ACCOMMODATING CHILDHOOD

ANNETTE RUTH APPELL*

Unlike other social categories, such as race, gender, sexual identity, and disability, the legal academy has bestowed scant critical examination on the category of childhood. Yet like other socio-legal categories with natural referents, childhood masks the contingency and normativity of behavior, expectations, power, and regulation, rendering the social order natural and inevitable. Childhood also scripts behavior and produces subordination and privilege in a manner unique to the adult–child dichotomy. As such, the category bears examination not only for what it reveals about adults, but also for what it reveals about the power and agency of children and the artificiality of childhood as presently constructed.

This Article presents children as complex and powerful subjects in their own right, but also recognizes and embraces the important foundational and instrumental roles of childhood. While the dichotomous developmental frame that dominates the regulation of youth is important from the perspective of adults, and even children, this framework unduly limits consideration and appreciation of children's agency and participation in social and political orders. Despite the undeniable developmental differences between most children and most adults, the socio-legal categories of childhood and adulthood are no less inevitable than man-woman, black-white, able-disabled. The adult-child divide is a social construct in, and of, a regime that creates and privileges independence in adulthood and privatizes and subordinates dependency in childhood. In turn, this subordination creates moral and political power in adults and removes it from children.

This Article recognizes the structural importance of this categorical divide and the vulnerability this divide creates in childhood, but also childhood's possibilities. Taking cues from ascendant human rights and disability approaches, this Article suggests a model for bringing justice to children while preserving the important freedoms childhood creates for adults. This model, the Children's Participation Act, presents an analytic framework for a more contemporary approach to children's rights, which aims to protect and promote children's dignity

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and participation. This approach is part of a broader movement away from negative rights and toward liberty rights that enhance self-determination and value positive engagement with children and recognition of their individuality and humanity.

Athena "was the daughter of Zeus alone. No mother bore her. Full-grown and in full armor, she sprang from his head."[1]

"[T]he very principle of myth [is that] it transforms history into nature."[2]

INTRODUCTION

Childhood is one of the last "natural" categories to escape critical legal scrutiny. While other disciplines have begun to interrogate the purpose and legitimacy of the adult-child divide and the power vacuum children occupy, with very few exceptions[3] jurisprudence and legal scholars accept children's

[1] EDITH HAMILTON, MYTHOLOGY 29 (1940).

[2] ROLAND BARTHES, MYTHOLOGIES 129 (Annette Lavers trans., 1972).

[3] *See e.g.*, BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE (2008) (rehearsing children's remarkable abilities and accomplishments); Samantha Godwin, *Children's Oppression, Rights, and Liberation*, 4

subjugation, distrust children for their vulnerability and lack of experience, and treat agency in childhood as exceptional and problematic. Put another way, the law and legal studies seek to protect children and keep them in their place: homes, schools, and juvenile and family courts. Even the much-heralded U.N. Convention on the Rights of the Child ("CRC") fails to challenge, or even problematize, the structural subversion of and the privatization of childhood.[4] It may not be surprising then that neither "children or children's groups . . . [took] part in the drafting process or exercised any influence in the preliminary discussions" of the CRC.[5] The irony of the exclusion of the very subjects of the CRC is surprising in light of a more general movement toward encoding norms that promote greater freedom and equality across lines of race, gender, ability, sexual identity, and old age. At the same time, this omission is not surprising because the socio-legal category of childhood renders children unwise, vulnerable, and incompetent, and thus without the capacity and experience to exercise control over themselves or others.[6]

While this power structure seems natural and inevitable, many philosophers and political scientists have raised the question of how a social order in which one group of people subordinates another can be morally, politically, and legally justified, particularly when other previously legally subjugated groups, such as women and African Americans, are no longer presumptively disabled under the law, and as the law calls for inclusion of and accommodation for people with disabilities. The answers to this predicament vary, but they all rely on developmental distinctions between adults and children and on foundational philosophical, political, and legal distinctions between the mutually constitutive categories of childhood and adulthood in a contractarian society.

N.W. INTERDISC. L. REV. 247 (2011) (proposing equal rights for children); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973) (arguing that the law should not presume children's incompetence); *see also*, Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267 (1995) (rehearsing legal and non-legal approaches to children's rights).

[4] Ashley Barnes, *CRC's Performance of the Child as Developing*, *in* LAW AND CHILDHOOD STUDIES 392, 394 (Michael Freeman, ed., 2001); Annette R. Appell, *The Pre-political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 730 (2009); *see also*, Andrew Rehfeld, *The Child as Democratic Citizen*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 162 (2011) ("The CRC prioritizes the welfare of children, treating them as a protected, at risk class and marginalizing them from active engagement as political citizens.").

[5] Daiva Stasiulis, *The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement, A Difference-Centred Alternative to Theorization of Children's Citizenship Rights*, 6 CITIZENSHIP STUD. 507, 516 (2002). Even so, Stasiulis views the CRC as casting children as "full human beings, invested with agency, integrity, and decision-making capacities . . . and . . . as persons and as rights-bearing citizens with a range of social, political and civil rights, but also calls upon states to ensure that they are active, participating citizens, playing a role in governance 'according to their age and maturity', rather than simply being passively governed." *Id*. at 509.

[6] *See, e.g*., Francis Schrag, *The Child in the Moral Order*, 52 PHILOSOPHY 167 (1997) (describing the difference between adults and children and the justification for the power differential between adults and children). In this article "childhood" refers to the socio-legal category; "child" or "children" refers to the flesh and blood constituents of the category of childhood. *Id*.

This Article illustrates that childhood, though constructed to accommodate both children's vulnerability and adult liberty, can continue to serve those social goals even as it affords children more freedom. As childhood theorist Allison James notes, children's vulnerability simply suggests a different type of equality, not exclusion.[7] While acknowledging the "natural" differences between many children and most adults, I challenge the totalizing categorical distinction between adulthood and childhood, the extent of the limitation on children's agency, and their segregation from public life. I also accept the utility and importance of family as a proper and even desirable place for children—and adults in a liberal regime.

In fact, this project does not aim to dismantle the socio-legal category of childhood altogether because the symbiotic relationship between childhood and liberalism makes it all but impossible to imagine a liberal democracy without the category of childhood. Liberalism makes adult autonomy possible, and children's freedom and independence all but impossible. To understand childhood as a liberal construct also helps reveal that children's vulnerability is not located in the child, but instead in the political and legal systems that create vulnerability. This symbiotic adult-child divide also masks a widespread phenomenon that is part of the human condition.[8] It is my hope that this analysis will provoke further grounded discussion in the legal academy regarding justice and childhood under the current regime and surface additional methods to recognize the personhood and contributions of children.

As I illustrate here, the social category of childhood is both like and unlike other social categories such as gender, race, ability, and sexuality. Childhood's particular uniqueness is more suited to ascendant approaches reflected in human rights[9] and disability models, rather than the regime of negative rights that has characterized sexual, gender, and racial liberty in the U.S. This analysis locates vulnerability not in children's minds and bodies, but instead in negative liberties, an unaccommodating state, and a system that disenfranchises children. At the same time, this project is mindful of this nation's long and ongoing history of

[7] Allison James, *To Be (Come) or Not to Be (Come): Understanding Children's Citizenship*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 167, 171 (2011); *see also* John Wall, *Can Democracy Represent Children? Toward a Politics of Difference,* 19 CHILDHOOD 86, 86-87 (2011) ("[T]he exclusion of children from direct political representation is due to a lack, not in children themselves, but in existing conceptualizations of democracy.").

[8] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) (critiquing formal equality metrics and arguing that vulnerability, an inevitable and "enduring aspect of the human condition . . . must be at the heart of our concept of social and state responsibility"); Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33, 38 (2003) (arguing that rights must be backed up by measures to ensure the ability to exercise those rights, rather than a regime of negative rights that limit state power in the name of liberty).

[9] *E.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."). *See also*, John Wall, *Human Rights in Light of Childhood*, 16 INT'L J. CHILD. RTS. 523, 533 (2008) (claiming that human rights are aimed more at "collective inclusion in social processes, to a public voice and agency").

substituting state interests for the wishes and interests of children—and their families.[10] Certainly children's vulnerability and inexperience justify some interventions in the name of child protection and development, but this rationale also enhances state power when it deploys children's interests to justify individually targeted and coercive intervention into the lives of poor and minority children and their families, people whose liberty is already most vulnerable to state intervention because of their non-normativity.[11] I deploy a metric that aims to accommodate children's vulnerability by enhancing *their* participation in their own lives, their families, and the polity.

I reject the equality metric for empowering children for similar reasons as feminist, critical race, queer, and disability theories have: the deployment of the white, able-bodied, heterosexual, non-caregiving man as the ideal citizen, and thus the measure for equality.[12] This critique has led movement away from formal equality rights and toward a vision of rights that protect or promote relationships,[13] inclusion, caring, and flourishing. As Kenji Yoshino has observed, liberty rights, those which protect one's life choices, rather than equality rights, appear to be ascendant.[14] The Americans with Disabilities Act ("ADA") illustrates this more liberatory approach. Similarly, approaches such as Martha Nussbaum's capabilities theory[15] and Martha Fineman's vulnerability theory[16] also suggest an increased

[10] MARTY GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005); Barbara Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381 (2011); Annette R. Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573 (2008).

[11] DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); PEGGY COOPER DAVIS, NEGLECTED STORIES THE CONSTITUTION AND FAMILY VALUES (1996); *see also*, Rodham, *supra* note 3, at 490 ("The most striking characteristic of children's law is the large degree of discretion permitted decision-makers in enforcing community norms.").

[12] Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 18-19 (1991); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 293 (2001); Aart Hendriks, *The Right to Health Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and the Women's Convention*, 44 AM. U. L. REV. 1123, 1126-27 (1995).

[13] *E.g.*, JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 52 (2011) (arguing for a relational account of autonomy that "requires constructive relationship throughout one's life, not just as a child when one is first developing the capacity").

[14] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (arguing that the Court has phased out the equal protection doctrine and instead applies a substantive due process liberty analysis in a doctrinal hybrid method that he identifies as "dignity claims" which promote the freedom of choice rather than equality, which distinguishes among people rather than uniting them). *See also*, Martha Minow, *"A Proper Objective": Constitutional Commitment and Educational Opportunity After* Bolling v. Sharpe *and* Parents Involved *in Community Schools*, 55 HOW. L.J. 575, 603 (2012) (arguing that the due process's focus on deprivation of liberty attendant to gender and racial segregation better addresses the harm of segregation in an era when equal protection has devolved into "a tangle of classifications and stereotypes that have marked debates over single-sex education"); *but see* Rodham, *supra* note 3, at 510-12 (exploring various rationales to support an equal rights approach for children).

[15] *E.g.*, Nussbaum, *supra* note 8.

[16] *E.g.*, Fineman, *supra* note 8. *See also*, Jonathan Herring, *Vulnerability, Children*, *and the Law*, *in* LAW AND CHILDHOOD STUDIES, *supra* note 4, at 243, 250-55 (noting that vulnerability is a social creation that affects both adults and children).

engagement with human beings as dependent, rather than independent. This Article demonstrates and critiques vulnerability in the context of childhood while taking cues from these evolving and more robust conceptions of rights.

Unlike other approaches to children's liberation,[17] this Article is both child-centered and grounded in the theoretical construct that protects moral and political liberty in parenthood, in adulthood, and in childhood. I take seriously children's vulnerability, the important role of childhood in protecting moral and political freedom, and the problematic role of well-meaning state surrogates, such as judges, lawyers and social workers. For these reasons, I suggest a method that will enhance children's voice and freedom rather than the state's powerful regulatory voice. Deploying tools of critical race and gender theories, as well as childhood theory, I challenge the inevitability of current constructions of childhood even within a liberal regime. While childhood may well be a core constituent of liberalism,[18] childhood's contours and the status of its occupants are not. Indeed, other countries have begun to bring children into the political fold through methods that are consistent with many of the freedoms of U.S. liberalism.[19]

The rise in theorizing liberty, as opposed to formal equality, also suggests that the parent-child union is sustainable even if children gain more freedom.[20] Children's liberty is constitutionally, that is to say legally, cabined by childhood because children's liberty resides in their parent's liberty, rendering children objects of their parent's freedom; but children are also protected by this freedom *vis á vis* state power. Through its *parens patriae* authority the state, in turn, protects children from their parents and from other risks. Treating children the same as adults (the equality approach) would challenge both adulthood and childhood, as the former would become less free and the latter more hazardous. The accommodation approach is consistent with models of parenting in which parents

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[17] *See* Rosalind Dixon & Martha C. Nussbaum*, Children's Rights and Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549, 552 (2012) ("Many existing accounts of children's rights . . . depend on a theory of children as 'adult-like,' or quasi-adults entitled to the same rights and entitlements as adults under a social contract approach.").

[18] *See* HOLLY BREWER, BY BIRTH OR CONSENT, CHILDREN, LAW, AND THE ANGLO AMERICAN REVOLUTION IN AUTHORITY (2005) (exploring the evolution of govern by divine right, a democracy ruled by consent of the government, arising out of the Enlightenment and liberal moral, political and epistemological theory).

[19] *See* Stasiulis, *supra* note 5, at 518-19 (2002) (describing laws in European countries requiring "parents to consult their children on matters that affect them in line with their age and development"). Stasiulis further notes the negligible participation of children whom sit on school boards and serve in community governance associations, and municipal councils. *See id*. at 519.

[20] I do not aim here to abolish the parent-child relationship or the family despite available alternatives for managing the vulnerability of youth. *See, e.g*., Annette R. Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141 (2004) [hereinafter Appell, *Uneasy Tensions*]; Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in Child Protection Proceedings*, 48 S.C. L. REV. 577 (1997) [hereinafter Appell, *Protecting Children*]; Annette R. Appell & Bruce Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63 (1995). I have more faith in flesh and blood relations than in bureaucrats and attorneys. Appell, *supra* note 10.

protect their children's vulnerability while also affording them increasing participation in the household and grooming them for authority and responsibility.

This approach allows us to imagine "a different model of citizenship [that acknowledges] children's different, but equal, entitlement to citizenship rights and recognition."[21] This model values the intimate associations of family life in a liberal democracy, but also affords children some measure of self-governance in this "private" realm and most certainly a more active role in the public sphere. This model may also curb the lottery of privilege and subordination that the present privatization of childhood produces, because children would not have only negative rights, but would have rights to accommodations for their vulnerability. The vision of transforming childhood from a cloistered, powerless place to one of political, social, and economic engagement in the polity, market, classroom, and the home is possible through a revision of childhood. Instead of a time *only* of vulnerability, play, development, and becoming, constructing childhood as a time of participation, growth, and membership, in the family as well as the polity, can expand opportunities for children and perhaps expand our visions of justice.

The first Part introduces the development thesis, which is at the core of liberal theory, adult freedom, and our theory of the state. The development thesis holds that children are unwise, weak, unreasonable, and wild whereas adults are wise, strong, reasonable, and restrained. The opposition between these two categories explains why adults are free, empowered to choose and control their sovereigns—government—and entitled to rule children. The development thesis thus animates the political, moral, and jurisprudential landscape of the United States, both accounting for children's captivity and adult's legal, moral, and political freedom and authority.

The second Part situates childhood in the pantheon of other socially constructed, regulatory categories. This Part illustrates that despite salient differences between children and adults, childhood is subject to the same type of theoretical challenges as other naturalized categories, such as sex, race, gender, sexual orientation, and sexual identity. Thus, a critical analysis of childhood reveals similar skepticism regarding the naturalness of children's vulnerability. Part II illustrates children's moral and political agency by presenting them as social, political, and market actors. Consulting identity-based critical legal studies and the relatively new multidisciplinary field of childhood studies, which critically examines childhood, this Part lays bare the artificiality of childhood, challenges children's powerlessness and passivity, and exposes the work the category performs in maintaining the social order.

The third Part critiques and rejects the traditional equality approach and instead presents an accommodationist approach that would recognize children's personhood and enhance their liberty within the current legal system. Here, I

[21] James, *supra* note 7.

propose a Children's Participation Amendment ("CPA"). The CPA represents a more contemporary rights approach patterned after the Americans with Disabilities Act. This scheme recognizes children's developmental differences and vulnerabilities, and presents remedies that would identify and accommodate children's strengths and weaknesses as participants in their own lives, the life of the family, in schools, and in the polity. The CPA promotes inclusion by removing barriers to, and providing assistance for, children's integration into civic life and their independence in their own lives.

This Article concludes that for these and other reasons, it is helpful to focus on children's liberty, rather than their equality. The CPA's accommodation model will likely offer more freedom for children inside and outside the family because it requires the state and family to engage in positive actions to mediate dependency at the same time it limits interference with children's autonomy. The accommodation approach affords more options and freedom for children because it offers a positive component that would help mitigate children's physical limitations to participate in life at home, in the polity, and in the market. While accommodating childhood may limit parental freedom in childrearing because of the proposed affirmative mandates regarding the child's home life and activities outside the home, gains in freedom for children may also free caregivers as children become more independent earlier.

I. CREATING CHILDHOOD

Childhood as it exists today is, of course, an ideological construct, arising out of Enlightenment philosophy and, most specifically, liberal political and moral theory.[22] This ideology establishes children as subjects without wisdom, knowledge, or political, moral, or legal competence, and thus excludes them from governance and self-determination. Adults, in contrast, presumptively possess these attributes and powers. The nearly universal justification for the exclusion of children from the freedoms and authority that belong by default to adults is what I term the development thesis. Philosopher and children's rights theorist David Archard sums it up succinctly:

> [T]he modern child is an innocent incompetent who is not but must become the adult. The 'must' conveys both the necessity of human development and the ideal character of maturity. In our culture this outlook determines the proper place of the child as one who cannot enjoy the rights and responsibilities of the adult.[23]

The law adopts, reflects, and reinforces this categorical approach to young humans. The legal child is disenfranchised, under the coverture of her parents or

[22] *See generally*, BREWER, *supra* note 18 (tracing the connections between the Enlightenment philosophy and the U.S. political system).

[23] DAVID ARCHARD, CHILDREN, FAMILY AND THE STATE 50 (2004).

guardians, categorically excluded from a variety of activities and occupations, and subjected to obligations and limitations that would be exceptional, unlawful, or unconstitutional if directed at adults. Although jurisprudence does create deviations from and gradations within each of these categories, the law treats such deviations as exceptional, rather than as opportunities to imagine new categories of citizenship and authority.

This widespread assumption of the development thesis constructs childhood as natural, benign, and inevitable. While its benignity is questionable, it is certainly not inevitable. On the contrary, the concept and category of childhood is at the core of liberal democracy and equal rights for adults. Even so, and notwithstanding the development thesis, it is worth asking how a social order in which one group of people subordinates another can be morally, legally, and politically justified when other previously legally subjugated groups, such as women and African Americans, are no longer presumptively disabled under the law, and when the law's trajectory calls for inclusion of and accommodation for people with disabilities and for the elderly.

The law, of course, did not originate the subordinate child or the development thesis. The unwise, incompetent, weak child is an important feature of the moral and political theory that undergirds our legal regime—theory that places rational and empirical thought at the center of moral, political, and epistemological authority.[24] These theories construe childhood and adulthood as distinct developmental categories in which adults are fully developed, invulnerable, rational beings who have the capacity for self-government and the governance of others. In contrast, children are developing beings who are irrational, unwise, vulnerable, and unable to exercise authority over their own lives or those of others; it is a time of presumptive incompetence and powerlessness. Adulthood is complete. These distinctions, along with the contingency of childhood and the perfection that is adulthood, are central to political and moral authority in liberal theory. This structural distinction between childhood and adulthood limits our ability to conceive of children as political and moral subjects who can govern themselves and others.

This divide between developed adult and undeveloped child is central to liberal legal theory as well. In fact, childhood plays a fundamental role in creating and maintaining adult liberty in that children are both part of parental liberty and are categorically denied most freedoms (and burdens) of moral and political authority. In contrast, adults are categorically afforded such liberty. It is not surprising then, that the answer to the child question is remarkably consistent across moral, political, and legal theory. The foundational role and persistence of this divide challenge legal regime change while the relegation of childhood to the

[24] BREWER, *supra* note 18, at 148; Appell, *supra* note 4, at 737-39.

private world of family and the future[25] further limits children's claims upon the state and direct participation in the polity. This Part traces the consistency of childhood's construction in Anglo-American moral, political, and epistemological philosophy as a category comprised of moral beings without moral authority.

While it is true that childhood occupies foundational social, legal, and political roles, this Article contests the totality of the development thesis as an explanation for childhood and a justification for its contours and regulation. On the contrary, while the development thesis does have a natural referent—physical and cognitive vulnerability—the response to this vulnerability is not inevitable. Instead, the development thesis reflects the moral, legal, and political norms at the core of the liberal state. For better or worse, I take these norms and liberalism's freedom seriously, but the naturalness, inevitability, and the boundaries of childhood in legal liberalism are overdrawn, overshadowing the idea that children not only are more than instrumental, but also powerful in their own right.

