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ACCOMMODATING VULNERABILITY

Annette Ruth Appell*

Unlike other social categories, such as race, gender, sexual identity, and disability, the category of childhood has received little critical examination in the legal academy. Like other socio-legal categories with natural referents, however, 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, but which also intersects with class, gender, race, sexuality, sexual identity, and ability. As such, the category bears examination not only for what it reveals about ourselves—adults, but also how to conceive of children as complex and powerful subjects in their own right. Unlike other frames for and approaches to children's rights, this paper recognizes and embraces the important foundational and instrumental roles of childhood, but challenges the dichotomous developmental approach that dominates the regulation of human beings and limits consideration of children and their place in the social and political order. This article offers a critical examination of the socio-legal categories of childhood and adulthood and invokes more contemporary approach to children's rights which aims to protect and promote children's human dignity. This approach, is part of a broader conceptual movement away from negative rights to liberty rights that enhance self-determination, demands positive engagement with children and recognition of their individuality and humanity.

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“[T]he very principle of myth [is that] it transforms history into nature.”¹

Athena “was the daughter of Zeus alone. No mother bore her. Full-grown and in full armor, she sprang from his head.”²

I. 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 exceptions³ jurisprudence and legal scholars accept children’s

¹ ROLAND BARTHES, MYTHOLOGIES 129 (1957, 1972).

² EDITH HAMILTON, MYTHOLOGY 29 (1940).

³*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 NORTHWESTERN INTERDISCIPLINARY LAW REV. 237 (2011) (proposing equal rights for children); Hillary Clinton, .

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 Convention is surprising in light of a more general movement toward encoding norms that promote greater equality regarding race, gender, disability, sexual identity, and old age. At the same time, this omission is not surprising because children do not sit at the adult table. They are over at the children’s table because they are 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 I might add, legally, justified, particularly when other previously legally subjugated groups, such as women and African Americans, are no longer presumptively disabled under the law, the law’s trajectory calls for inclusion of and accommodation for people with disabilities. The answers to this child question vary, but they all rely on developmental distinctions between adults and children and on foundational

⁴ Annette Ruth Appell, *The Pre-political Child of Child-Centered Jurisprudence* 46 HOUSTON L. REV. 703, 730 (2009); see also, Andrew Rehfeld, *The Child as Democratic Citizen*, 633 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 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.”). Note that when I refer to “childhood” I mean the socio-legal category; when I refer to “child” or “children” I mean the flesh and blood constituents who are assigned to the category of childhood.

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 (4) CITIZENSHIP STUDIES 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) (using narrative to describe the difference between adults and children and to justify the power differential between adults and children).

philosophical, political and legal distinctions between the mutually constitutive categories of childhood and adulthood in a contractarian society.

This paper illustrates that childhood, though constructed both to accommodate children's vulnerability and adult liberty, can continue to serve those social goals even as it affords children more freedom. 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). As childhood theorist Allison James notes, children's vulnerability simply suggests a different type of equality, not exclusion.⁷

I do 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. This is because 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, and that its particular uniqueness is more suited to ascendant approaches reflected in human rights⁹ and disability models, than the regime of

⁷ Allison James, *To Be (Come) or Not to Be (Come): Understanding Children's Citizenship*, 633 ANNALS OF THE AMERICAN ASSOCIATION OF POLITICAL AND SOCIAL SCIENCES 167, 171 (2011).

⁸ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality In The Human Condition*, 20 YALE J. LAW & FEM 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, 9 FEMINIST ECONOMICS 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 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." UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS Art. 1 (1948)

negative rights which 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 substituting state interests for the wishes and interests of children (and their families).¹⁰ I do not contest that children's vulnerability and inexperience justify some interventions in the name of child protection and development. I am, however, wary of enhancing state power in light of its historic and continuing deployment of children's interests as justification of individually targeted, coercive state intervention, which is aimed most frequently and persistently at poor and minority children and their parents. These are groups whose liberty is already most vulnerable to state intervention because of their non-normativity.¹¹ For these reasons, 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 an equality metric for empowering children.

Feminist, critical race, queer, and disability theories have exposed the limitations of equality approaches, wherein the measure of equality is a white, able-bodied, heterosexual, non-care-giving man.¹² As a result, there appears to be 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

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. 573 (2008).

¹¹ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002); PEGGY COOPER DAVIS, *NEGLECTED STORIES THE CONSTITUTION AND FAMILY VALUES* (1996).

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, *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* 53 (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

more liberatory approach. Similarly, approaches such as Martha Nussbaum's capabilities theory¹⁵ and Martha Fineman's vulnerability theory¹⁶ also suggest an increased engagement with human beings as dependent, rather than independent. This paper demonstrates those human limitations in the context of childhood and takes cues from these evolving and more robust conceptions of rights.

Unlike other approaches to children's liberation,¹⁷ this paper 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 theory, as well as childhood theory, I challenge the inevitability of current constructions of childhood even within liberalism. 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

that the Court has phased out 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 HOWARD 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.")

¹⁵ *E.g.*, Nussbaum, *supra* note 8.

¹⁶ *E.g.*, Fineman, *supra* note 8.

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, & 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* Daiva Stasiulis, *The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement*, 6 (4) CITIZENSHIP STUDIES 507, 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 suggests that that children should sit on school boards and serve in community governance associations, and

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 both 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 become more hazardous. The accommodation approach is consistent with models of parenting in which parents protect their children's vulnerability while also affording them increasing participation in the household while grooming them for increasing 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 would value the intimate associations of family life in a liberal democracy, but also afford children some measure of self-governance in this "private" realm and most certainly a more active role in the public sphere. Thus, I would reserve authority for children at home and in the polity, but would not appoint or empower state actors to mediate children's authority. Instead children and families would negotiate values and commitments. 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 as children develop skills and tools for full participation in the polity, market, classroom, and the home is possible by rethinking childhood. Instead of a time *only* of vulnerability,

municipal councils. *Id.* at p. 519.

²⁰ I do not aim here to abolish the parent-child relationship or the family. Although there may be better alternatives to managing the vulnerability of very young humans, having seen and studied the state as parent, *See, e.g.,* Annette R. Appell, *Uneasy Tensions between Children's Rights and Civil Rights*, 5 Nevada Law Journal 141 (2004); Annette Ruth Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in Child Protection Proceedings*, 48 S. CAROLINA LAW REV. 577 (1997); Annette Appell & Bruce Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER LAW & POL'Y 63 (1995). I have more faith in flesh and blood relations than bureaucrats and attorneys. *Representing Children Representing What? Critical Reflections on Lawyering for Children*, 39 Colum. Human Rts. Law Rev. 573 (2008).

²¹ Allison James, *To Be (Come) or Not to Be (Come): Understanding Children's Citizenship*, 633 ANNALS OF THE AM. ASS'N OF POLITICAL & SOCIAL SCIENCES 167 (2011).

play, development, and becoming, constructing childhood as a time of participation, growth, and membership, not just in the family, but in the polity as well can expand opportunities for children and perhaps expand our visions of justice.

The next part illustrates that childhood, like race, gender, ability, and sexuality, though connected to natural phenomenon, is a social, political and moral construct that creates adult liberty, legitimates government, establishes children as incompetent political actors, and unworthy of adult liberty. Through this construction, childhood serves a foundational role in liberalism. Here, childhood's political and moral origins are both masked and justified by the natural, which is to say, inevitable, fact that all children will be vulnerable for at least a portion of their childhood. Liberalism attributes this vulnerability is attributed to children's minds and bodies, and not to their environments, with their sharp edges, markets, private property, dangerous streets, cars and busses, and little public commitment to their individual developmental vulnerabilities and capabilities. Part II also introduces the development thesis, which holds that unlike children, adults are presumptively wise, strong, mature, 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. In other words, the development thesis 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 third part situates childhood in the pantheon of other socially constructed, regulatory categories. Childhood is subject to the same type of theoretical challenges as other naturalized categories, such as sex, race, gender, sexual orientation, and sexual identity. These critiques of suggest a similar skepticism regarding the naturalness of childhood. Part III 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 fourth part critiques and rejects the traditional equality approach and instead presents an accommodationist approach that would recognize children's personhood/legitimacy and enhance their liberty within the current legal system. Here I propose a Children's Participation Amendment (CPA). The CPA represents a more contemporary and apt 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. The CPA would provide affirmative duties to transform environments and activities to promote children's ability to participate in their own lives, in the labor market, and in the life of the polity.

Part V concludes that for these and other reasons, it is helpful to focus on children's liberty, rather than their equality (to adults). 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. At the same time, it may limit parental freedom in childrearing because of its affirmative mandates regarding the child's home life and activities outside the home. Accommodating childhood may also free caregivers because it would make children more independent earlier, shortening and narrowing dependency as children's environments are modified to aid their participation.

II. 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 creation of 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 guardians, categorically excluded from a variety of activities and occupations, and subjected to obligations and limitations that would be

²² See e.g., HOLLY BREWER (tracing the connections between Enlightenment philosophy and liberal political systems).

²³ DAVID ARCHARD (2004) at 50

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. I argue that, 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 the equal rights for adults. Even so, and notwithstanding the development thesis, I ask 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.

Despite the foundational social, legal and political roles of childhood, 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, but instead involves 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 I claim that the naturalness, inevitability, and the boundaries of childhood (even) in legal liberalism are overdrawn

²⁴ BREWER, *supra* note ; Appell, *Pre-political Child*,

and that children not only are more than instrumental, but also powerful in their own right.

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 private world of family and the future²⁵ 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.

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

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

²⁶ See David Archard, *John Locke's Children*, in THE PHILOSOPHER'S CHILD 85 (eds., Susan M. Turner & Gareth B. Matthews, 1998) ("most 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* (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); 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).

²⁸ "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

“imperfect beings . . . weak and helpless, without knowledge or understanding.”²⁹ In contrast, adult (male) liberty and self-determination “is grounded on his having 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 developmental thesis continues to dominate liberal philosophy. Children are emerging persons, not yet “under their own jurisdiction.”³² 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 “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

preserve, nourish, and educate the children they had begotten. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, BOOK II, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT, Chap. VI, para. 56.

²⁹ JOHN LOCKE, CONCERNING CIVIL GOVERNMENT, SECOND ESSAY, Chap. VI, 56.

³⁰ *Id.*, [JOHN LOCKE, CONCERNING CIVIL GOVERNMENT, SECOND ESSAY, Chap. VI.] at 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.* at 58.

³¹ *Id.* at 55 [LOCKE, 2ND ESSAY, Ch. VI, 55]; *see also*, HOLLY BREWER; Appell, *supra* note [Pre-political Child], at 738-41.

³² Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575, 587-89 (2003); *see also*, Schapiro, *What is a Child?*, *supra* note [109 ETHICS 715 1999] at 735-337 (discussing both children’s developmental and dependant status and suggesting prescriptions for adults to aid children to become “developed agents”). *in text here maybe elaborate with Ethics article*

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

³⁴ *Id.* at [Brennan & Noggle] 2, 7.

