Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children

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Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children

David J. Herring*

I. INTRODUCTION

A recent letter to the editor of the New York Times tells a story that, although tragic, is not unusual:

I recently encountered the case of a 6-year-old Hispanic girl named Judy, who has been with her foster mother since the age of 1 month. She had been immediately placed into foster care because traces of heroin were discovered in her blood at birth.

Shortly after Judy’s birth, her biological mother was incarcerated for two and a half years for the sale of drugs. Following her release from prison, Judy’s biological mother engaged her foster mother in a legal battle for custody of the child.

The case remained unresolved in the courts for three years, but custody was eventually granted to Judy’s biological mother. This 6-year-old continues to live with her foster mother, whom she loves very much and calls “mommy.” Judy visits with her biological mother each weekend, but she indicates she has no meaningful emotional connection with her. She dreads these get-togethers and adds that her biological mother frequently yells at her and hits her on the head and the arm (her foster mother has never used corporal punishment).

Next June (when Judy will be 7 years old), she will be permanently placed with her biological mother (whom she has never lived with). Judy’s foster mother said, tearfully, that “it feels like half of me is being ripped away.” Lately, Judy has

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been waking up in the night crying and feeling terrified about having to leave the only mother she’s known.¹

The Supreme Judicial Court of Maine described the equally unsettled life of a young boy in that state’s child welfare system:

Daniel C. was born August 4, 1971. . . . [His father was in prison and his mother was placed in a mental health facility soon after Daniel’s birth. The Department of Human Services sought termination of parental rights, but Daniel’s father contested the termination. At the termination hearing, the] District Court heard evidence that Daniel began to develop problems in 1979. Expert testimony indicated that Daniel experienced psychological and emotional problems due to anxiety concerning the lack of a permanent family relationship. These problems deepened over the next two years leading to a diagnosis in July of 1981 of anorexia nervosa. A psychiatrist who treated Daniel testified that this disorder had caused an abnormal drop in Daniel’s weight and that the condition could be fatal. After intensive treatment as well as reassurance that his foster parents were seeking to adopt him, Daniel began to improve. At the time of the termination [of parental rights] hearing, Daniel was 11 years old and had been in foster care since he was 15 months old, including eight and one-half years with the present foster family.²

These narratives provide insight into the all-too-typical functioning of state foster care systems and the trauma that many children experience while trapped in these systems for extended periods of time.³ Indeed, the children described above were luckier than many children placed in the foster care system because their foster care placements remained relatively stable.⁴ These accounts illustrate the widespread failure of state child welfare systems to implement reforms based on the goal of achieving timely, permanent placements for children.⁵ The weaknesses of the traditional justifications for implementing perma-

². In re Daniel C., 480 A.2d 766, 767-68 (Me. 1984).
⁴. See Tina L. Rzepnicki, Recidivism of Foster Children Returned to Their Own Homes: A Review and New Directions for Research, 61 SOC. SERV. REV. 56, 65 (1987) (citing foster care recidivism as a probable cause of the 14% increase in foster care entries between 1982 and 1983).
⁵. See Ilson, supra note 1, at A24 (concluding that the current foster care system often victimizes the very children it is supposed to protect).
Justifications for Permanency Planning

6. Permanency planning has been defined as “the systematic process of carrying out, within a brief time-limited period, a set of goal-directed activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers and the opportunity to establish life-time relationships.” Anthony N. Maluccio et al., Permanency Planning for Children: Concepts and Methods 5 (1986) (quoting Anthony N. Maluccio & Edith Fein, Permanency Planning: A Redefinition, 62 Child Welfare 195, 197 (1983)).

7. See infra part II.

8. See infra part III.

9. For the purposes of this Article, the term “legal decision-makers” refers to judges and attorneys who are involved directly, often daily, in counseling clients and making judicial decisions in civil child protection proceedings conducted within the juvenile dependency court system. The term does not include decision-makers at the legislative, administrative, or other public policy levels.

10. See infra part IV.

11. See infra part V.

12. See infra part VI.

permanency planning had one goal: to achieve timely, permanent placements for children.\textsuperscript{14} Social work concepts that grew out of this simple goal have had a profound effect on casework practice.\textsuperscript{15}

Public child welfare agencies now train caseworkers to: (1) address the child’s need for a stable, permanent home from the very beginning of the case;\textsuperscript{16} (2) formulate case service plans\textsuperscript{17} in a timely manner by identifying the parenting problems that brought the child to the welfare agency’s attention initially;\textsuperscript{18} (3) provide services to parents and children that are designed to achieve swift family reunion;\textsuperscript{19} and (4) review and revise case service plans periodically\textsuperscript{20} based on the parents’ progress or lack of progress toward solving the specifically identified parenting problems.\textsuperscript{21}

Caseworkers are now trained to reexamine the permanent placement goal regularly, throughout their work with the family.\textsuperscript{22} The caseworker’s ultimate goal is to achieve a safe, permanent placement for the child in a timely manner to meet the child’s developmental needs.\textsuperscript{23}

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\textsuperscript{15} Fein & Maluccio, supra note 13, at 336. The concept of permanency planning initiated during an Oregon study. \textit{Janet Lahti et al., Regional Research Institute for Human Servs., Portland State Univ.} (1978).

\textsuperscript{16} Fein & Maluccio, supra note 13, at 336-37.

\textsuperscript{17} See Rooney, supra note 3, at 153-55 (discussing several model projects and the goals of those projects).

\textsuperscript{18} A “case plan” is defined as a written document which includes, among other things, a discussion of the appropriateness of the type of home or institution in which a child is to be placed. 42 U.S.C. § 675(1)(A) (1988 & Supp. V 1993).

\textsuperscript{19} See Linda Katz, \textit{Effective Permanency Planning for Children in Foster Care}, 35 Soc. Work 220, 221 (1990) (discussing the practice of providing services to parents, forming contracts with parents, and visiting parents to check their progress).

\textsuperscript{20} Rzepnicki, supra note 4, at 58.


\textsuperscript{22} Mark Hardin, \textit{Judicial Implementation of Permanency Planning Reform: One Court That Works 40-42} (1992); see Joan Barthel, \textit{For Children’s Sake: The Promise of Family Preservation} (Edna McConnell Clark Foundation 1992) (evaluating family preservation movement); Katz, supra note 18, at 221 (listing methods and goals of permanency planning); Maluccio et al., supra note 6, at 3-13. See generally Linda Katz, \textit{Seeing Kids Through to Permanence: Courtwise} (1988) (suggesting a partnership between social agencies and lawyers to effectuate successful case planning). Although the effectiveness of family preservation programs has been questioned by several recent studies, these programs have grown at a rapid pace. Barthel, supra.

\textsuperscript{23} See Maluccio et al., supra note 6, at 66-76; Katz, supra note 18, at 226.
Permanent placements include, in order of preference, reunification with biological parents, adoption, legal guardianship, or formally planned long-term foster care.\textsuperscript{24} According to permanency planning principles, long-term placements are preferred to "temporary foster care,"\textsuperscript{25} and caseworkers should seek placements closest in form to a permanent, autonomous family.\textsuperscript{26}

In addition to changes in casework practice, permanency planning concepts brought about fundamental changes in child welfare laws. The 1980 enactment of the federal Adoption Assistance and Child Welfare Act (the "CWA"),\textsuperscript{27} indicated the power of permanency planning concepts in the legislative arena. Congress enacted the CWA (concluding that timely permanent placement could become a reality).

One commentator has delineated the time frames in which children need to be placed permanently. Michael S. Wald, \textit{State Intervention on Behalf of "Neglected" Children: Standard for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights}, \textit{28 Stan. L. Rev.} 623, 690-91 (1976). Professor Michael Wald, after reviewing relevant literature from the field of child development psychology, concluded that children under three years of age require permanent placements within six months of removal from the parental home, whereas children three years of age and older require permanent placements within one year of removal. \textit{Id.}


One commentator has questioned the need for complete severance of parental rights (including all visitation rights) for children who cannot be returned to the custody of their parents within these time frames. Marsha Garrison, \textit{Why Terminate Parental Rights?}, \textit{35 Stan. L. Rev.} 423 (1983) [hereinafter Garrison, Parental Rights]. However, there is general agreement concerning the children's needs for permanent placements within a time period that meets their developmental needs. \textit{Id.} at 424; \textit{see also} Marsha Garrison, \textit{Child Welfare Decisionmaking: In Search of the Least Drastic Alternative}, \textit{75 Geo. L.J.} 1745, 1821-26 (1987) [hereinafter Garrison, Child Welfare Decisionmaking] (proposing automatic initiation of termination petition after three years in placement).

\textsuperscript{24} \textit{See} MALUCCIO ET AL., \textit{supra} note 6, at 5.

\textsuperscript{25} For the purposes of this Article, the term "temporary foster care" means the placement of a child in foster care intended and designed to be temporary. In this regard, the official plan of the state child welfare agency is either to move the child out of the foster care placement as soon as it is possible to return the child to a biological parent, or to place the child in an adoptive home. Temporary foster care does not include placement in foster care that is officially planned to last until the child becomes an adult. This type of formally planned long-term foster care is a type of low priority permanent placement. \textit{See} PAUL D. STEINHAUER, \textit{The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care} 220-32 (1991).

\textsuperscript{26} \textit{See} MALUCCIO ET AL., \textit{supra} note 6, at 47-48.

after hearing extensive testimony on the phenomenon of “foster care drift”\textsuperscript{28} and the harm that results to children in such placements.\textsuperscript{29} Permanency planning concepts aimed at eliminating or minimizing foster care drift provided the basis for many of the major components of the CWA.\textsuperscript{30}

Under the CWA, a state is eligible for federal funds for foster care expenses only if the Secretary of Health and Human Services (“HHS”) has approved the state’s child services plan.\textsuperscript{31} A state plan must include a provision assuring “that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.”\textsuperscript{32}

A state plan must also provide for the development of a “case plan”\textsuperscript{33} and a “case review system”\textsuperscript{34} for each child receiving foster care maintenance payments.\textsuperscript{35} The caseworker must develop a case plan which assures that each child receives proper care and that appropriate services are provided to the original parents, the child, and the foster parents.\textsuperscript{36} The case plan should provide services geared toward improving the conditions in the original family home so the child can return to that home.\textsuperscript{37} Alternatively, if return is not possible, the case plan must arrange for a timely, permanent placement for the child.\textsuperscript{38}

During a case review, a reviewing tribunal must determine the continuing need for an out-of-home placement, the appropriateness of the current placement, the extent of compliance with the case plan, and the progress made toward alleviating or mitigating the problems which


\textsuperscript{30}See MALUCCIO ET AL., supra note 6, at 21; Fein & Maluccio, supra note 13, at 336; Pelton, supra note 13, at 337; Rooney, supra note 3, at 152.


\textsuperscript{32}Id. § 671(a)(15).

\textsuperscript{33}See supra note 17 for the definition of case plan.

\textsuperscript{34}The “case review system” is defined as a procedure for assuring that each child has a case plan that is periodically reviewed. 42 U.S.C. § 675(5)(A) (1988).


\textsuperscript{36}Id. § 675(1).

\textsuperscript{37}Id.

\textsuperscript{38}Id.
led to the out-of-home placement. Reviewing tribunals must also set a target date by which the child should be returned to the parental home, freed for adoption, or placed with a permanent legal guardian.

Case review systems must also ensure that every child in state foster care receives a dispositional hearing held by an appropriate state court or administrative body. Dispositional hearings must occur within eighteen months of the child’s removal from the parental home and periodically thereafter. The tribunal conducting the hearing must determine the child’s future placement. The child’s future placement could include a return to the parental home; a continuation of foster care for a specified period of time; an adoption; or, as a result of a child’s special needs or particular circumstances, placement in a permanent or long-term foster home.

When courts attempted to interpret and implement some of the major permanency planning components included in the CWA, substantial ambiguities in the legislation were discovered. For example, neither the CWA nor subsequently issued HHS regulations define the term “reasonable efforts.” Moreover, the CWA failed to propose guidelines for judicial enforcement of the reasonable efforts requirement. The CWA also allowed the “permanent” decision required at the eighteen-month court hearing to include continuation of foster care for an undefined “specified period” of time. Despite these ambiguities, the CWA clearly aims for the elimination of foster care drift.

Some state legislatures, following the lead of Congress, incorporated permanency planning concepts into state child welfare laws. For example, Michigan adopted a statutory scheme that requires: (1) judicial examination of agency efforts at each stage of a child welfare proceeding; (2) return of the child to a parent’s custody if the parent’s home could be made reasonably safe through the provision of services; (3) detailed case plans; (4) three-month judicial review hearings; and

39. Id. § 675(5)(B).
40. Id.
41. Id. § 675(5)(C). The CWA specifically allows state courts to appoint or approve an administrative body to perform the dispositional hearing. Id.
42. Id.
43. Id.
44. Id.
46. Herring, supra note 28, at 152-55; Shotton, supra note 13, at 226-27.
47. 42 U.S.C. § 675(5)(C).
(5) a judicial permanency hearing that must be conducted within the first year of the child's removal from parental custody. Moreover, Michigan law specifically requires a court to make appropriate “permanent” decisions at the permanency hearing.

Despite the advancements of social work practice and legislative reform based on permanency planning concepts, children still languish in temporary foster care placements. The foster care population has grown dramatically, while the average length of stay in temporary foster care placements exceeds two years in many jurisdictions. In a


49. Id. § 712A.19a(4)-(6). The court has several options at the permanency hearing. First, if the court determines that returning the child to the parental home would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the court must order the child returned to the parental home. Id. § 712A.19a(4). Second, if the court finds that the child would face a substantial risk of harm if placed in the parental home, the court must order the state child welfare agency to file a petition seeking termination of parental rights within 42 days. Id. § 712A.19a(5). However, if the state's child welfare agency demonstrates that termination of parental rights is clearly not in the best interests of the child, the court can either order that the child be placed in foster care on a long-term basis or order the continuation of the child's temporary foster care placement for a limited, expressly stated, period of time. Id. § 712A.19a(5)-(6).

50. David J. Herring, Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study, 24 U. Tol. L. Rev. 603, 606, 619 & n.65, 620, 670-71 (1993). The number of children in foster care has increased dramatically from 280,000 children at the end of fiscal year 1986 to 407,000 children at the end of fiscal year 1990. House Comm. on Ways & Means, 103d Cong., 2d Sess., Overview of Entitlement Programs: 1994 Green Book 640 tbl. #14-14 (1994) [hereinafter Green Book]. This increase has continued, with 442,000 children living in foster care placements at the end of fiscal year 1992. Id. The phenomenon of foster care drift caused by the failure of the child welfare system to achieve timely permanent placements for children living in temporary foster care placements has been well documented. A New York adoption study revealed that in 1989, a child, on average, spent 4.6 years in foster care before being eligible for adoption. Debra Ratterman, Termination Barriers: Speeding Adoption in New York State Through Reducing Delays in Termination of Parental Rights Cases at iii (1991); see also Permanency Planning Task Force Court Appointed Special Advocates Subcommittee, Demographics of Permanency in Allegheny County, Pennsylvania (1992) (reporting that of the children living in foster care in Allegheny County, Pittsburgh, Pennsylvania, 44% had been in foster care for more than two years); Voluntary Cooperative Information System & American Public Welfare Association, Characteristics of Children in Substitute and Adoptive Care: A Statistical Summary of the VCIS National Child Welfare Database 116-17 (1993) [hereinafter VCIS Characteristics 1993] (summarizing statistics showing that by the end of fiscal year 1989, 39.5% of the children living in substitute care had been in care for more than two years, 15.5% had been in care between two and three years, 13.4% had been in care between three and five years, and 10.6% had been in care five years or more); Katrine Ames et al., Fostering the Family: An Intensive Effort to Keep Kids with Parents, Newsweek, June 22, 1992, at 64 (revealing that a child in Alabama spends an average of 35 months in foster care).
very real sense, the permanency planning reform movement failed to achieve its goals in the trenches of the child welfare system. As elaborated upon in the next two sections, this failure can be attributed to the perception by legal decision-makers of weaknesses in the traditional justifications for implementing permanency planning concepts.51

III. TRADITIONAL JUSTIFICATIONS FOR PERMANENCY PLANNING

Integrating permanency planning concepts into both social work practice and child welfare laws has several traditional justifications. Permanency planning concepts arose out of the fields of social work and child psychology; therefore, justifications based on human service and psychological principles dominate.52 An examination of the scholarly works in these fields, as well as child welfare law, reveals the following traditional justifications.

A. Child Development Principles as a Justification for Permanency Planning

A primary basis for implementing permanency planning concepts arises from child development principles.53 Child development scholars developed an extensive body of theoretical work concerning the harm children may suffer while placed in unplanned long-term foster care.54 Commentators theorize that children left in lengthy "temporary" foster care placements have difficulty forming the committed, trusting relationships necessary for healthy development into adequately functioning adults.55 Although empirical studies initially validated these theories, subsequent studies ultimately failed to validate

51. See supra note 9 for a definition of "legal decision-makers."
52. See Fein & Maluccio, supra note 13, at 335-37. See generally MALUCCIO ET AL., supra note 6, at 3-30 (discussing the development of permanency planning); Pelton, supra note 13, at 337-38 (discussing the evolution of permanency planning and the failure of permanency planning); Rooney, supra note 3, at 152-55 (discussing the goals and achievements of permanency planning); Rzepnicki, supra note 4, at 56-58 (discussing the problems and changes in the foster care system).
53. See Fein & Maluccio, supra note 13, at 337. See generally MALUCCIO ET AL., supra note 6, at 7-8; Pelton, supra note 13, at 337 (discussing permanency planning as evolving from the belief that children need a permanent home); Rzepnicki, supra note 4, at 57 (discussing the problems of foster care).
54. See Wald, supra note 23, at 667-69.
55. Id. See Herring, supra note 28, at 146-50 (relating that recent empirical studies indicate that unplanned long-term foster care placements result in worse developmental outcomes for children than adoption or other planned permanent placements); Wald, supra note 23, at 669-72 (discussing short-term and long-term harms).
this justification for permanency planning concepts.56

For instance, by the mid-1970s, studies seemed to indicate that children may suffer significant developmental harm in temporary foster care placements.57 The strongest evidence of harm arose in cases where states repeatedly moved children between foster homes.58 These studies demonstrated that the inability of children to form attachments to others had a negative impact on their healthy development.59 Even this strong evidence was, however, equivocal; subsequent empirical studies indicated that children did not necessarily suffer significant developmental harm from temporary foster care placements.60

Despite this lack of strong empirical support, many commentators perceive a real risk of developmental harm resulting from unplanned lengthy foster care placements.61 The official purpose and the known realities of the foster care system reinforce this perception. The main purpose of foster care is to provide only temporary care for a child who must be removed from parental custody.62 The child welfare agency’s ultimate goal is to reunite the child and the biological parents.63 In reality, therefore, agencies do not utilize foster care to provide the child with a permanent substitute family. Instead, agencies use foster care to provide the child with a temporary, family-like living situation that meets the child’s basic64 needs.65

57. See Wald, supra note 23, at 669-72 (discussing short-term and long-term harms).
58. See id. at 671.
61. The strength of these perceptions led to profound reforms in child welfare policy and practice during the 1980s. See Garrison, Child Welfare Decisionmaking, supra note 23, at 1758-62; Shotton, supra note 13, at 224-25.
62. Maluccio et al., supra note 6, at 5.
63. See id.
64. Basic needs include essentials such as shelter, clothing, and food. Joseph Goldstein et al., Beyond the Best Interests of the Child 24 (1973).
This overall purpose of foster care is evident in mandatory foster parent training programs: child welfare agencies train foster parents to facilitate the children's reunion with their biological families. This facilitation role may not involve actual efforts to assist the biological parents, but it certainly requires foster parents to maintain a certain psychological distance from the foster child. As a general rule, child welfare agencies instruct foster parents to avoid forming the desire to maintain a long-term relationship with the child. In child welfare agency language, the foster parent is a "contract service provider," not a parent.