A. The Philosophical Child

Questions about childhood do not appear to have been the topic of sustained or disciplined study in philosophy until relatively recently.[26] When philosophers approach the child question, they provide similar answers, viewing children as moral but unformed beings in need of protection and guidance.[27] Under this view, children's confinement is justified because of their developmental limitations and also because children eventually will be free. For example, according to John Locke, children are not like Adam, who came to earth as an adult,[28] but instead are "imperfect beings . . . weak and helpless, without knowledge or understanding."[29] In contrast, adult (male) liberty and self-determination "is grounded on his having

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[25] *See, e.g.*, Ludvig Beckman, *Public Justifiability and Children*, 16 INT'L J. CHILD. RTS. 141, 146 (2008) (asserting that liberalism need not justify itself to children, but instead to "the person he or she will later become").

[26] *See* David Archard, *John Locke's Children*, *in* THE PHILOSOPHER'S CHILD 85 (Susan M. Turner & Gareth B. Matthews eds., 1998) ("[M]ost philosophers[‘] . . . account of childhood has to be extracted from scattered remarks; it is not to be found explicitly and systematically expressed in a single work.").

[27] *See generally* THE PHILOSOPHER'S CHILD, *supra* note 26. This is a collection of reviews of philosophers' writings regarding children from ancient to late 20th century, illustrating that analysis of children beginning with ancient Greek philosophy was often subordinate to other inquires, *e.g.*, epistemology, social contract, and family. *Id.*; *see also,* Tamar Schapiro, *What is a Child?*, 109 ETHICS 715, 717-731 (1999) (rehearsing and analyzing Immanuel Kant's developmental approach to childhood, including his assumption that children do not have principled perspectives, and therefore no moral authority); John O'Neill, *Is the Child a Political Subject?*, 4 CHILDHOOD 241, 242 (1997) ("From Hobbes to Rawls . . . it has been assumed that the child is entirely in the power of the male parent.").

[28] JOHN LOCKE, TWO TREATISES ON GOVERNMENT, ch. VI, § 56.

> From him [Adam] the world is peopled with his descendants, who are all born infants, weak and helpless, without knowledge or understanding: but to supply the defects of this imperfect state, till the improvement of growth and age hath removed them, Adam and Eve, and after them all parents were, by the law of nature, under an obligation to preserve, nourish, and educate the children they had begotten.

Id.

[29] JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, ch. VI, § 56.

reason [and]. . . is that which puts the authority into the parents' hands to govern the minority of their children."[30] Locke's epistemic view of children as blank slates at birth who gradually gain knowledge efficiently justifies their temporary subordination to parents, their lack of political agency as children, and establishes the categorical moral authority of adults.[31]

This development thesis continues to dominate liberal philosophy. Children are emerging persons, not yet "under their own jurisdiction."[32] Thus, children are people, but with limits: we limit their agency and authority to protect them and justify this paternalism because it is temporary and because children need protection.[33] Although children have moral status, childhood constructs them as immature and then requires them to be "treated differently from adults" because of their immaturity.[34] While acknowledging that our treatment of children is similar to the way we used to treat women and slaves, philosophers still justify this exceptionalism because children will have rights upon reaching adulthood.[35]

Philosophical approaches to the child question thus construct childhood as both developmental and categorical. The justification for different moral categories for children and adults, and for that matter, children's lack of political status, is based on children's immaturity—their developmental incompleteness.[36] While childhood is characterized by linear development such that immaturity and incompetence wane as children age, children's lack of wisdom and consequent vulnerability justify paternalism over children as long as they are children.[37] Although philosophers recognize that childhood is not monolithic as a developmental matter and that children have greater rational capacity as they age,[38] philosophers stop short of equating moral autonomy with intellectual competence[39] because such a measure would introduce indeterminacy regarding the moral status of adults which would in turn undermine adult moral agency.[40] Thus, despite the gradual nature of development, education philosopher Francis Schrag opted instead

30 *Id*. § 61. Moreover this power is a duty: "The power, then, that parents have over their children, arises from that duty which is incumbent on them, to take care of their off-spring, during the imperfect state of childhood. To inform the mind, and govern the actions of their yet ignorant nonage, till reason shall take its place." *Id*. § 58.

31 *Id*. § 55; *see also*, BREWER, *supra* note 18; Appell, *supra* 4, at 738-41.

32 Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575, 587-89 (2003); *see also*, Schapiro, *supra* note 27, at 735-37 (discussing both children's developmental and dependant status and suggesting prescriptions for adults to aid children to become "developed agents").

33 Samantha Brennan & Robert Noggle, *The Moral Status of Children: Children's Rights, Parents' Rights, and Family Rights*, 23 SOC. THEORY & PRAC. 1, 3-4, 7 (1997).

34 *Id*. at 2, 7.

35 Harry Brighouse, *How Should Children be Heard?*, 45 ARIZ. L. REV. 691, 698-99, 703 (2003).

36 *E.g*., *id*. at 702-03; Schapiro, *supra* note 32, at 588; Schrag, *supra* note 6, at 167, 169-177.

37 *See* Brennan & Noggle, *supra* note 33, at 7-8, 11-12 (explaining that children's vulnerability permits parents to exercise "stewardship rights" over their children for their care and protection).

38 *E.g*., ARCHARD, *supra* note 23, at 93-96 (arguing that children's agency should be encouraged and recognized as soon as they gain rational thought and knowledge).

39 Brighouse, *supra* note 35, at 702-03 (2003); Schrag, *supra* note 6, at 169-77.

40 Schrag, *supra* note 6, at 176-77.

for a bright line to demarcate moral authority and lack thereof,[41] leaving children categorically without such authority, thereby sacrificing childhood to adulthood.

The development thesis provides a strong, albeit largely adult-centered, theoretical rationale for children's limited moral authority in a liberal framework in which childhood's subordinate moral status defines and maintains moral freedom for adults. This categorical approach, with its relatively firm boundaries between childhood and adulthood, preserves the freedom of adults because functional definitions of adulthood could justify a subordinate moral position for or among adults with lesser intellectual capacity or fewer intellectual skills—*i.e.*, the ability to read, exercise discretion, and weigh options based on moral principles.[42] In other words, if moral agency is measured, then such measures could exclude some adults from moral agency—and presumably include some children.[43] Of course, this scheme already exists because adults can be wards and children may be treated as adults,[44] but these crossovers are exceptional.

B. The Political Child

Not surprisingly, political theory's answer to the question of children's subordination to adults and their diminished citizenship also relies on developmental notions of childhood and adult liberty. Indeed, the construct of childhood as distinct from—actually the opposite of—adulthood is an important, if not essential, feature of contractarian political organization. Even John Locke, who answered the child question at a time when children could, technically, rule adults, viewed children as unwise and not competent to govern their own lives, let alone the polity.[45] His theory of political liberalism—that the source of political authority is the consent of the governed and not god (birthright)—was premised on the claims that 'men' are born free and are not subject to supernatural lineage (*i.e.*, the King or Queen); instead, the people (men) should choose *their* government—their authority. This freedom and authority requires a competent subject with the capacity to reason and choose wisely, a subject who is in fact capable of consenting to government, rather than receiving government as divine right. This political subject is the opposite of the child, whose immaturity renders him or her unwise and imperfect.[46]

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41 *Id*. at 177.

42 *See id*. at 176-77 (opting for the bright-line test between childhood and adulthood to guard against undue incursions into adult freedom based on questions of wisdom and competence); Schapiro, *supra* note 27, at 737-38. "Questions about the nature of childhood are related to further questions about . . . adults suffering from mental illness" and claiming that the adulthood/childhood distinction is valid, even though children might fall on one or other side of the line, depending on context. *Id*.

43 *Cf*. Francis Schrag, *Children and Democracy, Theory and Policy*, 3 POLITICS, PHIL. & ECON. 365, 369 (2004) ("if we discount teenagers' policy preferences because they are "uninformed, should we not make an understanding of . . . complex issues a prerequisite for *adult* voting.").

44 *E.g*. Graham v. Florida, 130 S. Ct. 2011 (2010).

45 LOCKE, *supra* note 28.

46 BREWER, *supra* note 18.

Jean-Jacques Rousseau also deployed childhood as part of his analytic framework for the social contract. The family and, more specifically, the father's authority over the child, serve as the model for political organization. Children's subordination to their fathers is a temporary, consensual, and natural outgrowth of children's vulnerability and need. Children submit to this benign paternal authority because of their vulnerability, but once children no longer need their father, they are free (*i.e.*, adults).[47] This explains how, in a world where people are "born free and equal," children willingly "alienate their liberty only for their own advantage."[48] In turn, children's vulnerability foreshadows the human vulnerability that leads free "men" to band together politically.[49] In their own self-interest, children and adults, in families and the polity respectively, voluntarily surrender some of their freedom in exchange for the safety of a sovereign of their choosing. This marks the distinction between nature and law, force and freedom,[50] and perhaps childhood and adulthood.[51] This constructed (though naturalized) contract in turn is the source of dependency, establishing the family and children's vulnerability as a model for political organization, subjugation, and sovereignty.

Dominant political contract theory today removes children from the polity altogether and remains shrouded in the adult-child distinction. This distinction is central to notions of sovereignty and subjection, creating the political subject and explaining how this subject both embodies sovereignty and contracts power to a sovereign. The liberal subject is the autonomous adult male and the dependent, not fully rational child is properly the subject of private adult authority and not the subject of justice.[52] As Samantha Brennan and Robert Noggle observe, John Rawls's theory of justice both excludes children from a role in defining the terms of justice and takes the topic of justice within families off the table, because the original position is occupied by "'heads of households' who are neither children or inclined to develop rules of justice within the family."[53] Children are by definition excluded from the club of liberal citizenship because the status of citizen is defined in opposition to childhood as a place of autonomy and agency.[54] In other words, this categorical barrier protects adults from having to prove their ability to govern.

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47 JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT, bk. I, ch. 2 (1762).

48 *Id*.

49 *Id*.

50 *Id*. at ch. 8.

51 *See id*. ("[W]hat man acquires in the civil state, moral liberty, which alone makes him truly master of himself; for the mere impulse of appetite is slavery, while obedience to a law which we prescribe to ourselves is liberty.").

52 Samantha Brennan & Robert Noggle, *John Rawls's Children*, *in* THE PHILOSOPHER'S CHILD, *supra* note 26, at 203, 206.

53 *Id*. at 205. This point has been made by others. *E.g*., Eva Feder Kittay, *Human Dependency and Rawlsian Equality*, *in* FEMINISTS RETHINK THE SELF 219, 229 (Diana Tietjens Meyers ed., 1997).

54 Appell, *supra* note 4. On the contrary, "[c]hildren . . . are not people whose choices the liberal state must respect." HARRY BRIGHOUSE, SCHOOL CHOICE AND SOCIAL JUSTICE 11 (2000).

This assignment of childhood primarily to parents is, of course, a political choice that serves several political purposes. It absolves the liberal state from raising children or from adjudicating among adults to serve as guardians of children who are too young to care for themselves. This scheme thus helps curb the homogenizing power of the state as it promotes value pluralism, protects the liberty of parents who deviate from dominant norms,[55] and even helps to maintain political institutions.[56] Of course, in practice, this scheme disproportionately places these often uncompensated burdens[57] on women and especially on poor women and women of color.[58] Moreover, discussion regarding compensation for dependency rarely contemplates aid to children directly.[59]

Children's political existence is not purely instrumental, however, because children are rights-holders.[60] Even so, children's rights are not coextensive with adult rights. Instead, children have special rights because of their vulnerability and many of their adult-like rights are circumscribed because of their dependency.[61] In this way, their rights are developmental and their citizenship is partial.[62] Here we see children's undeveloped and transitional status as a state of becoming full citizens upon adulthood with adulthood the measure of full citizenship.[63] Until then, children are subject both to their parents' and the state's authority without

[55] Annette R. Appell, *Bad Mothers and Spanish Speaking Caregivers*, 7 NEV. L.J. 759 (2007) [hereinafter Appell, *Bad Mothers*]; Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683 (2001) [hereinafter Appell, *Virtual Mothers*].

[56] *See* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1239-40, 1242-43, 1269-70 (2010) (rehearsing political justifications for family privacy); Appell, *Uneasy Tensions*, *supra* note 20 (tracing the effects of state-sponsored removal of children from Indian families and tribes on the political existence of tribes).

[57] *But see*, Mary Ann Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001) (tour de force rehearsal of the benefits people with children receive and how people without children pay for them.).

[58] *Id.*; Linda McClain, *Care as a Public Value,* 76 CHI.-KENT L. REV. 1673 (2001).

[59] Bruce Ackerman and Anne Alstott proposed this, but upon adulthood, not during childhood. BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (2000).

[60] In fact, even after childhood formed into a private location, children had, and continue to have, various protective and liberatory rights, in addition to rights in tort and contract. Appell, *Uneasy Tensions*, *supra* note 20. The civil rights era brought additional rights to children in the last half of the 20th century, primarily in the context of schools. Brown v. Bd. of Educ., 74 S. Ct. 686 (1954); Title IX Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Tinker v. DesMoines, 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975); *In re* Gault, 387 U.S. 1 (1967); limited reproductive choice, *e.g.*, Bellotti v. Baird (I) 428 U.S. 132 (1976) (involving a pregnant girl's right to convince a judge that she is mature enough to choose to terminate her pregnancy); family affiliation (non-marital children cases); *but see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (failing to consult with children regarding whether they agreed with their parents that they should withdraw from school); Parham v. J.R., 442 U.S. 584 (1979) (upholding involuntary commitment of child to mental hospital with a low level of due process); Levy v. Louisiana, 391 U.S. 68 (1968) (upholding equal protection for children born in and outside marriage).

[61] Appell, *Uneasy Tensions*, *supra* note 20.

[62] *See* ELIZABETH F. COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS 180-82 (2009) (children are semi-citizens because the state limits their political and autonomy rights).

[63] Full citizenship, that is, if they are not otherwise semi-citizens, e.g., non-naturalized or illegal immigrants, lesbians or gays (who are denied certain rights, such as marriage).

political standing to define the content or limits of that authority. The main tensions here revolve around competing authority between parents and the state over children and childrearing.[64]

Moreover, the removal of children from the polity and relegation to the private family absolves the state from consulting or listening to children. Equality between children and adults is incomprehensible under a regime that constructs the child as unable to regulate herself or others and who at least symbolically consents to paternal authority for the sake of care and protection. Questions of equality among children present the parents as the problem or solution and tend to be future-oriented, raising issues of equality of opportunity during childhood as something that matters (only) in adulthood.[65] So embedded in the family, so excluded from the polity, and so subordinate are children that the idea of equality—even among children, let alone compared to adults—is unthinkable as a matter of liberal political theory.

Indeed, liberalism values both freedom and equality while placing them in opposition to each other.[66] In this frame, children are objects of their parent's liberty, although children partake of that liberty as well.[67] According to James Fishkin, the private family is the enemy of equality for children because parental liberty is the source of economic and other disparities.[68] In other respects, children's liberty *vis á vis* their parents is limited and their liberty against the state is circumscribed because children are constituents of their parent's liberty.[69] That is, their parents' liberty includes making moral, religious, political, economic, and geographic decisions for and about their children, thus passing on to them values, culture, class,[70] religion,[71] and identity.[72] These private, intimate associations

64 *E.g.*, IAN MACMULLEN, FAITH IN SCHOOLS? 15-40 (2007) (rehearsing arguments regarding the tensions among parental authority, education of children in a liberal society, liberty, and autonomy); BRIGHOUSE, *supra* note 54, at 12-17.

65 *See, e.g.*, JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY 4-5 (1983) (exploring the tensions between children's equality *as adults* and the exercise of parental authority that would undermine that equality); *see also* Harry Brighouse & Adam Swift, *Parents' Rights and the Value of the Family*, 117 ETHICS 80, 83, 85-86 (2006) (rehearsing future-oriented arguments for parental control of children).

66 Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 3 (2008); Harry Brighouse & Adam Swift, *Legitimate Parental Partiality*, 37 PHIL. & PUB. AFF., 44, 50 (2009).

67 *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

68 FISHKIN, *supra* note 65. Indeed, the U.S. has the "highest child poverty rate (defined as having household income less than 50 percent of the national median) of developed countries[.]" Caitlin Cahill & Roger A. Hart, *Re-Thinking the Boundaries of Civic Participation by Children and Youth in North America*, 17 CHILD., YOUTH & ENV'T 213, 214-15 (2007).

69 *E.g.*, Alstott, *supra* note 66; FISHKIN, *supra* note 65.

70 Brighouse & Swift, *supra* note 66, at 44, 59 ("Through the family children are enculturated into the expectations of life, especially worklife, of their parents and their parents' friends and acquaintances[.]").

71 Appell, *Virtual Mothers*, *supra* note 55.

72 Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family,* 25 WIS. J.L. GENDER & SOC'Y 73 (2010).

maintain and distribute private values and train future citizens (adults) to govern—to consent to government, rather than blindly accept political power. In this way, the private family performs the important political function of preparing future democratic republican citizens. The family thus serves as a distributive channel for material and moral goods. This structure also masks the state's role in distribution, casting questions of equality and disparity as private, family matters.

C. The Jurisprudential Child

In light of the role of childhood in moral and political liberalism, it is not surprising that liberal jurisprudence embraces, and codifies, the development thesis.[73] As vulnerable works-in-progress, children are largely subordinate under the law, cast as objects of parental liberty, future citizens, and as unwise, unreliable, and vulnerable. The law empowers adults—parents, teachers, lawmakers, judges—and other governmental institutions, particularly schools and administrative agencies, to dictate the terms of children's lives: their language, their religion, what they can read, what they eat, where they live, where they can go, when they can go out, and when they must be home. This does not mean that children do not have agency in these relationships. Indeed, adults can and do afford children choices, but adults normally control children's options on varying levels of specificity—an apple or an orange; dance lessons or softball; this dress or those pants; which of these books, etc.—but the law does not *require* adults to offer children choices.

The parental rights doctrine, which has achieved constitutional status,[74] codifies the private, developmental child. With minimal limitations,[75] the law assigns to the parent's liberty most matters regarding children's education, health, religion, freedom, and custody. Under this scheme, parents have the right to make decisions about and for the child, including the authority to determine which decisions a child can make about her body and her life course, subject to the state's police power,[76] other specific laws governing children,[77] and the limited autonomy the law affords children themselves.[78] This doctrine posits a mutual liberty interest

[73] *See*, *e.g.*, Anne C. Dailey, *Children's Constitutional Rights*, 96 MINN. L. REV. 2099 (2011) (rehearsing children's constitutional rights and limitations as tied to their perceived developmental status and corresponding ability to govern themselves); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055 (suggesting state policies that would promote children's freedom upon reaching adulthood).

[74] *E.g.*, Troxel v. Granville, 530 U.S. 57 (2000); Santosky v. Kramer, 455 U.S. 745 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[75] Hamilton, *supra* note 73; *see also*, JAMES G. DWYER, RELIGIOUS SCHOOLS VS. CHILDREN'S RIGHTS 64 (1998) (contesting the parental rights doctrine and proposing a "child-rearing privilege" until children can choose on their own faith).

[76] *See* Lochner v. New York, 198 U.S. 45, 54 (1905) ("[P]owers existing in the sovereignty of each State in the Union . . . [to regulate] safety, health, morals, and general welfare of the public.").

[77] Appell, *supra* note 4, at 708-11; *see generally* Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U. C. DAVIS J. JUV. L. & POL'Y 275 (2006) (rehearsing the varied regulation of children).

[78] For example, the mature minor doctrine. Bellotti v. Baird, 443 U.S. 622 (1979); *In re* E.G., 549

between parent and children, which serves either or both to protect adult freedom and maintain a diverse polity separate enough from the state to (in adulthood) govern in a democratic republic.[79] This scheme also helps to limit the heavy hand of the state and to protect the integrity of vulnerable families from coercive state intervention.[80] This regime thus serves state interests by assigning the bulk of children's dependency to the family, insulating the state from liability for most children.

In addition to the parental rights doctrine, constitutional jurisprudence regulates children's moral agency according to developmental frameworks. For example, the Constitution limits to adults the franchise[81] and the political offices of President, Senator, and Representative.[82] Children's incomplete and imperfect moral agency permits the law to treat youthful offenders more leniently than adults. Thus, "juvenile offenders are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes."[83] Accordingly, the Constitution also prohibits courts from sentencing children to death and greatly limits the crimes for which children can be sentenced to life without parole.[84] Children are distinct from adults in terms of criminal culpability because of their "lack of maturity, . . . underdeveloped sense of responsibility, a heightened susceptibility to negative influences and outside pressures, and the fact that the character of a juvenile is 'more transitory' and 'less fixed' than that of an adult."[85] At the same time, it is possible for a person under eighteen years old to commit an act vicious enough to transform him or her into an adult, because it would be inconceivable for a child to engage in such conduct.[86] Thus individual children can become adults by performing adulthood, effectively removing them from the category of (innocent) childhood and into adulthood.[87]

N.E.2d 322. (Ill. 1989).