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

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, philosophers stop short of equating moral autonomy with intellectual competence³⁸ because such a measure would introduce indeterminacy regarding the moral status of adults which would in turn undermine adult moral agency.³⁹ Thus, despite the gradual nature of development, Schrag opted instead for a bright line to demarcate moral authority and lack thereof,⁴⁰ leaving children categorically without such authority, thereby sacrificing childhood to adulthood.

The development thesis provides 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.⁴¹ In other words, if moral agency is measured, then such measures could exclude some adults from moral agency (and presumably include some children).⁴² Of course, this scheme already exists because adults can be wards and children may be

³⁶ Schrag; Archard Beckman Brighthouse; Tamar Schapiro; Brighthouse and Swift.

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

³⁸ Harry Brighthouse, *How Should Children Be Heard*, 45 ARIZ. L. REV. 691, 702-703 (2003); Francis Schrag, *The Child in the Moral Order*, 52 PHILOSOPHY 167, 169-177 (1997).

³⁹ Schrag, *supra* note , at 176-77.

⁴⁰ *Id.* [Schrag], at 177.

⁴¹ See Schrag (1997), *supra* note , 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); Tamara Schapiro *What is a Child?*, *supra* note , 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).

⁴² Cf. Francis Schrag, *Children and Democracy, Theory and Policy*, 3 POLITICS, PHILOSOPHY & ECONOMICS 365, 379 (2004-2005) ("if we discount teenagers' policy preferences because they are "uninformed, should we not make an understanding of . . . complex issues a prerequisite for *adult* voting.")

treated as adults,⁴³ 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.⁴⁴ 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 was 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.⁴⁵

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).⁴⁶ This explains how, in a world where people are "born free and equal," children willingly "alienate their liberty only for their own advantage."⁴⁷ In turn, children's vulnerability foreshadows the human vulnerability that leads free "men" to band together politically.⁴⁸ 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,⁴⁹ and perhaps childhood and

⁴³ *E.g. Graham v. Florida*, 560 U.S. ____, 130 S. Ct. 2011 (2010).

⁴⁴ LOCKE, 2ND TREATISE, *supra* note

⁴⁵ BREWER, *supra* note .

⁴⁶ JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT, Book I, ch. 2 (1762)

⁴⁷ *Id.* (Jean Jacques Rousseau, The Social Contract, Book I, ch. 2 (1762).)

⁴⁸ *Id.*

⁴⁹ ROUSSEAU, THE SOCIAL CONTRACT, ch. 8,

adulthood.⁵⁰ 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.

Not surprisingly, 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.⁵¹ 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."⁵² 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.⁵³ In other words, this categorical barrier protects adults from having to prove their ability to govern.

This assignment of childhood primarily to parents is, of course, a political choice which 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,⁵⁴ and even helps to maintain political institutions.⁵⁵ Of

⁵⁰ See ROUSSEAU SOCIAL CONTRACT, ch. 8 ("what 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.")

⁵¹ Brennan & Robert Noggle, *John Rawls's Children*, in THE PHILOSOPHER'S CHILD 203, 206 (eds., Susan M. Turner & Gareth B. Matthews, 1998) at

⁵² Samantha Brennan & Robert Noggle, *John Rawls's Children*, in THE PHILOSOPHER'S CHILD 203, 205 (eds., Susan M. Turner & Gareth B. Matthews, 1998). This point has been made by others. E.g., Eva Feder Kittay, *Human Dependency and Rawlsian Equality*, in FEMINISTS RETHINK THE SELF 219, 229 (ed. Diana Tietjens Meyers, 1997).

⁵³ Appell, *Pre-political Child*, supra note . On the contrary, "[c]hildren . . . are not people whose choices the liberal state must respect." HARRY BRIGHOUSE, SCHOOL CHOICE AND SOCIAL JUSTICE 11 (2000).

⁵⁴ Annette R. Appell, *Bad Mothers and Spanish Speaking Caregivers*, 7 NEV. L. J. 759 (2007); *Virtual Mothers and the Meaning of Parenthood*, 34 UNIV. MICH. J. LAW REFORM 683 (2001).

⁵⁵ See Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE LAW J. 1236, 1239-40, 1242-43, 1269-70 (2010) (rehearsing political justifications for family privacy); Annette R. Appell, *Uneasy Tensions between Children's Rights and Civil Rights*,

course in practice, this scheme disproportionately places these often uncompensated burdens⁵⁶ on women and especially on poor women and women of color.⁵⁷ Moreover, discussion regarding compensation for dependency rarely contemplates aid to children directly.⁵⁸

Children's political existence is not purely instrumental, however, because children are rights-holders.⁵⁹ 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.⁶⁰ In this way, their rights are developmental and their citizenship is partial.⁶¹ 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.⁶² Until then, children are subject both to their parents' and the state's authority without 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.⁶³

Moreover, the removal of children from the polity and relegation to the

5 NEVADA LAW J.141 (2004) (tracing the effects of state-sponsored removal of children from Indian families and tribes on the political existence of tribes).

⁵⁶ *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 LAW REV. 1753 (2000-2001) (tour de force rehearsal of the benefits people with children receive and how people without children pay for them.)

⁵⁷ *Id.*; Linda McClain, *Care as a Public Value*, 76 CHI-KENT LAW REV. 1673 (2000-2001).

⁵⁸ Bruce Ackerman and Anne Alstott propose this, but upon adulthood, not during childhood. BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (2000).

⁵⁹ 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, *supra* note [Uneasy Tensions]. 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. Board of Education* (1954); Title IX, *West Virginia Board of Education 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 (teen abortion cases); family affiliation (non-marital children cases), Stanley, Santosky; but see *Wisconsin v. Yoder*, 406 U.S. 205 (1972); Michael H., *Smith v. OFFER?*), Parham; perhaps *Deshaney*). Children also have the right to life and to enter into contracts.

⁶⁰ Annette R. Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, . . .

⁶¹ *See* ELIZABETH F. COHEN, *SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS* 180-82 (2009) (children are semi-citizens because of the state limits their political and autonomy rights).

⁶² Full 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.)

⁶³ *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 [SCHOOL CHOICE], *supra* note , 12-17.

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 best, 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.⁶⁴ 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 one another.⁶⁵ In this frame, children are objects of their parent's liberty, although children partake of that liberty as well.⁶⁶ According to Fishkin, the private family is the enemy of equality for children because parental liberty is the source of economic and other disparities.⁶⁷ 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.⁶⁸ 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,⁶⁹ religion,⁷⁰ and identity.⁷¹ These private, intimate associations 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

⁶⁴ 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),

⁶⁵ 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(4) *PHILOSOPHY & PUBLIC AFFAIRS*, 44, 50 (2009).

⁶⁶ E.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁶⁷ JOHN FISHKIN, *JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY* (1983).

⁶⁸ Alstott, FISHKIN 1983. *Comer Daily*

⁶⁹ Harry Brighouse & Adam Swift, *Legitimate Parental Partiality*, 37(4) *PHILOSOPHY & PUBLIC AFFAIRS*, 44, 59 (2009). "Through the family children are enculturated into the expectations of life, especially worklife, of their parents and their parents' friends and acquaintances; . . .")

⁷⁰ Appell, *Virtual Mothers*, *supra* note .

⁷¹ Appell, *Controlling for Kin*, *supra* note .

(and deficits). This structure masks the state's role in distribution, casting question 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. 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, law makers, 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,⁷² codifies the private, developmental child. With minimal limitations,⁷³ 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,⁷⁴ other specific laws governing children,⁷⁵ and the limited autonomy the law affords children.⁷⁶ This doctrine posits a mutual liberty interest between parent and children, which serves either or both to protect adult freedom and maintain a diverse

⁷² *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. Society of Sisters, 268 U.S. 510 (1925).

⁷³ Vivian E. Hamilton, *Immature Citizens and the State*, __ BRIGHAM YOUNG LAW REV. __ (20xx); *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).

⁷⁴ *See* Lochner v. New York, 198 U.S. 45, 54 (1905) (discussing "powers existing in the sovereignty of each State in the Union . . . [to regulate] safety, health, morals, and general welfare of the public.")

⁷⁵ Annette Ruth Appell, *The Pre-political Child of Child-Centered Jurisprudence*, 46 HOUSTON LAW REV. 703, 708-711 (2009).

⁷⁶ For example, the mature minors doctrine, Bellotti v. Baird, 443 U.S. 622 (1979); *In re E.G.* 549 N.E.2d 322. (Ill.1989)

polity separate enough from the state to (in adulthood) govern in a democratic republic.⁷⁷ This scheme also helps to limit the heavy hand of the state and to protect the integrity of vulnerable families from coercive state intervention.⁷⁸ This regime thus also 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 franchise⁷⁹ and the political offices of President, Senator, and Representative.⁸⁰ 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."⁸¹ 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.⁸² 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."⁸³ At the same time, it is possible for a person under 18 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.⁸⁴ Thus individual children can become adults by performing

⁷⁷ Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010); Anne Comer Dailey, *Developing Citizens* 91 IOWA L. REV. (2006); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 764, 788 (1997).

⁷⁸ Appell, *Uneasy tensions between children's rights and civil rights and/or Spanish Speaking Caregivers*, *supra* note .

⁷⁹ UNITED STATES CONSTITUTION, Amendment 26 (extending franchise to those 18 and older).

⁸⁰ UNITED STATES CONSTITUTION, Art. 1, §3, cl. 3 (Senators must be at least 30 years old), §2, cl. 2 (Representatives must be at least 25 years old); Art. 2, § 1 (President must be at least 35 years old).

⁸¹ *Graham v. Florida*, 130 S. Ct. 2011, 2037 (2010) (Roberts, J., concurring)

⁸² *Miller v. Alabama*, 567 U.S. __ (2012) __S. Ct. __ (2012) (8th amendment bars blanket sentence of life without the possibility of parole for juvenile homicide offenders); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (outlawing life without parole sentences for youth who commit non-capital crimes); *Roper v. Simmons*, (outlawing death penalty);

⁸³ *Graham*, 130 S.Ct., at 2037 (Roberts, J., citing *Roper v. Simmons*, 543 U.S. 551 (2005)).

⁸⁴ *See Graham*, 130 S. Ct., at 2052 , Justice Thomas, 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 . . . [who has demonstrated] "sufficient depravity and incorrigibility to warrant his current permanent incarceration.").

adulthood—that is, by such deliberate and extreme conduct that effectively takes them out of the category of (innocent) childhood and into adulthood.⁸⁵

The law also limits girls' freedom to obtain an abortion beyond that which it limits women's access.⁸⁶ Thus, a minor does not have the fundamental right to terminate her pregnancy without parental or judicial consent,⁸⁷ although in some states girls can relinquish their children for adoption without parental permission or judicial oversight,⁸⁸ 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,⁸⁹ their right to be free from police and school searches,⁹⁰ and their right to be free from coercive custody.⁹¹

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."⁹² This definition

⁸⁵ See also Conn. Gen. Stat. § 46b-150b (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 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.")