The purpose and realities of foster care placements, viewed in conjunction with child development theory, result in a perceived need to limit the time a child spends in temporary foster care placements. Based on child development information, the general belief is that a child must be placed in a family that has made a permanent commitment to the child in time to meet the child’s developmental needs. Hence, child development principles provide a powerful justification for implementing permanency planning concepts despite the lack of empirical evidence. This justification is strengthened by legal scholars’ reliance on child development principles in their comments on child welfare practices and law reform.

B. Social Work Practice Concepts as a Justification for Permanency Planning

Another customary justification for permanency planning is that implementing positive changes in social work practice would result from permanency planning concepts: caseworkers would be required

66. Skoler, supra note 65, at 357.
67. See GOLDSTEIN ET AL., supra note 64, at 23-24.
68. Id. at 24.
69. See id. at 23-26.
70. For an explanation of child development theory, see supra notes 53-69 and accompanying text.
71. See generally JOHN BOWLBY, ATTACHMENT AND LOSS (1969) (establishing a theory of human and child psychology); VERA I. FAHBERG, A CHILD'S JOURNEY THROUGH PLACEMENT 67-140 (1991) (discussing the need for stable relationships throughout a child’s development); GOLDSTEIN ET AL., supra note 64, at 31-49 (discussing child development in the context of the impact of a proposed child placement system).
72. See GOLDSTEIN ET AL., supra note 64, at 13-15 (discussing parental needs of children).
73. See, e.g., Robert H. Mnookin, Foster Care—In Whose Best Interests?, 43 HARV. EDUC. REV. 599, 622-26 (1973); Wald, supra note 23, at 644-46; Musewicz, supra note 45, at 647-74.
to address a child’s need for a permanent home from the very beginning of a case. Permanency planning concepts require governmental action prior to an actual incident of child maltreatment. Preferably, this action would occur at the first indication of a substantial risk of significant parenting problems, or when a parent requests assistance. A major component of implementing permanency planning concepts is creating services designed to prevent child maltreatment.

Once an incident of child maltreatment occurs, the assigned caseworker must assess the biological family thoroughly. Based on this assessment, the caseworker aggressively attempts to fashion specific, targeted services designed to avoid the need to remove the child from the parental home or to allow for swift reunion of the family if removal is mandated.

Based on the presumption that the biological family is the primary and most appropriate permanent placement for the child, permanency planning concepts necessitate services designed for family preservation. Thus, under permanency planning concepts, the caseworker first must work intensely to formulate a case-specific service plan.

The caseworker next must determine whether the identified parenting problems, when addressed by appropriate and available services, nevertheless pose a substantial risk of harm to the child. If this risk exists, the child must be removed from the parental home.

The caseworker must then continually assess the success or failure of the services being provided. If the services successfully lower the child’s risk of harm to an acceptable level, the caseworker must ensure

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74. See Katz, supra note 18, at 221.
75. Fein & Maluccio, supra note 13, at 338-39.
76. Id.; see MALUCCIO ET AL., supra note 6, at 32-34; Katz, supra note 18, at 220-21.
77. For the purposes of this Article, assume that incidents of child maltreatment occur when the child is living with one or both biological parents. Although this is certainly not always the case in child welfare matters, this assumption is used for two reasons. First, it is the most typical situation confronted in child welfare practice. Second, it simplifies the discussion of permanency planning concepts by avoiding the situation in which a child has a “psychological parent” who is not a biological parent. Thus, when the term “biological family” is used, assume that the biological parent or parents within this family are also the child’s psychological parent or parents. See generally GOLDSTEIN ET AL., supra note 64, at 9-27 (discussing several different types of parent-child relationships).
79. See Katz, supra note 18, at 221.
80. See id. at 221, 224-26.
81. MALUCCIO ET AL., supra note 6, at 20-30.
82. Id.
83. Id.
the child’s swift return to the parental home.\textsuperscript{84} If the services are unsuccessful, the caseworker must aggressively move toward another permanent placement for the child in time to meet the child’s developmental needs.\textsuperscript{85} Therefore, following permanency planning guidelines, the public child welfare agency must develop a broad range of quality programs. These programs should provide intense support and reunion services to troubled families in a timely manner.\textsuperscript{86}

Many textbooks in the social work field now emphasize permanency planning because these social work practice principles are comprehensive and beneficial.\textsuperscript{87} Permanency planning concepts provide a framework for a very proactive, positive child welfare agency and caseworker role. The desire to realize this positive role provides a strong rationale for adopting and implementing permanency planning concepts.

\textbf{C. Financial Implications as a Justification for Permanency Planning}

A third justification for permanency planning arises from the financial implications of implementing permanency planning concepts. Commentators point to the potential cost savings that could result from comprehensive implementation of permanency planning.\textsuperscript{88} These cost savings are a product of the predicted reduction in foster care expenses.\textsuperscript{89} Placing a child in foster care costs between $10,000 and $20,000 a year, including assignable administrative costs.\textsuperscript{90} Applying permanency planning concepts will significantly reduce the cost of foster care because implementation will arguably result in a reduction of the total number of days children will spend in foster care.\textsuperscript{91}

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84. Id.  
85. Id.  
86. Id. at 207-23; Herring, supra note 50, at 624-34.  
88. See Rooney, supra note 3, at 155-56.  
89. Id. at 156.  
90. See Herring, supra note 50, at 618 n.61.  
91. See Ratterman, supra note 50, at 27-29; Herring, supra note 50, at 662-71. The total number of days in foster care will be reduced by preventing some initial foster care placements, and through swift reunification of biological families. Herring, supra note 50, at 662.
Researchers have performed numerous cost/benefit studies on the effects of implementing various permanency planning components. These studies address a broad range of reforms based on permanency planning concepts. Family preservation programs have received the most attention. Early studies indicate that despite increased costs incurred in hiring more caseworkers to implement family preservation programs, the offsetting foster care savings make these programs extremely cost-effective. The potential savings provide a powerful justification for implementing permanency planning concepts. Policy and budgetary decision-makers, such as child welfare agency administrators and legislators, are especially persuaded by this financial justification.

D. Preservation of Minority Families as a Justification for Permanency Planning

A fourth justification arises from the racial makeup of children and families involved in the public child welfare system. Families of color are disproportionately represented in the child welfare system. Nationwide, African-American children comprise 14.6% of the child population; however, 36.5% of the children placed in foster care are

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92. BARTHEL, supra note 21, at 15, 45; Herring, supra note 50, at 662-71.
93. Reforms range from intensive family preservation programs to models of legal representation for child welfare agencies. See BARTHEL, supra note 21, at 15, 45; RATTERMAN, supra note 50, at 5-25 (noting that, among other reforms, the child welfare agency hired a full-time “permanency planning specialist”).
94. BARTHEL, supra note 21, at 15, 45; RATTERMAN, supra note 50, at iii-v; Herring, supra note 50, at 662-71.
95. See BARTHEL, supra note 21, at 45.
96. Id. at 15, 45-48. But see Fein & Maluccio, supra note 13, at 339. “Recent studies in California, New Jersey, and elsewhere show mixed results regarding the effectiveness of family preservation services in preventing out-of-home placement.” Id. at 339 (footnote omitted).
97. In fact, a number of commentators have argued that this powerful financial justification has led to an inappropriate, across-the-board adoption of family preservation and other preventive services. E.g., Fein & Maluccio, supra note 13, at 339. As Fein and Maluccio state:

Family preservation and family resource services for families whose children are at imminent threat of removal have been popular prescriptions for the crisis in numbers faced by the state agencies. Their justification has been their cost-effectiveness in reducing days in foster care. But without adequate funding, these solutions remain short-term, crisis-oriented, and stopgap and lack ongoing support for families. We shall have to learn again, as if another lesson were needed, that under-funded services provide only short-term gain.

Id.
98. Id. at 338.
99. THE CHILDREN’S RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION, A FORCE FOR
African-American. This fact has led critics to charge the child welfare system with racial and cultural genocide at worst and cultural bias and ignorance at best.

A child welfare system based on permanency planning concepts addresses these concerns quite well because implementing these concepts often allows the child to remain in the biological family. For example, the creation of a significant legal hurdle before removing a child from parental custody obviously helps families of color remain intact. Similarly, intensive and comprehensive family support services also help preserve these families. In addition, permanency planning concepts can be used to support the idea of kinship placement if removal from the parental home becomes necessary. Through the use of kinship care, the extended family remains intact and provides an environment of stability and permanency for the child and the child’s culture.

Concern for the preservation of minority families, however, fails to support other permanency planning concepts. For example, permanency planning concepts mandate a timely adoption placement in order to meet the child’s developmental needs, when return to the biological parent is not possible. As a result, more children of color will become available for adoption. Due to the shortage of adoptive homes

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100. Id.; see also VCIS CHARACTERISTICS 1993, supra note 50, at 91-94. White children comprise 69.3% of all children in the United States and represent 45.5% of the children in foster care, while Latino/a children comprise 11.7% of all children in the United States and represent 10.1% of the children in foster care. CHILDREN’S RIGHTS PROJECT, supra note 99, at 11.


102. See supra note 24 and accompanying text.

103. “Kinship placement” requires caseworkers to first seek out-of-home placement with members of the biological family. Gray & Nybell, supra note 101, at 515-17. Permanency planning favors return to the nuclear family, but considers the extended family as the next best permanent placement. Id. at 517.

104. Fein & Maluccio, supra note 13, at 340; Stack, supra note 101, at 539-40, 546-47.

in the minority community, many minority children will be adopted by white parents. The National Association of Black Social Workers vehemently and vigorously opposes these transracial adoptions and, if agencies fully implement this component of permanency planning concepts, the allegations of cultural genocide may become stronger.

Therefore, the preservation of families of color provides strong support for implementing many, but not all, components of permanency planning concepts. The components which lead to timely family preservation or reunification and those which incorporate an extended definition of the family assist in the preservation of families of color. In contrast, the components which require timely permanent placements outside the extended biological family will lead to the opposite result.

Child development principles, social work practice concepts, financial implications, and the preservation of families of color provide the traditional justifications for implementing permanency planning. These justifications, compelling and persuasive for policy-level decision-makers as well as decision-makers involved in law reform efforts, have resulted in broad administrative and legislative reforms. The next part of this Article addresses the impact, or lack thereof, of these traditional justifications on legal decision-makers in their representative and judicial capacities.

IV. LEGAL DECISION-MAKERS AND TRADITIONAL JUSTIFICATIONS FOR PERMANENCY PLANNING: FAILURE TO IMPLEMENT

While permanency planning concepts seem to have prevailed in the effort to reform official policies and formal procedures within the child welfare system, the actual results of such reforms have been less than impressive. Several commentators have documented many aspects of this failure to implement permanency planning concepts effectively in day-to-day child welfare practice. This Part section discusses specific permanency planning ideas which have not been fully

106. Bartholet, supra note 101, at 95-96; Hogan & Siu, supra note 101, at 494; see Kennedy, supra note 101, at 39.

107. Hogan & Siu, supra note 101, at 496.

108. Id.

109. See supra part II.

110. Fein & Maluccio, supra note 13, at 337-39; Herring, supra note 28, at 179-94; Herring, supra note 50, at 603-12; Pelton, supra note 13, at 338; Shotton, supra note 13, at 225-33.
implemented in day-to-day child welfare practice. Additionally, this Part offers reasons why legal decision-makers and caseworkers have not implemented these concepts will be provided.

A. Permanency Planning Implementation: A Chronicle of Failure

Despite the traditional justifications for vigorously implementing permanency planning concepts, public child welfare agencies and legal decision-makers do not in fact apply these concepts in their daily work. Commentators have noted three areas in which permanency planning concepts are clearly not being implemented: (1) the statutory "reasonable efforts" requirement; (2) the formulation and monitoring of case-specific service plans; and (3) permanent family placement in a timely manner.

First and foremost, the enforcement of the reasonable efforts requirement in the CWA has been a significant failure. Some explain this failure by pointing to the lack of community services available or utilized in attempting to meet the CWA's reasonable efforts requirement. The primary responsibility for failure to enforce reasonable efforts, however, rests on state juvenile court judges. One survey of 1200 state judges revealed that only 44 ever found that the public child welfare agency failed to make reasonable efforts. In fact, many jurisdictions utilize preprinted court order forms which either include a statement that the public child welfare agency has made reasonable efforts, or merely require court personnel to check a box placed next to such a preprinted statement.

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111. See generally Seaberg, supra note 45 (discussing the reasonable efforts requirement under the CWA).
113. Id. at 338.
114. Id. at 338-39.
116. Id. at 237.
117. Herring, supra note 28, at 153-54; Shotton, supra note 13, at 227. As a clinical law teacher who represents children and parents in dependency proceedings in the Allegheny County, Pennsylvania Juvenile Court, the author witnesses the use of this type of preprinted court order daily. The United States Supreme Court has recently interpreted the CWA in a way that sanctions this lack of enforcement of the reasonable efforts requirement. Suter v. Artist M., 112 S. Ct. 1360 (1992). In Artist M., the Court held that there is no private cause of action based on the CWA's reasonable efforts requirement, and indicated that the only requirement of the CWA is that the state have an approved state plan in effect and on file with the Federal Department of Health and Human Services. Id. at 1369-70.
Another area of process deficiency involves the failure of caseworkers to formulate and monitor case service plans. Although caseworkers are supposed to formulate case service plans in a timely manner, caseworkers often ignore the deadlines imposed. Once caseworkers formulate case plans, they regularly fail to identify specific parenting problems. Frequently, the case service plan merely provides a laundry list of services not aimed at the specific parenting problems that gave rise to the particular case. The list of services often automatically includes parenting classes, a substance abuse evaluation, mental health counseling, housing assistance, education or job training, and visitation between child and parent. In implementing such a generalized case plan, the agency caseworker often fails to focus on the specific parenting problems present. Needed services are usually not provided intensively, or even

118. See, e.g., Herring, supra note 50, at 648 (discussing an empirical study in Jackson County, Michigan which revealed that, in 1989, despite state child welfare law mandating the development of an initial case service plan within 30 days of removal, case service plans were developed, on average, 92.2 days after removal).

119. In representing parents in civil child protection proceedings in Michigan and Pennsylvania for over seven years, the author has often been startled by caseworkers’ lack of knowledge concerning their parent-clients’ parenting problems and the causes of these problems. The most common scenario involves a child who has been physically or sexually abused by a client’s spouse or partner. In this type of situation, the caseworker will often assume that if the partner leaves the home, the problems will be solved. The case plan will usually consist of two requirements: (1) the partner must move out of the home; and (2) the parent must participate in a generic group of parenting skills programs. The caseworker will neither investigate the client’s mental health history, nor consider requesting that the client undergo a psychological evaluation and individual counseling. As the parent’s attorney, the author often has to counsel his client to seek these services in order to identify and treat the underlying problems in the parenting situation.

120. In representing state child welfare agencies, parents, and children in civil child protection proceedings in Michigan and Pennsylvania for over seven years, the author has regularly confronted these types of case service plans. Caseworkers overwhelmed with caseloads between 30 and 50 families regularly rely on general case plans that are not tailored to the problems of the specific parent, child, or family. Based on the author’s discussions with child welfare attorneys across the country, this problem appears typical.

121. See supra note 120.

122. In the author’s experience, generalized case plans often fail to provide the one or two services that would be crucial in allowing the parent to provide a safe home for a child. The author is often involved with parents whose primary problem is a lack of adequate housing. In these cases, the caseworker will often require the parent to contact a broad array of service providers, but will fail to provide any effective assistance in finding adequate housing. In addition, in cases where the parent’s primary problem is substance abuse, the caseworker will often fail to assist the parent in enrolling in a substance abuse program in a timely manner. While waiting to enter a program (often for periods exceeding six months), the parent will have to participate in many services that cannot be effective prior to substance abuse treatment.
Such poorly formulated and implemented case service plans render it impossible for courts to monitor the implementation and effectiveness of the plan.\textsuperscript{124} Courts lose focus on the true problems while monitoring a parent’s participation in the standard laundry list of services.\textsuperscript{125} As a result, courts often give up on monitoring case-specific problems as they review a large number of cases\textsuperscript{126} which all appear similar in terms of case service plans.\textsuperscript{127} If a court stays involved with a case, it will often penalize parents by requiring the completion of unnecessary services prior to reunification with the child.\textsuperscript{128}

Indeed, the failure of child welfare systems to achieve outcomes that are consistent with permanency planning concepts is startling. Over the past decade, the number of children in substitute care has risen from 262,000 children to 442,000 children.\textsuperscript{129} Some attribute this rise

\begin{itemize}
\item \textsuperscript{123} See supra note 122. Generalized case plans that require the caseworker to provide a broad array of services to every client exacerbate the problem of overworked and overloaded caseworkers. Instead of efficiently and intensely providing only those services that are necessary to address the specific parenting problems in the case, the caseworker, on paper, is required to expend substantial effort in providing numerous, unnecessary services.
\item \textsuperscript{124} Based on the author’s experiences as a child welfare attorney in juvenile courts in urban areas, judges must manage dockets that require the review of up to 60 cases each day. In such circumstances, judges can spend approximately 10 to 20 minutes reviewing each case. These short hearings make it extremely difficult for judges to review well-drafted, efficient case plans in a comprehensive or rigorous manner. When case plans include a general laundry list of services that are not tailored to the specific parenting problems present in the case, comprehensive and rigorous review becomes an impossibility.
\item \textsuperscript{125} See supra note 124.
\item \textsuperscript{126} The author has witnessed this judicial response directly in his child welfare law practice in Pittsburgh, Pennsylvania. The juvenile court judges regularly fail to include express provisions in their court orders concerning parent/child visitation and services for a parent. A typical court order will include one sentence that applies to the specific case before the court. The sentence will address only the issue of the child’s placement (e.g., “child to remain in foster care with renew in six months”). In some cases the judges include express provisions for services for children (e.g., individual psychological counseling, or a medical evaluation), but the judges rarely address additional issues in their court orders. In this author’s opinion, the judges’ lack of initiative to require case-specific plans is fueled by their perception that caseworkers are only capable of developing general, uniform lists of services required in every case.
\item \textsuperscript{127} See supra note 126.
\item \textsuperscript{128} This has been a common problem confronted by the clients the author represents in civil child protection matters. Judges who have not been able to review specific cases comprehensively and rigorously are naturally reluctant to return a child to a parent. This reluctance results in higher hurdles to reunification being raised as a case continues in the court system.
\item \textsuperscript{129} See GREEN BOOK, supra note 50, at 640 tbl. #14-14.
\end{itemize}
to the rise in crack cocaine use by young women.\textsuperscript{130} Thus, the increase in foster care placements could be seen as less a failure to implement permanency planning concepts and more a result of social phenomena that exist independent of the public child welfare system.\textsuperscript{131}

To some extent, however, the failure to create widely available comprehensive drug treatment programs designed to meet the special needs of young women and their children is part of the failure to implement permanency planning concepts.\textsuperscript{132} Likewise, the failure of agencies and courts to investigate and assess drug-using parents to determine whether they can provide adequate care for their children constitutes a failure to understand and implement permanency planning concepts.\textsuperscript{133} Instead, agencies and courts often use a knee-jerk approach to drug-using parents which results in automatic removal of children from parental custody.\textsuperscript{134}

Despite attempts to attribute the rise in foster care placements to drug abuse, the available statistics concerning the average length of time children spend in temporary foster care placements reveal the failure to implement permanency planning concepts effectively. Nationwide, approximately forty percent of the children placed in substitute care spend over two years in continuous placement outside the parental home, with the average length of time being much longer in many

\begin{itemize}
\item \textsuperscript{131} See supra note 130.
\item \textsuperscript{132} See generally Beyond Rhetoric, supra note 130, at 289-96 (noting a lack of services designed to prevent removal; urging a renewed commitment to permanency planning; and recommending the development of community-based drug and alcohol treatment programs for parents, pregnant women, and children); Fein & Maluccio, supra note 13, at 338-39 (noting that permanency planning efforts should begin before a child is removed, and then noting the slow growth and lack of effectiveness of services designed to prevent removal).
\item \textsuperscript{134} See id. Automatic removal of children based on parental drug abuse does not occur in many urban jurisdictions. This is mainly due to the flood of those cases rather than improved investigation and assessment procedures. Based on the author's experiences in juvenile courts in Detroit, Michigan, and Pittsburgh, Pennsylvania, agency administrators and juvenile court judges realize that they cannot remove every child whose parent uses drugs. But rather than investigate and assess these cases for the possible provision of preventive services, the system takes no action. This approach contradicts permanency planning concepts.
\end{itemize}
jurisdictions. These statistics indicate the failure of actors within the child welfare system to make adequate efforts to rehabilitate parents in a timely manner. Although the statistics only indicate the failure to make adequate efforts, it is clear that caseworkers fail to achieve timely permanent placements for children whose parents cannot be rehabilitated in a timely manner.