[79] *See* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010); Anne Comer Dailey, *Developing Citizens*, 91 IOWA L. REV. 431 (2006); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 764, 788 (1997).

[80] Appell, *Uneasy Tensions*, *supra* note 20; Appell, *Bad Mothers*, *supra* note 55.

[81] U.S. CONST. amend. XXVI (extending franchise to those who are 18 and older).

[82] U.S. CONST. art. I, § 3, cl. 3 (stating that Senators must be at least 30 years old); *id*. § 2, cl. 2 (stating that Representatives must be at least 25 years old); *id*. art. 2, § 1 (stating that the president must be at least 35 years old).

[83] Graham v. Florida, 130 S. Ct. 2011, 2037 (2010) (Roberts, J., concurring).

[84] Miller v. Alabama, 132 S. Ct. 2455 (2012). The Eighth Amendment bars blanket sentence of life without the possibility of parole for juvenile homicide offenders. *Id*.; *Graham*, 130 S. Ct. 2011 (outlawing life without parole sentences for the youth who commit non-capital crimes); Roper v. Simmons, 543 U.S. 551 (2005) (outlawing death penalty for minor).

[85] *Graham*, 130 S. Ct. at 2037 (Roberts, J., citing *Roper*, 543 U.S. 551).

[86] *See Graham*, 130 S. Ct. at 2052 (Thomas, J. dissenting) ("Our society tends to treat the average juvenile as less culpable than the average adult, but the question here does not involve the average juvenile . . . [but with those who has demonstrated] sufficient depravity and incorrigibility to warrant his current permanent incarceration.").

[87] *See* CONN. GEN. STAT. § 46b-150b (2012). The grounds for order of emancipation: "(1) The minor has entered into a valid marriage, whether or not that marriage has been terminated by dissolution; or (2) the minor is on active duty with any of the armed forces of the United States of

The law also limits girls' freedom to obtain an abortion beyond that which it limits women's access.[88] Thus, a minor does not have the fundamental right to terminate her pregnancy without parental or judicial consent,[89] although in some states girls can relinquish their children for adoption without parental permission or judicial oversight,[90] and generally they are at liberty to choose to give birth and raise their children. Children's vulnerability also limits what they can say, when they can say it, what they can read,[91] their right to be free from police and school searches,[92] and their right to be free from coercive custody.[93]

The Convention on the Rights of the Child ("CRC"), the most universal declaration of children's place in the law, also largely reflects the development thesis with its private, liberal child. The CRC defines a child as a "human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."[94] This definition recognizes that childhood is a legal construct, but the CRC itself fully embraces the developmental, subordinated, categorical child. The CRC's construction of the family as the child's primary social unit suggests a remarkable unanimity regarding the developmental nature of childhood, the privacy of the child, and childhood's primary location in the family.[95] The CRC also explicitly inscribes a view of childhood as a time of education, play, and limited responsibility.[96]

America; or (3) the minor willingly lives separate and apart from his parents or guardian, with or without the consent of the parents or guardian, and that the minor is managing his own financial affairs, regardless of the source of any lawful income; or (4) for good cause shown, it is in the best interest of the minor, any child of the minor or the parents or guardian of the minor, the court may enter an order declaring that the minor is emancipated." *Id*.

88 *E.g*., Bellotti v. Baird, 443 U.S. 622 (1979) (holding that a girl may decide to have an abortion if a judge finds her to be mature enough to decide); *see also*, Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COL. J. GENDER & L. 410 (2009); Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589 (2002).

89 *Bellotti*, 443 U.S. at 622; Hodgson v. Minnesota, 497 U.S. 417 (1990).

90 Jen Durcan & Annette Appell, *Minor Mothers and Consent to Adoption: An Anomaly in Youth Law*, 5 ADOPTION Q. 69 (2001).

91 Morse v. Frederick, 551 U.S. 393 (2007); Erznoznik v. Jacksonville, 422 U.S. 205, 212-13 (1975); Ginsberg v. New York, 390 U.S. 629 (1968); *see also* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, (2011) (striking down restrictions on children's access to violent video games in part because it removed parental authority to allow children to see the violent depictions, but also because it constituted a content-based restriction); *but see* Tinker v. DeMoines, 393 U.S. 503 (1969) (upholding children's freedom of expression in school).

92 *See e.g*., New Jersey v. T.L.O., 469 U.S. 325, 342-43 (1985) (upholding the principal's search of a student's purse because she had been smoking cigarettes; and establishing for children a lower standard for searches at school).

93 Schall v. Martin, 467 US 253 (1984).

94 U.N. Convention on the Rights of the Child, G.A. Res. 44/25, art. 1, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC], *available at* http://www2.ohchr.org/english/law/pdf/crc.pdf. *See also id*. art. 5 (referring to the "evolving capacities of the child"); *id*. art. 28-29 (regarding education); and, *e.g*., *id*. arts. 2, 3, 7, 8, 9, 10, 14, 18, 20, 21, 23, 25-27 (regarding the child's parents or other caregivers).

95 *Id*. art. 5.

96 *See id*. art. 31 ("State Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities[.]"); *id*. art. 32 (regarding child labor protections). James, Jenks and Prout note and criticize the CRC's codification of a "universalist psychological model of the child" in light of

The CRC is remarkable, nevertheless, for recognizing children not as property but as human beings who should have identities,[97] procedural rights,[98] and moral rights.[99] At the same time, the CRC does not afford children agency[100] or a direct relationship to the state.[101] The CRC contains no provisions for children's franchise, other political participation, or for children's expression of themselves. On the contrary, their "best interests" govern *vis á vis* the state[102] and at home.[103] Nor does the CRC afford children the right to advocate for themselves in proceedings involving themselves. Similarly, the child only has a right to be heard, but not the right to be a party to those proceedings or to have an attorney.[104] Instead, the "child capable of forming his or her own views [has] the right to express those views freely" and to have those views be "given due weight in accordance with the age and maturity of the child."[105]

But more fundamentally, as Ann Quennerstedt observes, the CRC inscribes this reductionist categorical approach to childhood, in effect removing children from the human category, and reducing them to their developmental difference from adults.[106] The CRC grants children vague participation rights, but does not contemplate for children political rights, those that "concern the right to take part in and influence the exercise of power."[107] The ubiquitous "best interests of the child" standard bears testament to this construction. In most legal proceedings involving children, the substantive and often procedural standard for decision-making is the "best interests of the child"[108] and when children receive legal

the extraordinarily diverse material and social conditions in which children live throughout the globe. ALLISON JAMES, CHRIS JENKS & ALAN PROUT, THEORIZING CHILDHOOD 141 (1998).

97 CRC, *supra* note 94, arts. 7 and 8 in particular requiring the child be registered at birth and affording the child a right to a name at birth and a right to a nationality and to be raised by his or her parents. *See also id*. arts. 20, 30.

98 *Id*. arts. 12, 40.

99 *Id*. arts. 13-16, 23, 30. Jonathan Todres illustrates the significance of the CRC for children in his rehearsal of the CRC's important role in securing the rights of children in the aftermath of the 2010 earthquake in Port-au-Prince, Haiti. Jonathan Todres, *A Child Rights-Based Approach to Reconstruction in Haiti*, 6 INTERCULTURAL HUM. RTS. L. REV. 43, 68-70 (2011).

100 Others would afford such rights to all born children. Priscilla Alderson, Joanna Hawthorne & Margaret Killen, *The Participation Rights of Premature Babies*, 13 INTERN'L J. CHILD. RTS, 31 (2005) (arguing for participation rights of newborns).

101 *See, e.g.*, CRC, *supra* note 94, art. 27, §2. "The parent(s) or others responsible for the child have the primary responsible to secure, within their abilities and financial capacities, the condition of living necessary for the child's development." *Id*. § 3.

102 *Id*. art. 3, § 1.

103 *Id*. art. 18, § 1.

104 *Id*. art. 12, § 2; Appell, *supra* note 10.

105 CRC , *supra* note 94, art. 12, § 1.

106 Ann Quennerstedt, *Children, but Not Really Humans? Critical Reflections on the Hampering Effect of the "3p's,"* 18 INT'L J. CHILD. RTS. 619, 631 (2010). Anne C. Dailey appropriates this developmental rubric as well. Dailey, *supra* note 73.

107 Quennerstedt, *supra* note 106, at 630-32.

108 *See* Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 356-58 (2002) (discussing origin and content of the standard). It is possible that the eradication of childhood or empowerment of children would greatly undermine the inexorable and homogenizing best-interests standard applied to children and other legal incompetents.

representation, counsel is likely to be a guardian *ad litem* or a lawyer who represents not the child's will, but the child's best interests.[109] This silencing and objectification of children and childhood help to reinforce barriers to direct or equitable state support for children.[110]

The law's adoption of the development thesis defines children by their limitations and potential, eliding their identities as agents, subjects, and individuals. Instead, legal childhood reduces children to their disability and obstructs the possibility for agency, individuality, and nuanced notions of development and vulnerability. Based on this one characteristic, children are exiled from the polity and deprived of legal agency. Indeed, liberal legal theory's placement of children as subordinates in families serves, for better and worse, as a barrier to a more direct relationship of the child to the state, and certainly serves to limit state support for and involvement with children, particularly in liberal democracies like the U.S. and the U.K.[111] Indeed, because children do not vote and are "defined by their membership and thus subsumed within the family," they do not have an agential political relationship to the state.[112]

Thus, contrary to claims that liberalism does not account for children,[113] childhood is an essential aspect of liberalism because the demarcation between adult and child is central to our legal system and the theory that informs it.[114] These two categories create a bright-line test for power and powerlessness: authority comes from self-possession, rather than a rite of birth.[115] The U.S. was unique at the time of the founding for its political organization that equated authority with a set of elected representatives, rather than by rulers anointed by birth. Even though the social compact, instantiated through the Declaration of Independence and the Constitution, left out many adults, as well as children, that

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[109] *See* 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2010). As a condition of federal funding, states must have a law in place that requires appointment of a properly trained guardian ad litem for children in child abuse and neglect cases "to obtain first-hand, a clear understanding of the situation and needs of the child; and . . . make recommendations to the court concerning the best interests of the child." *Id*.

[110] More fundamentally, this is an outgrowth of a resilient belief in the connection between economic freedom and moral liberty, both for parents *vis á vis* their children and for the economic freedom in itself. *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 93-100 (2011) (tracing the connections between freedom of contract and family liberty.).

[111] ALLISON JAMES & ADRIAN L. JAMES, CONSTRUCTING CHILDHOOD: THEORY, POLICY, AND SOCIAL PRACTICE 103 (2004); *see also* Martha Minow, *A Feminist Approach to the Next Generation: A Feminist Approach to Children's Righ*ts, 9 HARV. WOMEN'S L. J. 1, 7 (1986) ("[T]he basic legal framework governing children . . . rests on a sharp distinction between public and private responsibilities for children . . . assign[ing] childcare responsibilities to parents, and thereby avoids public responsibility for children.").

[112] JAMES & JAMES, *supra* note 111, at 103.

[113] *E.g.*, Jennifer Hendricks, *Renegotiating the Social Contract*, 110 MICH. L. REV. 1083 (2012); Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133 (1998).

[114] BREWER, *supra* note 18.

[115] This is at least true in theory; of course in the early days of the republic, many adults were excluded from the franchise.

compact has slowly, and often painfully, admitted poor white men, black men, and women, but it has continued to exclude children.[116]

This analysis illustrates childhood is an important, and perhaps necessary, constituent of liberalism, and that it is very difficult, even impossible, to imagine liberalism or the liberal adult citizen without youth, particularly since slavery and most rights restrictions based on race and gender are no longer legitimate. Not only does youth define adults as competent and self-possessed, but youth also draws an important line between relatively absolute rights (for adults) and developmental rights (for children). The development thesis justifies the exclusion of children and provides a measure for when children can partake in rights.

This is because legal liberalism affords negative freedoms. Currently, we draw these lines roughly at eighteen for most adult liberties. Liberalism presumes that it is exceptional when adults cannot exercise these freedoms and that it is exceptional when children can. Indeed, childhood helps to make liberalism possible by providing a bright-line demarcation between competence and incompetence, ruler and ruled, free and bounded, and public and private. Thus, children cannot experience equal rights until they exit childhood. The best our current autonomy framework can provide for children is a diminution of childhood to a period of eight, thirteen, or sixteen years during which they would receive compensation through wages, salary, or other exchange (*e.g.*, room and board) for the developmental and domestic work they perform in childhood as students, companions, caregivers, and domestic aids.[117]

II. THEORIZING CHILDHOOD

Despite the coalescence of moral, political, and legal theory around the development thesis, childhood (like adulthood) is much more than a purely natural state. Like race and gender, like the market and the family, childhood is an ideological construct,[118] defined, maintained, and regulated by law. Although it may be true that human beings from birth to a certain age, say seven or fourteen or even twenty-one,[119] are likely to possess less capacity than their elders to care for

116 The Constitution actively and by omission excludes children as political actors. *E.g.*, age floors for constitutional office: U.S. CONST. art. II, § 1 (President must be 35 years old); U.S. CONST. art. I, § 3 (Senator must be 30 years old); U.S. CONST. art. I, § 2 (Representatives must be 25 years old); and the franchise U.S. CONST. art. XXVI (reducing minimum voting age from 21 to 18).

117 *See e.g.*, Ciara Smyth, Bettina Cass & Trish Hill, *Children and Young People as Active Agents in Care-giving: Agency and Constraint*, 33 CHILD. & YOUTH SERVICES REV. 509, 510 (2010) (stating that 4% of children (up to 17 years old) are caregivers for people with disabilities or older people in Australia; 2% of children (so defined) were caregivers in the UK; and approximately 3% of American children are caregivers, and statistics are likely underestimate caregiving because we do not perceive or recognize children's caregiving).

118 *See* Frances Olsen, *The Myth of State Intervention Into the Family*, 18 U. MICH. J.L. REFORM 835, 838-45 (1985) (claiming that the market and family are ideological).

119 Some suggest 25 years old. *E.g.*, Rehfeld, *supra* note 4. The emerging adulthood literature places adulthood in advanced capitalist countries at 27 to 29 years-old. *See* Jeffrey Jensen Arnett, *Emerging Adulthood(s), the Cultural Psychology of a New Life Stage*, *in* BRIDGING CULTURAL AND

and regulate themselves and others or to engage in higher-level reasoning,[120] these developmental facts do not dictate the contours or boundaries of childhood. Ideology does.

As with other identity categories, it is how we construct and interpret natural facts regarding human beings that creates and regulates identity and difference.[121] For example, feminism theorizes gender as a "constitutive element of social relationships based on perceived differences between the sexes and gender [as] a primary way of signifying relations of power,"[122] and we can similarly understand childhood as a way of signifying power and as constitutive of other identities, in particular, but not exclusively, adulthood.[123] Just as gender distinctions have several aspects or functions—symbolic, normative, political, and subjective[124]—so too do age categories. This insight pushes against the dimensions, if not the inevitability, of the development thesis.

Childhood's constituents span a wide range of ages, capacity, vulnerability, demographics, and geographies. While there are many differences among these constituents, they all possess various competencies, personalities, preferences, vulnerabilities, and accomplishments. In short, they are active members of their own lives with preferences, talents, skills, and useful occupations in and outside the market. This Part pushes against the development thesis and its exile of this robust and diverse segment of society from self-governance and participation in the larger polity.

A. The Constructed Child

In contrast to legal theory's embrace of the development thesis, childhood theory problematizes the developmental child because its purpose and importance resides in the future (in adulthood) and exists as the other (as the opposite of adult).[125] As such, childhood constructs children as instrumental, passive, and in need of shaping and domesticating, but not "recognised in their own right."[126] The development thesis appropriates and interprets seemingly natural facts to categorically define childhood, even though the contours and subjects of childhood

DEVELOPMENTAL APPROACHES TO PSYCHOLOGY 255-75 (Lene Arnett Jensen, ed., 2011).

120 Roberta Bosisio, *Children and Young People as Moral and Legal Actors: Finding from Studies Conducted in Northern Italy*, *in* LAW AND CHILDHOOD STUDIES, *supra* note 4, 190, 190-91, 243. She notes that "children, starting from their early years, are continuously faced with issues of justice and fairness in their everyday interactions, as well as with decision-making situations that carry moral implications." *Id*. at 191.

121 Although my analysis includes other identitarian theory, particularly critical race theory and intersectionality, racial distinctions are among the most purely socially constructed demarcations of difference, with any natural distinction existing as fragments of genes and perhaps phenotype.

122 Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, 91 AM. HISTORY REV. 1053, 1067 (1986).

123 Appell, *supra* note 4.

124 Scott, *supra* note 122, at 1067-69.

125 Jens Qvortrup, *Editorial: A Reminder*, 14 CHILDHOOD 395, 396 (2007).

126 JAMES & JAMES, *supra* note 111, at 193.

are contingent and regulatory, changing over time and space in response to different policies, conditions, location, and demographics.[127] Most importantly, childhood glosses over the real, human lives of children, casting them as insubstantial and irrelevant in their own right. The location of incompetence and vulnerability in children merely masks childhood as a social construct. On the contrary, as John Wall has noted in the context of children's political exclusion, the problem is "not in children themselves, but in existing conceptualizations of democracy."[128]

Childhood's regulatory features control both persons in the category (children) and those not in that category (adults). These regulations enforce the development thesis through various laws and norms governing children, adults, and parents, affording various rights, restrictions, and obligations for adults and children surrounding childhood.[129] These regulations derive justification from somewhat natural phenomena, and contemporaneous theories of child development, but they are also connected to norms regarding gender, sexuality, race, and class.[130] Thus, in this sense, childhood is a political classification, as is its corollary, adulthood.

As such, the child question is quite similar to the woman, race, and sexual minority questions—the topics of feminist jurisprudence, critical race theory, and queer theory.[131] These approaches all question the naturalness, hierarchy, and regulation of identity categories, while uncovering the political purposes of the creation and regulation of difference and the roles individuals play in reinforcing and challenging order. These identity categories and their regulation all, were at one point, and in some cases are still, premised on "natural" or "physical" norms and differences among people. More specifically, these identities diverge from the white, middle-class, heterosexual, adult male. These differences based on reproductive apparatus, phenotype, heritage, or affectional objects gain relevance when the legal or social assignment to one category or the other carries with it certain norms, expectations, privileges, and power relationships.

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127 Annie Bunting, *Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue*, 14 SOC. & LEGAL STUD. 17, 22 (2005).

128 Wall, *supra* note 7, at 86-87.

129 Appell, *supra* note 4, at 746-48.

130 CAROLINE F. LEVANDER, CRADLE OF LIBERTY, RACE, THE CHILD, AND NATIONAL BELONGING FROM THOMAS JEFFERSON TO W.E.B. DU BOIS (2006); Karen Sánchez-Eppler, *Playing at Class*, *in* THE AMERICAN CHILD: A CULTURAL STUDIES READER 40-62 (Caroline F. Levander & Carol J. Singley eds., 2003).

131 These observations help uncover the methods and purposes of subordination and privilege that childhood produces and, hopefully, will engage other legal theorists in another mode of analysis that intersects with gender, sexuality, race, class, and, of course, childhood and adulthood. This observation echoes queer legal theorist Francisco Valdes's call for queer legal theory "to nudge greater mutual interaction between and among existing legal discourses of outsider and progressive critical scholars on mutually-reinforcing sources or structures of privilege and subordination." Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation,"* 48 HASTINGS L. J. 1293, 1298 (1997) [hereinafter Valdes, *Queer Margins, Queer Ethics*].

These critical theories have challenged a "natural order" in which differences in race, gender, sexuality, and sexual identity intersect in a variety of ways to encode roles and expectations and to distribute power and resources. For example, feminist legal theory has analyzed law (and liberalism) through the lens of gender. Its two main projects have been to identify and critique law's male-centricity and catalog the ways in which the law subordinates women and empowers men. Feminist legal theorists have examined the law's different treatment of men and women, and uncovered the male subjectivity of the law which takes the independent adult male as the legal person and fails to account for those who are caregivers, otherwise dependent, or simply different.

This analysis has exposed how law, framed as neutral and objective, actually privileges men by normalizing their characteristics and ignoring or pathologizing characteristics of women. Feminist analysis has also interrogated the legal institutions that perform this work, for example families,[132] sex and pornography,[133] and the workplace.[134] In other words, feminist theory has identified how the subordination of women empowers men. At the same time, feminist legal theory seeks to bring to bear on the law the diverse and subjective experiences of women, in recognition of the different ways women experience and navigate the world.

Critical race theory has also challenged liberal tenets, the objectivity of the law, and the work that legal categories, particularly (but not only) race, perform. Using race as a frame of analysis, critical race theorists have laid bare the fiction of race as a natural category and analyzed its central role in creating and maintaining privilege, power, and subordination, as well as gender, class, and sexual identity.[135] These theorists have methodically and thoroughly uncovered how racism works, particularly in indirect, implicit, and seemingly inevitable or natural ways.[136] Debunking the notion of race and racial hierarchies as natural and inevitable, critical race theory has explained precisely how race is socially constructed and how whiteness is the unspoken norm. These theorists have uncovered the structural role that racial difference plays in sorting human beings

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132 *E.g.*, Olsen, *supra* note 118.

