*.[448] He bemoaned the result of the majority's decision, which he observed allows a state to "prohibit the sale to minors of what *Ginsberg* described as 'girlie magazines,'" while tying the state's hands in preventing "children from purchasing the most violent and depraved video games imaginable."[449] To illustrate the horrors depicted in the videos, he explained:

> In some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims

446. *Id.* (emphasis added).

447. *See supra* notes 428–432 and accompanying text. Arguably, in *Brown*, the Court imposed unrealistic standards on the body of scientific data, and gave inappropriate weight to contradictory studies. For a critical analysis of the scientific data provided in the amicus curiae briefs submitted in this case, see Deanne Pollard Sacks, *Do Violent Video Games Harm Children? Comparing the Scientific Amicus Curiae "Experts" in* Brown v. Entertainment Merchants Association, 106 NW. U. L. REV. 1 (2011).

448. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 813 (2011) (Alito, J., dissenting).

449. *Id.* at 814.

> are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.
>
> It also appears that there is no antisocial theme too base for some in the video-game industry to exploit. There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in "ethnic cleansing" and can choose to gun down African-Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.[450]

In a powerful dissent, Justice Breyer alone made several points. For example, he referred to the restriction of free speech under the California statute as "modest":

> The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help. All it prevents is a child or adolescent from buying, without a parent's assistance, a gruesomely violent video game of a kind that the industry itself tells us it wants to keep out of the hands of those under the age of 17.[451]

This point is critical. As Guggenheim emphasizes, *Brown,* like *Ginsberg*, was all about restricting minors' access to certain materials while leaving adults' access unaffected, and while allowing—perhaps even facilitating—parental decisions to exercise discretion in whether to make the materials accessible to their children as they so choose.[452] As such, *Ginsberg*, not *Stevens*, was the proper precedent to which to the regulation at issue in *Brown* should be analogized.[453] While some may disagree that children's access to either sexually explicit or violent materials should be limited in this way, to the extent that regulations of children's access to allegedly harmful speech do not affect adults' access to speech, application of rational basis rather than strict scrutiny is in accord with the state's greater reach in regulating the lives and conduct of minors and its deference to parental choice.

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450. *Id.* at 818–19.

451. *Id.* at 847–48 (Breyer, J., dissenting). This latter point is important. One could, as Guggenheim does, propose a statute that avoids the vagueness problems identified by Justice Alito, by limiting minors' access to those video games that the industry voluntarily labels as inappropriate for minors. *See* Guggenheim, *supra* note 332, at 772–73.

452. Guggenheim, *supra* note 332, at 748–49.

453. *Id.*

The Court has traditionally respected parental authority and supervisory roles in the lives of minors. While departures from this default rule do and should exist, the majority's opinion that there is justification for dispensing with such supervision in the case of violent video games is unpersuasive.[454] Justice Breyer correctly emphasized that where the state's dual regulatory interests in protecting children's well-being and promoting parents' authority in raising children "work in tandem," as they do in *Brown*, the state may "advance its interests in protecting children . . . through a default rule" that locates the choice in parental discretion.[455] This conclusion is consistent with the "long-recognized compelling state interest in protecting the parental claim to authority in directing the rearing of one's own children, with laws aiding that responsibility."[456] In light of the supervisory challenges confronting working parents of school-aged children in modern-day America, observed Justice Breyer, the state's regulatory assistance is much needed.[457]

The alternative to applying rational basis to cases like *Ginsberg* and *Brown* is to reject distinctions between minors and adults and consider the age-based regulations in a manner analogous to content-based restrictions on adult speech. This is, of course, far more respectful of minors' constitutional rights than is rational basis, and sets the bar high in terms of the quality of scientific evidence necessary to demonstrate allegations of harm justifying governmental restrictions.[458]

Yet, importantly, Justice Breyer did *not* argue for a different level of scrutiny. He and concluded that the evidence supporting California's law at issue in *Brown* met that weighty burden. Focusing on minors' vulnerability, and citing the Court's recent Eighth Amendment jurisprudence, Justice Breyer observed that minors "are 'more vulnerable or susceptible to negative influences and outside pressures,' and that their 'character . . . is not as well formed as that of an adult.'"[459] He continued: "And we have therefore recognized 'a compelling interest in protecting the physical and psychological well-being of minors.'"[460] With specific attention to violent video games, Justice Breyer discussed

454. *Id.*

455. *Brown*, 564 U.S. at 849.