Despite system reforms based on permanency planning concepts, a significant number of children are languishing in temporary foster care placements. Public child welfare agencies fail to recommend, and state juvenile courts fail to order, adoption placements, legal guardianship placements, or even formally recognized long-term foster care placements in a timely manner. Despite the traditional justifications for the energetic implementation of permanency planning concepts, the procedures actually utilized and the results actually achieved in child welfare cases vividly illustrate the failure to implement permanency planning concepts in any serious way in the trenches of the child welfare system.

B. Legal Decision-Makers' Failure To Implement Permanency Planning

1. Background

Child welfare practitioners and scholars have provided several reasons for the failure to implement permanency planning concepts. First, those working in the system attribute the failure to utilize family support and child welfare services to the lack of money allocated for these services and the lack of coordination of the services available. Second, although policymakers may grasp permanency planning concepts, agency caseworkers are not fully trained and do not fully

135. See State of America's Children, supra note 130, at 23 (relating that the median length of time infants (children who entered foster care before one year of age) spent in continuous foster care placement was 43.4 months in New York, 33.2 months in Illinois, 25.3 months in California); see supra note 50.


137. Of course, these statistics merely indicate the failure of agency and judicial personnel to make adequate efforts, because even intensive efforts may fail as a result of parental unwillingness or inability to respond to rehabilitative efforts.

138. See Beyond Rhetoric, supra note 130, at 281-309; Mark Hardin, Establishing a Core of Services for Families Subject to State Intervention at iii-xi, 1 (1992); State of America's Children, supra note 130, at 45-51; Children Can't Wait 1-12 (Katherine Cahn & Paul Johnson eds., 1993); Fein & Maluccio, supra note 13, at 344.
understand permanency planning concepts. Without a comprehensive understanding of permanency planning concepts, caseworkers are unable to implement these concepts in their daily practices and decisions. Third, caseworkers claim that biological parents’ rights are overemphasized. Practitioners perceive parental rights as a substantial, if not insurmountable, barrier to achieving timely permanent placements for children.

All of these reasons interrelate. Inadequate resource allocation often results in inadequate training. Inadequate training can lead to confusion and misconceptions about the scope and effect of a biological parent’s legal rights to a child. Misconceptions about parental rights can lead to a sense of hopelessness that works to frustrate the full implementation of permanency planning concepts.

Although agency caseworkers may use the above reasons to explain their failure to implement permanency planning concepts actively, legal decision-makers, both attorneys and judges, cannot persuasively utilize these reasons to explain their own failure to implement permanency planning concepts. Although legal decision-makers face inadequate funding just as agency caseworkers do, the consequence of inadequate resources on the legal decision-maker is simply an explosion in the number of cases handled by each decision-maker. The explosion of caseloads should not preclude the aggressive implementation of permanency planning concepts within the court system.


140. See generally Musewicz, supra note 45, at 653-61 (arguing that parental rights are often favored by courts even when they conflict with the child’s best interests). The author is often confronted by caseworkers who are frustrated, and sometimes outraged, at the legal system due to its perceived overprotection of parental rights. Although they generally realize that the courts will sanction their interventions in families, caseworkers often do not understand the courts’ insistence on the reunification of children and birth parents, or the substantial hurdles they confront when seeking termination of parental rights. These caseworker perceptions are not surprising since caseworkers receive very little legal consultation or advocacy training. See Herring, supra note 50, at 603-30.

141. See supra note 140.

142. For example, the author has learned that in Allegheny County, Pennsylvania, Juvenile Court judges handle up to 60 dependency cases each day. Attorneys representing children handle approximately 800 child clients, and each parent’s attorney represents approximately 500 parent clients. From the author’s discussions with other legal professionals across the nation, this situation is typical in most urban jurisdictions.
There are several isolated, but compelling, examples of judges and attorneys who have successfully implemented permanency planning concepts without a significant increase in resources. These isolated examples demonstrate the power of legal decision-makers to promote positive change single-handedly within the child welfare system. Moreover, these isolated examples indicate that rather than the need for more resources, the desirability of implementing permanency planning concepts needs to be acknowledged by legal decision-makers.

Furthermore, legal decision-makers, like agency caseworkers, may attempt to attribute their failure to inadequate training on permanency planning concepts. But unlike child welfare agency caseworkers who may not have received training in the field of social work, all lawyers and judges have received training in the law. By the very nature of the legal profession, lawyers and judges have a duty to familiarize themselves with applicable child welfare law when involved in this type of case. Even a cursory awareness of the pertinent federal and state laws leads to an awareness of permanency planning concepts and some of the traditional justifications for implementing the concepts.

143. Several isolated examples of judicial activism in the pursuit of achieving timely permanent placements for children demonstrate the ability of legal decision-makers to overcome current obstacles and effectively implement permanency planning concepts. See, e.g., GOODMAN & HURLEY, supra note 139, at 15 (describing efforts of Judge Richard Fitzgerald of Jefferson County, Kentucky to use the "reasonable efforts" requirement to ensure that appropriate permanency planning is accomplished for each child/family); HARDIN, supra note 21 (describing, in detail, a local court system designed to achieve timely permanent placements for children); Herring, supra note 50, at 658-59 (describing an activist judge who aggressively urges and compels all the parties and their attorneys to achieve timely permanent placements). In addition, attorneys actively representing the child welfare agency can assist in achieving timely permanent placement outcomes. See id. at 659-60. It should be noted that the implementation of permanency planning concepts will provide relief to overburdened court systems by efficiently moving cases through the court system in a timely manner. Id. In addition, with judicial guidance, implementing permanency planning concepts can result in the creative use of alternative dispute resolution techniques such as mediation, which can lead to a reduction in judicial caseloads. See GARY CRIPPEN, MAKING THE SYSTEM WORK: COURTS AS AGENTS OF ACCOUNTABILITY IN FAMILY AND JUVENILE CASES 20-21 (1993); Jessica Pearson et al., Mediation of Child Welfare Cases, 20 FAM. L.Q. 303, 317-20 (1986).

144. See, e.g., Herring, supra note 50, at 603-30.

145. For example, based on the author's experience in Allegheny County, Pennsylvania, many child welfare agency caseworkers have two-year associate's degrees in fields completely unrelated to social work or child psychology.

146. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(2) (1990) ("A judge shall be faithful to the law and maintain professional competence in it."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").
Consistent with this point, because all competent legal decision-makers should have knowledge of permanency planning concepts, they should not point to fear and confusion concerning the legal rights of biological parents as a reason for not implementing permanency planning.\textsuperscript{147} As competent legal professionals, they must be aware of achievable legal options for overcoming parental rights in a timely manner.\textsuperscript{148}

If these common reasons for explaining the failure to implement permanency planning concepts do not adequately explain the failure of legal decision-makers to actively implement permanency planning concepts, what explains this failure? The explanation may lie in the perceived weaknesses of the traditional justifications for implementing permanency planning concepts.

2. Perceived Weaknesses of Traditional Justifications

Child development principles, the basis for the first traditional justification,\textsuperscript{149} are compelling, but have not led to system-wide implementation of permanency planning concepts. Some attorneys and judges involved in child welfare matters have learned a great deal about the developmental benefits of timely permanency planning through the use of child welfare literature and expert testimony during their cases.\textsuperscript{150} This educational process has led to the implementation of permanency planning concepts in some cases.\textsuperscript{151} Such instances are isolated, however, and have not led to system-wide implementation of permanency planning concepts.

One major reason for the failure of child development principles to persuade legal decision-makers to implement permanency planning

\textsuperscript{147} \textit{Model Rules of Professional Conduct} Rule 1.1 (1983).

\textsuperscript{148} \textit{Id.} Legal decision-makers should be aware of options such as termination of parental rights with adoption, legal guardianship, or long-term foster care.

\textsuperscript{149} See \textit{supra} part III.A.

\textsuperscript{150} Based on the author's recent experiences in child dependency cases, legal decision-makers' exposure to child welfare literature and expert testimony has taught them the importance of permanency planning the healthy development of children. See \textit{Hardin, supra} note 21, at 1-17, 95-99; Patricia J. White, \textit{Courting Disaster: Permanency Planning for Children}, JUV. JUST., Spring/Summer 1994, at 15.

\textsuperscript{151} See, e.g., \textit{Herring, supra} note 50, at 632. In a termination of parental rights hearing, expert witnesses testified that under the best scenario, the parents would not be able to provide a home for their 11-month-old child within the next two years (the child had originally been removed from the parents' care at age five months due to severe physical abuse). \textit{In re McGath, No. 88078885-NA (Genesee County, Mich. P. Ct., May 16, 1989), aff'd in unpublished opinion, No. 118088 (Mich. Ct. App. 1989).} The court, in ordering termination of parental rights, found that this two-year period was well in excess of the reasonable period of time the child could safely wait for a permanent home in light of her developmental needs. \textit{Id.}
Justifications for Permanency Planning

concepts may lie in the failure to recognize all the legal rights at issue. Courts, while clearly recognizing the fundamental nature of a biological parent’s right to have custody of his or her child, have to date failed to recognize a child’s fundamental right to a permanent, stable living situation.\(^{152}\)

A more pragmatic reason for the failure of this justification probably arises from legal decision-makers’ perception of the risks and benefits involved in implementing permanency planning concepts. If vigorously implemented, permanency planning concepts require legal decision-makers to make hard decisions relatively early in a child welfare case, and thus often with incomplete information.\(^{153}\) They take the risk of returning a child to a parent’s custody, with the ever-present possibility that the child will be severely harmed and that their decisions will be scrutinized by the public.\(^{154}\) Alternatively, legal decision-makers must often make the emotionally difficult decision to sever a parent’s relationship to a child in some permanent manner.\(^{155}\) To avoid these risks and difficult decisions, legal decision-makers could choose to implement permanency planning concepts only in cases where expert witnesses guide their decisions.\(^{156}\) In these special


\(^{153}\) See Herring, supra note 28, at 155-58 (discussing the tendency of judges to find that the agency has made reasonable efforts based on incomplete or inadequate evidence, in order to allow removal).

\(^{154}\) Id. For an example of the publicity that can surround a judge who takes this type of risk (even in a case where the judge was forced to take this risk by an appellate court order), see Michael A. Fuoco, Dad Held in Death of Girl, 2, PITTSBURGH POST-GAZETTE, Mar. 10, 1994, at A13.

\(^{155}\) See Herring, supra note 28, at 155-58 (discussing the high standard of proving reasonable efforts that judges impose at a termination of parental rights hearing).

\(^{156}\) Based on the author’s experiences, this is a very real possibility. In Allegheny County, juvenile court judges have adopted the practice of requiring the child welfare agency to produce expert testimony at all hearings in which the agency is seeking an involuntary termination of parental rights. The judges rely extensively on the expert’s testimony when issuing an order terminating parental rights.
cases.\textsuperscript{157} Any blame for a bad decision can be transferred to expert witnesses.

Additionally, legal decision-makers often think nothing has to be done, based on their belief that children are relatively “safe” in foster care placements, thus negating any need to move swiftly to resolve the case.\textsuperscript{158} Legal decision-makers, who are often not trained in child psychology, may have difficulty independently realizing the full extent of developmental harm that temporary foster care placements can pose.\textsuperscript{159} Because legal decision-makers are generally not trained in the disciplines on which the child development justification is based, it becomes easy for these decision-makers to sanction the continuation of a “temporary” foster care placement indefinitely—a placement which is perceived as “safe” for both the child and the legal decision-makers involved in the specific case.\textsuperscript{160}

Legal decision-makers have difficulty valuing the basis of the second traditional justification—social work practice.\textsuperscript{161} The dissonance between the fields of social work and law has been well-documented.\textsuperscript{162} Thus, the achievement of social work practice improvements do not provide legal decision-makers with a compelling reason to implement permanency planning concepts.

The third justification, financial implications of permanency planning,\textsuperscript{163} also fails to influence legal decision-makers. Legal decision-makers in the child welfare system do not preside over a public budget that provides funding for foster care placements. Until the crush of cases builds up to a point where additional attorney and judicial resources are necessary,\textsuperscript{164} the financial benefits of imple-
menting permanency planning concepts are hidden. Therefore, the financial implication justification does not provide legal decision-makers with a strong reason to implement permanency planning concepts in their individual cases.  

The fourth justification, the preservation of families of color, also may not provide legal decision-makers with a convincing reason for implementing permanency planning concepts. In particular, legal decision-makers may find it difficult or ineffective to argue that a system-wide failure is a basis for an individual case. For instance, even in class action suits brought on behalf of children in foster care, courts apply traditional legal doctrines and reject the children's claims of denial of equal protection. Nevertheless, the imbalanced racial makeup of families in the child welfare system does suggest some insights for exploring additional justifications for implementing permanency planning concepts.

The next section will explore additional justifications for implementing permanency planning concepts which are rooted in the basic principles of the American political system. Legal decision-makers may find these additional justifications more compelling than the traditional justifications. These new justifications, in combination with the traditional justifications, may finally compel legal decision-makers to take permanency planning concepts seriously in their daily to practices and decisions.

V. POLITICAL ROLES OF THE FAMILY: ADDITIONAL JUSTIFICATIONS FOR IMPLEMENTING PERMANENCY PLANNING CONCEPTS

Political roles for the family in American society provide the basis for additional justifications for the implementation of permanency planning concepts. An exploration of political roles seems appropriate in the public child welfare arena where the public intrudes into family hearings for 30 cases between the times of 9:30 a.m. and 3:00 p.m. In the author's experience, this capacity to handle huge caseloads creates a perception that adequate judicial and attorney resources exist within the child welfare system, and that the need for reform, such as the vigorous implementation of permanency planning concepts, is minimal.

165. See supra note 164.
166. See supra part III.D.
168. See supra notes 98-100 and accompanying text.
life directly and extensively. In addition, focusing on the political role of the family seems especially appropriate in light of recent critiques of the traditional role of the family in society. One commentator advances a "public family" theory, arguing that the "private" family has traditionally served a public or political role. Thus, this section will explore the political roles for the family within the American political system and the implications of state intervention in the family sphere.

In light of the convincing critiques of viewing the family as only serving a private role, this section will focus its search for additional justifications for implementing permanency planning concepts on the private family's role in securing the proper functioning of democratic processes. This focus is wise in light of the view—adopted by this Article—that the American political system, as provided for in the Constitution, is structured primarily to secure the viability and continuation of democratic processes, rather than to define and secure substantive rights. Under this view, in order for the justifications explored to provide compelling reasons for implementing permanency planning concepts based on the American political system, the justif-


170. Dailey, supra note 169, at 994-1008. Professor Dailey asserts that:

The alternative theory of the family developed in [Dailey's article] challenges the traditional view of the private domestic sphere that underlies the contemporary doctrine of constitutional privacy. This alternative view exists as a competing, subversive strand within both family history and constitutional case law. It argues that the modern family has never constituted a purely private institution, but has always been subject to state regulation and public control. This challenge to the received wisdom concerning the private nature of family life focuses on the extensive state involvement in the formation and structure of the family as well as on the family's political role in both facilitating and constraining governmental power.

_id_ at 994.

See also Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349 (1982) (discussing the fading distinction between the concepts of public and private); Martha Minow, "Forming Underneath Everything That Grows:" Toward a History of Family Law, 1985 Wis. L. Rev. 819 (1985) (challenging the traditional view that the role of women in American history did not extend beyond the private family sphere).

ications must be grounded in theories about the structuring and protection of the democratic process.

The scope of this section will be limited in two significant ways. First, this Article will not explore traditional constitutional legal doctrine to discover additional justifications for implementing permanency planning concepts because constitutional doctrines have failed to compel legal decision-makers to implement permanency planning concepts in making decisions in individual cases. Without constitutional recognition of permanency planning concepts, an exploration of constitutional legal doctrine would provide little assistance in discovering additional justifications for implementing permanency planning concepts.

Furthermore, this Article will not explore natural law principles to find justifications for permanency planning. Although commentators have identified some mystical natural law claims as sources of parental rights which is independent of the interests of children, these natural law principles do not provide a justification for permanency planning because of their severely limited usefulness and their focus on the

172. As mentioned earlier, the courts have consistently held that children do not have a recognized fundamental right to a timely, stable permanent placement. See supra note 152 and accompanying text.

173. In explaining this limitation, it must be noted that several legal commentators who have examined familial relationships and the applicable constitutional law principles have addressed a line of United States Supreme Court decisions which emphasize the rights of parents. See, e.g., Hafen, Children's Liberation, supra note 169, at 619-26 (discussing, among others, the decisions of Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); and Wisconsin v. Yoder, 406 U.S. 205 (1972)); see also Dailey, supra note 169 (discussing the constitutional principle of privacy along with some United States Supreme Court decisions); Barbara B. Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992) (discussing Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

In trying to identify the special interest of parents recognized by the Court, Hafen states:

It is quite possible that when family life is involved, some natural law attitudes linger, even in this age of sociological jurisprudence. . . . The bearing and raising of children has probably brought people into contact with some sense of the Infinite, the mysteries of the universe, or Nature—however one may express it—more than any other human experience. Thus, it is not surprising that common law judges refer to parental interests as "sacred," "natural," or "fundamental" rights.

Hafen, Children's Liberation, supra note 169, at 628.

Despite Hafen's identification of natural law as a possible basis for parental rights and family autonomy, the author will not explore natural law principles as a justification because of his opinion that natural law principles do not relate to or justify parental rights.

174. ELY, supra note 171, at 43-72 (stating that natural law principles are too general
rights of parents rather than those of children or families.\textsuperscript{175}

With these limitations in mind, this section will now examine four political roles of the family to determine whether any of these roles provides additional justifications for implementation of permanency planning concepts.

\textbf{A. The Family’s Role in Producing Good Citizens and Facilitating Government Power}

Numerous commentators have identified one political role of the family in American society: the family’s responsibility to produce citizens capable of participating in civil society and in political life.\textsuperscript{176} One commentator places this political role for the family at the base of the constitutional design of the American political system—a design aimed at securing the democratic process.\textsuperscript{177} In this political role, the family secures and facilitates the democratic process by developing children into citizens who can make the democratic process work as designed by the framers.\textsuperscript{178}
This political role of the family provides little in the way of justification for implementing permanency planning concepts. The permanency planning concept favoring placement within the biological family may actually be undermined by this political role. One could argue that “better” democratic citizens could result from a system that identified model parents and placed children with these parents at birth or at the first sign that placement within the biological family would not result in the development of a good citizen.

In such a system, a public body could develop criteria and standards to identify model parents to maximize the production of good democratic citizens. These criteria could encompass a wide range of personal characteristics of potential caretakers such as financial resources, personal hygiene, intellectual skills, interpersonal skills, and disciplinary techniques. Potential caretakers, who met the specified criteria, could then be sought, trained, reviewed, and approved in a way designed to optimize the production of good democratic citizens. This scenario undermines the strong priority for placing children within their biological families.