133 *E.g.*, CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); ANDREA DWORKIN & CATHERINE MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY (1988); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

134 *E.g.*, Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

135 *E.g.*, IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 143-62 (2006); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997); RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1993); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1992).

136 *E.g.*, Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of the "Id, the Ego, and Equal Protection*," 40 CONN. L. REV. 931 (2008); Peggy Cooper Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

and distributing power and resources.[137] Ultimately, critical race theorists have shown that racism is not aberrational, but part of the fiber of law and society, carrying symbolic codes that equate and sort people according to their relationship to whiteness.[138]

Queer legal theory has taken on the binaries of male and female and of man and woman, along with the naturalness of heterosexuality and the assumed links between sex, gender, and sexual orientation.[139] Besides challenging the naturalness and supremacy of heterosexuality, queer legal theory disaggregates femininity from both women and females and masculinity from men and males. The disruption of assumptions about (personal and political) identities based on sex, gender, and sexual orientation has called into question binaries of man and woman, straight and gay, lesbian and gay,[140] and has complicated, if not eviscerated, identity-based theoretical approaches that posit various and differing attributes to women, men, lesbians, and gay men. This disruption has further complicated gender and sexual orientation by theorizing the fluidity and instability of sex and gender, particularly, but not exclusively, in light of emerging understanding of transgender and intersex people.[141]

These theories uncover and challenge the use of "natural" facts as the basis of authority, norm establishment, and the distribution of resources. Critical theories illustrate how these categories assume an ideal subject (usually white, male, heterosexual, and adult) and problematize the other—the woman, the person of color, the gay, the transgender, the intersex—as deviations from the norm. These deviations from the norm carry stigma and dictate reductions in privileges and resources. An intersectional approach to human identity and legal regulation highlights the instability of categories. For example, the definition, regulation, and performance of woman is both ideal and unstable, contingent on other categorical features, such as race, gender, sexual identity, sexual orientation, and class, each of which can make a woman more or less like the ideal that informs the category.

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137 Derrick Bell, *Racism: A Major Source of Property and Wealth Inequality in America*, 34 IND. L. REV. 1261 (2001); Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

138 *See supra* notes 135-37.

139 *E.g.*, Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996).

140 Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995); Francisco Valdes, Recalling Race, Gender and Sexuality: OutCrit Reflections on Legal Education, Social Identities and the "Rule of Law" – A Call Toward Collective Insurrections, 5 GEO. J. GENDER & L. 881 (2004); Valdes, Queer Margins, Queer Ethics, supra *note 131*. Queer legal theory also pushes against strands of feminist jurisprudence animated by the roles of men and women in dominance and subordination and in the distribution of male and female or masculine and feminine attributes. Brenda Cossman, Dan Danielsen, Janet Halley & Tracy Higgins, *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 604-17 (2003).

141 *See* Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213 (2005) (critical exploration of the regulation of transgender people).

Critical theory also illustrates how socio-legal identity categories are constitutive of each other in a way that naturalizes and prioritizes difference, constructing the resulting "problems" of the subordinated group as inhering within its members and as separate and apart from the dominant group. As Cornell West explained in the context of race, we view "the 'problems' black people pose for whites rather than … what this way of viewing people reveals about us as a nation."[142]

Still, we think of childhood as different, as possessing natural differences that are salient and totalizing, rendering children vulnerable, and sometimes dangerous to themselves or others because of their developmental nature. While it may be difficult to dispute the developmental child as a factual matter, the boundaries of childhood and the rules that apply to it are not inevitable. That is to say, the existence of a legal category for children as well as its boundaries and the rights of and duties owed to children are not nature's law, but "political choices" as Fran Olsen famously observed about the seemingly natural and private family.[143] So too the category of childhood is comprised of a set of value judgments and decisions about human beings between birth and eighteen; and about what it means to be a child and what it means to be an adult—even if there are some real and substantial differences between most children and most adults. It is true that young human beings are, universally, vulnerable, but we define their needs and capabilities in adult terms based on adult needs.[144]

As the CRC illustrates, legal studies remain inside the developmental rubric of childhood, contemplating the naturalized, mostly non-agential, developmental child.[145] Even as critical legal theories have challenged the naturalness of various social categories, such as race, sex, and gender, as well as the distribution of justice according to those categories, none have provided a sustained analysis of childhood. Indeed, feminist theory interrogates dependency, but does not, generally, interrogate dependents unless they are adults; and it does not account for the agency of youthful dependents, unless they engage in adult-like conduct (*e.g.*, sex).[146] If and when children appear in legal theory or doctrine, they generally are recipients, not actors, and cast as passive dependents.[147]

142 CORNEL WEST, RACE MATTERS 2-3 (1993).

143 Olsen, *supra* note 118, at 844 (noting that the family is a state-created and regulated institution).

144 Elizabeth F. Cohen, *Neither Seen nor Heard: Children's Citizenship in Contemporary Democracies*, 9 CITIZENSHIP STUD. 221, 230-31 (2005).

145 An exception is Hillary Rodham Clinton's call over 30 years ago for reversing the presumption of incompetency for children. Rodham, *supra* note 3; Hillary Rodham, *Children's Policies: Abandonment and Neglect*, 86 YALE L.J. 1522 (1977); Hillary Rodham, *Children's Rights: A Legal Perspective*, *in* CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21 (Patricia A. Vardin & Ilene M. Brody eds., 1979).

146 Exceptions include issues related to minor's sexual and reproductive agency.

147 Kittay, *supra* note 53, at 219, 229, 252 (accounting for the dependency of children, but not their agency).

B. The Child as Subject

While the state has some interest in the development of children—after all it contemplates and needs self-sufficient, rational liberal subjects—children's immaturity renders them inadequate for that role. This privatized childhood serves multiple political interests. It helps maintain a diverse polity, provides moral freedom for adults (and children, whose care and rearing might otherwise be provided by state bureaucrats),[148] and as Caroline Levander has noted, shifts "social responsibility from the state onto the self."[149] This privacy and individualism absolves the state from direct support of children and encourages parents to favor their own children and their own communities over (and at the expense of) others.[150] This phenomenon in turn diminishes or perhaps reifies community and casts resources and opportunities for youth as private, rather than public, goods.[151]

This construction holds obvious benefits and risks for children and for adults. For adults, it reifies the class, race, and gender distinctions that create dependency for adult (and child) caregivers who are either barred from wage earning because of care duties or who must work to support the children and the children's caregivers. At the same time, this scheme may afford caregivers deep joy and creativity in rearing the child, an experience the child will most likely share. With identity so closely tied to kin, and kinship closely tied to difference and autonomy, parental duties to their children are both benefits and burdens that minimize collective responsibility and heighten inequality.[152] Ironically, in such a system, it is the children and families for whom this privacy brings poverty that the relational privacy is most dear. In other words, the children and families who are least served socially and economically by market privacy are most vulnerable to public intervention and control.[153] This vulnerability is increased by virtue of the private market itself and by the heavy hand of the state.[154]

Calls for children's liberation often minimize (or simply ignore) these structural factors that create hierarchies and significant material and cultural

148 Appell, *Virtual Mothers*, *supra* note 55, at 686.

149 LEVANDER, *supra* note 130, at 13; *see also* Anne Alstott, *Family Values and the Law of Inheritance*, 7 SOCIO-ECON. REV. 145, 146 (2009) ("[T]he value of equality has been understood in individualistic terms in the U.S.: the ideal is equal opportunity for every person, and the key metaphor is the level playing field. In the U.S., individual merit remains a core value, and re-distribution via government is not always a trusted vehicle for ensuring equality.").

150 Brighouse & Swift, *supra* note 65, at 59-64.

151 BRIGHOUSE, *supra* note 54, at 11.

152 Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692, 701-09 (2006).

153 Appell, *Virtual Mothers*, *supra* note 55.

154 For example, poor families and their members are overrepresented in the child welfare, juvenile justice, and prison systems. DUNCAN LINDSEY, THE WELFARE OF CHILDREN 13-14 (2d ed. 2004); LAWRENCE GROSSBERG, CAUGHT IN THE CROSSFIRE, KIDS, POLITICS, AND AMERICA'S FUTURE 15-74 (2005); Bernardine Dohrn, *Look Out Kid/It's Something You Did: Zero Tolerance for Children*, *in* ZERO TOLERANCE 89, 95 (William Ayers, Bernardine Dohrn & Rick Ayers eds., 2001).

disparities. They would take children out of the family but not out of the private realm or into self-determination; instead, these proposals contemplate different sets of adults to make such decisions.[155] These adults are most likely to be lawyers or judges, who are not intimately or affectionately involved with the child.[156] In either event they will likely not be intimate with the child or inclined to do the child's bidding.[157]

At the same time, the construction of childhood as private, dependent, unwise, and vulnerable belies the rich, active, and productive lives of children and deprives them and the state of important and active constituents who are central in shaping society and who perform labor inside and outside home and school.[158] In what is now the United States, children have been productive laborers since Colonial times.[159] Enslaved children, bounded out children, and children living with family worked inside and outside the home.[160] In fact, it was not until the industrial revolution and the development of the middle class that childhood became associated with play, leisure, and formal schooling.[161] The hard-fought and long battle to limit children's labor was also closely connected to the battles over federalism that laid the groundwork for the administrative state and the expansion of congressional power under the Interstate Commerce Clause.[162] Most telling is the fact that we deploy children's best interests to "exclude . . . children from paid work" while we consider it to be "reasonable to require them to undertake unpaid work;" indeed, this may reflect "children's relative lack of power [rather] than a reflection of systematic evidence about how best to promote children's well-being."[163] Indeed, it is not factory work, but unpaid domestic and

[155] *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005); ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (1996) (both illustrating that children's rights movements are aimed at adult goals and norms, rather than being child-driven or empowering children).

[156] GUGGENHEIM, *supra* note 155; MNOOKIN, *supra* note 155.

[157] Appell, *supra* note 10.

[158] *See* BERRY MAYALL, TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES (2002) (noting that children perform self-care, housework and childcare, contributing "directly to the family enterprise and indirectly by freeing up adult time"). Robert Epstein would end childhood at adolescence. ROBERT EPSTEIN, THE CASE AGAINST ADOLESCENCE (2007).

[159] HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY 5 (2002); *see also* James D. Schmidt, *Restless Movements Characteristic of Childhood: The Legal Construction of Child Labor in Nineteenth-Century Massachusetts*, 23 LAW & HIST. REV. 315 (2005) (tracing the statutory regulation of apprenticeships and its suppression of children's free (i.e., contractual labor)).

[160] HINDMAN, *supra* note 159, at 16, 19-20. Hindman characterizes the abolition of slavery as the "first major child labor reform in America." *Id*. at 20.

[161] Appell, *supra* note 4, at 746.

[162] *See* Seymour Moskowitz, *Dickens Redux: How American Child Labor Law Became a Con Game*, 10 WHITTIER J. CHILD & FAM. ADVOC. 89 (2010) (tracing the development of and hard fought battles regarding child labor laws in the federal Fair Labor Standards Act and a failed constitutional amendment banning child labor).

[163] Deborah Levison, *Children as Economic Agents*, 6 FEMINIST ECON. 125-126 (2000).

agricultural labor, that is most prevalent among the world's children and adolescents.[164]

Moreover, because children are consumers of goods and services, they form an important market force as consumers and job creators. Indeed, the institution of childhood produces both adult employment and social identities, such as parent, teacher, and day-care provider.[165] This feature, the creation of adult identities through childhood, serves further to obscure the contingency of childhood and to reify its contours.[166] Whether with their own money or that of their parents, children drive consumption and employment. A cursory glimpse of advertising or the success of McDonald's Happy Meals reveals this phenomenon.[167] Indeed, an entire industry devoted to courting children's market power directly and through production of images of children as "cute and innocent" in television and film have successfully driven market development and consumption by children and by adults for children.[168] In Western cultures in particular, in addition to markets for food, toys, television, and film, children are engaged in all sorts of formal extra-curricular activities—sports, performance arts, and other organized activities that often extend to the evening and, ironically, create markets for paid child-care for the children of the adults who are in charge of these pursuits.[169] In these ways, children as a class create jobs in the service sector for baby-sitters (who are often other children), nannies, park employees, and restaurateurs and their employees.[170] David Oldman observes that these phenomena both amount to "a process of *defamilization* of the modern child" and continue a history of exploitation of child labor, in that the children's play and activities create jobs and wealth for adults.[171]

But children are not mere foils or uniquely susceptible to marketing, peer pressure, and consumption. Anyone who has interacted with children for any sustained amount of time recognizes that children are present in their own lives and, even at very young ages, know what they want, have their own sense of

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164 *Id*. at 128; *see also* Cahill, *supra* note 68, at 214 (rehearsing the types of labor that children perform as caregivers, food-growers.).

165 Leena Alanen, *Gender and Generation: Feminism and the "Child Question," in* CHILDHOOD MATTERS 27, 40-41(Jens Qvortrup ed., 1994); David Oldman, *Adult-Child Relations as Class Relations*, *in* CHILDHOOD MATTERS, *supra* note 165, 43-58.

166 Alanen, *supra* note 165, at 40-41.

167 *See* Tatiana Andreyeva, Inas Rashad Kelly & Jennifer L. Harris, *Exposure to Food Advertising on Television: Associations with Children's Fast and Soft Drink Consumption and Obesity*, 9 ECON. & HUM. BIOLOGY 221 (2011); Jennifer L. Harris, Jennifer L. Pomeranz, Tim Lobstein & Kelly D. Brownell, *A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can Be Done*, 30 ANN. REV. PUB. HEALTH 211 (2009).

168 Stasiulis, *supra* note 5, at 511.

169 Oldman, *supra* note 165, at 54.

170 *Id*. The spread of the Chuck E. Cheese franchise, "where a kid can be a kid" presents a particularly pervasive example of the success of marketing to and for children. *The Experience*, CHUCK E. CHEESE, http://www.chuckecheese.com/discover/the-experience (last visited Mar. 22, 2013). *See* Susan M. Connor, *Food-Related Advertising on Preschool Television: Building Brand Recognition in Young Viewers*, 118 PEDIATRICS 1478 (2006).

171 Oldman, *supra* note 165, at 54-56; Alanen, *supra* note 165, at 33.

justice, are connected to other human beings, and understand that they have a past (and past selves), a present (and a present self), and a future (their future selves—as older children and as adults). They certainly are not blank slates, but carry with them identities, connections, values, and desires. Even as a developmental category then, childhood's construction of children is both incoherent and erroneous, particularly as it constructs children as lacking in judgment and discretion, and therefore without competence or agency, but dangerous when exercising self-determination.

Philosopher Gareth Matthews has observed that very young children, even toddlers, are moral beings and moral actors who engage in analogical reasoning and altruistic obligation.[172] Indeed, children pose philosophical questions and conduct moral reasoning throughout childhood, partaking in abstract analysis and philosophical inquiry regarding issues such as the relationship between the alphabet, sound, words, and thought.[173] Further, children understand moral obligation as distinct from something for which the child would be punished.[174] Studies of children reveal that they have strong senses of responsibility and exhibit characteristics associated with responsibility, such as "being accountable, capable, competent, reliable and trustworthy in a number of situations."[175]

It is not surprising then that children view themselves as responsible, contributors, and as moral actors.[176] In his early teens, Benjamin Franklin began to formulate sophisticated political theory.[177] His (initially pseudonymously) published political tracts and critiques of the views of powerful leaders like Cotton Mather were widely read, influential, and controversial,[178] and Franklin's adolescent views of free speech would eventually be codified in the U.S. Constitution's First Amendment, having begun to frame those and other sophisticated political theories in his early teens. Another great leader, Frederick Douglass, taught himself to read and write while a youth because he recognized at an early age that those skills would be his "'pathway to freedom.'"[179]

Children are participants, and even leaders, in political movements and protests.[180] Eleven-year-old Hubert Eaves garnered headlines when he refused to

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[172] GARETH B. MATTHEWS, THE PHILOSOPHY OF CHILDHOOD 56, 57-58 (1994). Children are "genuinely moral agents." *Id*.

[173] *Id*. at 34.

[174] *Id*. at 56-58.

[175] Håvard Bjerke, *Children as 'Differently Equal' Responsible Beings: Norwegian Children's Views of Responsibility*, 18 CHILDHOOD 67, 68 (2011).

[176] *Id*.

[177] WOODHOUSE, *supra* note 3. Frederick Douglass, Dred Scott's daughters Liza and Lizzie escaped to freedom during the Dred Scott litigation. WOODHOUSE, *supr*a note 3, at 85.

[178] *Id*. at 112-17.

[179] *Id*. at 56.

[180] *E.g*., J.J. Bell, *From Saucy Boys to Sons of Liberty: Politicizing Youth in Pre-Revolutionary Boston*, *in* CHILDREN IN COLONIAL AMERICA 204-213 (James Marten ed., 2007); *See infra* text accompanying notes 181-206. Children have engaged in sporadic labor protests. *See* HINDMAN, *supra* note 159, at 45 ("[T]here were numerous instances of strikes by child workers in U.S. history, [but] they

salute the flag on the grounds that it represented a systematically and violently racist nation.[181] Twelve-year-old Lillian Gobitis and her ten-year-old brother William took their religiously motivated protest against saluting the American flag to the Supreme Court,[182] as did the Barnette children after them.[183] These and other children engaged in risky and provocative political action that led to violence[184] but also, eventually, to a robust vision of freedom of conscience and the Supreme Court's authority.[185]

Children were active in the NAACP in the 1920s and 1930s, and important players in the Civil Rights Movement of the mid-twentieth century. Despite the perspective of adult organizers that the NAACP was merely socializing children for the future—for their eventual adulthoods[186]—NAACP youth councils lead the NAACP's move toward more activist and militant approaches to civil rights.[187] Black youth protests pushed the NAACP to represent the Scottsboro boys and to move beyond the middle class.[188] Fifteen-year old NAACP youth council member Claudette Colvin less famously refused to give up her seat on the bus for a white person months before Rosa Parks did so.[189]

Children were also leaders in this movement. Sixteen-year-old Barbara Johns, impatient with the slow pace of adults, organized the students of R.R. Moton High School in Prince Edwards County to stage a sit-in and sought out the NAACP legal counsel;[190] this organizing[191] would eventually reach the Supreme Court as part of the *Brown vs. Board Education* litigation.[192] It was, after all, children who integrated schools, often at great risk, but also with a strong sense of duty and purpose.[193] Black and white children actively greeted the United States Supreme

tended to be spontaneous acts of rebellion over transitory issues.").

181 CECILIA E. O'LEARY, TO DIE FOR: THE PARADOX OF AMERICAN PATRIOTISM 231 (1999).

182 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

183 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

184 Vicent Blasi & Seana V. Shiffren, *The Story of* West Virginia State Board of Education v. Barnett*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 409, 420-21 (Michael C. Dorf ed., 2009) (describing the attacks on children who refused to say the pledge).

185 Blasi & Shiffren, *supra* note 184, at 426.

186 REBECCA DE SCHWEINITZ, IF WE COULD CHANGE THE WORLD: YOUNG PEOPLE AND AMERICA'S LONG STRUGGLE FOR RACIAL EQUALITY 160-73 (2009). These youth were powerful forces in the movement as well and their actions helped to move the NAACP in more militant directions. *Id*. at 165-248.

187 *Id*. at 170-71, 173.

188 *Id*. at 165, 241-48.

189 *Id*. at 245. Her action "'electrified Montgomery's black community' when she was beaten and jailed for refusing to move to the back of a city bus." *Id*.

190 *Id*. at 218-20; BELINDA ROCHELLE, WITNESSES TO FREEDOM: YOUNG PEOPLE WHO FOUGHT FOR CIVIL RIGHTS (1993).

191 DE SCHWEINETZ, *supra* note 186, at 218-19. The litigation was Davis v. Cnty Sch. Bd. of Prince Edward Cnty, Va., 103 F. Supp. 337 (E.D. Va. 1952).

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

193 *See, e.g*, DE SCHWEINETZ, *supra* note 186, at 103-15, 204-05 (referring to a group of African American children, known as the Little Rock Nine, who were integrated into Central High School in Little Rock, Arkansas). *See also* DE SCHWEINITZ, *supra* note 186, at 204; DE SCHWEINITZ, *supra* note 186, at 218-225 (describing youth desegregation organizers in the 1960s).