⁸⁶ 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 LAW REV. 589 (2002).

⁸⁷ *Bellotti*, 443 U.S. at 622; *Hodgson v. Minn.*, 497 U.S. 417 (1990)

⁸⁸ Jen Durcan & Annette Appell, *Minor Mothers and Consent to Adoption: An Anomaly in Youth Law*, 5(1) ADOPTION QUARTERLY 69 (2001).

⁸⁹ *Morse v. Frederick*, 551 U.S. 393 (2007); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-213 (1975); *Ginsberg v. New York*, 390 U.S. 629 (1968); see also *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 564 U.S. __ (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).

⁹⁰ 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).

⁹¹ *Schall v. Martin*, 467 US 253 (1984).

⁹² U.N. CONVENTION ON THE RIGHTS OF THE CHILD, ART. 1. See also, ART. 5 (referring to the "evolving capacities of the child"; ART. 28-29 (regarding education); and, e.g., ARTS.

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.⁹³ The CRC also explicitly inscribes a view of childhood as a time of education, play and limited responsibility.⁹⁴

The CRC is remarkable, nevertheless, for recognizing children not as property but as human beings who should have identities,⁹⁵ procedural rights,⁹⁶ and moral rights.⁹⁷ At the same time, the CRC does not afford children agency⁹⁸ or a direct relationship to the state.⁹⁹ 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 state¹⁰⁰ and at home.¹⁰¹ 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.¹⁰² 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

2, 3, 7, 8,9, 10, 14, 18, 20, 21, 23, 25-27 (regarding the child's parents or other caregivers).

⁹³ *Id.* (CRC), ART. 5.

⁹⁴ See ART. 31("State Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities . . ."); Art. 32 (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 extraordinarily diverse material and social conditions in which children live throughout the globe. *THEORIZING CHILDHOOD* 141 (1998).

⁹⁵ Articles 7 & 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. Also, Art. 20, 30,

⁹⁶ Arts. 12 & 40.

⁹⁷ 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 Human Rights Law Rev.* 43, 68-70 (2011).

⁹⁸ 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. CHILDREN'S RIGHTS*, 31 (2005) (arguing for participation rights of newborns).

⁹⁹ See, e.g., CRC, Art. 27, sec. 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." State Parties should help if they can. *Id.* at sec. 3.

¹⁰⁰ Art. 3, sec. 1.

¹⁰¹ Art. 18, sec. 1.

¹⁰² See CRC Art. 12, sec. 2; Appell, *Representing Children, Representing What?*

accordance with the age and maturity of the child.”¹⁰³

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 adult.¹⁰⁴ 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.”¹⁰⁵ 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.”¹⁰⁶ In legal matters if children receive legal 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.¹⁰⁷ Moreover, children may not have legal standing in matters affecting their interests.¹⁰⁸ This privatization and objectification of childhood creates perceived barriers to direct or equitable state support for children in a liberal democracy with a *laissez faire* approach to economic liberty in part because of 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.¹⁰⁹

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 U.K.¹¹⁰

¹⁰³ CRC Art. 12, sec. 1. Cite secondary sources—maybe from REPRESENTING CHILDREN IN FAMILIES.

¹⁰⁴ Ann Quennerstedt, *Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the “3p’s”*, 18 INT’L J. CHILDREN’S RTS. 619, 631 (2010). Anne C. Dailey appropriates this developmental rubric as well. CHILDREN’S CONSTITUTIONAL RIGHTS, 95 MINN. L. REV. 2099 (2011).

¹⁰⁵ Quennerstedt, *supra* note , at 630-32.

¹⁰⁶ *E.g.*, CAPTA, ASFA, adoption, custody, guardianship.

¹⁰⁷ CAPTA,

¹⁰⁸ *E.g.*, divorce proceedings; special education hearings (IDEA); and the CRC merely affords the that children have the right to be heard. C.R.C. ART. 12.

¹⁰⁹ *See, e.g.*, David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (2011).

¹¹⁰ JAMES & JAMES 2004, *supra* note , at 103; *see also* Martha Minow, *A Feminist Approach to the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV.

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.¹¹¹

Thus, contrary to claims that liberalism does not account for children,¹¹² 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.¹¹³ These two categories create a bright line test for power and powerlessness: authority comes from self-possession, rather than a rite of birth.¹¹⁴ The U.S. was unique at the time of the founding for its political organization that equated authority with a set of elected set of 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 compact has slowly, and often painfully, admitted poor white men, black men, and women, but it has continued to exclude children.¹¹⁵

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 freedoms. Liberalism presumes that it is exceptional when adults cannot exercise these freedoms and that it is exceptional when children can. Indeed, childhood helps to

WOMEN’S L. J. 1, 7 (1986) (“the 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.”)

¹¹¹ JAMES & JAMES 2004, *supra* note , at 103.

¹¹² This insight runs contrary to claims that liberalism does not account for children. *E.g.*, Jennifer Hendricks, *Renegotiating the Social Contract*, 110 MICH. L. REV. (forthcoming) [text ca note 12] (2012) (in press); Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133 (1998).

¹¹³ Holly Brewer, *By Birth or Consent, Children, Law, & the Anglo American Revolution in Authority* (2005); Appell, *Virtual Mothers*, *supra* note .

¹¹⁴ This is at least true in theory; of course in the early days of the republic, many adults were excluded from the franchise.

¹¹⁵ The Constitution actively and by omission excludes children as political actors. *E.g.*, age floors for constitutional office: Art. II, §1 (President must be 35 years old); Art. 1, §3 (Senator must be 30 years old); Art. 1 §2 (Representatives must be 25 years old); and the franchise Art. 26 (setting voting age at 18 (down from 21).

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 leave the category. The best our current autonomy framework can provide for children is to shrink the category of childhood, to a duration of 8, 13, or 16 years; or, perhaps, compensate children with a salary for the developmental work they perform, as students, caregivers, and domestic aids, while they occupy childhood for the purpose of becoming independent adults.

III. 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,¹¹⁶ defined, maintained, and regulated by law. Although it may be true that human beings from birth to a certain age, say 7 or 14 or even 21,¹¹⁷ are likely to possess less capacity than their elders to care for and regulate themselves and others or to engage in higher-level reasoning, these developmental facts do not dictate the contours or boundaries of childhood. Ideology does.

As with these other identity categories, it is what we make of natural facts regarding human beings that creates and regulates identity and difference.¹¹⁸ For example, as feminism theorizes gender as a “constitutive element of social relationships based on perceived differences between the sexes and gender [as] as primary way of signifying relations of power,”¹¹⁹ we can understand childhood as a way of signifying power and as constitutive of other identities, in particular, but not exclusively, adulthood.¹²⁰ Just as gender distinctions have several aspects or functions: symbolic, normative, political and subjective,¹²¹ so too do age categories.

¹¹⁶ See Frances France 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).

¹¹⁷ Some suggest 25 years-old. *E.g.*, Andrew Rehfeld, *Representing Children*, *supra* note . 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 DEVELOPMENTAL APPROACHES TO PSYCHOLOGY 255-75 (LENE ARNETT JENSEN, ED., 2011).

¹¹⁸ 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.

¹¹⁹ Scott, *Gender: A Useful Category of Historical Analysis*, *supra* note , at. 1067.

¹²⁰ Appell, *The Pre-political Child of Child-Centered Jurisprudence*, *supra* note .

¹²¹ Scott, [Gender: A Useful Category of Historical Analysis,] *supra* note , at 1067-69.

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 often 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).¹²² As such childhood constructs children as instrumental, passive, and in need of shaping and domesticating, but not "recognised in their own right."¹²³ The development thesis appropriates and interprets seemingly natural facts to categorically define childhood, even though the contours and subjects of childhood are contingent and regulatory, changing over time and space in response to different policies, conditions, location, and demographics.¹²⁴ Most importantly, childhood glosses over the real, human lives of children, casting them as insubstantial and irrelevant in their own right.

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 regarding childhood.¹²⁵ These regulations derive justification from somewhat natural phenomenon, and contemporaneous theories of child development,¹²⁶ but they are also connected to norms regarding gender, sexuality, race and class.¹²⁷ Thus, in this sense,

¹²² Jens Qvortrup, *Editorial: A Reminder*, 14 CHILDHOOD 395, 396? (2007).

¹²³ Allison James & Adrian L. James, *Constructing Childhood: Theory, Policy and Social Practice* 193 (2004).

¹²⁴ *E.g.*, Child labor over time and geography; reproductive choice; as criminal defendants; historical differences in the contours of childhood; definition of child and child's place over time...;

¹²⁵ Appell, *Pre-Political Child supra* note , at 746-48.

¹²⁶ Note on contingency of child development

¹²⁷ 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*

childhood is a political classification, as is its corollary, adulthood.

In this sense, 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.¹²⁸ 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 the 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, identities that 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.

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,¹²⁹ sex and pornography,¹³⁰ and the workplace.¹³¹ In other words,

Class in The American Child: A Cultural Studies Reader 40-62 (eds. Caroline F. Levander & Carol J. Singley, 2003);

¹²⁸ 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, 2398 (1997).

¹²⁹ E.g., Olsen, *The Myth of State Intervention*, *supra* note .

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.¹³² These theorists have methodically and thoroughly uncovered how racism works, particularly in indirect, implicit, and seemingly inevitable or natural ways.¹³³ 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 and distributing power and resources.¹³⁴ 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.¹³⁵

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 and gender and sexual orientation.¹³⁶ Besides challenging the naturalness and supremacy of heterosexuality, queer legal

¹³⁰ E.g., CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); 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).

¹³¹ E.g., Vicki Schultz, *Life's Work*, 100 COLUM. LAW. REV. 1881 (2000).

¹³² E.g., IAN HANEY LOPEZ, *COLORBLIND WHITE DOMINANCE, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (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 & RIGHTS* (1992).

¹³³ 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. 931-978 (2008); Peggy Cooper Davis, *Law as Microaggression*, 98 YALE LAW J. 1559 (1989).

¹³⁴ Derrick Bell, *Racism: A Major Source of Property and Wealth Inequality in America*, 324 IND. L. REV. 1261 (2001); Dorothy Roberts, *The Genetic Tie*, 62 U. CHICAGO LAW REV. 209 (1995); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1992-1993).

¹³⁵ See sources cited at notes to , *supra*...

¹³⁶ E.g., Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J. L. & HUMANITIES 161 (1996).

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, have called into question binaries of man and woman, straight and gay, lesbian and gay;¹³⁷ and have complicated, if not eviscerated, identity-based theoretical approaches that posit various and differing attributes to women, men, lesbians, and gay men. It 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.¹³⁸

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. This deviation from the norm carries stigma and dictates a reduction 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. 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.”¹³⁹

Still, we think of childhood as different, as possessing natural differences that are salient and totalizing, rendering children vulnerable, and

¹³⁷ Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys* 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); *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. 1193 (1997). 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 & LAW 601, 604-617 (2003).