Justifications for implementing permanency planning concepts do not necessarily have to provide a defense for the current priority for placement within the biological family. Even if a system of assigned caretakers who lack a biological connection to the child was adopted, society could still maintain an autonomous, permanent family model of child care. This family model could be maintained if state intrusion extended only to the initial assignment of children to caretakers, with all subsequent intrusions strictly limited. This type of system could actually enhance permanency for children. If the public body emphasized standards and criteria indicating a high degree of long-term commitment to raising children, the assigned caretakers would likely be more committed to providing a permanent home for the children placed with them than would some of the children’s biological

179. This Article adopts a broad definition of the term “family,” slightly altering the definition used by James Fishkin. JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY 36-37 (1993). A “family” is a community composed of a child and one or more adults in a close affective relation which is expected to endure at least through childhood. Id. at 36. Such a family need not include adults with a biological connection to the child, and may be much more extended than the familiar nuclear family. Id. It need not include two parents of the opposite sex. Id.

180. The maintenance of this model could be somewhat undermined through any pre-placement training process for assigned “model” caretakers. Depending on the degree of indoctrination concerning parenting methods and skills, the training process could conceivably extend the effect of state intrusion well beyond the point of placement. Thus, a system of assigned caretakers could threaten the autonomy component of the autonomous, permanent family model of child care.
parents.\footnote{181} The political role of the family as a producer of good citizens does not, however, mandate the adoption of the autonomous, permanent assigned caretaker model described above. It does not dictate a family-type model at all. Instead, communal child care arrangements could theoretically produce good citizens.\footnote{182} These arrangements would exclude a family-type associational institution from a child’s life, and replace it with a community form of child care.

Although this communal arrangement could be quite “permanent” in some senses, such as physical location, it would not fulfill the underlying rationales of permanency planning concepts. Fundamentally, it would not provide the environment which allows children to form primary attachments with a few special, consistent, committed adult caretakers.\footnote{183} Under the best conditions, these communal child care arrangements would be analogous to a high-quality group home placement, which is one of the lowest priority placement options under permanency planning concepts.\footnote{184} In this publicly-run group home setting, caretakers would lack the autonomy and sovereignty necessary for an environment in which children can develop trusting and permanent attachments with primary caretakers.\footnote{185} Thus, the identified political role of the family in producing good citizens does not provide a powerful justification for implementing permanency planning concepts and may actually undermine the implementation of such concepts.

\footnote{181} The number of biological parents who would actually lose permanent custody of their children under a system of assigned caretakers depends on the standards and criteria established for caretakers. Since the majority of biological parents provide adequate care for their children in many ways and have made a long-term commitment to care for their children, most biological parents could become the assigned caretakers for their own children.


\footnote{184} Maluccio et al., supra note 6, at 47-49.

\footnote{185} Goldstein et al., supra note 64, at 31-52; Hafen, Children’s Liberation, supra note 169, at 651-52.
B. The Family's Role in Producing Socially Diverse Citizens as a Control On Majority Factions

Several commentators have identified a second political role for the family. Families "also serve to constrain state power by nurturing potential resistance to governmental views."¹⁸⁶ In serving this second identified political role, the family promotes social diversity and checks the monolithic authority of the majoritarian state.¹⁸⁷

Contemporary legal commentators have not explored this second role of the family within the American political system rigorously.¹⁸⁸ Nonetheless, the family's role of producing socially diverse citizens who can restrain state power provides interesting possibilities for developing additional justifications for implementing permanency planning concepts.

¹⁸⁶. Dailey, supra note 169, at 996-97; see also Hafen, Constitutional Status, supra note 169, at 480-81; Kathleen M. Sullivan, Rainbow Republicanism, 97 YALE L.J. 1713, 1722-23 (1988). Professor Dailey states:

As the Supreme Court has repeatedly reaffirmed, "the child is not the mere creature of the State." Our liberal democracy rejects the conformity resulting from direct state indoctrination; instead it requires intermediate institutions to initiate individuals into the political life of the state.

The family's role in nurturing the development of responsible civic individuals is not its only constitutional function. The family also serves the vital and unique function of instilling in children "the sense of belonging and having roots in a distinct tradition." These diverse "ways of life" promoted by differing family traditions in turn nourish our liberal political system. They exist, of course, in tension with the authority of the state, balancing the state's power with their potential threat of subversive resistance. As one commentator has described it, the family is the "sphere of private non-conformity."

The preservation of social diversity is a function which the state cannot assume without undermining the foundation of democratic liberty.

¹⁸⁷. See supra note 186.

¹⁸⁸. See Hafen, Constitutional Status, supra note 169, at 480-81; Wald, supra note 182, at 989-93. Most have glossed over this role of the family with a mere mention. Id. Even Professor Dailey, who describes this political role more fully, does not rely on this family role in setting forth her theory of family justice. Dailey, supra note 169, at 1023-24. In fact, she seems to abandon, and even undermine, this role for the family. See id.
1. Madison’s Faction Theory as a Justification for Permanency Planning

Social diversity is valued under liberal democratic principles, because it provides a constraint on state authority. James Madison adapted this component of democratic theory and put it to pragmatic use in *The Federalist No. 10*. Madison identified social diversity as a constraint on groups of citizens he defined as factions:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

Factions, by virtue of Madison’s definition, are negative forces in a civil democratic society.

Madison identified two characteristics of individuals that cause factions. First, an individual’s reasoning is fallible. Fallible reasoning leads people to form different opinions on issues. Due to individuals’ “self love,” they will develop a passion for their opinions, and form factions to see their opinions enforced. Second, individuals’ faculties differ. Madison asserted that the acquisition of property depends upon an individual’s faculties, and hence, differences in faculties lead to unequal distribution of property. Unequal distribution of property among individuals results in citizens with different interests. Citizens with similar economic interests form groups that pursue specific economic interests at the expense of the true interests of the community, thus potentially leading to factious action.

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189. *See David F. Epstein, The Political Theory of The Federalist 1-10* (1984); *see also supra* note 186.
192. *Id. at 123-24.
193. *Id.
194. *Id.
197. *Id.
198. *Id.; White, supra* note 195, at 59 (noting that Madison identified these differences in economic interests as the most common and durable source of factions.).
Madison asserted that factions were prevalent under the Articles of Confederation. He argued that “a factious spirit has tainted our public administration,” and that such a factious spirit constituted a mortal disease for popular governments. Madison observed that this factious spirit led to unsteadiness and injustice within the loose confederation of states established by the Articles of Confederation. Madison then explained that a more centralized, well-constructed, national Union could control the effects of factions.

Madison described in detail how the Federal Constitution would control the effects of factions. He began by identifying two ways to control the effects of majority factions: "Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number or local situation, unable to concert and carry into effect schemes of oppression." Hence, in order to control majority factions, obstacles must be constructed which will prevent the formation of these factions, or if a majority faction is formed, it must be so cumbersome that the difficulties render action

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200. Id. at 123. Madison noted:

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

201. Id. at 122-23.

202. Id. Madison looked at two possible ways to cure factions. Id. at 123. First, the government could destroy the liberty which is essential to the existence of factions. Id. Madison quickly rejected this method based on the notion that liberty is essential to political life, and that the cure would be worse than the disease of factions. Id. Second, the government could give every citizen the same opinions, passions, and interests. Id. Madison also ruled out this method as completely impracticable. Id. at 123-24.

203. Id. at 126-28.

204. Madison is most concerned with factions consisting of a majority of the citizens. Id. at 125-26. But under his definition, a faction may consist of either a majority or minority of the citizens. Id. at 125. Madison recognized that minority factions may exist and need to be controlled, but he believes they are relatively easy to control. Id. at 126. "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." Id. at 125. For Madison, the difficult case for a proponent of popular government is presented by a faction that manages to become a majority. WHITE, supra note 195, at 134. For a critique of Madison’s focus on majority factions and an argument that the control of minority factions is necessary within the present American political system, see Frank H. Easterbrook, The State of Madison’s Vision of the State: A Public Choice Perspective, 107 HARV. L. REV. 1328 (1994).

impracticable. Madison then explained how the large republic proposed in the federal Constitution would work to control factions through both of these methods.

First, in a large federal republic, a large number of citizens elects a small number of representatives. Madison asserted that this representative form of government would be more likely to thwart majority factions than a more direct, pure democracy. He based this assertion on his faith in the wisdom of the representatives chosen from, and chosen by, a relatively large group of citizens. Madison expressed hesitation in implicitly trusting elected representatives and recognized that large republics do not guarantee control of factions. Nevertheless, he believed that formation of a large republic was the best method of ensuring the election of proper guardians of the public weal.

Second, Madison argued that the large number of citizens and the extensive territory which would exist in a large republic could interfere with faction formation. The probability of citizens forming common

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206. See White, supra note 195, at 132-35.
207. The Federalist No. 10, supra note 190, at 126-27.
208. Id. at 127.
209. Id.
210. Id.
211. Madison clarified his doubts by asserting:

The effect of the [delegation of government to a small number of citizens elected by the rest] is, on the one hand, to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or by sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people.

Id. at 126.
212. Id. at 128. Madison did not view this control as adequate. See supra note 211. While fit representatives will actively work to achieve the public good, they will not sufficiently check the negative effects of factions. The Federalist No. 10, supra note 190, at 125. As David Epstein stated, “the diversity of parties is in Madison’s view the more important solution; its effect is to make each faction too small to successfully commit injustices.” Epstein, supra note 189, at 109.
213. The Federalist No. 10, supra note 190, at 127. Madison stated:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass
factious motives would be reduced because a large number of citizens would more likely have numerous distinct passions and interests. Even if the majority formed a common factious motive, a republic with citizens spread out over a wide geographic area would make it very difficult for a majority of citizens to discover their majority status and strength, and then act on their common motive.

These difficulties were largely due to the poor means of transportation and communication which existed in Madison's time. Communication to a wide audience could not occur in a private or semi-private forum. Madison believed that extending the sphere of the republic, by population and territory, would result in significant barriers both to the formation of factious majorities and to the realistic

within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Id. at 127-28.

214. WHITE, supra note 195, at 141-42; see THE FEDERALIST NO. 10, supra note 190, at 127.

215. THE FEDERALIST NO. 10, supra note 190, at 128.

216. WHITE, supra note 195, at 142-43.

217. RICHARD D. BROWN, KNOWLEDGE IS POWER: THE DIFFUSION OF INFORMATION IN EARLY AMERICA 270-71, 1700-1856 (1989). The lack of opportunity for majority factions to communicate was especially true because of Madison's definition of factious activity. Factious activity leads to actions against the true public interest. THE FEDERALIST NO. 10, supra note 190, at 125. When such "unjust or dishonorable purposes" are involved, communication is even more problematic. Id. at 127-28.

However, current technology allows for private or semi-private communications to a wide audience. Targeted mass mailings and distributions of videotapes are utilized regularly by both commercial and political entities. See, e.g., Erik Eckholm, From Right, A Rain of Anti-Clinton Salvos, N.Y. TIMES, June 26, 1994, at A1; Susan Estrich, Can it Be Possible? Attack Videos Prove Politics Can Indeed Get Dirtier, L.A. TIMES, July 3, 1994, at M2; Robert L. Jackson, Falwell Selling Tape that Attacks Clinton, L.A. TIMES, May 14, 1994, at A4. Teleconferences are also often used by commercial, political, and educational entities. In addition, computer networks give private individuals and other entities the ability to communicate to a wide, but self-selected and interested, audience. See, e.g., Richard Z. Chesnoff, Hatemongering on the Data Highway, U.S. NEWS AND WORLD REP., Aug. 8, 1994, at 52; James Coates, Internet Warning: Double Click with Care, CHI. TRIB., Apr. 1, 1994, at 58. These communications are not completely private because some persons who are not intended to receive the communication do receive it, but these technologies somewhat appear to overcome the barriers to disseminating factious communications to a large number of persons.
opportunities for factious majorities to act.\textsuperscript{218}

Madison’s political theories and pragmatic justifications for an extended republic have withstood the test of time within the American political system.\textsuperscript{219} However, as rapid changes in technology occur, the problem of majority factions may threaten minority interests and the larger public interest, as it did in the state governments under the Articles of Confederation. Modern transportation and communication technologies create a greater possibility that Madison’s safeguards may be overcome.\textsuperscript{220}

2. Modern Application of Madison’s Faction Theory

Madison’s faction theory sets forth two pivotal safeguards by which the formation of large republics would serve to control majority factions.\textsuperscript{221} Although the first safeguard—election of a small number of representatives by a large number of citizens—remains in place today, use of this method to control majority factions is inadequate for the same reasons that it was inadequate in Madison’s time.\textsuperscript{222} For this reason, it will not be explored further. Madison’s second method of majority faction control consists of two aspects: (1) the large number of citizens in a large republic; and (2) the extensive territory in a large republic.\textsuperscript{223} One aspect of this safeguard—a large number of

\textsuperscript{218} EPSTEIN, supra note 189, at 99-107; WHITE, supra note 195, at 141-45.
\textsuperscript{219} See EPSTEIN, supra note 189, at 59-110.
\textsuperscript{220} The potential for the development of a majority faction is most evident in the recent debate concerning the federal government’s budget deficit. One could argue quite convincingly that the permanent and aggregate interests of the community require elimination or reduction of the budget deficit. Although most citizens may agree with this long-term interest, many groups affected by any actions designed to achieve this long-term interest have mobilized to protect the federal programs that provide them with benefits. See, e.g., Steven Mufson, \textit{Clinton Considers Curbs on Social Security Cost of Living Raises}, WASH. POST, Jan. 29, 1993, at A9; Eric Pianin, \textit{Deficit-Cutting Wilts in Heat from Voters: Entitlements Remain Mostly Off-Limits}, WASH. POST, Aug. 4, 1992, at A1; Gerald F. Seib & Michael K. Frisby, \textit{Selling Sacrifice: As Opponents Gear Up, Clinton Prepares Pitch for His Economic Plan}, WALL ST. J., Feb. 5, 1993, at A1.

As Judge Easterbrook pointed out, this type of phenomena may actually present a problem of powerful minority factions. Easterbrook, \textit{supra} note 204, at 1334-35; see THEODORE J. LOWI, \textit{THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES} 271-313 (1979). Thus, the structure of American government must now provide effective means for the control of both majority and minority factions. Judge Easterbrook focuses on the structure of government itself, but it can certainly be argued that a wide diversity of individual citizens also assists in controlling powerful minority factions since a broad range of powerful minority factions will have the effect of insulating government from the influence of any particular faction.

\textsuperscript{221} See \textit{supra} notes 204-20 and accompanying text.
\textsuperscript{222} See \textit{supra} notes 208-12 and accompanying text.
\textsuperscript{223} See \textit{supra} note 213 and accompanying text.
citizens—still exists today. This safeguard is significantly diminished, however, through the elimination of an extended territory.

Although the United States has grown geographically since Madison’s day, it has, in a crucial sense, become much smaller. Citizens can travel cross-country much more quickly, conveniently, and frequently. More importantly, technology has led to an astounding increase in the amount and ease of communication among individual citizens. Communication occurs instantaneously via telephone, fax machine, or computer networks. These instantaneous communications are sent to and received by a very large audience. The explosion in communications extends far beyond communications for which the intended receiver is an individual or a small group. Television and nationwide print media allow millions of citizens to receive the same information simultaneously. These technological developments significantly reduce the geographical barriers to travel and communication which Madison relied upon to control majority factions.

Mass media communications also affect the control of factions provided by a large number of citizens. Clearly, the American population has grown since Madison’s time. American citizens, however, are no longer geographically isolated in small groups that receive distinct inputs which help form their opinions and develop their interests.\(^{224}\) A large number of citizens now receives the same informational inputs within a matter of minutes.\(^{225}\) Therefore, mass media curtails individuals’ formation of distinct opinions and interests.\(^{226}\)

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\(^{224}\) One of the most vivid examples of this is in the area of consumer trends. National advertising and news reports concerning available products sometimes result in certain products experiencing extremely high demand at a specific point in time (e.g., Christmas). See, e.g., Catalogs Picked Clean of Cabbage Patch Dolls, WALL ST. J., Sept. 21, 1984; Jura Koncius, Power Up Rangers, Power Up!, WASH. POST, July 21, 1994, at T5; Joseph Pereira, Tough Game: Toy Industry Finds It’s Harder and Harder to Pick the Winners, WALL ST. J., Dec. 21, 1993, at A1. The effect of these broad communications goes well beyond the creation of high demand for specific products. It includes the creation of a widely-held belief that a high rate of consumption is a major goal in life. See Juliet B. Schor, Life’s Larcenies, N.Y. TIMES, Jan. 17, 1994, § 7, at 10 (reviewing BARRY SCHWARTZ, HOW MARKET FREEDOM ERODES THE BEST THINGS IN LIFE (1994)).

\(^{225}\) See supra note 224.

\(^{226}\) Certainly this safeguard has not been eliminated. As Madison asserted, individual citizens have the ability to form different opinions based on the same information, and they possess different faculties that give rise to diverse interests. However, the reduction in the variability of informational inputs somewhat weakens Madison’s safeguard against majority factions that is based on a large number of citizens possessing diverse opinions and interests. This is especially true as mass media communications consist of opinions which are expressed in as convincing a manner as possible. Michael Harrison, The Voice of America, N.Y. TIMES, July 9, 1994, at 19; Michiko Kakutani, Critic’s Notebook: Opinion vs. Reality in an Age of Pundits, N.Y.
In a free society, the government cannot squelch the ingenuity of citizens because a free society depends on this ingenuity to reduce the barriers to majority factions. The control on majority factions provided by an extended territory has disappeared. In addition, it has become risky to rely completely on the mere existence of a large number of citizens who possess diverse opinions and interests. Thus, there appears to be a current need for the discovery of other controls on majority factions.

Control of majority factions depends on wide diversity in human reasoning and faculties.\textsuperscript{227} The family unit plays a pivotal role in developing an individual citizen’s reasoning and faculties.\textsuperscript{228} Therefore, future control of factious behavior may depend largely on society’s protection of diverse family environments.

3. Family as a New Safeguard

As Madison’s controls become less reliable,\textsuperscript{229} the American political system must rely, at least in part, on other sources for diverse citizens to control majority factions. The extended American republic promotes the development of diverse opinions and interests through a wide array of intermediate associational institutions.\textsuperscript{230} Intermediate associational institutions are groups of individual citizens which mediate between individual citizens standing alone, and the state or society as a whole.\textsuperscript{231} One of the basic intermediate associational institutions in American society is the family.\textsuperscript{232} Within the family, a

\textsuperscript{227} See supra part V.B.1.
\textsuperscript{228} See Goldstein et al., supra note 64, at 13-16; Peter K. Smith & Helen Cowie, Understanding Children's Development 59-86, 310-44 (1988).
\textsuperscript{229} See supra notes 221-28 and accompanying text.
\textsuperscript{231} Dahl, supra note 230, at 1-40; Political Order and the Plural Structure of Society, supra note 230, at 1-25. Although the classic definition of intermediate associational institutions stresses the relationship between the individual and the state, this Article uses an expanded definition which includes the relationship between the individual and "society." By using this expanded definition, this Article intends to also focus on the role of intermediate associational institutions in mediating between individuals and society-wide forces such as the mass media.
\textsuperscript{232} See supra note 230. Of course, the family unit is not the only associational setting in which an individual's early development occurs. Certainly other intermediate associational institutions, such as schools, churches, and informal peer associations, affect an individual child's development.
child becomes attached to others and develops an individual personality and individual skills.\textsuperscript{233} These attachments and personal developments provide the basis for the subsequent formation of individual opinions, passions, and interests.\textsuperscript{234} Families provide an important setting for the development of individuals’ physical and mental skills, their opinions on government and religion, their economic interests, and their ability to form attachments.\textsuperscript{235} Especially in the crucial early years of life, the family acts as the intermediate associational institution in American society which provides the core setting in which individual development occurs.\textsuperscript{236}

The family’s central role in the development of an individual’s opinions and interests is crucial because Madison relied on a wide diversity of opinions and interests to control factions. To develop different opinions and interests, individuals require different reasoning approaches and faculties which are developed mainly during childhood.\textsuperscript{237} The family environment greatly affects this development.\textsuperscript{238} Society’s protection and support of diverse family environments may provide a significant control on factious action in the future for two reasons: (1) the control of majority factions depends upon a wide diversity in human reasoning and faculties; and (2) the family unit plays a pivotal role in the development of an individual citizen’s reasoning.