456. Minow, *supra* note 443, at 473.

457. *Brown*, 564 U.S. at 849.

458. Ross, *supra* note 317, at 521 (arguing that "[w]hen sensitive matters of freedom of speech collide with images of children's vulnerability," the state must be required to demonstrate a compelling interest in shielding children through the specific regulation of speech, the nexus between the regulated speech and the specific harm, and that the regulation in question "will alleviate the articulated harm.").

459. *Brown*, 564 U.S. at 850 (citing Roper v. Simmons, 543 U.S. 551, 569–70 (2005); Sable Commc'ns of California, Inc. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126 (1989)).

460. *Brown*, 564 U.S. at 849.

the scientific evidence in the briefs, and supplemented those documents with his own review of additional meta-analyses and policy documents. He concluded that the California legislature had sufficient evidence to determine that it had a compelling interest in regulating children's access to these materials, and that its means for achieving such regulation was the narrowest means available.[461] Justice Breyer pointedly emphasized the "serious anomaly in First Amendment law" that the majority's decision creates when one compares what can be constitutionally restricted under *Ginsberg*, and what is permitted under *Brown*.[462] Harvard Law School Dean Martha Minow regards the following contrast by Justice Breyer as one of the most important insights emanating from the *Brown* decision.[463]

> [W]hat sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman—bound, gagged, tortured, and killed—is also topless?[464]

Striking the right balances in determining what types of exposures to speech should be easily accessible to children versus controlled by adults is fraught with challenges. Yet, as most family law scholars writing about *Brown* have reminded readers, deference to parental authority is typically weighted heavily in the calculus. One may argue that the balance should be struck differently, and that the state's or children's interests should be given more weight in specific situations. Yet, children's unfettered access to gruesomely violent video games seems an unlikely place to change directions. As Dean Minow points out:

> Democracy requires participation by people who know how to make choices; children sometimes learn by making choices for themselves but on other occasions learn through the choices made by parents, teachers, and democratically elected government . . . If minors can obtain with no adult guidance violent video games identified by their distributors as inappropriate for minors, they may be shaped before the adults in their lives have a chance to weigh in. If the social science evidence of harm from playing such games is valid, democratic processes in the future may choose more aggression, more toleration of violence, and reduced sensitivity to human suffering.[465]

I have devoted substantial space to a discussion of *Brown* because it departs so dramatically from the Court's arguably overprotective

461. *Id.* at 855.
462. *Id.* at 856.
463. Minow, *supra* note 443, at 475.
464. *Brown*, 564 U.S. at 857.
465. Minow, *supra* note 443, at 476.

jurisprudence that regulates and restricts minors' access to various forms of speech. The disconnect between our society's willingness to censor materials with sexual content versus violent content is striking, and flies in the face of available evidence as to the harms children experience from such exposures.[466] Of course, sexual content can be violent and violent content can be sexual—rendering it all the more essential that empirical research findings be parsed and interpreted carefully. Yet, assuming we can disentangle and keep separate these two categories for the purpose of discussion, our society's discomfort with children's and adolescents' exposure to information, speech, and images relating to sex, while tolerating relatively unfettered proliferation of violent materials available for the consumption of minors, deserves rethinking.[467] *Brown* brings these contrasting views and associated practices into sharp relief, given that the distinction is now seared into our nation's First Amendment law. Additionally, *Brown* underscores, like no case before it, the inconsistencies in the Court's constructions of children's vulnerability across its free speech cases.

What is *Brown* really about? As noted above, many commentators suggest that it *should* have been about state support for parental control over whether their children can access violent video games, an approach that arguably does not rely as heavily on empirical validation that minors are particularly vulnerable to psychological or physiological harm from exposure to these materials. But, perhaps *Brown* is also about something else. Ashutosh Bhagwat, in discussing *Ginsberg* and some of its pre-*Brown* progeny, reminds us that in *Ginsberg* the Court focused on the "ethical and moral development[al]"[468] effects of youth's exposure to the regulated materials.[469] He concludes that the:

> empirical attacks on the government's purported independent interest in protecting children miss the point. They challenge an assertion which is not being made, and fail to address the true question: whether the State has a legitimate or compelling interest in inculcating moral and ethical values in children by controlling their access to indecent materials as a step towards creating a morally virtuous citizenry.[470]