Court decision in *Brown* with a sense of hope and possibility, and an understanding that not just their, but the, world would be different.[194] Black children in particular reported feeling a sense of empowerment.[195] "Young blacks through the South, often despite the considerable misgivings of their parents and the intransigence of whites, readily accepted . . . [the] responsibility [of integration] and chose to push their local communities into compliance with the ruling."[196] In *Brown's* aftermath, the Little Rock Nine, the only black children allowed into the all-white Central High School in Little Rock, Arkansas, bravely and with great strength and composure broke that barrier even as they were met with jeers, physical violence, and attacks on their parents.[197]

Fourteen-year-old Emmett Till engaged in the political act of whistling at a white female cashier, sparking a movement and perhaps even the 1957 Civil Rights Act.[198] High school students were among the sit-in activists who challenged segregated public and private services. Seventeen-year-old Harvey Garitt joined the movement on his own and with knowledge that he could jeopardize his education.[199] In 1969, thirteen-year-old Barbara Burrus marched with forty-five other black youth between ages eleven to fifteen years old, as well as a number of parents, to protest a school consolidation plan.[200] The understated and eloquent black armband anti-war protest of Mary Beth Tinker, her brother, and their friend also made its way to the U.S. Supreme Court.[201] In 1972, Bronx high school students formed what is believed to be the first gay student group.[202]

More recently, twelve-year-old Walter Polovchak claimed American democracy over Soviet rule.[203] High school students Aaron Fricke and Constance McMillen engaged in political action by openly seeking to bring their same-sex dates to their respective proms.[204] Jessica Taft's study of teenage girl activists in North and South America reveals extraordinarily intentional, thoughtful, respectful, and sensitive approaches to political analysis, strategy, and organizing.[205]

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194 DE SCHWEINETZ, *supra* note 186, at 204-06.

195 *Id*. at 206.

196 *Id*. at 204.

197 ROCHELLE, *supra* note 190, at 18-27. As an adult, Elizabeth Eckford, one of the nine, reflected on those days and the weight of their actions: "It was up to us to make integration a success." *Id*. at 21.

198 *See* DE SCHWEINETZ, *supra* note 186, at 101-03 (describing the incident and its aftermath, including reference to the event in the testimony of witnesses before the Senate Subcommittee on Civil Rights in 1957); DE SCHWEINETZ, *supra* note 186, at 215-17 (describing the youth response, which included embracing Till's swagger and pushing the same racial barriers for which Till died).

199 ROCHELLE, *supra* note 190, at 43-44.

200 McKeiver v. Pennsylvania, 403 U.S. 528, 536 (1971).

201 Tinker v. Des Moines Indep. Cmty. Sch. Dis., 393 U.S. 503 (1969).

202 Dominique Johnson, *"This is Political!" Negotiating the Legacies of the First School-Based Gay Youth Group*, 17 CHILD., YOUTH & ENV'TS 380, 381 (2007).

203 Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985).

204 McMillen v. Itwamba Sch. Dis., 702 F.Supp. 2d 699 (N.D. Miss. 2010); Fricke v. Lynch, 491 F.Supp. 381 (D.Ct. R.I. 1980).

205 JESSICA TAFT, REBEL GIRLS: YOUTH ACTIVISM AND SOCIAL CHANGE ACROSS THE AMERICAS (2011).

These examples of children's agency and intentionality in their own lives and in the social and political discourse in their schools and in their nation push against the construction of childhood as a time of impotence and privacy, and it pushes against construction of children as ignorant, unsophisticated, and without political perspectives or agency.[206] On the contrary, children in the U.S. have been, and continue to be, active laborers, consumers, and political activists during what law and society now construct as their childhoods. This history belies childhood's construction as private, passive, important only as an aspect of adult liberty, and significant only in the futurity of its constituents.

C. Childhood's Exceptionalism

Despite similarities between childhood and other pseudo-natural categories that no longer *de jure* disqualify members of non-normative groups from full participation[207] and those groups that are moving closer to legal legitimacy,[208] the inhabitants of childhood remain *de jure* subordinate and without authority for most purposes. Childhood differs from other subordinate identities, because it is by definition transient. Unlike genitalia, reproductive organs, phenotype, and sexual orientation, the very characteristic that places children in childhood is temporary and evolving for essentially all of its constituents. Moreover, children's natural characteristics truly are universally salient,[209] at least for a portion of their childhood. For most people, however, childhood is temporary and its trajectory terminates in independent, competent adulthood. This trajectory is usually a gradual process from complete vulnerability and dependency to increasing strength, ability, and independence. The range and experience of childhood's constituents are extreme, from life-threatening vulnerability to strength and competence on par with adults. Although the law does afford some gradual uptake of rights and authority for childhood's members as they develop, law and society effectively treat this diverse and unstable category as a monolith. Children's vulnerability and the transience of childhood legitimate this at once liberal and illiberal scheme.

Unlike other social and legal identity categories that distribute power, privilege, and subordination, childhood is unique in that all of its constituents for at least some part of their childhood need assistance simply to survive and to carry out basic human functions. Although children can develop the basic skills they need to

206 Just north of the U.S., in 1995 a 12-year-old Canadian boy founded Kids Can Free the Children (FTC), now a large international organization working for and on behalf of children's rights and well-being; and more generally, children politically active through many methods and fora. *See* Stasiulis, *supra* note 5, at 528-29 (describing Free the Children and other forms of action, such as, "activist children seek influence through a range of forms of more direct democratic engagement and opposition—both conventional (lobbying petitioning) and less conventional (embarrassing adult policy-makers whose concerns for children are revealed to be platitudinous").

207 For example gender, people of color, and people with disabilities.

208 Such as homosexuals and non-citizens.

209 This is especially true when children are very young and in the context of society in which independent adults are normative.

survive, and perhaps thrive, without excessive assistance from their elders, they will be more prepared for and have better life chances if they have assistance in learning how to navigate the complex, highly developed environments, markets, and technology of an industrial and information economy. The idea of abolishing childhood under the current regime certainly would harm children as much as it would adults.

Indeed, moral and political liberalism contemplate autonomous subjects who "have the internal resources and skills to evaluate and revise . . . [their] own commitments and practices."[210] People are not born with these tools; instead, these habits are cultivated and develop in childhood and through adulthood,[211] often with the aid of armies of other human beings of all ages, generally beginning with the adults who are their parents or guardians. Older siblings or cousins are also important influences on children, as are schoolmates, teachers, neighbors, friends, other kin, and various media. Certainly, human children are not well situated to inhabit the role of independent liberal citizen without assistance, guidance, discipline, and care.

Moreover, as noted above, this categorical approach to enfranchisement plays an important role in a liberal democracy by creating and categorically qualifying citizens. Childhood presents a relatively neutral method of distinguishing the liberal subject, as someone capable of self-governance and governance of others, from those who are not. Without childhood, or some form of it as a socio-legal category, it is unclear how we would distinguish between dependency and autonomy. Would everyone be autonomous or would no one? Would we test for autonomy, much as we do for a license to drive or to become a lawyer or hairdresser? Or would we presume everyone is competent absent proof to the contrary? Of course testing for the right to vote, to parent, to serve on a jury, or to engage in other democratic freedoms is undemocratic and illiberal,[212] and it is not surprising that we have, over time, rejected such measures.[213] Moreover, even as

[210] Brighouse & Swift, *supra* note 65, at 80-81 (2006); *see also* EAMON CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY 11 (1997) ("The value of autonomy or reasoned self-rule is the key to understanding what rightly holds together liberal and democratic principles."); MACMULLEN, *supra* note 64, at 23 ("Autonomy is the capacity for critical-rational reflection . . . on an ongoing basis."). MacMullen also claims that autonomy *requires* the capacity for second-order thought. MACMULLEN, *supra* note 64, at 69; Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. OF CHI. LEGAL F. 27 (2004) (analyzing the shifting and competing control parents, the state, and children have on children's development); Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557 (1995) (analyzing what political liberalism requires of education in a morally and religiously diverse polity).

[211] *See* MACMULLEN, *supra* note 64, at 73 ("[I]t helps to be educated if you are to shape and actively endorse your own ethical values."); *Id*. at 113-36 (claiming that a primary goal of education is ethical autonomy).

[212] *But see* Buck v. Bell, 274 U.S. 200 (1927) (holding that state sterilization program for individuals identified as epileptic or feeble-minded is constitutional and not a violation of the plaintiff's Fourteenth Amendment rights).

[213] *E.g.*, U.S. CONST. art. 13-14; Voting Rights Act of 1965, 42 U.S.C.A. § 1973 (1988); Voting Rights Act of 1965, 42 U.S.C.A. § 1973aa-6 (1988).

the development thesis creates adult freedom, it carves too wide of a swath for children and accounts too little for caregivers.

While eradicating some form of childhood is all but unimaginable, reducing children's subordination is not impossible, even within a liberal construct. The dominant negative rights approach of the U.S. obscures the possibilities of greater liberty for children because negative rights are most useful for people who have the ability to exercise them. Most adults, for example, can exercise many freedoms without assistance: they can prepare food, walk and navigate public and private transportation, read, work, and vote. Many children share these capabilities, but the very young children cannot exercise many autonomous functions. In addition, there is no guarantee, nor do we have tests to ensure, that adults can undertake these tasks. Instead, we rely on the odds that they have the experience, willpower, and other-regarding habits to hold the responsibility of citizenship and even guardianship in a liberal society. We can certainly all think of adults who do not share those qualities; and we can also think of children who do. But for a variety of strong and weak reasons, we prefer to draw relative bright lines. The next Part challenges this line drawing, seeking to soften the dichotomy of power and authority, capacity and vulnerability and afford a more child-centered approach to childhood while protecting the important core presumptions of adulthood.

III. GROUNDING CHILDREN'S LIBERATION

As foundational, and arguably essential, as the adult-child divide is in liberalism, a liberal legal system[214] does not mandate the present contours of childhood. While we must account for children's vulnerability for at least part of their lives, it is difficult to justify to children why they are disenfranchised for nearly two decades of their lives, during which time they have little authority and fewer claims to power. The justification for this confinement arises in part out of parental freedom and in part out of children's need in a society that is not child-centric. This is particularly true because traditional U.S. approaches to difference and exclusion invoke negative rights. In addition, liberal legal regulation requires the state to be neutral regarding race, gender, and belief systems, and to forbid differential treatment of similarly situated people. While these negative rights offer relief from certain barriers for adults, they offer little consolation for children because society is not structured for children's independence, and negative rights do little to accommodate vulnerability; as a result, these rights may be of little use to children.[215]

In light of the movement toward freedom and equality for identity-based groups, it is worth revisiting both the exclusion of children from many autonomy

[214] I use the phrase "liberal legal system" to refer very broadly to a liberal democracy that values and protects adult moral and political autonomy to govern themselves and to participate in the polity and "to believe in . . . free and equal citizenship." CALLAN, *supra* note 210, at 2.

[215] This is equally true for adults who are particularly dependent or vulnerable.

rights and the push for equality. Such a project could aid in developing a more just conception of childhood that accounts for children's developmental trajectory, the private value creation that is a liberal keystone, and also children's autonomy. From a child-centered perspective, the traditional negative rights approach is problematic because it essentially excludes children from power. This Part examines metrics for affording children more autonomy and a more direct and mutual relationship to the state, without incurring the risk of becoming subordinate to the state.

A. Beyond Protection and Seclusion

There is no question that all human beings are more or less vulnerable in various ways and at various times, some of which are more predictable and universal than others. Children's predictable vulnerability and their construction as aspects of their parents' (and more generally adult) liberty do not mandate the nearly totalizing dependency of children until age eighteen. On the contrary, such stark notions of dependency and autonomy may establish desirable bright lines that create and protect adult autonomy and guard against the subjective judgment of decision-makers, but these lines also mask capacity in children and the ongoing vulnerability of the human condition, including the vulnerability of those who care for vulnerable beings.[216]

Although we have carved out childhood as the quintessential and most categorical vulnerability, its precise contours are not essential. Nor is it our practice of excluding children from all authority between birth and, roughly, eighteen years old. Even as currently constructed, childhood can afford children more freedom and authority; and liberalism can absorb more authority in childhood. Indeed, childhood already has many exceptions. We can treat children like adults, for example, through the responsibilities of parenthood and wage work. Children can drive cars, own property, and make certain medical decisions. There is no clear justification for children's lack of the franchise, their presumed unsuitability for political office, and their significant subordination to adult governance and direction from birth until eighteen, unless a child is emancipated earlier. After all, it was not too long ago that women, African Americans, and people younger than twenty-one years old[217] categorically did not have the franchise, and women and African Americans could be excluded from juries by virtue of their sex and race.[218] Despite this progress, children remain excluded from these basic rites of citizenship.

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216 *See also* Fineman, *supra* note 8.

217 U.S. CONST. amends. XV, XIX & XXVI (extending the franchise regardless of race or sex, and to people 18 years old, respectively).

218 Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that juries must represent an accurate cross-section of the community, which includes women); Strauder v. West Virginia, 100 U.S. 303 (1879) (holding that it is unconstitutional to bar jury participation on racial grounds).

Even within our current system in which parents, schools, and the state exercise considerable dominion over children, it is possible to imagine a more refined and principled approach to childhood. Such an approach would presume competency in children, just as we presume competency for adults, regardless of their beliefs, skills, education, and ability. The burden then would be on those who would limit children's freedom and autonomy—*e.g.*, legislatures, parents, and school administrators. Thus children would not be presumptively weak, unwise, incompetent, and vulnerable, but the default would treat children with dignity, as if they were competent and self-possessed. This approach might abbreviate children's (and therefore adult care-givers') vulnerability and dependency.

We need not reflexively require as a condition of political participation more of children than we require of adults. Most children already engage in some form of productive work, and when they work in the formal labor market, they pay taxes. We do not require any particular level of education or economic criteria for the franchise, for holding any number of political offices, or for engagement in political organizing.[219] It is easy to imagine children voting, serving on public bodies, and as political candidates.[220] Children themselves no doubt have many ideas about how and when they should participate.[221] The question is how we get there. Our present civil rights landscape offers two primary approaches: equal rights and accommodation. I will consider each in turn.

B. Traditional Approaches to Civil Rights: Children's Equal Rights

Adults have deployed legal mechanisms to limit discrimination based on identity categories and actual or perceived differences regarding gender, race, religion, ethnicity, old age, and disability. These include the Fourteenth, Fifteenth, Nineteenth, and Twenty-sixth Amendments to the U.S. Constitution, as well as various civil rights statutes, such as the Civil Rights Acts of 1866[222] and 1964,[223] the Equal Pay Act of 1963,[224] the Age Discrimination in Employment Act,[225] and the Americans with Disabilities Act.[226] These laws seek to reduce discrimination

219 For example, the historically challenged present day Tea Party—who are confused regarding their namesake—and an actual elected Congressional representative (Michelle Bachman) who claimed the founder's ended slavery.

220 The Constitution places minimum age limits on certain federal offices, which is an exclusion that might be difficult to challenge.

221 For example, the Movement of Working Children and Youth of Africa identified rights and norms for children that included the rights to "self-expression and to form organizations. To assemble, unite, speak as one and defend our group interests." Manfred Liebel, *Citizenship from Below: Children's Rights and Social Movements*, *in* CHILDREN AND CITIZENSHIP 32, 41 (Antonella Invernizzi et al. eds., 2008). The Movement also sought the right to be heard, to be taught a trade, to "light and appropriate work, and the "right to respect." *Id*. at 40-41.

222 42 U.S.C. § 1981 (1866).

223 42 U.S.C. § 2000e (1964).

224 28 U.S.C. § 206 (amended by 29 U.S.C. § 206 (1938)).

225 29 U.S.C. §§ 621–634 (1967).

226 Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (1990) (codified in scattered

and disempowerment based on actual or presumed biological distinctions including age, sex, phenotype, physical and cognitive ability, and emotional stability. These laws seek to remedy, if not erase, distinctions arising out of pure, unadulterated prejudice, particularly in the case of race,[227] and assumptions about competence, capacity, and the social order. Most of these laws address specific spheres, such as employment, voting, public spaces, access, and housing. Others are broader and affirm the membership of all, and especially disfavored groups in the community. These include the Fourteenth Amendment, the Civil Rights Acts of 1866[228] and 1871,[229] the Age Discrimination in Employment Act,[230] and the Americans with Disabilities Act,[231] each of which provide for formal or accomodational equality in a range of human endeavors and environments.

The Fourteenth Amendment equal protection and substantive due process doctrines provide formal equality and liberty approaches that, although very important, essentially afford negative-only rights against state-sponsored discrimination or interference with fundamental liberty, including exercise of religious, familial, and sexual freedom. While these are extraordinarily important freedoms and protections, they are essentially available only among equals or to those who can exercise liberty. The liberal subject does not include or take into account the vulnerability of children (and the resulting vulnerability of adults).[232] On the contrary, the formal liberal equality model inscribes the independent adult as the ideal citizen and constructs children as elements of adult freedom. Thus, the formal equality approach is problematic from the perspective of people who deviate from the ideal person.[233] This ideal person is able-bodied, able-minded, without dependents, and without a womb.[234] As such, children and others who are vulnerable or dependent by virtue of caring for others cannot easily benefit from equal rights because the material conditions of their lives limit their choices in a liberal democracy.[235]

sections of United States Code).

227 For example, racial segregation, and other tools of white supremacy.

228 42 U.S.C. § 1981 (1866) ("All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws . . . ").

229 42 U.S.C. § 22 (1871).

230 29 U.S.C. §§ 621–634 (1967).

231 Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (1990) (codified in scattered sections of United States Code).

232 *See, e.g.*, VIRGINIA HELD, THE ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL 13 (2006) ("Dominant moral theories have seen 'public' life as relevant to morality while missing the moral significance of the 'private' domains of the family and friendship . . . They have posited an abstract, fully rational 'agent as such' from which to construct morality, while missing the moral issues that arise between interconnected persons in the contexts of family, friendship, and social groups.").

233 *See generally* Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 QUEEN'S L.J. 179 (1993-1994); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993); Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250 (1989).

234 *See* MacKinnon, *supra* note 12.

235 Appell, *supra* note 152, at 702-03.

Children are least able to exercise their freedoms directly, at least while they are young. The inclusion of children in the polity—particularly in the franchise, in representative government, and in the workplace—might increase their power and autonomy and, perhaps, lead to a more responsive state. But a formal equality model would simply make childhood a bit shorter and narrower. This is because the equality model is based on negative liberty (and the norm of adulthood that undergirds liberalism), which does not offer much more freedom to children until they are in a position to exercise it.[236]

The natural facts of development, including the vulnerability of very young children, present challenges to the utility of negative rights that merely prohibit state action interfering with liberty or discriminating based on "natural" factors, such as race, phenotype, gender, and age. Negative rights have little utility for people whose ability to take advantage of such freedoms is constricted by life conditions, such as lack of financial resources, physical ability, or cognitive skill. In a rights regime that constructs rights as state forbearance or equal treatment, children will not fare well. For much of their childhood, they will not be able to exercise freedom without assistance; and in most measures, they will fall short of their elders, so will not be able to exercise freedoms.

Particularly during their early years, the rights of physical, moral, and political autonomy are of little value, and can be dangerous. Indeed, extending direct autonomy rights to infants and toddlers renders those rights incoherent. There are certain liberal freedoms that young children simply cannot exercise with any semblance of self-direction. Although an equal rights approach could create a more nuanced childhood, one in which children have a more direct relationship to the state and have more autonomy rights at a younger age, that is not much of a change from the current regime, which already allows children some uptake in rights as they age. Equal rights norms would increase those rights, but such rights would provide only limited relief for children or improvement from the current regime.

The "flaw in the like-treatment model is that it fails to recognize that the problem 'resides in the structures (built to reflect and accommodate privileged norms) and not in the person who is judged 'different' . . . [and] popular prejudice can magnify the effects.'"[237] So, simply affording children equal status as adults

[236] This is also true of substantive due process, but the rearing of children in intimate family settings that inculcate private value systems is consistent with pluralism and affords children as a whole a variety of possible value systems: secular, religious, cultural, atheist, agnostic, etc. Children may have a direct or familial right to freedom of thought and conscience, and intimate associations, but they are rarely in the position to exercise them without assistance. Indeed, their caregivers (normally parents) serve as surrogates for and shepherds of children's freedoms. Affording babies and young children this sort of moral freedom would be fairly meaningless, and may likely lead to fairly secular adults. It seems that children win and lose in a system that allows adults to, in effect, create their moral worldview, but as developmental and political matters, it seems unavoidable.

[237] Gerard Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework*, *in* HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN

would not be particularly empowering for very young children who could not care for themselves, do not have the skills or wherewithal to earn a living, find shelter, or feed themselves, or exercise the franchise. The laissez-faire equality approach would limit the opportunity to take more seriously the roles and obligations of democratic citizens. Children need a more responsive state, not freedom that they cannot exercise.

C. Accommodating Children's Participation

Advances in human rights frameworks and the structural and positive approach of the Americans with Disabilities Acts are instructive for children because children are, for large parts of their youth, unable to affirmatively exercise negative rights. Most children are also not similarly situated to most adults, including the ideal liberal subject. In addition, children are part of and share in the liberty interests of their parents. These attributes are central to the liberal republic, which counts on the private creation of values and the consent of the governed.[238] The metrics of equality and negative freedom do not map directly onto children for the developmental, economic, moral, and political reasons rehearsed above. As a result, children need a model that accounts for their vulnerability and life in a liberal democracy.