This political role of the family helps to explain the line of Supreme Court privacy decisions that arise out of the family setting and construct a zone of freedom from state intrusion.\textsuperscript{239} Under this theory, the

\textsuperscript{233} See Bowlby, supra note 71, at 322-71; Fahlberg, supra note 71, at 20-60; Goldstein et al., supra note 64, at 13-16.

\textsuperscript{234} See Bowlby, supra note 71, at 322-71; Fahlberg, supra note 71, at 20-60.

\textsuperscript{235} Goldstein et al., supra note 64, at 13-16; Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 635-37 (1980).

\textsuperscript{236} See generally Bowlby, supra note 71 (establishing a theory of human and child psychology); Fahlberg, supra note 71, at 69-80 (discussing the importance of family attachments during a child’s first years); Goldstein et al., supra note 64, at 669-76 (discussing child development in the context of the impact of a proposed child placement system).


\textsuperscript{238} See Goldstein et al., supra note 64, at 13-16; Smith & Cowie, supra note 228, at 276-344; Karst, supra note 235, at 635-37.

\textsuperscript{239} See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). For a more extensive description of this line of cases see Dailey, supra note 169, at n.3 & 33 (stating that the family “has established itself as a central focus of heightened constitutional concern in a line of cases affirming
zone of family freedom from state intrusion does not emanate from principles of natural law or traditional liberalism, but from a role for the family within the American political system which requires a degree of freedom from state intrusion.\textsuperscript{240} The constitutional protection of a zone of family "privacy," "autonomy," or "freedom from state intrusion,"\textsuperscript{241} allows the family to fulfill the political role of producing diverse individuals.\textsuperscript{242} This political role requires a certain degree of family freedom from state intrusion.\textsuperscript{243}

One must acknowledge that the construction of a zone of family freedom from state intrusion will result in harm to many children.\textsuperscript{244} In some situations, the family will ignore, neglect, or abuse the children emotionally or physically.\textsuperscript{245} In other situations, the family will push some children relentlessly to achieve in certain endeavors, to the exclusion of other activities necessary for a well-rounded life experience.\textsuperscript{246}

the importance of the family as a fundamental social unit.").

240. Commentators have recently noted the troubling aspects of grounding a zone of family freedom on principles of individual liberalism or natural law. See Dailey, supra note 169; Hafen, Children's Liberation, supra note 169.

241. This Article uses the term "zone of freedom from state intrusion." The terms "zone of privacy" or "zone of autonomy" are confusing in the sense that these terms can be both individual and family-focused. If focused on the individual, principles of "privacy" and "autonomy" can conflict within the family setting. See Hafen, Children's Liberation, supra note 169, at 610-44; Dailey, supra note 169, at 981. A "zone of freedom from state intrusion" is more clearly centered on the family unit, while avoiding the confusion with individual rights terms and principles.

242. See supra note 186.

243. Defining the limits of this zone of family freedom presents a public policy issue. As one legal commentator has noted, the public and private spheres are not clearly separated, and a well-designed public sphere creates and allows certain private spheres to exist. Frank Michelman, Private Personal But Not Split: Radin Versus Rorty, 63 S. CAL. L. REV. 1783, 1792-94 (1990).

244. The likelihood of this outcome for a large number of children is evidenced by the number of child maltreatment reports. In 1992, there were 2.9 million reports of child maltreatment, with 40% to 55% of these reports eventually substantiated. Green Book, supra note 50, at 636.

245. See supra note 244.

No one can predict how each individual child will emerge from diverse family backgrounds.\textsuperscript{247} However, it is clear that each individual raised in a family largely free from state intrusion will bring distinct reasoning skills and faculties to the social and political community.\textsuperscript{248} For example, a neglected child may become a psychologically dysfunctional individual, lacking the ability to relate to others or may become an extremely competent, strong, self-reliant person.\textsuperscript{249} An economically deprived child may become an individual who is completely unaware of and uninterested in others or may become a person who brings unique and healthy insights to the social and political community.\textsuperscript{250} Although no one can predict the outcome of each child raised in diverse family backgrounds, this developmental diversity, rather than geographic breadth, will provide a check on factious behavior in the future.

As the primary safeguard that Madison relied on becomes less reliable, the American political system must begin to rely, at least in part, on the family as the source of diverse citizens who will control majority factions. Some of the major tenets of permanency planning help ensure the continuation of families’ political role in producing individuals with diverse opinions and interests.

4. Permanency Planning Concepts: Helping to Assure Diversity

Madison’s faction theory directly implicates the public child welfare system. The need to secure the boundaries of the zone of family privacy that allows the family to serve its political role justifies implementing some of the fundamental components of permanency planning concepts. One permanency planning concept not only gives biological parents initial custody of their children if possible, but constructs a


\textsuperscript{248} \textit{See generally} \textit{The Invulnerable Child} (E. James Anthony & Bertram J. Cohler eds., 1987).

\textsuperscript{249} \textit{See supra} notes 237-38 and accompanying text.

\textsuperscript{250} Examples of individuals who have experienced neglect during childhood and have become competent adults are numerous. The author personally has observed a significant subset of the Clinic’s child clients who function competently in most areas of life (school, work, intimate relationships) despite experiencing neglect earlier in life. The author’s most vivid personal example of this possibility is his father. Despite a childhood characterized by severe neglect and abandonment, the author’s father is an exceptionally strong, self-reliant adult who provided the author and his sister with an extremely nurturing home environment. \textit{See generally} \textit{The Invulnerable Child}, \textit{supra} note 247.

high barrier to state disruption of this initial custody assignment.\textsuperscript{251} This convention serves the same function as a random number generator which assigns children to caretakers.\textsuperscript{252} Randomness precludes overwhelming state interference in the family. Retaining biological parental custody prevents the state from making family environments "optimal," and more importantly, standardized, uniform, and fungible.\textsuperscript{253}

In addition, under permanency planning, only if a child is at "serious risk of substantial harm"\textsuperscript{254} should the family be compelled to participate in services narrowly tailored to reduce the risk of harm to the child.\textsuperscript{255} If this goal can be accomplished while the child lives in the parental home, the child must remain in that home.\textsuperscript{256} However, if services cannot reduce the risk in the parental home to an acceptable level, the child must be removed.\textsuperscript{257}

A second concept of permanency planning secures the political role of the family even when children are removed from their homes and placed in foster care. Permanency planning requires caseworkers to quickly place children in permanent homes free from state intervention

\textsuperscript{251} See supra notes 77-86 and accompanying text.
\textsuperscript{252} The random selection of biological parents can be seen in contrast to the earlier discussion in which a state could assign the "best" caretakers for every child. See supra part V.A. The state could train and license parents, and ensure a certain economic level for all children. \textit{Id.}
\textsuperscript{253} This initial random assignment of children to biological parents does not theoretically preclude the state from guaranteeing a certain minimal economic level for each child. The federal government has attempted to achieve this goal through the Aid for Dependent Children ("AFDC") program. 42 U.S.C. §§ 601-617 (1994). However, this program has been woefully inadequate in raising children out of poverty. See \textit{STATE OF AMERICA'S CHILDREN}, supra note 130, at 1-2. In 1992, 21.9\% of children lived in households with income below the federal Department of Health and Human Services poverty guideline. \textit{Id.} Combined AFDC and Food Stamp benefits provided a family with a household income that amounted to 70\% of the poverty guideline. \textit{Id.} Under current fiscal realities, the assignment of children to their biological parents precludes the state from securing certain minimum and adequate economic level for each child. See \textit{BEYOND RHETORIC}, supra note 130, at 113-15 (noting that a comprehensive family income security plan would require $40 billion to $44 billion a year in government expenditures).
\textsuperscript{254} The term "serious risk of substantial harm" should be defined in a very narrow way. For a full discussion concerning the appropriate standards for state intervention, see \textit{JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD} (1979); Wald, supra note 23, at 642; Michael S. Wald, \textit{Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child}, 78 MICH. L. REV. 645, 652-57 (1980).
\textsuperscript{255} Wald, supra note 23, at 643.
\textsuperscript{256} \textit{Id.} at 651.
\textsuperscript{257} \textit{Id.}
and control.\textsuperscript{258} Under permanency planning concepts, foster homes do not qualify as permanent homes since they are designed to serve as temporary placements.\textsuperscript{259} Moreover, foster homes do not qualify under Madison's faction theory since they are under the direct control of the state.\textsuperscript{260} The timely placement of children in permanent homes


\textsuperscript{259} See supra notes 61-69 and accompanying text.

\textsuperscript{260} The foster care system is a highly regulated system that directly controls foster parents through detailed training and monitoring. Most states specifically mandate the method and number of hours of foster parent training.

California—Although there are no state requirements for training of foster parents, each county may mandate training. CAL. WELF. & INST. CODE § 16507.7 (West 1993). Such training may be no longer than six months in duration and shall meet for a "specified number of hours determined by each program." Id. The training must also cover the topic areas listed in the code. Id.

Florida—30 hours training are mandated within one year of being issued a license. FLA. ADMIN. CODE ANN. r. 10M - 6.022 (1992). Group Preparation and Selection or GPS-MAPP is the preservice training program selected by the Florida Department of Health and Rehabilitative Services. Id. r. 10M - 6.017.


Iowa—12 hours of preservice training and 6 hours of in-service training are required prior to each renewal of a license. IOWA ADMIN. CODE r. 441-117.1(2)(b) (1987). Two additional hours of training are required every five years on child abuse identification and reporting. Id. r. 441-112.10(2). The Nova University Foster Parent Project training program "Preparation for Fostering: Preservice Education for Foster Families" is the recommended program. IOWA ADMIN. CODE r. 441-117.1(2)(a) (1993).

Michigan—While only 6 hours of training are required for certification, 18 additional hours of training are required within 2 years of receiving the original license. MICH. ADMIN. CODE r. 400.6226 (State of Michigan, Department of Social Services, Licensing Rules for Child Placing Agencies) (1992). Proposed rules require 12 hours of training to be completed not later than the end of the initial 6-month licensing period, with another 12 hours required within the next two years.

New York—Foster parents providing care in designated emergency foster family boarding homes must complete 15 hours of training within four months of being designated as such. A minimum of six hours of yearly follow-up training expands upon the areas covered during the initial training. N.Y. COMP. CODES R. & REGS. tit. 18, § 446.5 (1988 & Supp. 1993).

These states all list designated areas that training must cover, including child development, child discipline, rights and responsibilities of foster parents, communication, separation and the importance of the child's own family, family systems, reasons for placement termination and the feelings involved in such a termination, crisis intervention and assessment skills, handling stress and anger, caseworkers and their role, team effort of foster parents and caseworkers, permanency planning, adoption issues, and participation in foster care reviews. See, e.g., CAL. WELF. & INST. CODE § 16507.7; FLA. ADMIN. CODE ANN. r. 10m - 6.023; IOWA ADMIN. CODE r. 441-117.7(2); MICH. ADMIN. CODE r. 400.6226; N.Y. COMP. CODES R. & REGS. tit. 18, § 446.5.

In addition, these states regulate almost every aspect of daily life in the foster care setting. For example: In Michigan, heating, ventilation, and light shall be “sufficient
relatively free from state intervention is consistent with Madison's theory. Only with timely permanent placement resolution can the family fully perform its political role for children in the public child welfare system.

Furthermore, in light of the political role of the family in producing diverse individuals, and consistent with permanency planning concepts, the priority for returning a child to a biological parent should to provide a comfortable airy atmosphere,” MICH. ADMIN. CODE r. 400.192(7) (1993); furnishings and housekeeping standards shall be “such that the home presents a clean orderly appearance,” Id.; in New York, the type of bedding shall be “comfortable” and “have suitable springs in good condition,” N.Y. COMP. CODES R. & REGS. tit. 18, § 444.5(10) (1991); in Florida, the number of beds shall be one per child, Id.; Fla. ADMIN. CODE ANN. r. 10M 6.025(14); adequate disposal of garbage and refuse, MICH. ADMIN. CODE r. 400.192(11); refrigeration for perishable foods, Id.; purchase only pasteurized milk, cream, and milk products, Id. r. 413.192(13); daily routine shall be “such as to promote good health, rest and play habits,” Id. r. 400.194(27); the daily diet shall be “varied, adequate and wholesome and it shall include sufficient quantities of milk, eggs, meats, fruits, vegetables, whole grain cereals, and breads,” Id. r. 400.194(31); screens on all windows and outside doors during the summer months, N.Y. COMP. CODES R. & REGS. tit. 18, § 444.5(b)(13) (1991); “there shall be a written policy which assures that foster children are permitted to send and receive mail,” MICH. ADMIN. CODE r. 400.6209 (1992); clothing shall be appropriate to the seasons and “of such style and quality as not to distinguish them from other children in the community,” N.Y. COMP. CODES R. & REGS. tit. 18, § 444.5(c)(6); supply of water of satisfactory sanitary quality for drinking and household use, Id. § 444.5(b)(12); heating apparatus shall be “adequate and safe to insure a temperature of at least 68 degrees,” Id. § 444.5(b)(14); adequate and sanitary bathing, toilet, and lavatory facilities, Id. § 444.5(b)(15); existence of at least one smoke detector, Fla. ADMIN. CODE ANN. r. 10M 6.025(16)(F)(2); no corporal punishment—“problems of child training should be handled with sympathy and understanding,” MICH. ADMIN. CODE r. 400.194(33) (1993). One Michigan regulation provides that “no room shall be used for living purposes where more than 1/2 the room height is below grade for more than 25% of the perimeter measurement of the home. All sleeping rooms shall have a window of a type that may be opened readily and is accessible for evacuation.” MICH. ADMIN. CODE r. 400.192(9) (1992).

Most states mandate monitoring of the foster care home through visits by social workers or caseworkers, usually on a monthly basis. MICH. ADMIN. CODE r. 400.6252. Some states mandate that foster parents agree to periodic unannounced visits, while other states require yearly unannounced visits as a requirement in relicensing foster homes. IOWA ADMIN. CODE r. 441-113.15(1). Michigan mandates that foster parents agree to admit representatives of the health department or fire marshal’s office into their home at any time for purpose of inspection. MICH. ADMIN. CODE r. 400.192(6).

See generally CAL. WELF. & INST. CODE § 16507.7 (West 1993); FLA. ADMIN. CODE ANN. r. 10m - 6.010 F.A.C. (1992); IOWA ADMIN CODE r. 441-117.12(a) (1993); MICH. ADMIN. CODE r. 400.192(9) (1992); N.Y. COMP. CODES R. & REGS. tit. 18, § 443.1 to 444.8 (1988 & 1993 Supp.).

261. Permanency planning concepts place a high priority on biological family reunification. See supra part III.B. This priority reinforces society’s initial random assignment of children. See supra notes 251-53 and accompanying text. Reunification demonstrates society’s commitment to the efficient production of diverse individuals, even though it exposes children to a risk of harm that could be avoided. See supra part V.B.3. The system is not designed to achieve the best possible outcome for each
only persist in cases where the state intervenes with narrowly tailored services, and where the child’s return home can be expected within a short, well-defined period of time. In cases where these are unreasonable expectations, decision-makers should pursue other permanent placement options immediately.

5. Effect of Present Child Welfare Procedures on Faction Theory

Both theoretical and philosophical justifications compel implementing permanency planning based on Madison’s *The Federalist No. 10*. However, because Madison wrote *The Federalist No. 10* with a very pragmatic goal in mind—to encourage the adoption of the proposed Constitution—the pragmatic implications must be examined before using *The Federalist No. 10* as a justification for permanency planning. Despite being a valid justification on a individual child, but to achieve family independence and individual diversity. See id. This design encourages governmental actors to restrain themselves when they would otherwise intervene aggressively to secure an optimal, uniform child care setting for each child. See id. The governmental restraint is desirable since extensive government intervention would undermine the political role of the family in producing widely diverse individuals.

262. In certain cases, children can be returned to a biological parent if the state provides extensive services. For example, the students in the University of Pittsburgh School of Law’s Child Welfare Law Clinic who represented a mentally disabled biological parent reunified the child and the biological parent by placing both in a state-funded foster care placement. This type of reunification, while on the surface fulfilling some of the components of permanency planning concepts, raises serious issues under the political role of the family theory developed in this part. In such a reunification placement, the degree of state intervention remains extremely high and, if achieved in a large number of cases, could raise a threat to the family’s political role in producing diverse individuals.

263. A child’s caretaker should be regulated by the state only for a short period of time; otherwise, regulation poses a threat to the development of diverse individuals. Quite often, the allowable length of this period is rather arbitrary, and not directly based on child development principles. However, the allowable length of time could coincide with the time period dictated by child development principles—6 to 18 months. See supra note 23 and accompanying text.

264. Well-designed state child welfare laws currently provide for swift resolution of cases where the child cannot return to the custody of a biological parent. For example, Michigan’s child welfare statutes expressly provide that termination of parental rights may be sought as early as the initial disposition hearing, and that in all cases the court must conduct a permanency hearing within the first six months of an initial disposition order placing the child outside the custody of the biological parents. See Mich. Comp. Laws Ann. § 710.56 (West 1993).

265. Finding a pragmatic justification is especially important because Madison was a noted pragmatist. White, supra note 195, at 45. Madison wrote *The Federalist No. 10* to provide a compelling justification for the adoption of the new Constitution. The Federalist No. 10, supra note 190, at 3. In light of Madison’s pragmatic approach and purpose in *The Federalist No. 10*, pragmatic considerations must be addressed.
theoretical and philosophical level, *The Federalist No. 10* is a less valid justification on a pragmatic level.

One of the primary goals of permanency planning is to achieve timely permanent placement for children, thereby reducing or eliminating foster care drift. The number of children experiencing foster care drift is a very small percentage of the overall population of children. Thus, it can be argued that the effect of foster care placement and drift on society's ability to produce diverse citizens, which is required to control factious behavior, is inconsequential. One can even assert that the relatively small subset of children who experience state parenting effectively results in wider diversity. Children who experience long-term public child care will develop reasoning and faculties that are remarkably different from those developed by children raised in families largely free from state intrusion. Therefore, on a pragmatic level, foster care drift may not pose society-wide problems for the political role of the family.