Thus, to the extent one examines *Brown*, and indeed, all of First Amendment cases reviewed in this Section through this lens, they fall in line with one another to a greater extent. Indeed, as Bhagwat emphasizes, whereas children's vulnerability to psychological harm from certain exposures can be subjected to empirical study and its "proof" evaluated,

466. Ross, *supra* note 317, at 505.
467. *See, e.g.*, KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 124–63 (2003).
468. Ginsberg v. New York, 390 U.S. 629, 641 (1968).
469. Bhagwat, *Protecting Children*, *supra* 259, at 685.
470. *Id.*

"ethical and moral questions, however, by their very nature [are] not susceptible to empirical or scientific proof; rather their answers exist in the eyes of the beholder."[471] Despite the seeming clarity such a lens brings to some of the First Amendment cases that posit harm to children as a basis for restricting children's access to speech, it is exceedingly troubling if children's access to speech hinges primarily on governmental actors' and judges' vague and value-laden notions as to what promotes children's development into moral future citizens, rather than on scientifically supported evidence of psychological or physiological harm.

CONCLUSION

Children are persons who are not-yet-fully-developed *and* are engaged in a rapid process of development. Developmental science supports the general premise that minors differ from adults on a wide range of dimensions that may mesh with notions of what it means to be *vulnerable*. Legislators and other legal actors rely on many of these notions in drafting governmental policies, and jurists rely on constructs of children's vulnerability in reviewing the policies' constitutionality. Yet, there has been little targeted analysis and scrutiny of vulnerability constructs and how they are applied in constitutional jurisprudence. This Article is an invitation to begin a more earnest analysis of the concept of children's vulnerability as it relates to such jurisprudence, and offers a modest initiation of this process.

This Article presented a taxonomy of children's vulnerability derived from and relevant to the U.S. Supreme Court's constitutional jurisprudence relating to children and adolescents, informed by scholarship across disciplines, including fields such as bioethics, philosophy, psychological science, and developmental neuroscience. It proposed five categories of vulnerability: harm-based vulnerability; influence-based vulnerability; capacity-based vulnerability; status-based vulnerability; and dependency-based vulnerability. After providing a sociohistorical context and some basic understandings about children's development from the scientific literature, I examined selected cases falling within the first vulnerability category of harm-based vulnerability.

This analysis revealed substantial variability in the way in which the Court has employed vulnerability constructs. In some instances, the Court has regarded these constructs as social facts requiring empirical scientific support within the dictates of the applicable constitutional doctrine. Most notably, in determining the constitutionality of closed-circuit television techniques for courtroom testimony of alleged victims of child abuse, the Court consumed and fairly applied contemporaneous psychological science. Furthermore, although cases considering the

471. *Id.*

effects of using children in the creation of child pornography did not delve into relevant research to as great an extent, the Court's conclusions there are generally consistent with such findings. By contrast, the Court's jurisprudence in considering children as recipients of speech in schools, or as the audience for sexually-explicit or violent speech, presented vulnerability constructs that are at odds with scientific research. Indeed, the Court often failed in the first instance to articulate with precision or apparent honesty the state's interest in such regulation. In these cases, notions of children's vulnerability are strategically manipulated, allowing the Court to achieve certain results, while side-stepping elucidation of a credible account of its underlying rationales.

Further examination of judicial constructs of children's vulnerability, and scrutiny of the relationship of legislators' and judges' assertions about children's nature and functioning, as proposed here, may not change the results of cases. Yet, where the Court makes "factual" assertions about children's characteristics or functioning—the subject matter of developmental science—these assertions should be measured against the body of relevant scientific knowledge. With respect to the Court's use of science more generally, UC Hastings Dean David Faigman suggests that "[t]o the extent that taking facts seriously will accomplish anything, it is hoped that it will lead the Court to be more plainspoken about what the reasons for what it does."[472] Along similar lines, Professor Gary Melton hopes that challenging the scientific basis of developmental assumptions about children by the courts will promote "intellectual honesty" possibly forcing judges "to identify the real bases of their decisions."[473]

Constitutional cases must, in the first instance, be decided based on constitutional principles. Yet, where the Justices invoke characterizations of children's vulnerability to determine, for example, if a governmental purpose or means survives constitutional scrutiny, those characterizations must also be scrutinized. Concepts of children's vulnerability—as assertions of phenomena that exist in the real world—must rest on, and be measured against—the best available evidence.

472. FAIGMAN, CONSTITUTIONAL FICTIONS, *supra* note 13, at 185.
473. Melton, *supra* note 16, at 240–241.