¹³⁸

¹³⁹ CORNELL WEST, RACE MATTERS 2-3 (1993).

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.¹⁴⁰ 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 in adult needs.¹⁴¹

As the CRC illustrates, legal studies remain inside the developmental rubric of childhood, contemplating the naturalized, mostly non-agential, developmental child.¹⁴² 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).¹⁴³ If and when children appear in legal theory or doctrine, they generally are recipients, not actors, and cast as passive dependents.¹⁴⁴

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—

¹⁴⁰ Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. LAW REF. 835, 844 (1985) (exploring the family to be a state-created and regulated institution).

¹⁴¹ Elizabeth R. Cohen, *Neither Seen nor Heard: Children's Citizenship in Contemporary Democracies*, 9 CITIZENSHIP STUDIES 221, 230-31 (2005).

¹⁴² An exception is Hillary Rodham Clinton's call over 30 years ago for reversing the presumption of incompetency for children. *Children under the Law*, 43 HARV. ED. REV. 487 (1973); Hillary Rodham, *Children's Policies: Abandonment and Neglect*, 86 YALE L.J. 1522 (1977); *Children's Rights: A Legal Perspective in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES* 21 (Alicia A. Vardin & Ilene M. Brody eds., 1979).

¹⁴³ Exceptions include issues related to minor's sexual and reproductive agency.

¹⁴⁴ Kittay, *supra* note , [*Human Dependency and Rawlsian Equality*, in *FEMINISTS RETHINK THE SELF*] at 219, 229, 252 (accounting for the dependency of children, but not their agency).

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),¹⁴⁵ and as Caroline Levander has noted, shifts "social responsibility from the state onto the self."¹⁴⁶ 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.¹⁴⁷ This phenomenon in turn diminishes or perhaps reifies community and casts resources and opportunities for youth as private, rather than public, goods.¹⁴⁸

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.¹⁴⁹ 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.¹⁵⁰ This vulnerability is increased by virtue of the private market itself and by the heavy hand of the state.¹⁵¹

¹⁴⁵ Appell, *Virtual Mothers*, *supra* note , at 686.

¹⁴⁶ LEVANDER [CRADLE OF LIBERTY], *supra* note , at 13; *see also* Anne Alstott, *Family values and the law of inheritance*, 7 SOCIO-ECONOMIC REV. 145, 146 (2009) ("the 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.")

¹⁴⁷ Brighthouse & Swift, *supra* note [Parential Partiality], 59-64.

¹⁴⁸ BRIGHOUSE [SCHOOL CHOICE], *supra* note , at 11.

¹⁴⁹ Annette Ruth Appell, *Children's Voice and Justice: Lawyering for Children in the 21st Century*, 6 NEV. L. J. 692, 701-09 (2006).

¹⁵⁰ Appell, *Virtual Mothers*, *supra* note

¹⁵¹ 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

Calls for children's liberation often minimize (or simply ignore) these structural factors that create hierarchies and significant material and cultural 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.¹⁵² These adults are most likely to be lawyers or judges, who are not intimately or affectionately involved with the child.¹⁵³ In either event they will likely not be intimate with the child or inclined to do the child's bidding.¹⁵⁴ 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.

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.¹⁵⁵ In what is now the United States, children have been productive laborers since colonial times.¹⁵⁶ Enslaved children, bounded out children and children living with family worked inside and outside the home.¹⁵⁷ In fact, it was not until the industrial revolution and the development of the middle class in that childhood became associated with play, leisure, and formal schooling.¹⁵⁸ 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.¹⁵⁹ And because children are consumers of goods and service, they form an important market force as consumers and job creators.

(William Ayers, Bernardine Dohrn, & Rick Ayers eds., 2001).

¹⁵² 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).

¹⁵³ *Id.* (GUGGENHEIM & MNOOKIN)

¹⁵⁴ Appell, *Representing Children, Representing What?* *supra* note .

¹⁵⁵ See MAYALL 2002, *supra* note, at 49 (noting that children perform self-care, housework and childcare, contribution "directly to the family enterprise and indirectly by freeing up adult time.")

¹⁵⁶ HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 5 (2002)

¹⁵⁷ *Id.* [HUGH D. HINDMAN] at 16, 19-20. Hindman characterizes the abolition of slavery as the "first major child labor reform in America." *Id.* at p. 20.

¹⁵⁸ Appell, *Pre-political Child*, *supra* note, at 746.

¹⁵⁹ See Seymour Moskowitz, *Dickens Redux: How American Child Labor Law Became a Con Game*, 10 WHITTIER J. OF CHILD & FAMILY ADVOCACY 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).

Indeed, the institution of childhood produces both adult employment and social identities, such as parent, teacher, and day-care provider.¹⁶⁰ This feature, the creation of adult identities through childhood, serves further to obscure the contingency of childhood and to reify its contours.¹⁶¹

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.¹⁶² 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.¹⁶³ 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 activities.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶

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

¹⁶⁰ Leena Alanen, *Gender and Generation: Feminism and the "Child Question"*, in CHILDHOOD MATTERS at 40-41 (Jens Qvortrup, ed., 1994); David Oldman, *Adult-Child Relations as Class Relations*, in CHILDHOOD MATTERS, 43-58 (Jens Qvortrup, ed. 1994).

¹⁶¹ Leena Alanen, *Gender and Generation: Feminism and the "Child Question"*, in CHILDHOOD MATTERS 27, 40-41 (Qvortrup, ed., 1994).

¹⁶² See Tatiana Andreyeva, Inas Rashad Kelly, Jennifer L. Harris, *Exposure to food advertising on television: Associations with children's fast food and soft drink consumption and obesity*, 9 ECONOMICS AND HUMAN BIOLOGY 221 (2011); Jennifer L. Harris, Jennifer L. Pomeranz, Time Lobstein, & Kelly D. Brownell, *A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can Be Done*, 30 ANN. REV. PUBLIC HEALTH 211 (2009).

¹⁶³ Stasiulis (2002), *supra note* , at 511.

¹⁶⁴ Oldman, *supra* [*Adult-Child Relations as Class Relations*] at 54.

¹⁶⁵ *Id.* [Oldman]. 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. <http://www.chuckecheese.com/company-info/>. See Susan M. Connor, *Food-Related Advertising on Preschool Television: Building Brand Recognition in Young Viewers*, 118 PEDIATRICS 1478 (2006).

¹⁶⁶ Oldman, *supra note* , at 54-56; Alanen, *supra note* [*Gender and Generation*] at 33.

their own lives and, even at very young ages, know what they want, have their own sense of 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 agency.

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.¹⁶⁷ Indeed, children pose philosophical questions and conduct moral reasoning throughout childhood, partaking in abstract moral reasoning and philosophical inquiry regarding issues such as the relationship between the alphabet, sound, words, and thought.¹⁶⁸ Further, children understand moral obligation as distinct from something for which the child would be punished.¹⁶⁹ Studies of children reveal that they have strong senses of responsibility and exhibit characteristics associated with responsibility, such as “accountable, capable, competent, reliable and trustworthy in a number of situations.”¹⁷⁰

It is not surprising then that children view themselves as responsible, contributors, and as moral actors.¹⁷¹ As a teenager, Benjamin Franklin’s initially pseudonymously published political tracts and critiques of the views of powerful leaders like Cotton Mather were widely read, influential, and controversial.¹⁷² 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.¹⁷³ Frederick Douglass taught himself to read and write because he recognized at an early age that those skills would be his “pathway to

¹⁶⁷ GARETH B. MATTHEWS, *THE PHILOSOPHY OF CHILDHOOD* 56 (1994) (children are “genuinely moral agents.”) pp. 57-58

¹⁶⁸ Gareth B. Matthews, *The Philosophy of Childhood* p. 34

¹⁶⁹ Gareth B. Matthews, *The Philosophy of Childhood* p. 56-58.

¹⁷⁰ Håvard Bjerke, *Children as ‘differently equal’ responsible beings: Norwegian children’s views of responsibility*, 18(1) *CHILDHOOD* 67, 68 (2011).

¹⁷¹ *Id.* [Bjerke]

¹⁷² BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 112-117 (2008)

¹⁷³ *Id.* [BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008) (Frederick Douglass, Dred Scott’s daughters Liza and Lizzie who escaped to freedom during the Dred Scott litigation. WOODHOUSE, *supra* note , at 85.

freedom.”¹⁷⁴

Of course children themselves have been participants in political movements and protests.¹⁷⁵ Children were important players in the civil rights movement of the 20th century. For example, children have engaged in labor protests.¹⁷⁶ Eleven-year-old Hubert Eaves garnered headlines when he refused to salute the flag on the grounds that it represented a systematically and violently racist nation.¹⁷⁷ 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 Court¹⁷⁸ as did the Barnette children after them.¹⁷⁹ These and other children engaged in risky and provocative political action that led to violence¹⁸⁰ but also, eventually, to a robust vision of freedom of conscience and the Supreme Court’s authority.¹⁸¹

Children were active in the NAACP in the 1920s and 1930s and in the Civil Rights Movement of the mid-20th Century. Despite the perspective of adult organizers that the NAACP was merely socializing children for the future—for their eventual adulthoods,¹⁸² NAACP youth councils lead the NAACP’s move toward more activist and militant approaches to civil rights.¹⁸³ Black youth protests pushed the NAACP to represent the Scottsboro boys and to move beyond the middle class.¹⁸⁴ 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.¹⁸⁵

¹⁷⁴ WOODHOUSE, *supra* note , at 56.

¹⁷⁵ 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); *infra*. text at and accompanying notes __ to __.

¹⁷⁶ See LINDMANN, *supra* note , at 45 (“there were numerous instances of strikes by child workers in U.S. history, [but] they tended to be spontaneous acts of rebellion over transitory issues . . .”).

¹⁷⁷ Cecilia Elizabeth O’Leary, *To Die For* 231 (1999).

¹⁷⁸ *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

¹⁷⁹ *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

¹⁸⁰ 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).

¹⁸¹ Blasi & Shiffren, *supra* note , at 426.

¹⁸² DE SCHWEINETZ 160- 173. These youth were powerful forces in the movement as well and their actions helped to move the NAACP in more militant directions. *id.* pp. 165-248.

¹⁸³ *Id.* (DE SCHWEINETZ) at 170-71, 173.

¹⁸⁴ *Id.* (DE SCHWEINETZ) at 165, 241-48..