The accommodation model presents a more contemporary and forward-looking framework, which is particularly apt for children. This strategy both promotes children's participation in their lives, their families, and the polity, and serves as a developmental model to ferry children to adulthood. Instead of the present harsh lottery of childhood[239] as a time of private seclusion, childhood could become a time of participation and inclusion. To aid in this analysis, I propose a constitutional Children's Participation Amendment ("CPA"),[240] which draws on accommodation, rather than negative liberties, and borrows loosely from the Americans with Disabilities Act[241] to proffer a more substantive constitutional amendment, and one which might also commit the state to act, rather than refrain from acting. The CPA meets children where they are and, instead of excluding them, it requires accommodation to remove barriers for the purpose of enabling children to more fully participate in and control their own lives and the life of the polity. This metric requires more of the state and those who care for children than the current regime. Under the CPA, the state and caregivers would help enable

RIGHTS INSTRUMENTS 69, 75-76 (Theresia Degener & Yolan Koster-Dresse eds., 1995).

238 Appell, *Virtual Mothers*, *supra* note 55, at 726-27.

239 LEE RAINWATER & TIMOTHY M. SMEEDING, POOR KIDS IN A RICH COUNTRY 22, 29 (2005).

240 I suggest a constitutional amendment to work around the Fourteenth Amendment, Section Five limitations (*see* City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997)) and to place this statute on par with existing constitutional rights, including the rights of parents.

241 *See* 42 U.S.C. §§ 12111–12117. Mark C. Weber, *Forward: A Symposium on Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act*, 46 DEPAUL L. REV. 871, 874-875 (1997) (suggesting the central mission of the Americans with Disabilities Act is to redefine equity by providing accommodations for disabled persons, thereby creating "functional equality").

children to exercise basic human freedoms, such as meeting their personal needs and participating in the work force, the market, the community, and the polity. The CPA provides:

The Children's Participation Act

> Article 1: The right to participate in major life activities at home, in the market and in the polity shall not be abridged by the United States or by any state on account of youth.
> Article 2: Major life activities include, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, associating, voting, and holding political office.
> Article 3: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article, including reasonable accommodations to effect children's participation rights."

I have inserted "home" for purposes of analysis to contemplate government regulations directing homebuilders, landlords, and caregivers (if any), to accommodate the environment and daily life of young people, and to permit and enable their full participation and authority in the household.[242] These realms of participation limit the privacy of child, family, and home by requiring caregivers to modify their homes to accommodate children's participation in cooking, bathing, cleaning, play, and housework. This might result in lower counters and tables; elimination of sharp edges; rails for stairs; protection from stoves and ovens, but also access once children are able to cook; accessible door locks; and barriers to busy streets.

The extent to which the CPA reaches into the home could be viewed as anti-liberal, because it would regulate the household and the rearing of children, requiring caregivers to provide special accommodations and freedoms. On the other hand, the state already regulates the home through child welfare, domestic violence, public health, building codes, fire codes, education, and criminal law, so state intrusion is not exceptional. The deeper shift that the CPA would produce is in the authority of parents *vis à vis* their children because the CPA requires children's participation in the family, limiting the autocratic rights of parents, but only to the extent of balancing the views and wishes among parents and children.[243] This may limit parental authority within the family, but the family

[242] I hold a strong presumption that in a liberal society, children would remain with parents or other private parties during at least their early youth, and not in congregate state care or simply on their own, until they have some level of self-sufficiency—so they do not die for lack of basic care. In any event, "home" refers to where they live.

[243] Operationalizing or protecting this norm would be challenging because of the imbalance of power within the family and the importance of family privacy and autonomy for both parents and children. Affording children the right to sue their parents or involving local child welfare system

would remain a private realm of value creation. The CPA does not delegate power to state actors or others outside the family and does not identify parents as actors who may not abridge children's participation, but indirectly parental rights may be limited because state laws would have to be modified to limit custodial rights to protect children's participation rights. Thus, we can imagine some intrafamily litigation regarding children's participation rights under the CPA.

I include the polity, political office, the franchise, and jury duty, so children would have both access to political office and to the franchise and to assistance in exercising those offices.[244] This amendment would likely supersede minimum age requirements for the offices of President, Senate and House. The amendment clearly overturns the Twenty-sixth Amendment to the extent that amendment excludes people younger than eighteen from the franchise.

In contrast to the formal equality model, which would rely heavily on the individual's ability to execute or perform equality, the CPA's accommodation approach suggests that it is up to the state (or employer, parent or guardian) to ensure that mitigating measures are made to enable children to participate in major life activities and that perceived disability (here, physical, emotional, and cognitive immaturity) does not limit options or drive decisions regarding children.[245] This approach does not attempt to treat children like adults, but instead embraces and accounts for children's developmental status and resulting vulnerabilities, even as it aims to facilitate children's fuller participation in their own lives, the life of the family, the market and the polity. The CPA would embrace, rather than problematize, children's limitations, providing accommodation as and only when needed, but prohibiting restrictions and over-reaching when children are able to perform major life activities.

The remainder of this section analyzes this accommodation approach in the context of the primary areas of contemporary differential regulation of children as compared to adults. Here I sample primary foundational defining regulatory categories regarding children under the current regime of childhood: custodial status; moral and physical autonomy; education; labor; criminal activity; sex; and political participation. This analysis embraces diversity in children's development insofar as it will be affected morally, intellectually, and politically. By locating vulnerability in the family, this scheme retains important liberal freedoms for adults and children and protects cultural, moral, and spiritual affiliation of children, until or unless they develop their own priorities.

oversight both carry significant risks. I leave this to Congress, Children's Participation Act, *supra* Part III.C, or perhaps another paper.

244 *See infra* Part III.C.7.

245 ADAAA added "regarded as" being disabled. 42 U.S.C. § 12102(1)(C) (2012).

1. Care and custody

State, federal, and constitutional laws assign children to adult caregivers. These caregivers, normally parents, provide care and protection for children and are authorized to make nearly all decisions regarding the child until emancipation (which arrives automatically at the age of 18 unless earlier pursuant to a legal proceeding). These decisions include diet, clothing, entertainment, recreation, social engagements, curfew, travel, housing, geographical location, education, medical care, moral and religious training, and a certain amount of discretion regarding whether and how to discipline children.[246] Currently, constitutional jurisprudence sanctions this assignment and authority, but the CPA would call for revisiting at least some aspects of parental liberty, though assignment to parents should survive the CPA.

The CPA recognizes both children's dependencies and their autonomy. Young human beings need care for some period of what we now consider to be childhood, so they may need adults or older children to assist and watch over them. While children are very young and literally without the ability to feed themselves, buy, grow, make, or cook food, or toilet themselves, the state or specific caregivers would be required to assist them directly and make accommodations that would help enable children to engage in as major life activities as soon as possible.[247] In addition, in a market economy babies and very young children may not be able to support themselves through labor, so they may need grants or other material supports until they can earn or create what they need. CPA does not specify who would provide these supports, so in light of the current regime, it may well be a combination of public and private assistance that would respect family autonomy, but also, arguably, mediate conditions that interfere with children's participation.

Unlike the current approach, which for most purposes subrogates children's legal agency until they are eighteen years-old, the CPA would require public and private actors to create environments that remove physical and structural barriers to children's participation in their own lives. This approach would limit parental authority as children matured. Their ability to do for themselves with or without help would dictate what they are authorized to do, rather than under current regimes, which effectively limit children's legal autonomy until eighteen for most purposes. Even so, for the early years, parents have considerable opportunity to

[246] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). Exceptions to parental authority include the mature minors doctrine and limited constitutional rights for girls to seek judicial permission to bypass parental consent for abortions. *E.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); *see also*, B. Jessie Hill, *Medical Decision Making by and on Behalf of Adolescents: Reconsidering First Principles*, 15 J. HEALTH CARE L. & POL'Y 37 (2012) (rehearsing the various and exception-ridden laws regarding minor medical decision making).

[247] This is similar to the current regime, but suggests a more positive role for the state in direct provision or oversight of accommodations, even while children remain in private care whenever possible.

rear them, impart values, and model and promote habits of judgment that may or may not protect children from unwise decisions.

The CPA is silent on the question of what accommodations would be required, so it is likely that historical assignment of parents to rear children would survive the amendment, particularly in light of the value liberalism places on the parent-child relationship and private value creation.[248] As noted above, current state and federal law afford parents a great deal of authority and responsibility regarding their children. The CPA would not require a deviation from current notions of the public-private childrearing order, so it is reasonable and quite consistent with the current regime's assignment of children to parents or their designees. The additional specificity regarding parental and state obligations would not erase the public-private divide, but instead create additional obligations to children.[249] Children's vulnerability, as well as political notions of private value creation and parental autonomy, justifies their custodial placement with parents (assuming other constitutional provisions survive the CPA) or in the custody of others who could help them care for themselves until they are more independent.

The CPA accommodates dependency by facilitating children's independence. The CPA might afford children more authority, perhaps incrementally, regarding the child's life than the current regime permits. Children would likely have more authority in their daily lives: bathing, dressing, eating, play, chores, duties, and choosing bedtime. The CPA would permit the state directly, or perhaps through regulation of caregivers, to make accommodations for children's vulnerabilities so that children can perform as much of their lives as possible. The default would be to afford children as much authority as they can receive as soon as they can and establish norms for environments that facilitate children to be as independent and agential as possible.

The children's needs (or children themselves when able) would dictate children's accommodations, although parents likely would be the first interpreters and recommenders of need and accommodation; and parents would be the first responders to these needs, all subject to general laws relating to care and custody. What those needs are and what accommodations are necessary might establish some baselines consistent with current regulations regarding care and custody, but CPA might require a child-centered and child-friendly environment to enhance children's participation in family life and housework.

The CPA would prompt regulations designed to make homes accessible and safe for children. These regulations might require subsidies for those parents who could not afford to retrofit their homes. Moreover, as children age, parental

248 Appell, *Bad Mothers*, *supra* note 55, at 689-690; William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 236-240 (1998); *see also*, Alice Ristroph & Melissa Murray, *Disestablishing the Family,* 119 YALE L.J. 1236, 1263-64 (2010) (discussing the role of family as producer of "American values" and civic virtue).

249 *See*, Appell, *Virtual Mothers*, *supra* note 55, at 687-705 (describing the structure and multiple purposes of the parental rights doctrine).

authority regarding children's accommodations would likely wane. For example, if a child wanted to participate in sex without fear of disease or pregnancy then he or she would be able to obtain birth control products, even if the parents did not approve of the behavior and without the child needing to prove her maturity to other adults.

Children may also have direct claims on the state to provide subsidies or other supports to caregivers or to children directly to provide CPA-mandated accommodations. Or the CPA would require the state directly to make accommodations for children to care for themselves, including direct subsidies to children to meet their needs[250] and direct provision of accessible accommodations. At a minimum, the state would amend building regulations and other codes regarding home construction and retrofitting. Similarly, regulations would address the size, safety, and accessibility of stores, malls, business offices, and public buildings. Counters, tables, seats, and windows might be more accessible to people of all heights and strengths. Packaging would be safer and easier to open (something adults would likely appreciate as well) and law might restrict dangerous and sharp objects in areas children will frequent.

This reassessment of need and resources could have implications for other vulnerable citizens, and perhaps a new construction of rights and needs relating to ability, rather than age or development. In any event, additional accommodations for children and more intensive training and supports to help them reach independence in as many areas as soon as possible, may result in a shortening of childhood. Then again, in light of current trends toward extending childhood,[251] this scheme may lengthen dependency.

2. Moral and Physical Autonomy

Questions of moral authority and physical autonomy are closely connected to family rights and boundaries. Currently, the state assigns nearly all decisions regarding children to their parents in the first instance or state actors pursuant to general regulations and targeted intervention arising out of the state's *parens patriae* and police powers.[252] Thus parents choose where children will live, what activities they can perform, their religion (if any), their language, their medical care, their extracurricular activities, their schools, and sometimes even their friends. Arguably, the state has significant interests in this arrangement: a *parens patriae*

[250] Frances Olsen has famously suggested that children would not be dependent in a state that did not privatize property. Olsen, *supra* note 118, at 852.

[251] *See* Arnett, *supra* note 119.

[252] *See generally* Addington v. Texas, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."); *see also*, Reynolds v. U.S., 98 U.S. 145, 164-68 (1878); Thurlow v. Massachusetts, 46 U.S. 504, 583 (1846) (describing the inherent power of the government to keep order and uphold the laws).

interest in protecting vulnerable subjects, and a political interest in the production of independent citizens with plural values and the ability to participate in the social, economic, and political economies of a democratic republic.[253] These interests are met in a liberal republic through private rearing of children that exposes them, as a whole, to a variety of values, value systems, and allegiances as long as certain requirements are met to ensure that children's basic needs are met and children learn basic skills to perform in these economies.[254]

In this regime, parents have a strong constitutionally protected freedom to rear their offspring in the parents' chosen value systems.[255] This fundamental feature of our constitutional system animates current laws that permit parents to choose children's schools, religious activities, secular occupations, and health care. That is, parents have a liberty interest in rearing offspring in the parents' chosen value systems.[256] Under current law, this interest is the right of the parent, a right which is not entirely mutual but in which the child shares.[257] Parents decide whether they want to raise their children and, within state guidelines (and economic ability), how they raise their children, where they live, what religion, if any, they will observe, what school they will attend, when they can go out and when they must be home, where, if anywhere, they take vacation, what extracurricular activities in which they participate, and what type of medical care they receive. [258]

The CPA does not on its face limit parental authority over childrearing *vis á vis* the state, but it does suggest that parental authority be limited with regard to the child's will. In this way, the CPA creates, if not mandates, opportunities for participation in the family because the child's views would be pertinent, valuable, and not automatically dismissed or ignored. Children's dignity and liberty interests would override any attempts at force, physical coercion, and corporal punishment. Parental use of physical force against children would be subject to domestic violence and perhaps criminal sanctions, as it would if the child were an adult. Just as society has evolved to condemn bullying and battering strangers, lovers, and domestic partners, so to the notion of directing those control mechanisms against children would be objectionable, if not abhorrent.[259] Similarly, children would participate in decisions about their health care.[260]

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

254 *Id*.

255 *Id*.

256 *See e.g*., *Yoder*, 406 U.S. 205; Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925) (privileging private, often familial, transmission of cultural morals and values to children).

257 Appell, *supra* note 152, at 702-03.

258 *E.g. In re* E.G., 549 N.E.2d 322 (Ill. 1989) (affirming child's right to refuse lifesaving medical treatment when the trial court finds that the she was mature enough to make the decision).

259 Indeed, Aoife Nolan reports that 29 nations have banned all forms of corporal punishment of children, including parental corporal punishment. Aoife Nolan, *Litigating the Child's Right to a Life Free from Violence: Seeking the Prohibition of Parental Physical Punishment of Children Through the Courts*, *in* LAW AND CHILDHOOD STUDIES, *supra* note 4, at 530, 530-31.

260 *See* Ursula Kilkelly & Mary Donnelly, *Participation in Healthcare: The Views and Experiences*

Children's associational freedom under the CPA could be construed as freedom of conscience, and this freedom suggests that children should have the authority to make important and intimate decisions about their own lives, most likely with assistance of their caregivers when such accommodation or assistance is necessary. Thus, similar to the current regime, children's participation would begin in the family, but such participation would be required because CPA grants to children the right to participate in decisions regarding themselves, rather than being subject unilaterally to the will of their caregivers.

The loss of parental license to assault and batter their own children might have an impact on the current power dynamic between parents and their children, but mostly it would promote a more mutual engagement with children. The CPA promotes norms of parental respect for children's human dignity and facilitates their participation in the family, in family decision-making, and, especially, in decisions related directly to the child. Just as adults must negotiate and offer justification when trying to achieve an objective or outcome with intimate partners, colleagues, bosses, employees, and friends, the CPA would require them to do that with children. This respect is especially important because the family is the first and primary social, political, and educational setting for most children and thus is an ideal and inevitable site for children to learn and exercise participation.[261] In this setting, children would be entitled to a measure of autonomy, privacy, and dignity.[262]

The CPA would place parents in a position of making accommodations to reduce or ameliorate children's limitations regarding moral and physical autonomy and in creating conditions in the family for participation of all members of the family. Eventually children would make decisions for themselves as they become more skilled decision-makers. This newfound authority for children may lead both to a more democratic family and to the development of habits of deliberate thought for parents and children, such that "because I told you so" would not be enough of a justification for parental decisions.

Moreover, the CPA would permit children with strong beliefs or wishes to override a parent's veto unless the decision posed a great risk to their health or safety. At the same time, a parent could in effect veto a child's choice if the child could not exercise a certain freedom without parental assistance, but the spirit of the CPA is to take children seriously, treat them with dignity, and both enable and increase their participation in their own lives and the life of the family and the

of Children and Young People, 19 INT'L J. CHILD. RTS. 107, 109, 115-117 (2011) (rehearsing research findings that has shown children want to participate in such decisions and that such participation "may have a positive effect on the outcome of the healthcare treatment").

261 Smiljka Tomanović, *Negotiating Children's Participation and Autonomy Within Families*, 11 INT'T J. CHILD. RTS. 51 (2003).

262 *See* Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759, 763 (2011) ("[P]rivacy is an essential dignity interest for children and–though necessarily constrained by the limits of childhood autonomy–should be protected as a concept essential to human development, even within the realm of childhood.").

polity. Even so, there is at least one portion of every person's life during which they simply have very little ability to exercise moral and physical autonomy; to provide food and shelter for themselves; to choose a religion; to choose their intimate relations, hobbies, friends, civic associations, religious affiliations, sexuality, and other expressions or markers of identity; and to acquire certain skills like speaking, reading, writing, and walking.

For very young children, there would be a lack of mutual authority between them and their parents, not merely as a privilege of adulthood, but also because of the fact that very young children can exercise just a small sliver of this freedom: they can express what feels good and bad, when they want to eat and when they do not, what tastes good and what does not, and where they want to be and with whom.

Much as under the current regime, under the CPA parents would be the first responders regarding their children's moral freedom before children are capable of operating as moral actors (*i.e.*, choosing values). Parents would introduce them to religion (or not); send them to parochial schools, or not; and parents would introduce children to cultural practices and other rituals. To the extent they have the requisite economic and geographic choices, parents would choose schools, language, neighborhood, type of home, and family composition.

Eventually, children would choose, but their choices would be heavily influenced by choices their parents made before children could meaningfully participate. For example, a child might be inculcated into the beliefs of Catholicism before he or she is able to understand what that means. The child may carry those beliefs and practices into adulthood (and the next generation) or the child may reject them. A child exposed to no religion at home could choose to join a church or a temple, a wish the CPA might construe as requiring parental accommodation, even if such a wish ran counter to parental preference. These parental influences and objections seem to be unavoidable, but they are positive aspects of child accommodation, which also promote value pluralism,[263] and still afford parents a first run at shaping their children's belief systems and values.

Indeed, before children develop self-consciousness and basic skills and disciplines, they are captive to and formed by their environments, particularly in the U.S. with its privatized wealth and great regional and class disparities.[264] In this system children's options for when they can exercise choice are formed early, even before they can exercise much agency. For those who fear parental authority and the privacy of childhood, this might be too much influence. For those who fear the state's authority and the use of children to advance adult interests in the name

[263] This parental authority is unique as compared to state-sponsored religion, such as the invocation of "under God" in the Pledge of Allegiance. *See* Buss, *supra* note 210, at 53-54 (arguing that children have a "right against establishment" of religion, which protects them from state influence on religious thought and practice, though such right is not a right to religious freedom).

[264] Even in a more materially egalitarian society, very young children will need assistance for basic human needs and development. These natural facts limit their autonomy.

of children, this might be too little. From the liberal state's perspective, the private value creation early on will be sufficient to maintain diversity and independent values because by the time children are more independent, their values and beliefs will be established, even if still malleable.

Once they are able, children would choose their friends, their religion, their school, and their values. This freedom also suggests that they should be able to make as many determinations about their social relations, health, welfare, reproductive lives, and their families as soon as they are able. The CPA could require accommodations to help children make these decisions on their own, or with assistance to prepare them to make such choices earlier. These accommodations might include more ambitious education standards and goals to prepare children to make decisions reflectively as early as possible.

An accommodation approach would also militate toward more privacy for children within the home both in the sense of children's decision-making and the parent's right to know about everything a child does, or has or plans to do, including the right to monitor the child's communications, information consumption, and correspondences.[265] This would also limit the right of parents to consent to police searches of their children's room, backpack, or other possessions.[266] Similarly, random, suspicionless searches of their lockers, their purses, backpacks, and their bodily fluids[267] would likely not withstand scrutiny under the CPA's empowerment and dignity norms.