On the other hand, although the total number of children who experience foster care drift is small, more children from poor and minority families experience such placements. On a pragmatic level,

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266. See supra note 14 and accompanying text.
267. See supra note 28 for the definition of foster care drift.
268. At the end of federal government fiscal year 1990, the latest point in time for which reliable statistics are available, 0.61% of the total U.S. child population (persons 18 years old or younger) lived in foster care placements. See GREEN BOOK, supra note 50, at 640 tbl. #14-14.
269. See M. Bohman & S. Sigvarsson, *A Proposed Longitudinal Study of Children Registered for Adoption: A 15-Year Follow-up*, in *ANNUAL PROGRESS IN CHILD PSYCHIATRY AND DEVELOPMENT* 217, 217 (Stella Chess & Alexander Thomas eds., 1981) (concluding that there is a considerably higher risk of maladjustment for foster children as compared to adoptees); Anne Keanne, *Behavior Problems Among Long-Term Foster Children, 7 ADOPT. AND FOSTERING* 53 (1983) (finding a rate of 30% of disturbance in foster children was significantly higher than the 7% rate for children in the general population); Herring, supra note 28, at 146-50 (discussing three empirical studies that compared children who had grown up in long-term foster care to adoptees and children in the general population); John Triseliotis, *Identity and Security in Adoption and Long-term Fostering, 7 ADOPT. AND FOSTERING* 22 (1983) (concluding that the ambiguous nature of foster care seemed to have a qualitative impact on the foster children's sense of identity).
270. For example, at the end of federal government fiscal year 1990, 407,000 children lived in foster care. GREEN BOOK, supra note 50, at 640 tbl. #14-14. At that time, 14.3 million children lived in poverty. STATE OF AMERICA'S CHILDREN, supra note 130, at 1. Assuming that all children placed in foster care were from families experiencing poverty (not a wildly unrealistic assumption, see PELTON, supra note 87, at 63-64), children placed in foster care represented 2.8% of the total population of children living in poverty.
As an additional example, approximately 36.5% of the children in foster care are African-American, while only 14.6% of the total United States child population is
public child welfare interventions target these distinct segments of the population.\textsuperscript{271} This targeting may significantly reduce the range of family situations and limit the production of diverse individuals.\textsuperscript{272} Children who would have otherwise experienced certain cultural and/or economic family settings are "saved" by the state and placed in a mostly white middle-class family environment.\textsuperscript{273}

Implementing

African-American. CHILDREN'S RIGHTS PROJECT, supra note 99, at 11. Based on these numbers, at the end of federal government fiscal year 1990, 148,600 African-American children lived in foster care (36.5\% \times 407,000 children in foster care) out of a total African-American child population of 9,818,000 (14.6\% \times 67,246,000 children in the United States population), see GREEN BOOK, supra note 50, at 640 tbl. #14-14. Based on these numbers, the African-American children placed in foster care represented 1.5\% of the total population of African-American children. These examples only indicate, and do not provide a complete picture of, the extent of foster care placements in these communities, because they rely on the number of children living in foster care at a specific point in time. This number does not include all children affected by foster care placements since many children enter foster care and leave. See PELTON, supra note 87, at 54. For example, in fiscal year 1989, 222,000 children entered substitute care, and 182,000 left substitute care. VCIS CHARACTERISTICS 1993, supra note 50, at ix-x.

\textsuperscript{271} See PELTON, supra note 87, at xiii-xiv, 165-77; Gray & Nybell, supra note 101, at 513-22; Hogan & Siu, supra note 101, at 493-96.

\textsuperscript{272} See supra note 271.

\textsuperscript{273} See supra note 271.

States regulate the physical foster home environment as well as the type of foster parents that they seek. Through detailed regulations, states define the types of homes and atmospheres most desirable for foster children. The regulations discussed in note 260, supra, reveal a preference for middle-class conditions in a foster home. Using words like "wholesome," in regard to diet, "comfortable airy atmosphere," in regard to the home atmosphere, furnishing and housekeeping standards, described as being "such that the home presents a clean orderly appearance," and emphasizing a daily routine to promote "good health, rest and play habits in children," all seem to promote a happy, healthy, middle-class family living situation. See supra note 260. A Michigan regulation, like regulations in other states, calls for, "[p]lay space, fenced if necessary,
permanency planning concepts minimizes state intervention in these targeted groups, thus helping to ensure a wider diversity of citizens. Nevertheless, even within the targeted populations, public child welfare intervention directly affects only a small percentage of children.\(^\text{274}\) Therefore, one could argue that minimizing these interventions is not necessary to ensure the wide diversity of citizens needed to help control majority factions.

The public child welfare system also indirectly affects children living in families with much broader characteristics. Public child welfare cases and practices receive media attention.\(^\text{275}\) Through this media attention, families who are not directly affected by child welfare interventions learn a great deal about what actors in the public child welfare system consider appropriate parenting behavior.\(^\text{276}\) Parents shall be available and free from hazards which might be dangerous to the life and health of the child. The play area shall be kept free from litter, rubbish and inflammable material at all times." \(^\text{277}\) This emphasis on the physical surroundings reflects middle-class standards concerning safe and comfortable physical surroundings.

Not only do states seek to regulate the foster home environment, but they also have regulations regarding the types of neighborhoods in which foster homes should be located. For example, a New York regulation provides, "(11) The home shall be situated in a neighborhood with sufficient community resources to meet a child's anticipated social, educational, recreational, and religious needs." \(^\text{278}\) Middle-class status items and activities also get some special attention. For example, New York allows for special payments to be made for "necessary" items not covered by the regular board and care and clothing allowances, and lists as examples: special attire for proms; school expenses, such as the costs of field trips, school jewelry, pictures, and yearbooks; music, art and dancing lessons; and the purchase or rental of such items needed to take part in these activities. The state promotes the belief that these items and activities should be part of a child's life by making extra payments available for foster children to be able to engage in these activities and to have these items. \(^\text{279}\)

By eliminating some types of environments and prospective foster parents through regulation, the states, to a large degree, ensure that foster children will live in a middle-class environment. \(^\text{280}\) Approximately 2.8% of the children living in poverty are placed in foster care and approximately 1.5% of African-American children are placed in foster care. \(^\text{281}\) For examples, see infra notes 426-29, 433 and accompanying text.

274. Approximately 2.8% of the children living in poverty are placed in foster care and approximately 1.5% of African-American children are placed in foster care. \(^\text{270}\)

275. For examples, see infra notes 426-29, 433 and accompanying text.

276. Examples of such behavior include disciplining children without the use of corporal punishment, closely supervising young children at all times, and avoiding the use of illicit substances. \(^\text{282}\) See Gray & Nybell, supra note 101, at 515-19; Wald, supra note 182, at 1000-24.
who wish to avoid state interventions may adjust their behavior accordingly. This phenomenon arguably tends to standardize family parenting behavior and reduce the diversity of family child care settings. Implementing permanency planning concepts minimizes this phenomenon by providing a clear demonstration of society’s commitment to, and respect for, diverse family associations largely free from state intrusion. In this way, permanency planning reinforces the family’s political role in producing diverse individuals who will control factious behavior. Again, on a pragmatic level, however, it can be persuasively argued that the effect of child welfare case publicity on actual parenting behavior, if any, is insignificant in terms of altering family environments in a way that truly threatens the production of a sufficient number of widely diverse citizens.

In summary, The Federalist No. 10 provides a fairly powerful justification for permanency planning concepts on a theoretical and philosophical level. On a pragmatic basis, however, The Federalist No. 10 justification is weak. This weakness is bolstered by an inability to demonstrate a real threat to either American society or the American political system caused by excessive public child welfare system interventions or unplanned long-term foster care placements.

C. The Family and the Proper Functioning of a Large Pluralistic Democracy: Group and Associational Theories

Not all groups of citizens meet Madison’s negative definition of a faction. While factions are groups, some groups bring about positive effects in the political arena by identifying diverse issues and developing solutions which serve the true interests of the community. Madison recognized this positive role for groups of citizens. He wished to control majority action, not to eliminate it.

277. This tendency would likely be most pronounced in the targeted communities where public child welfare agencies are known to be most active. See supra note 273 and accompanying text.
278. See Wald, supra note 182, at 989-1000.
279. This argument would be strongly supported by the large number of reports of suspected child abuse and neglect in current American society, despite child welfare case publicity. See supra note 244.
281. See, e.g., MICHAEL FOLEY, AMERICAN POLITICAL IDEAS: TRADITIONS AND USAGES 85-87 (1991); LOWI, supra note 220, at 34-35.
282. See, e.g., FOLEY, supra note 281, at 85-87; LOWI, supra note 220, at 34-35.
283. WHITE, supra note 195, at 137.
284. Id.
Diverse groups play two positive roles in the American political system—a system characterized as democratic pluralism. First, groups provide a collective voice, which works to affect decisions in the pluralistic political arena. Second, groups of citizens insulate individuals from pervasive state intrusion and control.

In the first instance, individuals form a group. The group then speaks for the individuals collectively. If the collective voice is sufficiently powerful, the group affects the political decisions made within a large, democratic, pluralistic political system. The system of group action within a pluralistic democracy has received both attention and criticism from political theorists.

Commentators agree that groups play a powerful role in the American political system. Critics of pluralistic democracy focus on the lack of broad group participation in the political process. These critics argue that narrow, powerful economic interest groups, such as corporations, have inordinate influence within the political system.

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285. FOLEY, supra note 281, at 87. Democratic pluralism is a difficult term to define. One commentator has recently described pluralism as follows:

Pluralism is a broad and notoriously diffuse term, but in this particular context, it is used to refer to a conception of politics and government which views society as a collection of distinct, yet interrelated and interacting parts. The constituent units amount to an amalgam of interests. Interests may compete and conflict with one another. They may, on the other hand, simply transcend one another. But together, they have a cultural identity and share an agreed form of social conduct through which they achieve a state of co-existence. To the pluralist, these social units do not add up to an integrated and corporate whole. Neither do they accumulate to form a stratified social and political hierarchy. The value of such units lies in their provision of social and political diversity which prevents any aggregation of interests developing into a permanent form of class dominion. The pluralist conception of society, therefore, sees a vast profusion of group interests represented and embodied by political groups, none of which has the power to prevail over the rest. Because they are obliged to accommodate one another by extensive negotiations, it ensures that no one center of sovereign power can emerge.

Id. (footnotes omitted). Robert Presthus provided a more straightforward definition. According to Presthus, pluralism is “a sociopolitical system in which the power of the state is shared with a large number of private groups, interest organizations, and individuals represented by such organizations.” Presthus, supra note 280, at 274-80.

286. FOLEY, supra note 281, at 89.


288. See THE BIAS OF PLURALISM 201-02 (William E. Connolly ed., 1969); DAHL, supra note 230, at 31-54; FOLEY, supra note 281, at 85-100; LOWT, supra note 220, at 32-35.

289. See FOLEY, supra note 281, at 87-88.

290. See id. at 94-97; C. WRIGHT MILLS, THE POWER ELITE (1956).
and, thereby, form a ruling elite. This elitist system undermines a pluralistic democracy. A pluralistic democracy functions properly only when all groups of individuals have a powerful voice in the political arena. Groups consisting of minority and poor individuals do not have a strong voice today. If pluralistic democracy became more inclusive and balanced, many present critics would likely support it.

The formation of diverse groups that can provide a powerful voice in the political arena depends on a sufficient supply of diverse individuals. As discussed previously, the family plays a significant role in the production of individuals with diverse interests and opinions. Therefore, the family supplies society and the political system with the raw material—diverse citizens—necessary for the formation of powerful diverse groups. In light of the critiques of democratic pluralism, families, especially poor and minority families, must raise their children so that they will ultimately form diverse associations. In turn, these associations will provide a wide array of powerful voices within the political system.

The second positive role groups provide is insulating their members from state intrusion. This role is based on a theory of associational sphere sovereignty. Under this theory, a pluralistic society consists of numerous separate spheres of human association. According to this theory, the state is just one sphere which is not supreme over all other spheres. The state sphere interacts with other associational spheres on a relatively level playing field. To some degree, each associational sphere insulates individuals from the activities and rela-

291. Foley, supra note 281, at 94-97; Mills, supra note 290.
292. Foley, supra note 281, at 90-91.
293. Id. at 94-97.
294. See The Bias of Pluralism, supra note 288, at 13-19; Dahl, supra note 230, at 81-107; Foley, supra note 281, at 85-100; see also Easterbrook, supra note 204 (supporting Madison's constitutional plan and the desirability of factions, but also discussing various reasons why all of Madison's visions have not come true); cf. Lowi, supra note 220, at 31-41 (focusing on the effect of modern pluralism on government's role and authority in society rather than on the inadequacy of group participation and power for certain populations within society, but expressly recognizing the power of groups within the current political arena).
295. See supra part V.B.
296. See Political Order and the Plural Structure of Society, supra note 230, at 1-30; Walzer, supra note 287, at 312-21; Dailey, supra note 169, at 994-1031.
297. Examples of various groups are the family, the state, the church, and the market. See, e.g., Political Order and the Plural Structure of Society, supra note 230. See generally Walzer, supra note 287 (discussing spheres of human association in society).
298. Foley, supra note 281, at 85-92; Walzer, supra note 287, at 281-311.
299. See supra note 298.
tionships of other spheres. Thus, the family may serve to insulate the individual from the state, and the state certainly may insulate the individual from the church and even from the family.

This theory does not define the degree of insulation among spheres, but instead, instructs that the degree of insulation depends on the particular social systems. Under the associational sphere sovereignty theory, however, a social system should have some sort of sphere boundaries. These associational sphere boundaries play a positive role within a social system, because no sphere has a monopoly on regulating individuals or defining the purpose of life.

Associational spheres substantially affect a social system. For example, no sphere boundaries exist in the traditional views of individualism or communalism. The traditional liberal view of individualism places no group relationships between the individual and the state. The state becomes the exclusive and supreme human

300. See supra note 298.
301. This most commonly occurs when children enter the public school systems in the United States. Courts regularly enforce the Establishment Clause of the First Amendment in a way that insulates individual students from the religious sphere while they attend public schools. See, e.g., Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating state law which forbade teaching of evolution in public schools unless accompanied by the teaching of "creation science"); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that state law cannot authorize one minute of silence for meditation or voluntary prayer); School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963) (finding that state law cannot require that Bible passages be read or prayer be recited in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (concluding that state cannot compose and require prayer to be recited in public schools).
302. In cases involving incidents of serious abuse or neglect on the part of a caretaker, the state acts to insulate the individual child from the family associational sphere. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982) (finding that clear and convincing evidence of parental unfitness required in order to permanently terminate parental rights, but upholding a state's authority to intervene and protect children within the family sphere); In re A.M., 530 A.2d 430 (Pa. Super. Ct. 1987) (requiring a state to show a clear necessity before removing children based on substantiated sexual abuse); In re Y.P., 509 A.2d 397 (Pa. Super. Ct. 1986) (allowing state intervention where a mother was unwilling or unable to protect children from abuse by male friend).

See generally WALZER, supra note 287 (arguing for an egalitarian society composed of several spheres of justice each with its own components and opposing the domination of any one sphere); Hannah Arendt, Reflections on Little Rock, 6 DISSENT 45 (1959); Marie A. Fallinger, Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma, 49 U. PITT. L. REV. 143 (1987) (arguing that associational preferences based upon one characteristic will not promote social diversity).

304. See supra note 303.
305. See generally POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY, supra note 230, at 257-63 (discussing sphere of sovereignty); WALZER, supra note 287 (same).
306. FOLEY, supra note 281, at 27-45.
association. Under communalism, the state is again supreme. The only “group” with power is the entire community. Powerful intermediate associations do not exist.

In a social system that lacks powerful groups to mediate between the individual and the state, the state dictates the terms and defines the purpose of life. Since no individual or group truly knows the purpose of life, many people object to such a unitary system. However, a pluralistic social system with powerful intermediate associations avoids this objectionable result. Intermediate groups freely define life in diverse ways and pursue diverse goals within the public political arena. This type of social system comports with the pragmatic realities and the normative traditions of American pluralism.

The family provides one of the fundamental associational spheres. In American society, the family sphere plays a role in insulating the individual from the state. Naturally, other associational spheres may serve this same pluralistic function. The family sphere, however, has a profound effect on individuals during childhood which renders this sphere unique and indispensable. During some of the most crucial periods of basic human development, children do not play a truly active, understanding role in any associational sphere except for within the family. Rather, during this time period, a child’s only

307. Id.
308. See Political Order and the Plural Structure of Society, supra note 230, at 1-25.
309. See id.
310. Intermediate associations include those which are either powerful as actors in the political arena or as insulators between the individual and the state.
311. See Political Order and the Plural Structure of Society, supra note 230, at 1-25.
312. See id.
313. See Political Order and the Plural Structure of Society, supra note 230, at 1-25; Walzer, supra note 287; Arendt, supra note 303.
314. Foley, supra note 281, at 87-88.
315. See Dahl, supra note 230, at 31-54; Dahl, supra note 280, at 22-24; Foley, supra note 281, at 85-100.
316. See generally Dailey, supra note 169.
317. For example, churches, schools, business corporations, and labor unions.
318. See Fahlberg, supra note 71, at 20-39.
319. One of the most crucial periods of human development is the period from birth to age three. During this period of life, the family is the primary, if not exclusive, associational sphere in which the child participates. See id. at 69-80.

Note that this Article adopts a broad definition of the family which includes all the adults who have a close affective relationship with a specific child, whether or not the adults have a biological relationship with the child. See supra note 179.
social role requires him or her to attach to a primary caretaker or set of primary caretakers.\textsuperscript{320} This attachment process allows children to form intimate relationships within the family setting which will provide the pattern for their future relationships and associations with other individuals.\textsuperscript{321}

The role of the family associational sphere in a pluralist democracy must be distinguished from the role of the family in the production of good citizens.\textsuperscript{322} The family sphere serves a more fundamental role than to produce good citizens who will form "good" associations that will directly serve the long-term public interest. In securing the pluralistic system, society does not require the production of only good associations, but of many associations—both good and bad.\textsuperscript{323} Pluralistic social and political systems depend only on a sufficient number of individuals who possess basic associational skills that will allow others to form numerous associations outside the state sphere. Within the family sphere in American society, individuals first learn to relate to other individuals in a setting largely free from state intrusion and, thereby, learn to develop basic associational skills.\textsuperscript{324}

For groups to act as a collective voice and to insulate individuals from the state, they must have power.\textsuperscript{325} Groups must have enough power to affect decisions in the political arena and to constrain the state sphere. The group’s power originates from the associational skills of the individual group members. Individual associational skills result from an early intimate experience with a group that exists outside the state sphere.\textsuperscript{326} The family plays this political role within a large pluralistic democracy.\textsuperscript{327} In American society, the family is the primary associational sphere that provides direct and immediate care for children in a setting insulated from state intrusion.\textsuperscript{328}

The state arguably denies children not raised in a private family setting the opportunity to develop the basic associational skills neces-

\begin{itemize}
\item \textsuperscript{320} Faehlberg, supra note 71, at 67-74.
\item \textsuperscript{321} See id. at 20-65; Smith & Cowie, supra note 228, at 59-73.
\item \textsuperscript{322} See supra part V.A.
\item \textsuperscript{323} See generally Arendt, supra note 303 (arguing for protection of the freedom of association for the purpose of societal diversity); Karst, supra note 235 (arguing that freedom of association is fundamental to cultural diversity).
\item \textsuperscript{324} Faehlberg, supra note 71, at 22-23; Hafen, Constitutional Status, supra note 169, at 479-84.
\item \textsuperscript{325} Foley, supra note 281, at 85-100.
\item \textsuperscript{326} See supra note 324.
\item \textsuperscript{327} See supra note 324.
\item \textsuperscript{328} Hafen, Constitutional Status, supra note 169, at 476-84; see also Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (1985) (providing a history of the American family).
\end{itemize}
sary for the proper functioning of a pluralistic democracy. Foster care placements deny children this type of private family setting, because the state plays a major role in foster families. Specifically, the public child welfare agency caseworker becomes a significant presence in the life of a child placed in foster care. The caseworker's presence constantly reminds the child that he or she is under the control of a state agency, not his or her immediate adult caretakers. In addition, foster children must appear in court frequently. At each court appearance, the child directly confronts the fact that he or she is a "ward of the state." An even more profound example of state control occurs when the state moves a child in foster care from home to home.

The effects of such a childhood environment have significant ramifications on the development of basic associational skills. A

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329. See, e.g., Foley, supra note 281, at 85-87; Lowi, supra note 220, at 34-35.

330. See supra notes 260, 273 (discussing the states' selection criteria for, and subsequent regulation of, foster families).