¹⁸⁵ *Id.* (DE SCHWEINETZ) 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

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;¹⁸⁶ this organizing¹⁸⁷ would eventually reach the Supreme Court as part of the *Brown vs. Board Education* litigation.¹⁸⁸ It was, after all, children who integrated schools, often at great risk, but also with a strong sense of duty and purpose.¹⁸⁹ Black and white children actively greeted the United States Supreme Court decision in *Brown v. Board of Education*¹⁹⁰ with hope and possibility, and an understanding that not just their, but the, world would be different.¹⁹¹ Black children in particular reported feeling a sense of empowerment.¹⁹² “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.”¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ High school students were among the sit-in activists who challenged segregated public and private services. Seventeen-year-old

bus.”)

¹⁸⁶ *Id.* (deSchweinetz), at 218-220; Belinda Rochelle, *Witnesses to Freedom: Young People Who Fought for Civil Rights* (1993).

¹⁸⁷ DE SCHWEINETZ, at 218-19; the litigation was *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*, 103 F. Supp. 337 (E.D. Va. 1952).

¹⁸⁸ 347 U.S. 483 (1954).

¹⁸⁹ *See, e.g., id.* (DE SCHWEINETZ), at 103- 115, 204-5 (regarding the Little Rock Nine—African American children who integrated Central High School in Little Rock, Arkansas); 204 (); 218-225 (describing youth desegregation organizers in the 1960s)

¹⁹⁰ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁹¹ Rebecca de Schweinitz, *if we could change the world* 204-6 (2009).

¹⁹² *Id.* [REBECCA DE SCHWEINITZ], at 206.

¹⁹³ *Id.* (DE SCHWEINETZ), at 103- 115, 204-5 (regarding the Little Rock Nine—African American children who integrated Central High School in Little Rock, Arkansas); 204

¹⁹⁴ BELINDA ROCHELLE, *WITNESSES TO FREEDOM: YOUNG PEOPLE WHO FOUGHT FOR CIVIL RIGHTS* (1993) (18-27). Recalling those days as an adult, Elizabeth Eckford, one of the nine reflected on the weight of their actions : “It was up to us to make integration a success. . . .” p. 21.

¹⁹⁵ *See* DE SCHWEINETZ, 101-103 (describing the incident and its aftermath, including its use in the testimony of witnesses before the Senate Subcommittee on Civil Rights in 1957); 215-17 (describing the youth response which included embracing Till’s swagger and pushing those same racial barriers for which Till died).

Harvey Garitt joined the movement on his own and with knowledge that he could jeopardize his education.¹⁹⁶ In 1969, thirteen-year-old Barbara Burrus marched with 45 other black youth between ages eleven to fifteen years old, as well as a number of parents, to protest a school consolidation plan.¹⁹⁷ 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.¹⁹⁸ More recently, Twelve-year-old Walter Polovchak claimed American democracy over Soviet rule.¹⁹⁹ High school students Aaron Fricke and Constance McMillen engaged in political action by openly seeking to bring their same-sex dates to the prom.²⁰⁰

These examples of children's agency in their own lives and in the life of this country 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.²⁰¹ 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 participation²⁰² and those groups that are moving closer to legal legitimacy,²⁰³ the inhabitants of childhood remain *de jure* subordinate and without authority for most purposes. Childhood differs from other

¹⁹⁶ ROCHELLE, *supra* note , at 43-44.

¹⁹⁷ *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

¹⁹⁸ *Tinker v. DesMoines*, 393 U.S. 503 (1969).

¹⁹⁹ *Polovchak v. Meese* 774 F.2d 731 (7th Cir. 1985).

²⁰⁰ *Fricke v. Lynch*, 491 F. Supp. 381 (D.Ct. RI, 1980); *McMillen v. Itwamba School District*, 702 F.Supp.2d 699 (N.D.Miss. 2010).

²⁰¹ Just north of the U.S., in 1995 a 12-year-old Canadian boy founded Free the Children in Canada, 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 , at 528-29. [Daiva Stasiulis, *The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement*, 6 (4) *Citizenship Studies* 507 (2002)] (describing Free the Children and a 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)."

²⁰² *E.g.*, woman, people of color, people with disabilities.

²⁰³ *E.g.*, homosexual, non-citizen.

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 most of its constituents. Moreover, children's natural characteristics truly are universally salient,²⁰⁴ 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 people in the adulthood category. 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 temporariness of 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 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 complex, highly developed environments, markets, and technology of an industrial and information economy. So 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."²⁰⁵ People are not born with these tools; instead these habits are cultivated and develop in childhood and through

²⁰⁴ This is especially true when they are very young in particular and in the context of society in which independent adults are normative.

²⁰⁵ Harry Brighouse & Adam Swift, *Parents' Rights and the Value of the Family*, 117 *ETHICS* 80, 80-81 (2006); see also EAMON CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* (1997) ("the value of autonomy or reasoned self-rule is the key to understanding what rightly holds together liberal and democratic principles"); IAN MACMULLEN, *FAITH IN SCHOOLS* 23 (2007) ("Autonomy is the capacity for critical-rational reflection on an ongoing basis.") MacMullen also claims that autonomy requires the capacity for second-order thought. *Id.* at p. 69; see also 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).

adulthood,²⁰⁶ 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, 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 was competent absent proof to the contrary? Of course testing for the right to vote, to parent, to serve on a jury, or engage in other democratic freedoms is undemocratic and illiberal.²⁰⁷ Not surprisingly, we have, over time, rejected such measures.²⁰⁸ Moreover, even as 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 are that they have the experience, will-power 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

²⁰⁶ See MACMULLEN, *supra* note , at 73 ("it helps to be educated if you are to shape and actively endorse your own ethical values"); 113-136 (claiming that a primary goal of education is ethical autonomy).

²⁰⁷ *Buck v. Bell*, 274 U.S. 200 (1927).

²⁰⁸ *E.g.*, U.S. CONSTITUTION, ARTS. 13-14; VOTING RIGHTS ACT §2, 42 U.S.C. §§ 1973-1973aa-6 (1965).

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. It provides a more child-centered approach to childhood while protecting the core of the important presumptions of adulthood.

IV. GROUNDED CHILDREN'S LIBERATION

As foundational, and arguably essential, as the adult-child divide is in liberalism, a liberal legal system²⁰⁹ 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 offer relief from some barriers for adult liberty. 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 does little to accommodate vulnerability; as a result, these negative rights may be of little use to children.²¹⁰

From a child-centered perspective, this section 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. 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 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.

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

²⁰⁹ I use "liberal system" to refer to liberal democracy very broadly as one which values and protects adult moral and political autonomy to govern themselves and to participate in the polity: "to believe in . . . free and equal citizenship." EAMONN CALLAN, *CREATING CITIZENS 2* (1997).

²¹⁰ This is true for adults who are dependent or vulnerable as well.

universal than others. Children's vulnerability and their construction as aspects of their parents' (and more generally adult) liberty do not mandate the nearly totalizing dependency of children till age 18. On the contrary, such stark notions of dependency and autonomy may establish desirable bright lines that create and protect 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.²¹¹

Although we have carved out childhood as the quintessential and most categorical vulnerability, the contours are not essential. Nor is it our practice to exclude children from all authority from birth to roughly to 18. 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 and they may have the adult rights and 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 or their significant subordination to adult governance and direction from birth generally 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 years old²¹² categorically did not have the franchise. Women and African Americans could be excluded from juries by virtue of their sex and race.²¹³ Children are still excluded.

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, just as we presume competency for adults, regardless of their beliefs, skills, education, and ability. The burden then would be on those (e.g., legislatures) who would limit children's freedom and autonomy. Thus children would not be presumptively weak, unwise, incompetent, and vulnerable, but the default would treat children as if they were adults. This approach might abbreviate children's (and therefore adult care-giver) vulnerability and dependency.

Nor need we reflexively require as a condition of political participation more of children than we require of adults. Children already work and when they are in the formal labor market, they pay taxes. For example, we do not

²¹¹ See also Fineman, *supra* note [Vulnerability].

²¹² U.S. CONSTITUTION AMENDMENTS 15, 19, & 26 (amendments respectively extending the franchise regardless of race, sex, and to people 18 years old).

²¹³ Taylor v. Louisiana, 419 U.S. 522 (1975) (women); Strauder v. West Virginia, 100 U.S. 303 (1880) (blacks).

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.²¹⁴ It is easy to imagine children voting, serving on public bodies, and as political candidates.²¹⁵ Children themselves no doubt have many ideas about how and when they should participate.

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 include U.S. Constitution Amendments 14, 15, 19, and 26, as well as various civil rights statutes, such as the Civil Rights Acts of 1866²¹⁶ and 1964,²¹⁷ the Equal Pay Act of 1963,²¹⁸ the Age Discrimination in Employment Act,²¹⁹ and the American with Disabilities Act.²²⁰ These laws seek to reduce discrimination 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,²²¹ 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 14th Amendment, the Civil Rights Acts of 1866²²² and 1871,²²³ the Age Discrimination in Employment Act,²²⁴ and the Americans with Disabilities Act,²²⁵ each of which provide for formal or accommodational equality in a

²¹⁴ Something re current popular political discourse that displays magical thinking: e.g., the historically challenged present day Tea Party (confused re namesake); an actual elected Congressional representative (Michelle Bachman) who claimed the founders ended slavery).

²¹⁵ Of course the Constitution places minimum age limits on certain federal offices, an exclusion that might be difficult to challenge.

²¹⁶ 42 U.S.C. § 1981 (1866).

²¹⁷ 42 U.S.C. §§ 2000e et seq. (1964).

²¹⁸ 28 U.S.C. § 206 (amending 29 U.S.C. §206 (1938))

²¹⁹ Pub. L. 90-202, 29 USC §§621, et seq. (1967).

²²⁰ Americans with Disabilities Act of 1990 (Pub. L. 101-336), as amended, Pub. Law 110-325 (2008), codified in scattered sections of USC.

²²¹ For example, racial segregation, and other tools of white supremacy. cite

²²² “all persons shall have the same rights . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of the laws. . . .”

²²³ 42 USC 1981, 1982 & 1983.

²²⁴ 29 U.S.C. §§ 621 – 634.

²²⁵ Americans with Disabilities Act of 1990 (Pub. L. 101-336), as amended, Pub. Law 110-325 (2008), codified in scattered sections of USC.

range of human endeavors and environments.

The Civil Rights Acts and the 14th Amendment essentially provide a formal equality approach which affords negative rights, while the Americans with Disabilities Act applies an accommodation approach and one which contemplates affirmative rights. For reasons sketched above, the formal equality approach is problematic from the perspective of people who deviate from the ideal person.²²⁶ This ideal person is able bodied, able-minded, and without dependents, and without a womb.²²⁷ 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 limits their choices in a liberal democracy.²²⁸ Thus, granting children equal rights to adults would be of little help in light of their vulnerability for much of their youth. Children's vulnerability during their early years all but defeats the notion of formal equality of traditional liberal rights—physical, moral and political autonomy. 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 might 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, but that is not much of a change from the current regime, which allows children some uptake in rights as they age; and certainly equal rights norms would increase those rights, they would provide limited relief.