The CPA's orientation toward freedom and dignity militates against covert or overt monitoring of a child's communication and reading choices. Of course, it is entirely consistent with an accommodation model to consult with children, to discuss with them what they are reading or watching or listening to, and with whom they are friends in the physical world and the virtual world,[268] but it is contrary to the accommodation approach, which values freedom and dignity, to monitor and

[265] Shmueli and Blecher-Prigat found that "individual privacy in the home and within intrafamilial relationships is significant for children's personal development. Limiting or tracking surfing may seriously harm the child's social popularity and socialization, and thus prevent her from attaining certain social benefits. Studies even show that it may turn children into isolated young people or objects of suspicion. This may be particularly true regarding isolated youth, such as gay, lesbian, bisexual or transgender teenagers, especially if their parents do not know about their sexual orientation." Shmueli & Blecher-Prigat, *supra* note 262, at 788.

[266] *See* Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes too Far*, 53 WM. & MARY L. REV. 55 (2011) (recognizing the irony under the current regime which affords children more privacy ad authority on the street than in their homes, where their parents are empowered to consent to police searches in the home).

[267] *E.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002) (upholding random and suspicionless drug testing to students in all competitive extracurricular activities, including cheerleading, academic team band, choir, marching band and honor society); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding random, suspicionless drug testing for interscholastic athletes and as a condition of their participation).

[268] *See* Shmueli & Blecher-Prigat, *supra* note 262 (addressing children's privacy within their families, and particularly in the context of parental surveillance; and suggesting that privacy is a dignity interest).

otherwise spy on a child.[269] On the contrary, accommodating children's privacy, while keeping lines of communication open when possible, is most consistent with children's liberty and their development. Parents can, and perhaps should, maintain open lines of communication with their children, but could not, in keeping with an accommodation approach or even a positive developmental approach, spy on their children or unilaterally ban materials.[270]

Similar to current practices, children will no doubt have disagreements with their parents regarding whether they must partake in the practices and institutions for which their parents signed them up before, or even after, the children were cognizant and able to resist, such as religion, music lessons, clubs, sports, school, and the like. There may come a time when children choose not to participate. At that point, the parents and children can negotiate those differences of opinion, but ultimately, it would be up the child to decide whether to continue. This is a significant diminution of current parental authority and children will no doubt make decisions they regret or with which their parents disagree. But if we are to take seriously children's participation, then such results may be unavoidable. Children may also regret choices they made in their younger days and the lost opportunities that resulted, but such tradeoffs are inevitable.

Outside the family, the CPA would likely require schools, shopping areas, and parks to be within walking distance of children's homes or accessible via public transportation; perhaps there would be free or subsidized taxis, busses, or drivers so children could participate in various activities and services. Sidewalks would be de rigueur. Without such accommodations or the abolition of suburbs and suburban sprawl, children would need drivers or a significant investment in safe and accessible transportation. Barbara Bennett Woodhouse's "ecogenerism" theory also suggests social interventions that would promote children's care and well-being, rather than the convenience of adults:[271] for example, health coverage, strong early childhood supports, child-centered structures, poverty reduction, and social ordering around children's needs rather than adults' schedules.[272]

3. Education

Under the current regime, the state requires children to attend school for a portion of their childhood, sets education standards, and assigns to parents the right to make decisions about how and where their children will be educated, within

[269] As Shmueli & Blecher-Prigat claim, "[p]arental surveillance and intensive supervision remove the child from the realm of human interactions, making real trust and real intimate relationships impossible." *Id*. at 789.

[270] In fact, the parental consent provisions of the Children's Online Privacy Protection Act of 1998 (15 U.S.C. § 1303 (2012)) disempower children under 13 by requiring parental consent to certain online activity; however, such consent may be consistent with an approach that aims to accommodate children's vulnerability. 15 U.S.C. § 1303 (1998).

[271] *See* Barbara Bennett Woodhouse, *A World Fit for Children is a World Fit for Everyone: Exogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817 (2009).

[272] *Id*. at 826.

certain state criteria.[273] Children do not receive wages or salaries for their time and effort, and their parents and perhaps the state[274] determine which school they will attend, either by fiat (*e.g.*, geographic location and zoning) or according to parental desires about how, what, and where their children will learn.[275] Moreover, children are subject to truancy laws if they do not attend school.[276] Children also have very few rights at school regarding their personal freedom.[277]

While this arrangement would be unthinkable for adults (and children in an equal rights regime), under the CPA education is an accommodation to help children perform major life functions independently, as soon as possible, and to participate in the labor market and the polity. Unlike the current regime, education under the CPA regime might be more efficient and tailored to empower children and prepare them for political citizenship as soon as possible.[278]

Schools would likely be more democratic and less custodial, placing children in leadership roles in which children would be involved in establishing school policy through student councils or positions on school boards. Instead of serving as custodian and substitute parent, schools would be more democratic with students helping to establish rules of conduct, rights, limitations, and other norms of the school community.[279] Children could terminate their education as soon as they met competencies required for full participation in the polity and the market or they could continue for extra learning and knowledge.

In fact, the CPA might provide children with strong claims to improved schools that would help them to participate in major life activities as fully as possible. Instead of a socialization process and method to prepare future democratic citizens,[280] education could be more efficient, perhaps shorter in duration (over time or during the day), and might afford a variety of tracks and even apprenticeships after covering basic reading, writing, arithmetic, and civics lessons to give children options regarding various occupations, or perhaps a sampling of possibilities so children could choose what they wanted down the road. The purpose of education, similar to its current purpose, would be to help children

273 SAMUEL M. DAVIS, CHILDREN'S RIGHTS AND THE LAW 128-131 (1987).

274 Wealthy parents will have more choices regarding schools. Those without the means to move or send their children to a private school will have little control over selecting their child's school.

275 This is a choice primarily for rich people who have more economic liberty to move or send their children away; but increasingly with parochial, charter and magnet schools, even families with little economic means may have more choices for their children's education.

276 *E.g.*, MO. REV. STAT. 167.031 (2011) (providing for compulsory attendance of children at school from 7 until 14 years of age).

277 *E.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); New Jersey v. T.L.O., 469 U.S. 325 (1985) (limiting Fourth Amendment freedom as applied to children in school).

278 Rather than as an anti-competition tool for the labor market.

279 *E.g.*, Morse v. Frederick, 551 U.S. 393 (2007) (limiting speech); *Earls*, 536 U.S. 822; *Vernonia Sch. Dist.*, 515 U.S. 646; *T.L.O.*, 469 U.S. 325.

280 *See* Aaron M. Pallas, *Meeting the Basic Educational Needs of Children and Youth*, 32 CHILD. & YOUTH SERVICES REV. 1199, 1199 (2010) (highlighting the goals of public education meant to promote the youth to engage in democracy and contribute to economic productivity).

become democratic, republican citizens, and to gain the skills for occupations to support themselves. A major difference would likely be that education may be compressed into a shorter time period that was consistent with the developmental capacities of children and their ability to enter the labor market earlier with accommodations.[281]

Present laws that curb student speech and liberties[282] may not survive the CPA. On the contrary, children's participation and autonomy would be greatly increased at school. With the aim of increasing participation, the construction of schools as surrogate parents may shift to accommodate children's agency. Although lesson plans, classroom learning, and academic milestones might be set by professional educators, students would be involved in the regulation of school, establishment of norms, and perhaps even the assessment of teachers. This level of involvement would provide pedagogical rewards for children while serving to enhance their participation and hone their leadership skills. This democratic norm would provide a setting in which children take part in, rather than merely receive, education, and might refocus the school's mission on participation rather than management and obedience.

Similarly, schools could establish incentives for children to remain in school and to achieve higher goals for knowledge and learning. Perhaps school regulation would require schools to respond to student achievement and students' own ideas regarding school governance, scheduling, and norms. This type of participation treats children as members of an education team, as opposed to passive students merely subject to the authority of the school employees and rules.

Moreover, once children have the franchise, they may vote for greater public investment in education, particularly in underfunded school districts. Finally, direct financial investment in the students themselves, as in a salary or bonuses for attending school and achieving milestones, may be pedagogically valuable as well as a useful incentive for them to forego other pursuits and stay in school.[283]

4. Child Labor Laws

In light of the importance of education in a republican democracy, the state has an interest in limiting labor while people are engaged in educational pursuits, at least for elementary education. In addition, during the first several years of their lives at least, children cannot perform productive labor. Infants, toddlers, and even young children are of limited value particularly in occupations that require operation of heavy machinery, driving, heavy lifting, technological applications, and working around sharp objects, welding, and other dangerous production sites.

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281 *See also infra* Part III.C.4.

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

283 This may be particularly important for children who have to work to help support the family.

Thus the state limits children's participation in the labor market.[284] These youth-based regulations limit children's employment opportunities and earning potential, even though the state does not support most children directly; instead, the state privatizes such support to family. This scheme assigns to parents the provision of shelter, food, and clothing. Of course, very young children have limited value as laborers, but even small children can be, and have been, productive laborers, despite dangerous conditions, much as adults have been and often still are.[285]

Even so, children are legally permitted to work outside and inside the home and in fact many children do.[286] This regulation raises several issues. One is children's right to support themselves. The limited state funding for children and restriction of children's paid labor places them in a precarious position. Parents or other guardians generally perform the role of provider, but the children are in a lottery regarding the socioeconomic status into which they will be born or adopted. Depending on the rationale for the prohibition on children's labor,[287] various regulations may fall within the state's *parens patriae* or police powers,[288] but to the extent such rationale limit children's participation, accommodation should be made for a reasonable socioeconomic floor, whether through state subsidy, economic development, or paying children for any labor they perform, including attending school.

With regard to safety for certain manual labor positions, the state could regulate, through height or weight requirements, the level of motor and learned skill required, or other safety measures. Perhaps general laws restricting hours and the use of dangerous machinery for very young children without the physical and

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284 *See* The Fair Labor Standards Act, 29 U.S.C. § 201 (2012) (regulating child labor by setting wage, hour and safety requirements for children under the age of 18 and setting 14 as the minimum age of nonagricultural, "nonhazardous" employment, and regulations for older children vary depending on the age of the child and nature of the work); 29 C.F.R § 570.2 (setting various minimum ages of employment for agricultural except where the child is employed by a parent on a farm owned by the parent, in which case there is no age limit); and 29 C.F.R. § 570.33 (listing occupations that may be deemed "oppressive child labor"). *See also*, U.S. DEP'T. HEALTH & HUM. SERVICES, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. VITAL STATISTICS SYSTEM MAJOR ACTIVITIES AND DEVELOPMENTS, 1950-95, at 55 (1997), *available at* http://www.cdc.gov/nchs/data/misc/usvss.pdf (last visited Oct. 27, 2012). Birth certificates were deployed as a method to reduce child labor and effect compulsory education. *Id.*

285 *See* STEVEN MINTZ, HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD 258-59 (2004); HINDMAN, *supra* note 159, at 33-35 (noting that women and children fueled much of the early industrial workforce in the United States); Moskowitz, *supra* note 162, at 89 (highlighting the integral role of children as young as seven in 16th century New England Mills and textile mills in the post-Civil War South).

286 Moskowitz, *supra* note 162, at 92 ("[The U.S.] has the highest percentage of working children of any developed nation. Approximately 80–90% of youth work in paid jobs at some point while attending high school.").

287 Although concerns regarding safety animated regulation and limitation of children's labor, Congress's first unsuccessful child labor law related to the unfair competition of cheaper goods produced through child labor. Hammer v. Dagenhart, 247 U.S. 251, 273 (1918).

288 *See* Addington v. Texas, 441 U.S. 418, 426 (1979); Reynolds v. United States, 98 U.S. 145, 164-68 (1878); Thurlow v. Massachusetts, 46 U.S. 504, 583 (1846).

motor skills to manage the work safely also pass muster under the *parens patriae* doctrine. In light of the state's interest in educating its future citizens, it may have legitimate authority to regulate child labor insofar as it interferes with their development of other characteristics required for democratic citizenship, such as learning how to read, comprehend, and write. Mere paternalism or sentimentality tying children to leisure directly contravenes the impetus toward participation.

Indeed, the CPA might severely curtail child labor regulation under its provisions favoring children's participation in the market. Prohibiting children from entering the labor market would offend CPA's right to work provision. As suggested above, one way to treat children's labor, consistent with both CPA's accommodation and right to work provisions, is to construct education as labor. In fact, the state could pay all children for their labor—whether at home, at school, in the fields, the streets, or the factory. For example, children should receive compensation for their labor inside and outside the home. Although many children receive allowances and privileges for domestic work and monetary compensation for odd jobs and other work outside the home, much of their work in the home is unregulated and unpaid domestic labor assisting parents, other kin, and neighbors.

If children received salaries for their labor, the children would have some measure of economic power and authority.[289] This may not be a fully positive approach from the child's perspective because currently housework and other domestic chores, such as cutting the grass, sweeping the gangway, washing dishes, and caring for younger siblings, may be constructed as quid pro quo for room and board; if parents or other custodians must pay children salaries, they might begin to charge children for room and board.

Relatedly, and in keeping with a democratic republic that depends on, and theoretically values, wise citizens, leaders, and skilled and unskilled workers, schooling is labor for which children should receive compensation. As noted, the duration of years in which children are required to attend school would be tailored to gaining wisdom, skills, and knowledge, rather than paternalism or market concerns. Instead of grades, children could receive financial bonuses for higher performance on top of their student salaries. This system would at a minimum raise children's economic power and, depending on the source of their education salaries, their earnings could be taxed. We can also imagine corporate sponsorship of children's education, a revival of apprenticeships, and paid internships. Children could be integrated into various workplaces or occupations, with hazardous settings ameliorated for youth.

[289] As Nancy Scheper-Hughes and Carolyn Fishel Sargent observe, children's removal from the paid labor force diminished their power, but did not make them any less instrumental; instead, their economic value was replaced with their "expressive" value. SMALL WARS: THE CULTURAL POLITICS OF CHILDHOOD 10-12 (Nancy Scheper-Hughes & Carolyn Fishel Sargent eds., 1998).

5. Youthful Offenders

Currently, children may be punished or monitored for behavior that would be perfectly lawful for adults.[290] For example, children cannot smoke, are required to attend school, can be arrested for running away (what adults might call "leaving home," "breaking up," "separation," or "divorce"), and children are not allowed to have sex.[291] Under the present regime, children who do not submit to their youthful station receive therapeutic judicial interventions, rather than punitive ones.[292] So on the one hand, they are not free to do as they please; but on the other, their punishment is, in theory, designed to help them. This therapeutic jurisprudence, however, can be indeterminate and punitive,[293] and their sentences may be longer than those adults would receive for the same offense.[294]

When children commit criminal actions, they also receive therapeutic intervention, unless they are deemed to be adults. This regime in theory treats youthful transgression more leniently than adults, affording children more freedom for some offenses. For example, children are no longer eligible for the death penalty for capital crimes,[295] and the state cannot reflexively sentence children to life without parole even for capital crimes.[296] Still, children may also serve more time for offenses than adults would for the same crime,[297] and children also have lesser and fewer procedural rights than adults.[298] Thus, children have no right to

290 Julie J. Kim, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. U. L. REV. 843, 848 (2010) (describing typical status offenses for children as truancy, violations of municipal ordinances applicable only to children, runaway, consumption of tobacco and alcohol products, etc.). For examples of status offense statutes, *see, e.g.*, ARIZ. REV. STAT. ANN. § 8-201 (2007); R.I. GEN. LAWS § 14-1-3 (2011); GA. CODE ANN. § 15-11-2 (2008).

291 *See generally* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape,* 48 BUFF. L. REV. 703 (2000); Julie J. Kim, *supra* note 290, at 849; Ricardo Carvajal, David Clissold & Jeffrey Shapiro, *The Family Smoking Prevention and Tobacco Control Act: An Overview*, 64 FOOD & DRUG L.J. 717 (2009).

292 If they perform adulthood by virtue of the nature of their crime, they may be treated as adults. For example, a particularly brutal crime, such as twelve-year-old Lionel Tate's fatal beating of a playmate while wrestling, may send the child's case to adult criminal court. *See* David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 92 TEX. L. REV. 1555, 1556-57, 1569 (2004) (describing a national trend to treat youthful offenders as adults under the theory for crimes we can only imagine adults committing).

293 Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1215 (2003); Merygold S. Melli, *Juvenile Justice Reform in Context,* 1996 WIS. L. REV. 375, 380-85 (1996); Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juvenile to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 509 (1995).

294 *See, e.g.*, Kelly Keimig Elsea, *Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL'Y 135, 142 (1995-1996). Juveniles serve 50% longer prison sentences than adults for the same homicide conviction, and the average stay of an offender in the California prison system is 16.2 months—compared to 26.1 months in juvenile prisons—because adults are often released before serving their full sentence term where juveniles are not. *Id*.

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

296 Miller v. Alabama, 132 S. Ct. 2455 (2012).

297 *See* Megan C. Kurlychek & Brian D. Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court*, 42 CRIMINOLOGY 485 (2004).

298 Children's procedural rights track adult criminal rights, but not as strongly and generally through

bail,[299] and they enjoy the protections of procedural due process rather than the more specific criminal constitutional protections. Juveniles do not have an automatic right to counsel,[300] a right to a jury trial,[301] and they do not enjoy the same protections against search and seizure as adults.[302] In school, children can be searched and drug tested without any individualized suspicion.[303]

This therapeutic and paternalistic regulation may be consistent with CPA's embrace of children's "disabilities" and the accommodationist approach. Special treatment for children who committed crimes while still vulnerable and lacking in experience, judgment, and perhaps impulse control is consistent with CPA. In this case, a more lenient justice system accommodates children's lack of knowledge and judgment. The juvenile court system may serve these offenders as it does now (in theory), as a therapeutic system that addresses children's vulnerability as well as their development. Or, perhaps, the system could be more ambitious and reorient itself toward capacity and participation, rather than punishment and therapeutic jurisprudence.

6. Sex

Generally, the law construes children as nonsexual and vulnerable to harm arising out of sexual acts and sexual representation[304] well into their teenage years.[305] The law limits their exposure to sex and to sexual materials,[306] outlaws sexual conduct,[307] and limits children's ability to sell their images for

the 14th Amendment's due process clause, rather than those in the Bill of Rights. Breed v. Jones, 421 U.S. 519 (1975) (freedom from double jeopardy); *In re* Gault, 387 U.S. 1 (1967) (right to confront witnesses; right against self-incrimination; right to attorney); *In re* Winship, 397 U.S. 358 (1970) (right to proof beyond a reasonable doubt).

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

300 *In re Gault*, 387 U.S. at 35.

301 McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

302 Stafford Unified Sch. Dist. #1 v. Redding, 509 U.S. 364, 129 S. Ct. 2633 (2009); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

303 *Vernonia Sch. Dist.*, 515 U.S. 646.

304 Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982); Ginsberg v. New York, 390 U.S. 629 (1968).

305 Children and the law textbooks place consensual sex between teenagers in the "sexual abuse" chapters. *E.g.*, DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW 550 (2010).

306 *E.g.*, United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (upholding the Children's Internet Protection Act); Ginsberg v. New York, 390 U.S. 629 (1968) (upholding obscenity laws as applied to children).

307 Under 18 U.S.C. § 2241(c), any person who "knowingly engages in a sexual act with another person who has not attained the age of 12 years," including other minors, may be convicted of aggravated sexual abuse. State laws vary, but generally "a person over a certain age, usually sixteen or eighteen, who engages in sexual activity with a younger person, usually under the age of twelve or thirteen, commits a 'first-tier' crime of first degree rape or sexual assault; a 'second-tier' crime of a lesser degree is committed when a person engages in sexual activity with someone under (most commonly) the age of sixteen." Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279, 292 (2010).

pornography,[308] thus limiting their freedom of expression and their ability to engage in paid sex work. Although a girl may bear and raise her own child, the law also imposes sanctions on children who have consensual sex with each other,[309] and on adults who have sex with children.[310] The law polices child sex through statutory rape laws, incest bans, and prohibitions on children themselves having sex. In addition, child protection laws require reporting of child sexual activities to the state.[311] Unlike grown women,[312] a state may require pregnant girls who do not want to bear a fetus and birth a child to obtain parental permission for an abortion or convince a judge that she is mature enough to decide choose for herself whether an abortion is in her own interests.[313] State child protection law may mandate that family planning service providers report the sexual partners of a child to the child welfare authorities.[314] In addition, schools provide sex and reproduction education courses, but they may be designed to serve more to promote hetero-normativity through equating sex with heterosexual norms and behavior.[315]

Although the CPA does not mention sexual relations, sex is arguably a major life activity. If so, it would be difficult to justify limitations on children's sex; yet children's vulnerabilities are salient under the CPA. In keeping with accommodation and participation norms, a fundamental part of children's education would include lessons about the physical and psychological risks and benefits of sex. Adults could be sanctioned for taking advantage of vulnerable children may or perhaps the state could regulate age disparities between sexual partners. Certainly banning children from engaging in sexual relations would be difficult to justify under CPA, which eschews paternalism in favor of empowerment.

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308 *See Am. Library Ass'n*, 539 U.S. 194.

309 *E.g.*, *In re* T.W., 685 N.E. 2d 631 (Ill. App. Ct. 1997) (holding both children were victims).