331. In representing numerous children living in foster care, the author has witnessed the extent of intrusion into family life that a child must endure resulting from the activities of his or her foster care caseworker. For example, the foster care caseworker periodically visits children in their foster care home in order to monitor them and their family; often supervises visits between children and their biological parents and/or siblings; sometimes imposes school performance conditions (in one case threatening to remove a child from his foster home if he was disciplined at school); often transports children to, and monitors progress in, psychiatric counseling; and, in situations involving transracial placements, often makes sure children are adequately instructed about his or her cultural background.

332. See supra note 331.

333. The CWA requires an administrative or judicial review hearing every six months during a child's placement in foster care. 42 U.S.C. § 675(5)(B) (1994). Most states' child welfare laws require judicial review hearings at least every six months. See, e.g., 42 Pa. Cons. Stat. § 6351 (1994). At least one state requires judicial review hearings every three months. E.g., Mich. Comp. Laws Ann. § 712A.19(3) (West 1994); Mich. Ct. R. 5.973(B)(2). These review hearings are often quite burdensome for children, especially in urban settings where caseloads are extremely high. For example, in Allegheny County, Pennsylvania, up to 70 hearings may be scheduled for 9:30 a.m. Although many of these cases may not require a hearing due to the agreement of the parties, it is often 2:00 or 3:00 p.m. before a case is called. During this long wait, children must not only spend time in crowded, filthy court hallways, but also must interact with biological parents, caseworkers, attorneys, community service providers, and court personnel. These interactions are often extremely uncomfortable, strained, and upsetting for the children. Children often come away from these experiences resigned to the idea that their living situations are completely out of their control.

334. See supra note 333.

335. This fact is not hidden from children living in foster care. In representing children in Michigan and Pennsylvania, the author has regularly witnessed children who have been instructed to bring all of their belongings to court because they may be going to a new home following the court hearing.

336. See the empirical research studies discussed in Herring, supra note 28, at 144-
significant percentage of children placed in foster care fails to develop the ability to form trusting relationships with others and tends to withdraw from social participation with others. These associational outcomes exist in contrast to the outcomes for children who grow up in private family settings that remain free from state intrusion. Even in abusive family settings, children often form strong attachments to their primary caretakers, and arguably develop some basic associational skills.

The foster care setting and its outcomes pose a problem from the perspective of political theory and philosophy in a pluralistic democracy. Arguably, a large, pluralistic democracy may be significantly

50; Musewicz, supra note 45, at 637-47; Wald, supra note 23, at 670-72. The extent to which children are harmed by foster care placements is debatable. See, e.g., Garrison, Child Welfare Decisionmaking, supra note 23, at 1777-87. Even the empirical studies cited by Professor Garrison indicate a higher rate of social dysfunction for adults who experienced foster care placements as children when compared with the general adult population. Id.

337. See supra note 336.
338. See supra note 336.
339. See generally FAHLBERG, supra note 71, at 141-74 (describing the trauma suffered by children who are removed from their families); WALD ET AL., supra note 60, at 10-12, 136-44 (explaining attachment theory and the relationships between children and their primary caretakers); Patricia M. Crittendon, Children's Strategies for Coping with Adverse Home Environments: An Interpretation Using Attachment Theory, 16 CHILD ABUSE & NEGLECT 329, 339 (1992) (discussing the relationships between abused children and their families).

In representing children in civil child protection proceedings, the author regularly observes the strength of attachment between a child and an abusive parent. Children living in these abusive situations regularly have a fervent goal to remain in the parental home or to return to the parental home as soon as possible. This strong attachment may be the result of the relatively high level of functioning of abusive parents and the positive prognosis for these parents. See Patricia M. Crittendon, Family and Dyadic Patterns of Functioning in Maltreating Families, in EARLY PREDICTION AND PREVENTION OF CHILD ABUSE 161 (Bowne et al. eds., 1988). In contrast, the author regularly observes children being removed from foster homes without any objection to the removal. They generally appear to be resigned to their situation and unwilling to fight, or even express a desire to remain in their foster homes.

340. The foster care setting and its outcomes are also problematic from the perspective of constitutional legal doctrine. First, denying children placed in foster care a full opportunity to develop basic associational skills arguably violates their right to equal protection under the law. Even if these children do not constitute a suspect class, and even if the opportunity to develop basic associational skills is deemed not to constitute a fundamental right, it could be argued that there is no rational basis for keeping children in long-term foster care placements when permanent homes outside the foster care system are available. Second, denying children the opportunity to develop basic associational skills may violate their substantive right to freedom of association. As noted above, these arguments asserting a child's constitutional right to a permanent family home have been rejected by the courts. A full analysis of these possible constitutional claims is beyond the scope of this Article; however, for examples of some constitutional arguments, see the sources cited in note 152, supra.
harmed if a substantial number of children are raised in foster homes under state control. The state constitutes a very powerful associational sphere. In order to constrain this powerful state sphere, individual citizens must have the ability to form diverse and powerful groups separate from the state. By raising children in the public foster care system, society theoretically jeopardizes its ability to produce sufficient numbers of diverse citizens who possess the basic associational skills that allow them to form the powerful private groups necessary for the proper functioning of a large pluralistic democracy.

The family's political role in securing the proper functioning of democratic pluralism provides strong theoretical and philosophical justifications for the major components of permanency planning concepts. Both the high barriers to state intervention in the biological family before removal of children from parental custody, as well as the achievement of timely permanent private family placements following removal, conform to this political role for the family. These major principles of permanency planning sustain the child's development of basic associational skills through continuous and intimate experiences with specific adults in a setting insulated from pervasive state control.

However, this justification for implementing permanency planning concepts faces the same problem identified in exploring a justification based on the political role of the family in controlling majority factions. The pragmatic, real-world effect of the current foster care system on the American political system appears insignificant. A significant percentage of children raised in foster care develop the skills necessary to form associations outside the state sphere, with many children exiting long-term foster care as fully functioning adult citizens.341 Although relatively more children raised in foster care settings may fail to develop basic associational skills,342 arguably a sufficient number of children raised in foster care will successfully develop basic associational skills.343 Thus, long-term foster care placements pose no actual threat to the pluralistic political system.

Again, the pragmatic effect may be more substantial for groups that depend on a sufficient number of individual citizens who identify with minority communities. A much greater percentage of individuals from

341. See Garrison, Child Welfare Decisionmaking, supra note 23, at 1777-86. Again, it should be noted that the extent to which children emerge from foster care as fully functioning adults is debatable. See Herring, supra note 28, at 144-50. Nevertheless, even the empirical studies cited in this Article indicate that a significant percentage of adults who had experienced foster care placements as children function as fully competent adults. Id.
342. See supra note 336.
343. See supra note 341.
these populations are affected by the public child welfare system.\textsuperscript{344} The failure of individuals from minority populations to develop basic associational skills significantly affects groups dependent on individuals from these populations.\textsuperscript{345} According to critics of the current functioning of democratic pluralism in America, minority groups need more strength to secure the proper functioning of the American political system.\textsuperscript{346} Thus, American society cannot afford to reduce the number of individuals with basic associational skills who may become members of these targeted groups.\textsuperscript{347} But even within the most targeted populations, the percentage of children who experience public child welfare interventions remains low.\textsuperscript{348} This fact leads to the conclusion that long-term foster care placements do not significantly hinder any specific type of association or actually harm the pluralistic American political system.

Therefore, on a philosophical and theoretical level, the political role of the family in securing the proper functioning of a pluralistic democracy strongly justifies implementing permanency planning concepts. But even acknowledging the more extensive effect of public child welfare interventions on groups made up of members of minority communities, the minimal pragmatic effect of long-term foster care placements significantly weakens this justification for implementing permanency planning concepts.

Two of the three political roles of the family discussed to this point—the family's role in producing socially diverse citizens\textsuperscript{349} and the family's impact on group and association theories\textsuperscript{350)—are not mutually exclusive. The production of diverse associations, and thus diverse factions, depends not only on citizens with diverse reasoning and faculties, but also on diverse citizens who possess basic associational skills. Developing a broad array of powerful associations depends on producing citizens who not only possess basic associational skills, but diverse reasoning and faculties. In a sense, these two political roles for the family, which arise from different veins of political theory and philosophy, merge. The family serves political roles in supporting the production of both “associational

\textsuperscript{344} See supra note 270 and accompanying text.
\textsuperscript{345} Empirical evidence of this effect can be found in charges that the child welfare system causes cultural genocide. See supra note 101 and accompanying text.
\textsuperscript{346} See supra notes 289-94 and accompanying text.
\textsuperscript{347} See The Bias of Pluralism, supra note 288, at 13-19; Dahl, supra note 230, at 16-26; Foley, supra note 281, at 85-100; Presthus, supra note 280, at 285-291.
\textsuperscript{348} See supra note 270.
\textsuperscript{349} See supra part V.B.
\textsuperscript{350} See supra part V.C.
diversity” and “associational power.” The large American democratic republic values associational diversity and associational power, because both attributes assist in controlling factious behavior and in securing the proper functioning of a pluralistic democracy.

D. The Family and Tolerance for Associational Diversity and Power

Examination of a line of United States Supreme Court decisions concerning the substantive right to privacy identifies the final political role of the family discussed in this Article. Many of these decisions address situations within a family setting, and at times appear to be based on principles of family autonomy, while at other times appear to be based on the rights of individuals. Consequently, several commentators question the source of privacy rights.

In questioning the source of these rights, commentators criticize the Court for creating confusion as to whether these rights are individually or family-based. In particular, commentators note that family-based privacy rights have historically resulted in a substantial loss of individual rights, especially for women and children. In any event, it is least plausible that the Court chose the family setting to identify and define a substantive right to privacy simply because it was more comfortable explaining this right in the traditional family setting.

This possibility raises additional questions: Why was the Court more comfortable defining individual privacy rights within a family setting? Why did the Court choose the family setting, rather than settings involving only isolated individuals, to initially define the

351. See Epstein, supra note 189, at 88-93.
352. Dahl, supra note 230, at 81-85; Foley, supra note 281, at 85-100.
353. See supra note 239 for a discussion of this line of cases. This Article has avoided the traditional term of a “zone of privacy” in order to avoid the confusing conflict between individual rights and familial rights. See supra note 241. Now, as this Article discusses legal doctrine, it uses the more traditional term.
355. See supra note 354.
356. See Dailey, supra note 169, at 1018-27; Minow, supra note 170, at 840-51; Woodhouse, supra note 173, at 1036-68.
357. See supra note 356.
358. The confusion concerning the locus of privacy rights may be due to the failure of the Court to articulate the political roles of the family in American society. If the Court had fully explored and articulated the political roles for the family in reaching its privacy decisions, this confusion would have been significantly reduced. See Dailey, supra note 169, at 962-81.
degree of governmental self-restraint required by a substantive constitutional right to privacy? Specifically, why do courts tolerate extreme situations—family settings in which adult caretakers provide only minimally adequate care for children? In addition, why are the boundaries between the family and the state defined and enforced primarily in the judicial forum, as opposed to more political or democratic forums?

These fundamental questions mirror the questions in Dean Bollinger’s theory of tolerance towards free speech. Although not addressed by Dean Bollinger, this theory applies to the right of association, and can be extended to form the basis for an additional justification for permanency planning.

1. Bollinger’s Theory of Tolerance and Free Speech

Dean Bollinger constructed a unique social principle, or public role, for free speech protections. Bollinger asserted that free speech protections secure not only speech, but also stand as a vivid example

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359. The courts regularly place children in family settings in which the caretakers have marginal parenting skills or capacities. This has become even more common with the increased availability and use of in-home services designed to aggressively preserve intact families or to reunify families that are experiencing parenting problems. In one case, the author represented the child welfare agency that was seeking to terminate parental rights for a three-year-old child who had failed to thrive due to neglect while living with his biological parents and his seven siblings. The judge asked one question that proved to be pivotal: if the child was now old enough and strong enough to fight with his siblings for food. The experts responded that the child was now physically able to fight for food. In deciding to deny the child welfare agency’s request for termination of parental rights, the judge immediately placed the child back in the home of the biological family after he had lived for over two years in the care of his foster parents. Although not quite as dramatic as this case, because the courts did not return children to their biological parents immediately upon denying an agency request to terminate parental rights, courts in many other cases have required children to go through intense reunification efforts with their biological parents who possess marginal parenting skills, even after the children have received lengthy placements in foster care. See, e.g., In re Jones, 436 N.E.2d 849 (Ind. Ct. App. 1982); State v. Robert H., 393 A.2d 1387 (N.H. 1978), disavowed by In re Tricia & Trixie H., 493 A.2d 1146 (N.H. 1985); In re Sheila G., 462 N.E.2d 1139 (N.Y. 1984); In re La Freniere, 420 A.2d 82 (R.I. 1980); Harris v. Lynchberg Div. of Social Servs., 288 S.E.2d 410 (Va. 1982). Cases like these make it clear that courts are willing to tolerate extreme parenting situations that merely provide minimally adequate care for children and do not attempt to secure the best possible parenting situations for children.

360. LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986). Following his critique of what he terms the “classical model” and the “fortress model” of protection for free, sometimes extreme, speech, Bollinger concludes that these models are inadequate. Id. at 43-103. According to Bollinger, these models are inadequate because they focus on the value of speech itself to provide justifications for protecting speech activity. Id.

361. Id.
of American society's broad commitment to tolerance. To support his argument, Bollinger detailed the strong human impulse for intolerance of others' thoughts. This impulse of intolerance, if left unrestrained, could result in both excessive governmental and social sanctions. Dean Bollinger argued that the exercise of extensive governmental restraint in the discrete area of speech activity tempers the impulse of excessive intolerance in all areas of human activity. He added that American society singled out speech as a special area of human activity with an extremely high degree of protection. Bollinger asserted that society created this area of protection to promote the tolerant intellectual character necessary in a large democracy.

After setting forth his broad social theory of free speech protection, Dean Bollinger examined how this theory assists in understanding the issues of a free speech theory:

[I]n understanding the three fundamental issues that have so bedeviled the development of a viable free speech theory for modern times: Why should we exercise such extraordinary self-restraint in the regulation of speech when we do not with respect to nonspeech behavior? Why, in particular, should we tolerate extremist speech? Why should we vest the interpretative and enforcement functions of the principle in the judicial branch?

Bollinger's theory provides insightful answers to these fundamental questions. According to Bollinger, the protection of speech, even

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362. Id. at 107.
363. Id. at 109-10. According to Bollinger, thoughts may be revealed through speech and behavior. Id. at 110-11.
364. Id. at 113-14. Such governmental and social sanctions include long-term imprisonment, social ostracism, and violent attacks. Id.
365. According to Bollinger:

At this stage, however, it would be better if we described the purpose behind the principle not as that of protecting speech but rather as that of dealing with the phenomenon of what we have called the "impulse to excessive intolerance" generally, though we do that by insisting on an extraordinary degree of toleration only in the limited context of speech activity. The role of free speech is directed at developing a capacity of far greater moment than that of just regulating the appropriate level of legal restraints on speech activity in the society. The legal principle operates in a small sphere, and in a special way, in order to address a larger issue. Law (in this case, constitutional law) is being used not simply as a barrier against entry but as a major project concerned with nothing less than helping to shape the intellectual character of the society.

Id. at 107 (alteration in original).

366. See id. at 12-15.
367. Id. at 117-18.
368. Id. at 107.
extremist speech which may incite strong reactions of intolerance, vividly demonstrates society's commitment to tolerance in all areas of human activity.  

This tolerance helps develop the necessary intellectual character of society in a large pluralistic democracy. The judiciary must protect this demonstration of tolerance from majoritarian forces inspired by intolerance, and provide a coherent explanation for toleration.

Dean Bollinger specifically addresses free speech protections under the First Amendment. However, his theory applies to the other areas protected under the First Amendment.

2. Bollinger's Theory Applied to the Right of Association

Bollinger's theory also applies to the right of association protected by the First Amendment. The major difference between speech activity and associational activity is the breadth of activities encompassed within these areas of human endeavor. As Bollinger pointed out, speech activity is a limited sphere of verbal behavior that can be fairly well defined. Therefore, according to Bollinger, free speech can stand as a discrete area of protection that demonstrates social tolerance. Associational activity involves a much broader sphere of activity, encompassing both verbal and non-verbal behavior. Therefore, the government cannot construct barriers protecting all associational activities to the same degree as speech protection.

The Constitution allows detailed regulation of many associational activities such as corporate activities, labor union activities, school

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369. See id. at 104-44.
370. Id. at 117-18.
371. Id. at 135-37 (explaining the importance of protecting these views and why the judiciary must protect such tolerance). Bollinger cited the example of the Nazis' wish to march in Skokie, Illinois. Id. at 125-31.
372. For example, the Bollinger theory could apply to the free exercise of religion and the right of association. It should be noted that the free exercise of religion often involves the right of association. Religious activity is often associational activity with a specific empowering force or purpose. See Frederick M. Gedicks, Toward a Constitutional Jurisprudence of Religious Group Rights, 1989 Wis. L. Rev. 99, 114 (1989); Ira C. Lupu, Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, 67 B.U. L. Rev. 391, 431-33 (1987).
373. Associational activity refers to both the formation of associations and the subsequent actions of associations.
375. Id. at 124.
376. There are many types of associations within American society other than the family or religious organizations. Associations include corporations, labor unions, schools, neighborhood groups, clubs, and organized crime. These associations within American society engage in a wide array of both verbal and non-verbal behavior.
activities, and organized crime activities. Nonetheless, associational activities face the same phenomenon of social intolerance that Bollinger details in developing his theory for free speech protection. Associational activities face intolerance from both society in general and majoritarian forces of the state. The powerful human feelings that lead to intolerance of others' views constitute an especially powerful force when focused on associational activities. These feelings most likely result from a general perception that associational activity, as opposed to activity by isolated individuals, poses a greater threat to society. Thus, associational activities may face a serious threat from the forces of intolerance. This threat may be greater than that faced by speech activity.

Despite these natural feelings of intolerance for associational activity, First Amendment doctrine evidences society's view that American society should value and protect associational activity. Applying Bollinger's theory to the right of association, the state should strongly protect specific associational spheres from governmental

377. This is evidenced by the inability of these types of associational groups to exclude persons as members. Professor Failinger labeled these groups as "middle-spectrum associations"—associations which fall between private, intimate associations such as family and public, political associations. The courts protect these middle-spectrum associations in social and economic settings to a much lesser degree from state intrusion and regulation. Failinger, supra note 303, at 149; see also Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) (applying California's Unruh Civil Rights Act to local Rotary Clubs by requiring clubs to admit women does not violate the First Amendment and does not interfere unduly with club members' freedom of association); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (applying the Minnesota Human Rights Act to the Jaycees to bar discrimination in places of public accommodation did not abridge male members' freedom of association).

378. See BOLLINGER, supra note 360, at 93.

379. The powerful force of intolerance for associational activities has been evident throughout history. The repression of communist party activities in the McCarthy era, and the recent attacks on hate group activities, provide vivid examples of this human impulse for intolerance. See, e.g., MORRIS DEES & STEVE FIFFER, A SEASON FOR JUSTICE: THE LIFE AND TIMES OF CIVIL RIGHTS LAWYER MORRIS DEES (1991) (describing the tactic of using civil lawsuits to bankrupt the Ku Klux Klan); M.J. HEALE, AMERICAN ANTICOMMUNISM: COMBATING THE ENEMY WITHIN 1830-1970 167, 167-90 (1990); JOEL KOVEL, RED HUNTING IN THE PROMISED LAND 109, 109-36 (1994).

380. Views can be evidenced through speech and non-speech activities. See BOLLINGER, supra note 360, at 124.

381. See supra note 379.

382. This perception is evidenced by the fact that criminal activity involving a conspiracy is punished more harshly than criminal activity involving a single perpetrator. See, e.g., Callanan v. United States, 364 U.S. 587 (1961); United States v. Inafuku, 938 F.2d 972 (9th Cir. 1991), cert. denied, 112 S. Ct. 877 (1992); Paul Marcus, Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area, 1 WM. & MARY BILL RTS. J. 1, 6 (1992).