Of course children's vulnerability and the natural facts of development present challenges to full participation and to the utility of negative rights that American constitutionalism has traditionally produced. These liberty rights, which prohibit state action that interferes with liberty or which treats similar situations dissimilarly based on irrelevant and 'natural' phenomenon factors, such as race, phenotype, gender, and advanced age, have less 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. Advances in human rights approaches and the structural and positive rights under the Americans with Disabilities Acts are instructive for children who are, for large parts of their youth, unable to affirmatively exercise negative rights, who are not similarly situated to most adults, and

²²⁶ See generally Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *Ethics* 250 (1989); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 *OXFORD J. LEGAL STUD.* 18 (1993); Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 *QUEEN'S L.J.* 179 (1993-1994).

²²⁷ See MACKINNON *supra* note 12

²²⁸ Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 *NEV. L.J.* 692, 702-703 (2006).

who are part of and share in, as a fundamental matter, the liberty interests of their parents.

The equal protection analysis illustrates how specific laws that restrict children's activities and choices account for their vulnerability, but also contribute to it. After a certain point, restrictive regulation of youth while accounting for the basic needs of children in a democratic republic enhances their vulnerability and exclusion without strong reason or benefits that flow directly to children. That is, these laws promote very basic protection of children but provide very few checks or benefits. This publically regulated private ordering that creates and maintains childhood in effect creates a lottery for children, ensuring inequality during childhood both because of the adult-child divide and because the privacy of childhood reproduces adult inequality.²²⁹ While aspects of this privacy are central to the liberal republic, the extent of the childhood's privacy is not entirely child-centered.

Moreover, the negative character of constitutional rights, and more specifically equal protection, are based on autonomous subjects who can exercise those rights. 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. In this way, an accommodation model is particularly helpful because it requires affirmative assistance to help children physically and cognitively self-determine.

Indeed, a formal equality model would simply make childhood a bit shorter and narrower. Because it is based on negative liberty (and the norm of adulthood that undergirds liberalism), it may not offer much more freedom to children. The liberal subject does not include or take into account the vulnerability of children (and the resulting vulnerability of adults). On the contrary, the formal liberal equality model is, perhaps, more illiberal than the accommodation model, not only because it inscribes the independent adult as the ideal citizen and constructs children as elements of adult freedom. 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.’”²³⁰ So, simply affording children equal status as adults would not be very empowering for very young children who could not care for themselves, do not have the

²²⁹ Appell, *supra* note [prepolitical child].

²³⁰ Gerard Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework*, in THERESIA DEGENER & YOLAN KOSTER-DREESE, HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 69, 76 (1995).

skills or wherewithal to earn a living, find shelter, feed themselves, exercise the franchise and would miss the opportunity to take more seriously the roles and obligations of democratic citizens. Children need a more responsive state, not freedom that they cannot experience.

Of course children's vulnerability and the natural facts of development present challenges to full participation and to the utility of negative rights that American constitutionalism has traditionally produced. These liberty rights, which prohibit state action that interferes with liberty or which treats similar situations dissimilarly based on irrelevant and 'natural' phenomenon factors, such as race, phenotype, gender, and advanced age, have less 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. Advances in human rights approaches and the structural and positive rights under the Americans with Disabilities Acts are instructive for children who are, for large parts of their youth, unable to affirmatively exercise negative rights, who are not similarly situated to most adults, and who are part of and share in, as a fundamental matter, the liberty interests of their parents.

C. Accommodating Children's Participation

Instead, I suggest that a more contemporary and, in the case of children, forward-looking approach would be an accommodation model. This strategy would both promote children's participation in their lives, their families and the polity, but also serve as a developmental model to ferry children to adulthood. Instead of the present harsh lottery of childhood²³¹ as a time of private seclusion, childhood could become a time of participation and inclusion. To aid in this analysis propose the Children's Participation Amendment (CPA), which draws on accommodation, rather than negative liberties and borrows loosely from the Americans with Disabilities Act²³² 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 participate in control of their own lives and the life of the polity. This metric requires more of the state and those who care for children to enable children

²³¹ LEE RAINWATER & TIMOTHY M. SMEEDING, *POOR KIDS IN A RICH COUNTRY* 22, 29 (2003).

²³² 42 U.S.C. §§ 1211 – 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").

to exercise basic human freedoms, such as their personal needs, their participation in the work force, the market, and the polity. The CPA provides:²³³

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.²³⁴ 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 work.²³⁵ This might achieve a result of lower counters and tables; elimination of sharp edges; rails for stairs, and 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 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

²³³ I suggest a constitutional amendment to work around the 14th Am. Sec. 5 limitations and to place this statute on par with existing constitutional rights, including the rights of parents.

²³⁴ 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.

²³⁵ These accommodations would be considered part of the public accommodation mandate if family did not survive the CPA.

not exceptional and it is not clear that the CPA would be any more intrusive. 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.²³⁶

In contrast a 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.²³⁷ This approach does not attempt to treat children like adults, but instead embraces and accounts for children's developmental status and resulting vulnerabilities (as disabilities), even as it facilitates children to participate more fully in their own lives and in the polity. The CPA would embrace 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 fundamental and 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 in so far as it will be affected morally, intellectually and politically. This scheme, by locating vulnerability in the family, retains important liberal freedoms for adults, does not choose sides in the moral and spiritual affiliation of children, but leaves them to develop their own priorities.

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 (automatically at the age of 18 unless earlier pursuant to a legal proceeding). These decisions include diet, clothing,

²³⁶ This amendment would likely supersede minimum age requirements for the offices of President, Senate and House. The amendment clearly overturns the 26th Amendment to the extent that amendment excludes people younger than 18 from the franchise.

²³⁷ ADAAA added "regarded as" being disabled. 42 U.S.C. §12102(1)(C).

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.²³⁸ Under current constitutional jurisprudence, this assignment and authority is constitutionally sanctioned, but CPA would call for revisiting at least some aspects of that liberty.

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 unable independently 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 major life activities. 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.

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.²³⁹ As noted above, current state and federal law afford parents a great deal of authority and responsibility regarding their children. It is not clear that the CPA would 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 even as parents and the state have more specific obligations to children.²⁴⁰ Children's vulnerability, as well as political notions of private value creation and parental autonomy, justifies their custodial placement with

²³⁸ 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)

²³⁹ See Appell, *Virtual Mothers*, *supra* note , at 689-690; William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 236-240 (1998).

²⁴⁰ See, Appell, *Virtual Mothers*, *supra* note , at 687-705 (describing the structure and multiple purposes of the parental rights doctrine).

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 children's needs (or children themselves when able), not their parents, would determine what accommodations children need, so there may be some erosion on parental rights when children need accommodation, for example if a child wanted to participate in sex without fear of disease or pregnancy, then she or he should be able to obtain birth control products even if the parents did not approve and without proving their own maturity. 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 more child-centered or child-friendly environment to enhance children's participation in family life and housework. CPA might require regulations 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, the CPA would accommodate dependency by making children more independent. 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, and choosing bedtime. 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 let children have as much authority as they can as soon as they can and to create an environment that makes children as independent and agential as possible.

Children may also have claims on the state to provide subsidies or other supports for caregivers to care for children. Otherwise, CPA would require the state directly to make accommodations for children to care for themselves, including direct subsidies to children and accessible accommodations.²⁴¹ 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

²⁴¹ could fit in Fran Olsen's private property observation here—need to revisit private property

needs relating to ability, rather than age or development. In any event, there would likely be a shortening of childhood and perhaps earlier and more intensive training and supports to help children reach independence in as many areas as soon as possible. Unlike the current approach, which for most purposes subrogates children's legal agency until they are 18 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 greatly 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 limits children's legal autonomy until 18 for most purposes. Even so, for the early years, parents have considerable opportunity to rear them, impart values, and model and promote habits of judgment that may or may not protect children from unwise decisions. Indeed, in light of current trends toward extending childhood,²⁴² this scheme may lengthen dependency.

2. Moral and Physical Autonomy

Closely related to family rights and boundaries are the questions of moral authority and physical autonomy. 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.²⁴³ Thus parents choose where children will live, what activities they can perform, their religion, their language, their medical care, their extracurricular activities, their schools, and sometimes even their friends. Arguably, the state has two compelling interests in this arrangement—its *parens patriae* 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.²⁴⁴ This interest is 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

²⁴² See Arnett *supra* note 118.

²⁴³ *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); *The License Cases*, 46 U.S. (5 How.) 504, 583 (1846) (describing the inherent power of the government to keep order and uphold the laws)

²⁴⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

learn basic skills to perform in these economies.²⁴⁵

Adults have a strong constitutionally protected freedom to rear their offspring in the parents' chosen value systems.²⁴⁶ This fundamental feature of our constitutional system animates current laws which permit parents to choose children's schools, religious activities, secular occupations, and health care provision. That is, parents have a liberty interest in rearing offspring in the parents' chosen value systems.²⁴⁷ Under current law, this interest is the right of the parent, a right which is not entirely mutual but in which the child shares.²⁴⁸ It is exercised by parents who decide whether they want to raise their children and, within state guidelines, how their children should be raised, 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.²⁴⁹ CPA would not necessarily change this power dynamic, but it would require engagement with the children so they can participate in these decisions and ultimately children could veto them as long as their health is not at risk. This may lead to the development of habits in deliberate thought for both adults and children (because "I told you so" would not be enough of a justification).

The CPA does not on its face limit parental authority over childrearing, *vis á vis* the state, nor does it explicitly afford to children sexual freedom or freedom of conscience, but it does afford children associational freedom and what could be construed as freedom of conscience. This suggests that children would have the freedom to make important and intimate decisions about their own lives on their own or with assistance of their caregivers when such accommodation or assistance is necessary. The CPA would place parents in a position of making accommodations to reduce or ameliorate children's limitations regarding moral and physical autonomy.

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

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See e.g., *Wisconsin v. Yoder*, 406 U.S. 205; *Prince v. Massachusetts*, 321 US 158; *Pierce v. Society of Sisters*, 268 U.S. 510 (each privileging private, often familial, transmission of cultural morals and values to children).

²⁴⁸ Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 Nev. L.J. 3, 702-703 (2006)

²⁴⁹ E.g. *In re E.G.*, 649 N.E.2d 322 (Ill. 1989) (child's right to refuse life-saving medical treatment after establishing she was mature enough to make the decision).

their intimate relations, hobbies, friends, civic associations, religious affiliations, sexuality, and other expressions or marker of identity; and to acquire certain skills like speaking, reading, writing, and walking. Before children develop these and other basic skills and disciplines, they are captive to and formed by their environments, particularly in the U.S. with its privatized wealth and need and great regional and class disparities.²⁵⁰ 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 of children, this might be too little. From the liberal state's perspective, assuming it seeks to maintain a liberal democracy, 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 malleable still.²⁵¹

For very young children, there would be a lack of mutual authority between children and parents, not merely as a privilege of adulthood, but also because 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. As children age and have higher-level wishes, desires and preferences they will push against others and particularly parents and teachers. It is in the context of this triangle of autonomy that children's equality and participation are particularly challenging in our constitutional system. It implicates parental authority and school authority, to the extent that the schools stand in the shoes of the parents.²⁵²

Children should be able to choose their friends, their religion, their school, and their values at the earliest possible moment. This freedom also suggests that they should be able to make as many determinations about their health, welfare, reproductive lives, and their families as soon as they

²⁵⁰ 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.