310 Kansas, for example, outlaws sexual intercourse with a child who is under 14. KAN. STAT. ANN. § 21-3502(a)(2) (2012), sexual intercourse with a child between 14 and 16 under KAN. STAT. ANN. § 21-3503(a) (2012); voluntary sex between a child 14-16 years old and child under 18 years old. *Id*. §§ 21-3504(a)(1), 21-3522.

311 Aid for Women v. Foulston, 441 F.3d 1101 (10th Cir. 2006).

312 Gonzales v. Carhart, 550 U.S. 124 (2007); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

313 Bellotti v. Baird, 443 U.S. 622 (1979); *see also*, Guggenheim, *supra* note 88; Sanger, *supra* note 88. Sanger also finds that courts in practice do not merely assess what they are permitted to asses—whether the pregnant teenager is mature enough to make the decision to abort, but instead judges reach beyond their authority and interrogate girls "about their knowledge of abortion" and provide "details of the procedure, alternatives, possible consequences," a process which directly crosses the line between the court's and the girl's autonomy. Sanger, *supra* note 88, at 418.

314 *See Foulston***,** 441 F.3d 1101 (upholding constitutionality of the mandatory reporting statute that construed teen consensual sex as child abuse to be constitutional because, although children have informational privacy rights, child sex is illegal and children do not have legitimate expectation of privacy regarding information about illegal sex).

315 Nicki Thorogood, *Sex Education as Disciplinary Technique: Policy and Practice I England and Wales*, 3 SEXUALITIES 425, 426, 429 (2000) ("[S]ex education is implicitly (and . . . explicitly) about producing 'normal' (hetero) masculinity and (hetero) femininity and that these are core categories in the regulation of the social world. That is, sex education is a technique of governance in the Foucauldian sense.").

If and when children are ready, they can (and do) engage in various sexual activities.[316] Studies also indicate that children learn most about sex (and gender subordination) from the internet and television, media to which they have ready access.[317] Although the state does have an interest in protecting vulnerable subjects and in regulating sex for purposes of health, *parens patriae* powers and police powers and regulations of sex based on other concerns, such as stereotypes, paternalism, or moral approbation, would be disfavored.

In fact, part of accommodating children's life activities might mandate that honest and explicit sexual education be required for children. The challenge is not to operate under stereotypical views of children and their abilities, but to recognize children's vulnerability and to work with them, through instruction, discussion, and other tools to help them understand and assess if and when they are ready, to affirm that sex is in their control, and identify what risks sexual relations pose. This sense of agency may be among the most salient (and developmentally useful) tools for children to control their own bodies and desires.[318] This agency is also consistent with an accommodation model that aims to help children exercise self-determination.

A blanket ban on children's sexual conduct arises out of presumptions that children are immature, vulnerable, and lacking in judgment. Certainly, the state has a role in regulating sex; after all, the state prohibits unwanted and exploitive "sexual" contact through rape and assault and battery laws, and laws prohibiting incest. The state may have a *parens patriae* interest in protecting children too young to understand sex or for whom it will be physically harmful, but the notion of children's right to participation would suggest a need for exceedingly strong state interest in a blanket prohibition of sex based only on youth.

On the contrary, banning children from sexual conduct may be construed as a infringing on a child's dignity and self-determination.[319] Under the accommodation approach, the state's *parens patriae* and police power authority supports some regulation for public health purposes, and perhaps even criminalizing sex between adults and children up to a certain age, but also to protect children from exploitation that can cause physical and psychic scars. The state certainly has a role in protecting young(er) children from exploitation by older children and especially from adults, based on the presumption that children may either be too young (undeveloped) to consent, will be easily manipulated or coerced, or that children will be emotionally and physically harmed by sexual activity even if they consent. The state also has a valid and important interest in protecting public health.

316 *See infra* notes 319-25 and accompanying notes.

317 Michelle J. Anderson, *Sex Education and Rape*, 17 MICH. J. GENDER & L. 83 (2010).

318 *See* Angela Campbell et al., *Child Citizenship and Agency as Shaped by Legal Obligations*, 23 CHILD. & FAM. L.Q. 489 (2011).

319 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).

Regulating—*i.e.*, banning—intergenerational sex between adults or older children and young people who cannot consent, who may not be able to appreciate what sex is, and for whom sexual relationships would be harmful physically and emotionally, may be an appropriate accommodation for children, but one that should be sufficiently tailored to the wide range of development during different points in childhood. Children who can understand sex and who can consent are in a different situation from infants and young children, but there may be some legitimacy in regulation regarding sexually transmitted diseases and reproduction.

Many children are sexually active in their teens.[320] Studies show that over fifty percent of teenagers are sexually active and two-thirds will have had sex by the time they graduate from high school, a shocking percentage of whom will not use contraceptives.[321] These statistics suggest that the state's duty to protect public health would be a legitimate ground to regulate, but not to ban, such relations. Certainly the public health implications of these statistics suggest a role for the state to educate sexually active children about reproductive health and stemming the transmittal of diseases and perhaps even to provide contraceptives. Such interventions might include sex education and access to reproductive and disease barriers.

The state's interest in prohibiting sex with and among children may be inferior to its interest in public health. From a health perspective, the state has a strong interest in limited regulation of teen sex because it may increase awareness of the risks related to sex, such as disease and pregnancy, what methods children can utilize to protect their health, and help them understand the choices they make and the repercussions of their actions and decisions. A regulation that accommodates children's vulnerability and seeks to inform their participation regarding such choices is consistent with the participation model. Such an approach would also keep them out of legal trouble, such as status offenses relating to sex and "sexting."[322]

Perhaps a more participatory regulation would be provision of sex education courses in school to ensure that children (and, ultimately, adults) who engage in sex will have relatively complete and accurate information about sexual relations, reproduction, contraception, sexually transmitted diseases, and their legal right to say "no." In fact, studies show that children learn about sex from their peers, magazines, television, movies, and the internet (with its readily accessible pornography).[323] Through these media, they also learn about sex, gender, and

320 Anderson, *supra* note 317, at 85.

321 *Id*. at 85-86.

322 *See* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010) (challenge to district attorney's threat to charge teenagers for felony possession or distribution of child pornography because they texted images of themselves wearing underwear).

323 Anderson, *supra* note 317, at 95-96; *see also* Heidi L. Adams & Lela Rankin Williams, *What They Wish They Would Have Known: Support for Comprehensive Sexual Education from Mexican American and White Adolescents' Dating and Sexual Desires*, 33 CHILD. & YOUTH SERVICES REV. 254

identity,[324] important lessons that the state may have an interest in supplementing as a public health and educational matter. On the other hand, studies also suggest that the state's messages about sex are simplistic ("just say no") and not targeted to the lived experience of children.[325]

7. Political Participation

As a formal matter, the law constructs people under the age of eighteen as lacking political agency. They do not have the franchise and generally do not hold public office, do not sit on juries, and do not have a regular, established, and active role in legislatures or executive offices. On the national level, the Constitution provides a minimum age for the Presidency, the Senate, and the House.[326] It establishes the floor for the franchise at age eighteen.[327] Down from age twenty one, this Vietnam-era nod to youth still excludes people under age eighteen from voting, which is difficult to justify if we value the personhood and dignity of children. Indeed, just as we do not require that all voters be similarly situated,[328] we need not require all voters to be above a certain age. As childhood sociologist Manfred Liebel notes, "children may possess other qualities that can be particularly fundamental to citizenship, such as the 'intuitive' feeling for what is phoney, or for discrepancies between words and deeds."[329] At the very least, children should participate in or be consulted in their governance, regulations that affect them, public works, and the design of the institutions that affect them most directly, such as schools, streets, homes, and neighborhoods.

The CPA contemplates children's participation in the polity, which has both expressive and developmental functions, in addition to serving to promote one's preferences and values in a democracy. As Daryl Levinson explains, "the benefits of active political participation in developing personal autonomy and responsibility, reflective moral agency, and deliberative capacity [are] qualities that are valuable for both the individual and society."[330] Voting is the most widespread form of political participation and the CPA suggests that children too should have the franchise and the means to exercise it. Accommodation for voting might require a strong civic education program early on, perhaps a surrogate vote before children

(2011).

[324] Anderson, *supra* note 317.

[325] *E.g.*, Adams & Williams, *supra* note 323, at 1883; *see also*, Thorogood, *supra* note 315, at 425 (noting that the sex education in England and Wales has been ineffective at preventing young pregnancies and aimed more at teaching sex and gender roles than teaching children about sexual well being).

[326] Member of the House of Representatives must be at least 25 years of age. U.S. CONST. art. I § 2, cl. 2; U.S. Senators must be 30 years of age. *Id*. § 3, cl. 3. The President must be 35 years old. *Id*. art. II, § 1, cl. 5.

[327] U.S. CONST. amend. XXVI.

[328] The Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965) (outlawing discrimination, such as literacy and other tests to access the franchise).

[329] Manfred Liebel, *supra* note 221, at 35.

[330] Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1343-44 (2012).

can physically exercise the franchise, and developmentally nuanced election literature to aide children in understanding the choices, the voting form, and helping to enable them to express a preference in the voting booth.

There is a very real question of whether there should be any age cut-off. At the very least, the franchise should be available to children who have language capabilities or some other way to understand and communicate a choice or decision. Mary Carlson and Felton Earles suggest that children ten and older are able to engage in "deliberative democracy as legitimate and competent citizens . . . through the recognition and guidance of adults[.]"[331] Still, there are no such limits on the adult franchise; nor need their choices be wise, informed, or independent, so special exclusions for children are hard to justify. There would be no way to address concerns regarding whether children have the requisite basic skills (reading and discriminating among positions), but in the present regime, these concerns may relate to adults as well, yet for good reason we do not test them for the franchise.[332] Children too young to read, write, or reach the voting booth buttons could bring assistants, or certainly modern technology could facilitate audible recordings that articulate the options to children and methods for them to exercise their choice. There could be free transportation for children to travel to polling places too far or too dangerous[333] to walk to from their homes.

If immaturity (rather than age) is a bar to the franchise, then there would have to be some method to test maturity or some proxy, but it would be difficult to use age as the metric under CPA, unless the age floor was at a point where most people can read and think abstractly.[334] On the other hand, the most democratic method may be no age requirement. Anyone who has the mechanical ability to vote can do so. That may be horrifying to some,[335] but certainly we already have a system in which we do not require anything but age for the franchise,[336] in a regime that

331 Mary Carlson & Felton Earls, *Adolescents as Deliberative Citizens: Building Health Competence in Local Communities*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 233, 239 (2011).

332 *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (striking down voting qualification requirements); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (affirming the Fifteenth Amendment's mandate to strike down discriminatory franchise requirements).

333 Such dangers may include crossing busy streets or passing dangerous gangs on their way to the polls.

334 Schrag places children's ability to deliberate and provide justification at the age of 10. Schrag, *supra* note 43, at 367. This is consistent with the line many states draw for children's right to make or weigh in on certain decisions regarding family. *See* Cynthia Godsoe, *All in the Family: Towards a New Representational Model for Parents and Children*, 24 GEO. J. LEGAL ETHICS 303, 334 n.177 (2011) ("[V]irtually all states require that children of a certain age consent to their own adoption, some as young as age ten."); Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Right*, 17 VA. J. SOC. POL'Y & L. 318, 356 (2010) (placing age of consent between 10 and 14); *see also, e.g.*, ALASKA STAT. § 25.23.040 (2012) (age 10).

335 Indeed, political scientists may view the children's suffrage as dangerous. *See e.g.*, Rehfeld, *supra* note 4 (viewing children's franchise as likely harmful).

336 Perhaps not having committed certain felonies that transform children into adults. *See supra* text accompanying notes 81-87.

permits anyone eighteen and older to vote no matter what she knows about the candidates or whether he votes as his spouse instructs him.

A number of theorists have suggested as much, offering both instrumental and normative rationale for extending the vote to children.[337] Particularly in the U.S. where voting tests and poll taxes are unconstitutional,[338] the only requirements for voting are the ability to get to the polling place, to ask for a ballot, and mark the ballot. There are no rules against voting according to one's spouse's wishes, or to blindly choosing among candidates, referenda, or initiatives. Some theorists have argued that children should have the franchise without regard to age.[339] Others suggest an age limit[340] or that those who vote should have an understanding of "deliberative responsibility."[341] Democratic values militate toward exceedingly strong rationale for rationing the right to vote, but in the present context those rationale may not be present.[342]

Advocates for children's suffrage note that this practice would promote children's unique interests.[343] There is surely some connection between the children's growing poverty as compared to the relative wealth of the elderly.[344] Children might be interested in a living wage, so their parents would not have to work so hard; better schools or housing; more and safer parks; gun control; changes in environmental standards; safety; accessible transportation; the right to sit on school boards; the right to participate in other regulatory or adjudicatory bodies. The franchise would also provide civic educational benefits for children.

The main objection to the franchise of children, besides their perceived or constructed incompetence, is logistical. In light of the normal range of development among the constituents of childhood, the franchise may be a rite in which many children cannot participate because they have not reached the developmental milestones necessary to exercise the franchise. This is a low bar though because there are currently very few requirements for the franchise and no

337 *E.g.*, Stefan Olsson, *Children's Suffrage: A Critique of the Importance of Voters' Knowledge for the Well-Being of Democracy*, 16 INT'L J. CHILD. RTS. 55 (2008); Paul E. Peterson, *An Immodest Proposal*, 121 DAEDALUS 151 (1992); Rehfeld, *supra* note 4; Schrag, *supra* note 43; *see also*, Levinson, *supra* note 330, at 1343-44 (though not referring specifically to children, Levinson praises "the benefits of active political participation in developing personal autonomy and responsibility, reflective moral agency, and deliberative capacity—qualities that are valuable for both the individual and society").

338 Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (striking down voting qualification requirements); Katzenbach v. South Carolina, 383 U.S. 301 (1966).

339 Paul Peterson would not have an age limit, in light of the disproportionate sway that older people have over the polity. Peterson, *supra* note 337.

340 Rehfeld, *supra* note 4. Schrag would perhaps limit the franchise for "the very young, who have no understanding of what 'public deliberation is.'" Schrag, *supra* note 43, at 367.

341 Schrag, *supra* note 43, at 367 (referring to Charles Beitz).

342 Olsson, *supra* note 337, at 61.

343 Schrag, *supra* note 43, at 375; Peterson, *supra* note 337, at 152.

344 Peterson, *supra* note 337, at 152-53.

requirement that voters be knowledgeable about the issues or candidates for whom they will vote.[345]

Even so, affording the franchise to all, with no age minimum, might not be problematic because presumably a child who cannot walk or read would not vote. Moreover, adults (or older children) could assist very young children in the franchise. For example, children's caregivers would likely help children exercise the franchise.[346] A parent, older sibling, neighbor, or other relative would likely bring child to the polls and assist in the mechanics of casting the vote. There may be concern that older children or adults may in effect be voting for their children or younger siblings, but there is no requirement now that voters have independent views about candidates or issues. Nor is it clear why or how that would be problematic. On the contrary, as notions of political citizenship developed in the U.S., the trajectory generally has been from restrictions—white, male, property-holders—to a general franchise based on belonging to the category of adult (defined first, as a federal matter, as twenty-one and then eighteen).[347]

Besides the venerable franchise, there are other mechanisms for children's participation. For example, Daryl Levinson's distinction between rights and votes suggests that rights can, to some degree, stand in for votes.[348] This approach would provide special rights for children, for example, anti-discrimination rules or the right to serve in special counsels, legislatures, or executive agencies. Perhaps every municipality or political unit could have youth councils that would inform, advise, and monitor governmental policy.

Other political participation includes the right to serve on juries and to run for or serve in political office. Indeed, the CPA may be construed to modify minimum age limits for constitutional offices. At a minimum, the CPA would enable children's participation from as early as possible. Even so, there are many possibilities for children to participate. The right to vote and to serve in public office is bound up with inclusion, deliberation, and power. As such, the CPA would require the removal of barriers to children's participation and even remedies

345 It is not unheard of for spouses to vote as their spouse instructs or for political party members to vote the party line.

346 Schrag suggests that perhaps parents could vote for children. Schrag, *supra* note 43, at 374-75; *see also*, Olsson, *supra* note 337, at 70-72.

347 The war on crime and the related disenfranchisement of persons who are convicted of crimes runs counter to this movement. *See* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 262 (2004) ("Thirteen percent of African-American men cannot vote because of criminal conviction, a rate seven times the national average."); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1156-57 (2004) (describing the phenomenon of felony disenfranchisement and its disproportionate effect on minorities). Moreover, "[c]riminal disenfranchisement laws . . . penalize not only actual wrongdoers, but also the communities from which incarcerated prisoners come and the communities to which ex-offenders return by reducing their relative political clout." *Id*. at 1161.

348 *See* Levinson, *supra* note 330, at 1344 (noting that the right to vote is more expressive and more legitimating than rights, which tend to create divisions).

to make such participation possible, and in my view to both the franchise and political office.

Viewing children as participants and their rights as accommodating freedom, rather than equality, illustrates the possibilities of bringing children out of the margins, particularly in a liberal society that rests, at its core, on the distinction between children and adults, and which vests in families the freedoms, vulnerabilities, and dependencies of liberalism. Children's subordinate position, particularly regarding their parents, protects adult and parental authority, while grooming children for adulthood. Childhood vulnerability is more predictable and widespread than adult vulnerability, which for most adults is mediated by maturity, experience, and capability. Still, adults are also vulnerable and experience a wide range of power and vulnerability themselves, often as a result of caring for children. Age is one of the last permissible categories of discrimination. It may be time to reconsider some of our dearest presumptions about children's rights and dignity in the current regime.

CONCLUSION

As I have illustrated here, the social category of childhood is like other social categories such as gender, race, disability, and sexuality, but childhood's particular uniqueness suggests different approaches more akin to a human rights[349] or disability model, rather than the negative rights approach that has characterized sexual, gender, and racial liberty. The equal protection model logically may lead to dismantling the socio-legal category of childhood altogether, perhaps leaving young human beings unduly vulnerable. If, as I suggest here, we locate vulnerability in negative liberties, an unaccommodating state, and a system that disenfranchises children, we might more productively imagine a world in which children were legitimate.

Indeed, locating vulnerability outside of children may disclose vulnerability as more widely spread across the population and as part of the human condition.[350] Such a conceptual movement could militate toward a jurisprudence that does not privatize dependency, does not create dependency in caregivers, and does not ration power or care. We are not there yet and while the ideal subject is independent and invulnerable,[351] I do not seek to eradicate childhood. Instead, this analysis illustrates that liberalism's equal rights model is not a feasible or particularly

[349] For example, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[350] Fineman, *supra* note 8.

[351] SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 139 (1989) (noting that women's traditional responsibility for child rearing renders them vulnerable themselves); *see also*, Carol Quillen, *Feminist Theory, Justice, and the Lure of the Human*, 27 SIGNS 87, 95 (2001) (noting that the ideal person is not a caregiver); Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CAL. L. REV. 1285, 1294 (2005).

productive approach to empowering children in a liberal landscape because negative rights are helpful primarily for those who are independent and for whom negative rights are sufficient. Emerging conceptions of participation, belonging, and liberatory rights provide more fruitful models for children. I suggest a regulatory scheme that accommodates, rather than pathologizes, vulnerability. Such a conceptual movement could militate toward a jurisprudence that does not privatize dependency, does not create dependency in caregivers, and does not ration power or care.[352]

The Children's Participation Act provides a useful framework for imagining justice for children because it models accommodation rather than autonomy. A more radical approach would have abolished childhood and adulthood entirely, but that would have required, as radical approaches do, a new theory of the state and the individual. Imagining the child as the norm would entail an entirely different conception of the state and the individual, of physical space, personhood, and freedom. And of course, our conceptions of the state, rights, and participation would vary depending on whether the imagined child was the infant, the toddler, the pre-teen, or the teenager.

Finally, this analysis, grounded as it is in our present regime, supports state action that assigns children to parents.[353] Because I situate this analysis within the current regime, it is important to acknowledge that children will need care for some of what we now consider childhood and liberalism depends heavily on privacy of child rearing for reasons others and I have discussed elsewhere.[354] For these reasons, I continue to imagine families as important social institutions for children. I am also cautious about divining alternate methods for mediating dependency in a country with a long and deep history of interfering with reproductive control and disregarding the value of family ties of poor people and people of color.[355] I leave an analysis of the dissolution of family as a legal entity for someone else. I have spent too much time in juvenile courts to challenge the current scheme of distributing children and their vulnerability.

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[352] Such an approach may also justify, or indeed mandate, the abolition of the family altogether, but I do not take that step in this paper.

[353] Parenthood, of course, is a contingent category that may refer to a range of biological or non-biological relations that legally or performatively care for children.

[354] *See* Anne C. Dailey, *Liberalism's Ambivalence*, 28 QUINNIPIAC L. REV. 617 (2010); Galston, *supra* note 248, at 236-40 (suggesting that family autonomy protects value pluralism, a central idea in political liberalism).

[355] Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Appell, *Uneasy Tensions*, *supra* note 20.