383. See Failinger, supra note 303, at 146-47.
intrusion. This would demonstrate society's commitment to associational diversity and develop the tolerant intellectual character which secures the proper functioning of a large democracy. Both the religious and family associational spheres offer the opportunity to make such a vivid demonstration of societal commitment to tolerance. Religious associations have a long history of societal and constitutional protection in America. In all their forms, religious associations allow for a clear demonstration of society's commitment to associational diversity and power.

The First Amendment does not expressly protect the family sphere, as it does the religious sphere. Nevertheless, the family has been a fundamental form of association since the beginning of American society. Although the relationships between family members have changed over time, the family—broadly defined—has consistently provided the initial associational sphere for individuals. By insulating this associational sphere from a large degree of state intrusion, society can clearly demonstrate tolerance for diverse associational spheres which exist separate from the state.

The opportunity for society to demonstrate associational tolerance provides an additional political role for the family. The family sphere, insulated to a significant degree from state intrusion, demonstrates society's tolerance for associational diversity and power. Most individuals will intimately relate to this demonstration based on their own family experiences.

384. See generally BOLLINGER, supra note 360, at 117-18 (explaining the importance of applying Bollinger's theory to protect the ideals of democracy).
385. See Gedicks, supra note 372, at 122-37. Although generally arguing that Supreme Court decisions involving First Amendment rights of associational freedom and free exercise of religion have not offered religious groups sufficient constitutional shelter to cover their interests in self-definition, Professor Gedicks examines the relevant Supreme Court decisions and concludes that "whenever government action so severely pressures a religious group's concept of itself that its very existence is threatened, the First Amendment generally commands that the government, not the group, be the one that yields, even if the resulting anti-social consequences are not narrowly confined...." Id. at 136. Professor Gedicks discovers this area of church autonomy in Supreme Court decisions. See id. at 129-37; see, e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Wisconsin v. Yoder, 406 U.S. 205 (1972); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952).
386. See U.S. CONST. amend. I.
388. For the broad definition of "family" utilized in this Article, see supra note 179.
389. See supra note 387.
This political role of the family answers the questions raised concerning the courts' treatment of the right to privacy. First, the Supreme Court may have chosen the family setting initially to detail governmental self-restraint required by a constitutional right to privacy. This path not only defines individual rights, but also demonstrates society's commitment to associational diversity. From this perspective, the Court protects the family association from excessive state intrusion, at least in part, to demonstrate tolerance for diverse associations outside the state sphere. As in the free speech area, such demonstrations help develop a proper societal intellectual character.

Specifically, courts may tolerate extreme family situations to demonstrate a commitment to associational diversity. The language of state child welfare statutes often permits courts to "rescue" children from poverty, an "immoral" environment, or even a moderate degree of neglect or abuse. However, the courts regularly refuse to apply the statutes in this broad manner. Judicial restraint in these extreme

390. See Failinger, supra note 303, at 149-52 (discussing, for example, the "diversity producing" justification for the protection of associations expressly recognized by Justice Brennan in Bowen v. Gilliard, 483 U.S. 587, 610 (1987) (Brennan, J., dissenting) and in Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984)). Although the cases discussed by Professor Failinger do not address the family association specifically, they do indicate the Court's concerns with protecting associational diversity. See Dailey, supra note 169, at 979 (explaining how the family unit defines the core interest in protecting diverse affiliations).

391. An "extreme situation" would include minimal state intrusion into families in which parents provide minimally adequate care for children.

392. Most state laws which would allow intervention define child maltreatment too broadly. See, e.g., Wald, supra note 23, at 628-29; see also 42 PA. CONS. STAT. § 6302 (West 1994) (defining a "dependent" child as "a child who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals ...."). In addition, the legislative intent is ambiguous, because these laws usually expressly define their overall purpose as preserving the unity of the family and separating parents and child only when necessary. See, e.g., id. § 6301, stating that the Juvenile Act is to be:

[I]nterpreted and construed as to effectuate the following purposes: (1) to preserve the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of the chapter. . . . (3) To achieve the foregoing purposes in a family environment whenever possible, separating the child from parents only when necessary for his welfare or in the interest of public safety.

Id.

393. The author has regularly witnessed the courts applying such statutes to preclude state intervention in families in the form of removal of children from parental custody, based solely on evidence of family poverty (even in situations of homelessness), homosexual relationships within the household, an infant's exposure to drugs in utero, or even significant unsanitary conditions in the home. This result has become more prevalent with the significant growth of in-home services designed to provide short-
situations vividly demonstrates the tolerance for associational diversity that society can utilize in situations well beyond the family setting.\textsuperscript{394} Further, such restraint demonstrates the importance of diverse associations relatively free from state intrusion in a large pluralistic democracy.\textsuperscript{395}

Finally, as opposed to more democratic forums, the judicial forum may be the most appropriate forum to define and enforce the boundaries between the family sphere and the state sphere.\textsuperscript{396} Bollinger's foundation rests on the general human intolerance for different ideas, opinions, and associations.\textsuperscript{397} The courts, the non-majoritarian decision-makers in the American political system, can most fully exercise and explain the degree of governmental restraint necessary for an anti-majoritarian demonstration of society's commitment to associational diversity.\textsuperscript{398}

3. Tolerance of Associational Diversity as a Justification for Permanency Planning

This political role for the family provides a significant and pragmatic justification for implementing permanency planning concepts. Cases in the child welfare system involve parents who allegedly cannot provide minimally adequate care for a child within the current family setting.\textsuperscript{399} These cases, which often receive public attention,\textsuperscript{400} provide rich opportunities for society to demonstrate its commitment to diverse family settings and, more broadly, diverse associations insulated from extensive state intrusion.

Implementing permanency planning concepts would allow this demonstration to occur. Most directly, permanency planning concepts
construct a hurdle to state intrusion into the family sphere. If caseworkers believe state intervention is necessary, they may provide only those services specifically aimed at assisting the family to avoid removal of the child. Caseworkers may remove a child from the family setting only as a last resort. Further, removal may occur only when the provision of services specifically aimed at the identified parenting problems cannot reduce the risk of harm to the child to a minimally acceptable level. Once removal occurs, caseworkers and legal decision-makers must find a permanent placement for the child in a timely manner. The permanent placement should not include the public foster care system and should attempt to place the child within the original family setting.

Despite the understandable human intolerance of marginal parenting and the impulse to secure the best possible result for each child, the state cannot dictate parenting practices designed to achieve a child’s "best interests." The state also should not provide long-term care for children within a system permeated by state regulations and policies. Permanency planning’s preference for a biological parent’s home as the child’s permanent placement demonstrates society’s strong commitment to associational diversity. Maintaining this original random assignment of children to their biological parents, even in the face of minimally adequate caretaking conditions, demonstrates a deep societal commitment to the associational diversity and power which helps secure the proper functioning of a large pluralistic democracy.

4. A Case Study

In the child welfare setting, a commitment to associational diversity regularly exposes children to a risk of harm which often could be reduced through additional state intervention. This calculated exposure to risk demonstrates society’s willingness to sacrifice some degree of child safety and well-being to secure associational diversity and power. Often, these demonstrations capture the attention of the public.

401. See supra part III.
403. Id.
404. Id. § 675(1).
405. The original family is usually the biological family.
407. See supra note 260 for a discussion of state regulation of the foster care system.
408. See supra notes 386-98 and accompanying text.
409. See supra notes 244-46 and accompanying text.
410. See supra note 400.
A recent case in the Pittsburgh area provides an example of this type of demonstration. The case involved an African-American boy named Byron. The public child welfare agency removed Byron from his mother’s custody almost immediately following his birth. Byron’s mother was a single, African-American woman. His father was deceased.

Caseworkers removed Byron from his mother’s custody because of her use of cocaine during pregnancy, her history of substance abuse, and her failure to provide adequate care for Byron’s siblings. A juvenile court judge found Byron “dependent” pursuant to the Penn-
sylvania Juvenile Act, and placed him in foster care. The foster family consisted of a married couple, their biological child, and their two adoptive children. They lived in an upper-middle-class suburb of Pittsburgh, and were both Caucasian. The foster father was self-employed.

When Byron had lived with his foster family for almost six months, the child welfare agency sought to move Byron to a different foster home based on the agency's "race-matching" policy. The foster family opposed the move, retained an attorney, and intervened in the juvenile court process. In response, the juvenile court judge entered an order precluding the child welfare agency from moving Byron.

At this point, the media began detailed coverage of the case, with the initial focus on the agency's race-matching policy. All of the actors in the case were described in the media. The clear message was that the white foster family was totally committed to Byron and was able to provide an extremely nurturing home environment. The press painted the biological mother as a rather hopeless drug abuser who could not provide the level of care for Byron that the foster family could provide. In this initial press coverage there was no detailed

417. 42 PA. CONS. STAT. §§ 6301-6351 (West 1994).
419. See Ackerman, June 26, 1993, supra note 412, at A1; Root, supra note 412, at 45, 49.
420. See supra note 419.
421. See supra note 419.
423. See Stack, Dec. 22, 1993, supra note 414, at B1; Barbara W. Stack, White Foster Parent Says Policy is Formula for Heartbreak, PITTSBURGH POST-GAZETTE, Feb. 6, 1994, at A1 [hereinafter Stack, Feb. 6, 1994] (discussing child welfare agency's policy of moving African-American children from white foster homes just prior to the date when the children will have spent six months in the particular foster home). After a child has been in a foster home for six months, Pennsylvania Department of Public Welfare regulations give foster parents standing to protest a child's move from their home. See 55 PA. CODE § 3700.73 (1994); Barbara W. Stack, CYS Alters Foster Policies: Children Now Won't Be Moved Because of Race, Rules Say, PITTSBURGH POST-GAZETTE, June 8, 1994, at C5 [hereinafter Stack, June 8, 1994].
426. See supra note 427.
428. See supra note 427.
exploration of the ability of either the biological mother or of the extended biological family to provide minimally adequate care for Byron.\textsuperscript{429} In response to this initial media coverage, the letters to the editor of the local newspaper were overwhelmingly in favor of the foster parents’ efforts to maintain custody of Byron.\textsuperscript{430}

The child welfare agency responded to the court’s denial of its request for a change in placement in a very unexpected manner. Although the local system generally did not implement permanency planning concepts vigorously, in this case the agency worked with the mother. They quickly enrolled her in a residential drug treatment program that would allow her to regain custody of two of her children while she underwent treatment.\textsuperscript{431} The mother responded positively to treatment and sought custody of Byron in several court hearings over the following year.\textsuperscript{432} The media continued to cover the case closely, and a very public debate ensued concerning the appropriate permanent placement for Byron.\textsuperscript{433} The foster parents wanted to adopt Byron,\textsuperscript{434} even though Byron’s biological mother wanted custody.\textsuperscript{435} The majority of writers still favored adoption by the foster parents, largely due to their ability to provide better care for Byron.\textsuperscript{436} Because the

\textsuperscript{429} See supra note 427.


\textsuperscript{431} Stack, June 8, 1994, supra note 423, at C5. The child welfare agency's provision of intensive reunification services is extremely unusual in Allegheny County, Pennsylvania. This is evidenced by the fact that the foster family has initiated a federal civil rights lawsuit against the child welfare agency which includes a claim that the agency and other community support service providers conspired to provide the biological mother with too many services. These excessive services allegedly were provided only because the biological mother was African-American and the foster parents were white, allowing the biological mother to regain custody of Byron. \textit{Id.} The foster parents contend that this violated federal law. See \textit{id}.


\textsuperscript{433} See, \textit{e.g.}, Letters to the Editor, PITTSBURGH POST-GAZETTE, Jan. 2, 1994, at B3; Letters to the Editor, PITTSBURGH POST-GAZETTE, Jan. 9, 1994, at B3; Letters to the Editor, PITTSBURGH POST-GAZETTE, Jan. 11, 1994, at D2.


\textsuperscript{435} See Ackerman, June 24, 1993, \textit{supra} note 412, at C1.

\textsuperscript{436} See Letters to Editor, PITTSBURGH POST-GAZETTE, Jan. 2, 1994, at B3 (including three letters in support of the biological mother, and three letters in support of the foster parents); Letters to Editor, PITTSBURGH POST-GAZETTE, Jan. 9, 1994, at B3 (including one letter in support of the biological mother, and five letters in support of the foster parents); Letters to Editor, PITTSBURGH POST-GAZETTE, Jan. 11, 1994, at D2 (including
biological mother made progress in drug treatment, however, some wrote letters to the editor arguing that she should have custody.437

When Byron was seventeen months old, the juvenile court judge entered an order placing him in the custody of his biological mother.438 Many members of the public believed that this result demonstrated the complete failure of the public child welfare system.439 This result revealed a partial failure of the system because it took far too long for the child welfare agency and the court to implement permanency planning concepts.440 However, Byron’s case provided a very public and pragmatic demonstration of society’s commitment to family diversity, and, more broadly, to associational diversity and power. This case clearly demonstrated governmental restraint and tolerance in allowing a single, formerly drug using African-American woman to regain custody of her biological child despite a very real and present opportunity to provide that child with a “better” family environment. Despite the majoritarian human impulse for intolerance of the biological mother’s family setting, the state provided a vivid demonstration of tolerance for associational diversity and power.441

four letters in support of the foster parents).

437. See supra note 436.


439. See Letters to Editor, Pittsburgh Post-Gazette, Jan. 11, 1994, at D2 (two letters expressly questioning the child welfare system); Letters to Editor, Pittsburgh Post-Gazette, Jan. 9, 1994, at B3 (including four letters expressly questioning the child welfare system); Letters to Editor, Pittsburgh Post-Gazette, Jan. 2, 1994, at B3 (including two letters expressly questioning the child welfare system).

440. From a developmental perspective, Byron, an infant at the time of removal from parental custody, should have been placed in a permanent home within 6 to 12 months. See Wald, supra note 23, at 690-91. This was the position articulated by Byron’s biological family and several African-American advocacy groups. See Ackerman, June 26, 1993, supra note 412, at A1; Ackerman, June 24, 1993, supra note 412, at C1; Pro & Stack, Dec. 21, 1993, supra note 412, at A1; Smith, March 13, 1993, supra note 412, at B1. This excessive length of time needed to determine the appropriate permanent placement for a child involved in a highly publicized case indicates the extremely lengthy periods of time most children spend in the limbo of temporary foster care placements. For example, a recent study in Allegheny County, Pennsylvania revealed that 44% of the children living in temporary foster care placements had been in care for more than two years. See Permanency Planning Task Force Court Appointed Special Advocates Subcommittee, supra note 50, at 3.

441. The public debate concerning this case continues. During the summer of 1994, the biological mother admitted to using cocaine again and the Juvenile Court judge placed Byron with his maternal aunt. The biological mother was also arrested and charged with prostitution. The foster family continued to seek custody of Byron. In early October 1994, the Juvenile Court judge ordered the agency to place Byron and his sister Byrae with the foster family, and seek the termination of the biological mother’s parental rights, with the foster parents first in line to adopt both children. See Editorial, A Home for Byron: Judge Jaffe Made a Painful, But Plausible, Decision, Pittsburgh Post-Gazette, Oct. 11, 1994, at B2; Cindi Lash, Byron, Sister Removed from Mother’s
The serious implementation of permanency planning concepts by the public child welfare agency and the juvenile court resulted in the demonstration of tolerance in Byron’s case. This example reveals that the opportunity for the family to fulfill its political role in demonstrating society’s tolerance for associational diversity is significantly enhanced through implementing permanency planning concepts in the public child welfare system.

Byron’s case also reveals that this argument for permanency planning concepts reaches well beyond a theoretical or philosophical level. The associational diversity tolerance argument does not depend solely on individual citizens who were involved in the public child welfare system affecting the political system. The basis for the argument stems from the actual effects that all individual citizens have on the society and on the political system. \(^{442}\) The argument is rooted in the shaping of the intellectual character of society to tolerate the associational diversity necessary for the functioning of a large pluralistic democracy.

VI. CONCLUSION

Permanency planning concepts have largely prevailed at the public policy and legislative levels. \(^{443}\) However, legal decision-makers involved in child welfare proceedings have not seriously implemented these concepts. \(^{444}\) Legal decision-makers could provide leadership in implementing permanency planning concepts, but the traditional justifications for implementing permanency planning concepts do not compel such activist leadership. \(^{445}\) Moreover, legal decision-makers seem to

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\(^{442}\) The identification of this broader basis is analogous to Dean Bollinger's identification of a broader basis for the justification of exercising extensive governmental restraint in the area of regulating speech activity. Bollinger asserted that free speech protections secure much more than speech activity, in that they promote the tolerant intellectual character necessary in a large democracy. BOLLINGER, supra note 360; see supra part V.D.1.

\(^{443}\) See supra part II.

\(^{444}\) See supra part IV.B.1.

\(^{445}\) See supra part IV.B.2.
have difficulty relating to the traditional justifications based on child development principles, social work practice concepts, economic principles, and the racial makeup of families involved in the public child welfare system.\textsuperscript{446}

In light of the apparent failures of the traditional justifications in real-world child welfare practice, this Article explored new justifications for implementing permanency planning concepts based on political history, theory, and philosophy.\textsuperscript{447} Exploration of the political roles of the family within the American political system provides additional reasons to implement permanency planning concepts.

The family's role in producing "good" citizens provides little justification for implementing permanency planning concepts. Permanency planning concepts do not guarantee that children will be raised in ideal family situations, or even in family situations in which the level of care rises above a minimally adequate level. Permanent placements guarantee children long-term caretakers who are not closely monitored by the state, rather than a family to make children "good" citizens.

The family's roles in producing diverse individuals, and individuals with basic associational skills, strongly justify implementing permanency planning concepts on both a theoretical and philosophical level. The timely placement of children in permanent family settings, relatively free from state intrusion, provides children with the opportunity to experience a family life that fulfills these political roles.

On a pragmatic level, American society and the American political system do not require implementing permanency planning. The foster care population remains relatively small,\textsuperscript{448} and arguably, enough children are raised in permanent family settings to ensure numerous diverse individuals who possess basic associational skills. The public child welfare system may have a greater effect on minority populations. Even for these targeted populations, however, the percentage of children placed in foster care is relatively low.\textsuperscript{449} Thus, although these justifications for implementing permanency planning concepts appear strong on both a theoretical and philosophical level, there is little pragmatic effect on the political system.

This Article validates a final political justification for implementing permanency planning concepts—associational diversity and associ-
The family association provides society with the opportunity to demonstrate tolerance for diverse associational activity. By exercising a high degree of governmental restraint in regulating the family, society demonstrates its commitment to tolerate diverse associations insulated from state intrusion. Such a demonstration assists in developing the intellectual character and the human associations necessary for the proper functioning of a large pluralistic democracy. Some of the most vivid demonstrations of this associational tolerance can occur in the context of the public child welfare system. Within this system, the government must exercise a high degree of restraint and allow a parent who provides only minimally adequate care for a child to maintain custody of the child. Implementing permanency planning concepts demonstrates tolerance in cases which often receive public attention. The usefulness of such a vivid, widely observed tolerance for associational diversity and associational power within the political system provides a strong, pragmatic justification for the implementation of permanency planning concepts.

Society pays a price for the vivid demonstration of associational diversity achieved through implementing permanency planning concepts. The state occasionally exposes children to a risk of harm that could be eliminated or reduced through more extensive state intrusion in families. Nevertheless, exposing children to a higher risk of harm provides significant benefits to a large, pluralistic democracy. Diverse families produce diverse individuals, individuals who experience intimate associational relationships outside of the state sphere from the very beginning of life and who acquire the basic associational skills necessary to form powerful groups outside the state sphere. All of these outcomes lead to the associational diversity and power necessary for the proper functioning of a large pluralistic democracy whose designers had the wisdom to recognize that no individual or single group could define and achieve the true public good.