²⁵¹ child development in this context.

²⁵² *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654 (1995) (upholding suspicionless searches of school children because the "subjects of the policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.")

are able. In fact, it is possible that the CPA might require accommodations to help children make these decisions on their own, or to be able to make them earlier. These accommodations might include more ambitious education standards and goal that prepare children at the earliest time possible to make such decisions reflectively as early as possible.

Much as under the current regime, here 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); cultural practices; and rituals. Parents would choose schools (to the extent they have a choice), language, neighborhood, type of home, and family composition. Eventually, children could choose, but their choices would be heavily influenced by choices their parents made. That influence seems to be unavoidable and a positive aspect from the perspective of value pluralism.

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.²⁵³ For example, health coverage, strong early childhood supports, child-centered structures, poverty reduction, and social ordering around children's needs rather than the adults schedules.²⁵⁴

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 make a choice 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

²⁵³ Barbara Bennett Woodhouse, *A World Fit for Children is a World Fit for Everyone*, 46 HOUSTON L. REV. 817 (2009).

²⁵⁴ *Id.* (Woodhouse, *A World Fit for Children*) at 826.

opportunities that resulted, but tradeoffs are part of life.

3. Education

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 certain state criteria.²⁵⁵ Clearly, this infringes on children's liberty in several ways: they are required to attend school (without receiving any monetary compensation for their time and effort); their parents and perhaps the state²⁵⁶ determine which school they will attend, either by fiat (e.g., geographic location) or according to parental desires about how, what and where their children will learn.²⁵⁷ Moreover, children are subject to truancy laws if they do not attend school.²⁵⁸

Mandatory education is consistent with the CPA approach as an accommodation to help children perform major life functions independently and as soon as possible and to participate in the polity. Education would be more efficient and tailored to empower children and preparing them for citizenship as soon as possible. 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 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.²⁵⁹ 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, CPA might provide children with strong claim 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,²⁶⁰ education could be more efficient, perhaps shorter in

²⁵⁵ SAMUEL M. DAVIS, CHILDREN'S RIGHTS AND THE LAW 128-131(2011)

²⁵⁶ Wealthy parents will have more choices regarding schools. Those without the means to move or to send their children to a private school, will have little control over choice of their child's school.

²⁵⁷ This is a choice primarily for rich people who have more economic liberty 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.

²⁵⁸ *E.g.*, MO. REV. STAT. 167.031 (2011) (providing for compulsory attendance of children at school from 7 until 14 years of age).

²⁵⁹ *Vernonia School Dist. v. Acton*, 515 U.S. 646, 654 (1995)

²⁶⁰ See Aaron M. Pallas, *Meeting the basic educational needs of children and youth*, 32 CHILDREN & YOUTH SERVICES REV. 1199, 1199 (2010) (listing goals of public education

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 for choices regarding toward 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 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.²⁶¹

Present laws that curb student speech and liberties²⁶² 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 as well as serving to enhance their participation and related participation and leadership skills. A more democratic setting in which children part, rather than recipients of, the education process might refocus the mission on accommodating children rather than managing them or the curriculum to standards set by outside agencies.

Similarly, schools could establish incentives for children to remain in school and to achieve higher goals for knowledge and learning. Perhaps schools would be regulated based both on student achievement and on the assessment of the students themselves. 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 employee's and rules. Moreover, with the franchise, students 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

as preparation of youth for democracy and economic productivity).

²⁶¹ See also subsection 4 below ("Child Labor Laws").

²⁶² *Morse v. Frederick*, 551 U.S. 393 (2007).

or bonuses for attending school and achieving milestones may be pedagogically valuable as well as a useful incentive to forego other pursuits and stay in school.²⁶³

4. Child Labor Laws

The state limits children's participation in the labor market.²⁶⁴ 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.²⁶⁵

Even so, children are legally permitted to work outside and inside the home and in fact many children do.²⁶⁶ This regulation raises several issues. One is children's right to support themselves. In light of the limited state funding for children, restriction of children's paid labor, places them in a precarious position. Depending on the rationale for the prohibition on children's labor,²⁶⁷ various regulations may fall within the state's *parens patriae* or police powers.²⁶⁸

In light of the importance of education in a republican democracy, the

²⁶³ This may be particularly important for children who have to work to help support the family.

²⁶⁴ See, The Fair Labor Standards Act, 29 U.S.C. § 201(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 CFR §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 CFR §§570.33 (listing occupations that may be deemed "oppressive child labor").

²⁶⁵ See STEVEN MINTZ, *HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD* (2004), 258-59; HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 33-35 (2002) (noting that women and children fueled much of the early industrial workforce in the United States); Seymour Moskowitz, *Dickens Redux: How American Child Labor Law Became a Con Game*, 10 WHITTIER J. OF CHILD & FAMILY ADVOCACY 89 (2010) (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).

²⁶⁶ Seymour Moskowitz, *Dickens Redux*, *supra* note , at 92 (noting that the US "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.")

²⁶⁷ Although concerns regarding safety animated special regulation of children's labor, Congress's first unsuccessful fair competition related to the unfair competition of cheaper goods produced through child labor. *Hammer v. Dagenhart*, 247 U.S. 251, 273 (1918).

²⁶⁸ See sources cited at note 242 above.

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.

With regard to safety, the state could regulate through height or weight requirements for certain manual labor positions, the level of motor and learned skill required, and other safety measures as under the present regime. Perhaps hour restrictions and restrictions regarding the use of dangerous machinery for very young children without the physical and motor skills to manage the work safely also pass muster (*parens patriae*). The state also has an interest in educating its future citizens, so the state may have legitimate authority to regulate child labor insofar as it interferes with their development of other characteristics need for democratic citizenship. Mere paternalism or sentimentality regarding children and leisure directly contravenes the impetus toward participation.

Indeed, CPA would make child labor prohibitions suspect under its provisions favoring children's participation in the market. Even if mandatory education survived, prohibiting children from entering the labor market would offend CPA's right to work provision. Another way to treat children's labor, arguably consistent with both CPA's accommodation and right to work provisions, is to construct education as labor. 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, preferably monetary, 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 is unregulated and unpaid domestic labor assisting parents, other kin, and neighbors inside and outside the home. If children received salaries for their labor the children would have some measure of economic power and authority.²⁶⁹ 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, so it is possible that parents or other custodians would begin to charge even younger children for room and board if

²⁶⁹ 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).

domestic labor became wage work.

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, rather than paternalism or market concerns. Instead of grades, they 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 work places or occupations, with hazardous settings ameliorated for youth.

5. Youthful Offenders

Currently, children may be punished or monitored for behavior that would be perfectly lawful for adults.²⁷⁰ For example, children cannot smoke, are required to attend school, can be arrested for running away from home (what adults might call "leaving home," "breaking up," "separation," or "divorce"); and children are not allowed to have sex.²⁷¹ Under the present regime, children who do not submit to their youthful station receive therapeutic judicial interventions, rather than punitive ones. 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,²⁷² and their

²⁷⁰ 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; GA. CODE ANN. § 15-11-2 (2008).

²⁷¹ See generally Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 Buff. L. Rev. 703 (2000); Julie J. Kim, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 Wash. U. L. Rev. 843, 849 (2010); Ricardo Carvajal, David Clissold, Jeffrey Shapiro, *The Family Smoking Prevention and Tobacco Control Act: An Overview*, 64 Food & Drug L.J. 717 (2009).

²⁷² 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, 380-385 (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).

sentences may be longer than those adults would receive for the same offense.²⁷³

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 crimes²⁷⁴ and the state cannot reflexively sentence children to life without parole even for capital crimes.²⁷⁵ but children also may serve more time for offenses than adults would.²⁷⁶ Children also have lesser and fewer procedural rights.²⁷⁷ Thus, children have no right to bail²⁷⁸ 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,²⁷⁹ juvenile defendants do not have a right to a jury trial,²⁸⁰ and they do not enjoy the same protections against search and seizure as adults.²⁸¹ In school, they can be searched and drug tested without any individualized suspicion.²⁸²

This therapeutic and paternalistic regulation may be consistent with CPA's embrace of children's 'disabilities' and 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

²⁷³ 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).

²⁷⁴ *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁷⁵ *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012).

²⁷⁶ 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).

²⁷⁷ Children's procedural rights track adult criminal rights, but not as strongly and generally through the 14th Amendment's due process clause, rather than those in the Bill of Rights. *Breed v. Jones* (freedom from double jeopardy); *In re Gault* (right to confront witnesses; right against self-incrimination); right to attorney, *Winship* (1970) (right to proof beyond a reasonable doubt) Children do not have a right to bail (*Schall v. Martin*, 467 US 253 (1984); or a jury trial (*McKeiver v. Pennsylvania*, 403 US 528 (1971)).

²⁷⁸ *Schall v. Martin*, 467 US 253 (1984).

²⁷⁹ *In re Gault*, 387 U.S. 1 (1967).

²⁸⁰ *McKeiver v. Pennsylvania*, 403 US 528 (1971).

²⁸¹ *Stafford v. Redding*, 509 U.S. ___, 129 S. Ct. 2633 (2009); *Bd. of Ed. v. Earls*, 536 U.S. 822 (2002); *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995).

²⁸² *Vernonia School Dist. v. Acton*, 515 U.S. 646.

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 representation²⁸³ well into their teenage years.²⁸⁴ The law limits their exposure to sex and to sexual materials,²⁸⁵ outlaws sexual conduct,²⁸⁶ and limits their ability to sell their images for pornography,²⁸⁷ 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,²⁸⁸ and on adults who have sex with children.²⁸⁹ 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.²⁹⁰ Unlike grown women,²⁹¹ a state may require pregnant girls who do not want

²⁸³ *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).

²⁸⁴ Children and the law textbooks place consensual sex between teenagers in the "sexual abuse" chapters. *E.g.*, DOUGLAS E. ABRAMS AND SARAH H. RAMSEY, *CHILDREN AND THE LAW* 550 (2010).

²⁸⁵ *E.g.*, *United States v. American Library Association*, 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).

²⁸⁶ 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)

²⁸⁷ *See United States v. American Library Association*, 539 U.S. 194 (2003).

²⁸⁸ *E.g.*, *In re T.W.*, 685 N.E. 2d 631 (Ill. App. Ct. 1997) (holding both children were victims).

²⁸⁹ Kansas, for example, outlaws sexual intercourse with a child who is under 14. *Kan. Stat. Ann.* § 21-3502(a)(2); sexual intercourse with a child between 14 and 16. *KAN. STAT. ANN.* § 21-3503(a); voluntary sex between a child 14-16 years old and child under 18 years old. § 21-3504(a)(1); *id.* § 21-3522.

²⁹⁰ *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006).

²⁹¹ *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

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.²⁹² State child protection law may mandate that family planning service providers report the sexual partners of a child to child the welfare authorities.²⁹³ 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.²⁹⁴

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 CPA. Thus it may be reasonable to regulate adults indirectly, by forbidding them from taking advantage of vulnerable children. Regulating children would be harder to justify under CPA which eschews paternalism in favor of empowerment. If and when children are ready, they can (and do) engage in various sexual activities.²⁹⁵ Studies also indicate that children learn most about sex (and gender subordination) from internet and television, media to which they have ready access.²⁹⁶ 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, regulations of sex based on other concerns, such as stereotypes, paternalism, or moral approbation would be subject to heightened scrutiny.

In fact, part of accommodating children's life activities, might mandate 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

²⁹²Bellotti v. Baird, 443 U.S. 622 (1979); see also, Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 20 HOFSTRA L. REV. 589 (2002); Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & LAW 409 (2009).

²⁹³ See *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir.) (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).

²⁹⁴ Nicki Thorogood, *Sex Education as Disciplinary Technique: Policy and Practice I England and Wales*, 3(4) SEXUALITIES 425, 426, 429 (2000) ("sex 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.")

²⁹⁵ See supra, text and accompanying notes to.

²⁹⁶ Michelle J. Anderson, *Sex Education and Rape*, 17 MICH. J. GENDER & L. 83 (2010).

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.²⁹⁷ It 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, that 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 their youth.

On the contrary, banning sexual conduct for children may be construed as a infringing on a child's dignity and self-determination.²⁹⁸ The state may have both *parens patriae* and its police power authority to regulate sex between children, for public health purposes, and perhaps even criminalizing sex between adults and children, under *parens patriae* powers, but also to protect children from exploitation that can cause physical and psychic scars. The state would be interested in protecting young(er) children from exploitation by older children and especially 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 may claim to be interested in teaching "juveniles the difference between appropriate and inappropriate behavior with the hope of preventing their getting into the adult criminal system."²⁹⁹

The state's interest is in protecting children from harm or exploitation, and to protect their and the public's health. 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, is an appropriate use of police power and one that may be sufficiently tailored. Children who can understand sex and who can consent are in a different situation, but there may be some legitimacy in regulation regarding sexually transmitted diseases and reproduction. Many children are sexually active in

²⁹⁷ See Campbell, et al. *Child citizenship & agency as shaped by legal obligations*, SSRN

²⁹⁸ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁹⁹ *Scott E. v. State*, 931 P.2d 1370, 1375 (Nev. 1997).

their teens.³⁰⁰ Studies show that over 50 per cent 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.³⁰¹ 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, 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 understand 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, status offenses relating to sex and "sexting."³⁰²

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).³⁰³ Through these media, they also learn about sex, gender, and identity,³⁰⁴ 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.³⁰⁵

³⁰⁰ *Id.* (Michelle J. Anderson)

³⁰¹ *Id.* (Michelle J. Anderson) at 85-86.

³⁰² *See* *Miller v. Mitchell*, 598 F.3d 139 (3rd 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).

³⁰³ *Id.* (Michelle J. Anderson) at 95-96; *see also* Heidi L. Adams & Lela Rankin Williams, 33 *CHILDREN & YOUTH SERVICES REVIEW* 254 (2011).

³⁰⁴ Anderson, *supra* note .

³⁰⁵ *E.g.*, Adams & Williams, *supra* note , at 262; *see also*, Nicki Thorogood, *Sex Education as Disciplinary Technique: Policy and Practice In England and New South Wales*, 3 *SEXUALITIES* 425 (2010) (noting the sex education in England and New Zealand

There are also real concerns regarding exploitation, particularly of older people toward younger people. At the same time, this exploitation may well exist at the other end of the spectrum: younger people taking advantage of elderly people through sex. If the state is concerned about exploitation of vulnerable people through sex, then perhaps an age neutral method of regulating sexual exploitation would be for the state to ban sex between people who are more than fifteen years apart in age.

7. Political Participation

As a formal matter, people under the age of eighteen are constructed as without political agency. They do not have the franchise and generally do not hold public office, do not sit on juries, 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.³⁰⁶ It is possible, though hardly normative in the U.S. for them to be consulted or otherwise involved in governance, public works, or the design of the institutions that affect them most directly, such as schools, streets, homes, and neighborhoods.

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 Darryl 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."³⁰⁷ Voting is the most widespread form of political participation and 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 can physically exercise the franchise (say through age 5), or special literature for children to understand, form and express a preference.

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. There are no such limits on the adult franchise; nor need their choices be wise, informed or independent. Children who can communicate a preference, but cannot operate the poll (because they cannot

has been ineffective at preventing young pregnancies and aimed more at teaching sex and gender roles than teaching children about sexual wellbeing).

³⁰⁶ Member of the House of Representatives must be at least 21 years of age. U.S. Constitution, Art. I, §2, Cl. 2; U.S. Senators must be 30 years of age. *Id.* at §3, Cl. 3; the President must be 35 years old. *Id.*, Art. II, §1, cl. 4.

³⁰⁷ Darryl J. Levinson, *Rights & Votes*, 121 *YALE L. J.* 1286, 1343-44 (2012).

read) could receive assistance in casting a vote. 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, we may have the same concerns about adults, but we do not test them³⁰⁸. 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 dangerous³⁰⁹ to walk from their homes.

If immaturity were a bar to the franchise, then there would have to be some method to test it 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.³¹⁰ 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,³¹¹ but certainly we already have a system in which we do not require anything but age for the franchise,³¹² in a regime that permits anyone 18 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.³¹³

³⁰⁸ See *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (striking down voting qualification requirements); *State of S.C. v. Katzenbach*, 383 U.S. 301 (1966) (affirming 15th Amendment's mandate to strike down discriminatory franchise requirements).

³⁰⁹ In case they may be required to cross busy streets or pass dangerous gangs on their way to the polls.

³¹⁰ Schrag places children's ability to deliberate and provide justification at age of 10, Schrag (2004), *supra* note , 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 (2011) ("virtually all states require that children of a certain age consent to their own adoption, some as young as age ten, such as custody and adoption); 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 (age 10).

³¹¹ Indeed, political scientists may view the children's suffrage as dangerous. See e.g., Andrew Rehfeld, *The Child as Democratic Citizen* (viewing children's franchise as likely harmful).

³¹² Perhaps not having committed certain felonies that transform children into adults.

³¹³ E.g., Andrew Rehfeld, *The Child as Democratic Citizen*, ANNALS POLITICAL SCIENCE 141 (Jan. 2011)), Schrag, *Children and democracy*, *supra* note ; Stefan Olsson, *Children's Suffrage: A Critique of Voters' Knowledge for the Well-Being of Democracy*, 16 THE INTERNATIONAL J. CHILDREN'S RTS. 55-76 (2008); Paul E. Peterson, *An Immodest Proposal*, 121 DAEDALUS 151 (1992).

Particularly in the U.S. where voting tests and poll taxes are unconstitutional,³¹⁴ 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.³¹⁵ Others suggest an age limit³¹⁶ or that those who vote should have an understanding of "deliberative responsibility."³¹⁷

In addition, advocates for children's suffrage note that it would promote children's unique interests,³¹⁸ provide civic educational benefits for children, and children's parents would likely be involved in the helping the child with the franchise.³¹⁹ More importantly, democratic values militate toward exceedingly strong rationale for rationing the right to vote, but in the present context those rationale may not be present.³²⁰

On the one hand, 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. There are very few requirements for voting currently and no requirements that people are knowledgeable about the issues or candidates for whom they vote.³²¹ Adults (or older children) could assist very young children in the franchise. One could imagine an adult or older child bringing a child to the polls and into the polling booth. 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 that voters have independent views about candidates or issues. It is not clear though why or how that would be problematic. Indeed, as notions of political citizenship developed in the U.S., the movement has been generally 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 21 and then

³¹⁴ *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (striking down voting qualification requirements); *State of S.C. v. Katzenbach*, 383 U.S. 301 (1966).

³¹⁵ Paul Peterson would not have an age limit, in light of the disproportionate sway that older people have over the polity. Paul E. Peterson, *An Immodest Proposal*, 121 *DAEDALUS* 151 (1992).

³¹⁶ Rehfeld, *supra* note . Schrag would perhaps limit the franchise for "the very young, who have no understanding of what 'public deliberation is.'" Francis Schrag, *Children and democracy*, *supra* note , at 367.

³¹⁷ Schrag, *supra* note (2004-05) (citing Charles Beitz)

³¹⁸ Schrag, *supra* note , at 375; Peterson, *supra* note .

³¹⁹ Schrag suggests that perhaps parents could vote for children. *Children in democracy*, 374-75; *see also*, Olsson, *supra* note , at 70-72.

³²⁰ Olsson, *supra* note , at 61.

³²¹ It is not unheard of for spouses to vote as their spouse instructs or political party members to vote the party line or as their alderman instructs; parties provide slates to guide voters.

18).

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 through membership in legislative bodies, courts, and even as advisory groups in policy-making bodies. 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 to make such participation possible.

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. Children vulnerability is more predictable and widespread than adult vulnerability, which for most adults is mediated by maturity, experience, and capabilities. Still adults are also vulnerable and experience a wide range of power and vulnerability themselves, often as a result of caring for children.

V. 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 rights³²² or disability model, rather than the negative rights approach that has characterized sexual, gender, and racial liberty. This is not to say that the participation model would not be well suited to these other socio-legal categories, but that they are particularly ineffective for children. 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, locating 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.

³²² 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." UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS Art. 1 (1948)

Indeed, locating vulnerability outside of children may disclose vulnerability as more widely spread across the population and as part of the human condition.³²³ 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 I do not seek here to eradicate childhood, while the ideal subject is independent and invulnerable.³²⁴ Instead, this analysis illustrates that liberalism's equal rights model is not a feasible or particularly 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.³²⁵

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.³²⁶ 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 I and others have discussed elsewhere.³²⁷ For these reasons, I continue to imagine families as important social institutions for children. I also am also cautious about divining alternate methods for mediating dependency in a country with a

³²³ Fineman

³²⁴ cite ruddick or other feminist critics of liberalism.

³²⁵ 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.

³²⁶ note contingency of parentage

³²⁷ See Anne Dailey, *Liberalism's Ambivalence*, 28 QUINNIPIAC L. REV. 617 (2010); William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 236-40 (1998) (suggesting that family autonomy protects value pluralism, a central idea in political liberalism).

long and deep history of interfering with reproductive control and disregarding the value of family ties of poor people and people of color.³²⁸ 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.

³²⁸ 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, *Children's Rights*, *supra* note .