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One Child, One Vote: Proxies for Parents

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INTRODUCTION

Classic liberal theory sees each of us as individuals who may or may not happen to form shifting alliances with others to maximize our own best interests. If the public good exists,[1] it emerges from the aggregation of these individual interests. Children pose a challenge for this view because they depend on others to protect them. Young children can neither define their own best interests nor effectively bargain for them in the political arena. Hence, liberal political theory that rests on a social contract between equal, autonomous actors has a hard time accommodating the very idea of childhood.[2]

Children have few rights in a system in which rights derive from autonomy. Although rights can be classified in different ways, and different kinds of rights may have different sources,[3] legally enforceable claims arise only from legislatures and courts. In litigation, we have long been willing to allow parents or "next friends" to represent children;[4] however, children are excluded from the legislative process because only those capable of deciding issues for themselves can participate. Because political rights seem to depend on autonomy, children are barred from the political process of interest group bargaining that takes place in a democracy.

This exclusion from politics harms children, stigmatizing them as less than full members of the polity.[5] The harm is not

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1. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46-60 (2d ed. 1963) (arguing that it is impossible to determine the common good separate from individual preferences).

2. Several commentators have noted the failure of liberal theory to account for children. *See generally, e.g.*, Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983 (1993); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994); Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1; Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); Ferdinand Schoeman, *Childhood Competence and Autonomy*, 12 J. LEGAL STUD. 267 (1983); Neil S. Binder, Note, *Taking Relationships Seriously: Children, Autonomy, and the Right to a Relationship*, 69 N.Y.U. L. REV. 1150 (1994).

3. *See, e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) (classifying four kinds of interests and counter-interests: (1) right/duty; (2) privilege/no-right; (3) power/liability; and (4) immunity/disability).

4. *See* Fitzgerald, *supra* note 2, at 55.

5. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 94 (1989) ("Voting is the preeminent symbol of par-

merely ideological, however; it has practical effects as well. For example, fifty years ago it was the elderly who were poor and neglected. Congress effectively raised them out of poverty with a series of social welfare programs including Social Security and Medicare.[6] When the cost of such entitlements became an issue, the programs for the elderly emerged nearly unscathed while the less well-funded programs designed to help poor children were drastically reduced.[7]

Part of the problem is that children can't vote. Children cannot be fully valued members of the community who get a fair share of the pie unless they get a fair share of the political power. However, political power for children seems impossible so long as we assume that power requires autonomy and individual choice. The solution lies in an old political theory: REPRESENTATION. Few of us can directly participate in the political process. Individuals need not participate directly, however; others can represent their interests.

Currently, children are vastly underrepresented politically. Although they are counted for the purpose of determining the number of representatives and constitute twenty-six percent of an average congressional district,[8] they cannot vote, nor can anyone else vote on their behalf. In this sense, they share the plight of women before the adoption of the Nineteenth Amendment. Their numbers swell the political power of their communities, but that political power is not shared by them. Even if we assume that the parents who reside with them vote in their in-

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ticipation in the society as a respected member, and equality in the voting process is a crucial affirmation of the equal worth of citizens." (footnote omitted)); Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 4 (1987) (noting that the right to vote "confirms an individual person's membership" in the community); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1084-85 (1991) [hereinafter Guinier, *Tokenism*] (calling voting an "affirmation of self-worth and human dignity").

6. *See* Social Security Act, 42 U.S.C.A. § 301 (1994); Medicare Act, 42 U.S.C.A. § 1396 (1994); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, p. 473, tbl.734 (1996); Jonathan Barry Forman, *Reconsidering the Income Tax Treatment of the Elderly: It's Time for the Elderly To Pay Their Fair Share*, 56 U. PITT. L. REV. 589, 593-96 (1995).

7. *See* NATIONAL CENTER FOR CHILDREN IN POVERTY, ONE IN FOUR: AMERICA'S YOUNGEST POOR (1996); Lief Jensen et al., *Child Poverty and the Ameliorative Effects of Public Assistance*, 74 SOC. SCI. Q., 542, 545 (1993).

8. *See* U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS 1 (1992) [hereinafter POPULATION CHARACTERISTICS].

terest, children continue to be substantially underrepresented. Parents and the children who live with them comprise over two-thirds of the people within an average congressional district but control just over half the votes.[9] In contrast, adults not living with children comprise less than one-third of the people but control nearly half the votes.[10] Consequently, when the pie is divided, children are dramatically underrepresented in the political process. Children, as citizens and members of the polity, need the protection afforded by the right to vote even if they are not capable of exercising it directly.

PEOPLE IN A CONGRESSIONAL DISTRICT

Minor Children	148,841	Combined
Parents w/ Children	228,986	377,827
Other Adults	194,639	
Total	572,466	

VOTES IN A CONGRESSIONAL DISTRICT

228,986	Parents with Children
194,639	Other Adults
423,625	Total Votes
Parents and Children:	66% of the people 54% of the voters
Other Adults:	34% of the people 46% of the voters

Part I of this article critiques autonomy as a source of rights on two grounds: its failure to account for power differences and its emphasis on individual rather than communal rights and duties. Part II documents how the notion of autonomy historically has been used to reserve the right to vote for insiders, as seen particularly in the struggles of African-

9. *See id.* at 2, 49; U.S. CENSUS BUREAU, POPULATION BASE FOR APPORTIONMENT AND THE NUMBER OF REPRESENTATIVES APPORTIONED: 1790 TO 1990 tbl.B (last modified July 15, 1997) http://www.census.gov/population/www/censusdata/apportionment.html> [hereinafter APPORTIONMENT].

10. *See* POPULATION CHARACTERISTICS, *supra* note 8, at 2, 49; APPORTIONMENT, *supra* note 9, at tbl.B.

Americans, women, and the poor to secure the right to vote. Part III critiques two proposed methods of improving children's welfare, namely increased autonomy rights and substantive entitlement programs. It also discusses the impact of excluding children from politics. Finally, Part IV suggests a new theory of representation that could grant children indirect access to the political process.

I. AUTONOMY AS A SOURCE OF RIGHTS

One of the central problems of liberal democratic theory is that rights are derived from autonomy. For our purposes, autonomy may be defined as "people's capacity to decide for themselves some of the ways they will or will not enter into relationships with others."[11] Liberal philosophers were frustrated with the perceived injustices of monarchy, so they posited that legitimate government could arise only from the consent of the governed.[12] That consent was expressed in a social contract between autonomous equals. Autonomy was crucial to such a social contract in two distinct ways. First, the social contract presumed that individuals were free to leave if they were unwilling to surrender some of their liberty for the security government offered.[13] The "love it or leave it" philosophy assumed that individuals either could move their entire families with them, or that they would have no responsibilities to the families left behind. Thus, the individuals had to be both self-sufficient and unhindered by claims of family or community.[14] Second, individuals had to consent both to be governed and to participate in self-government.[15] Because those who entered the social contract were vested with certain rights and duties, only mature and rational individuals could be capable of giving informed consent. Therefore, in traditional liberal theory, rights were granted to

11. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990) [hereinafter NEDELSKY, PRIVATE PROPERTY].

12. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter LOCKE, TWO TREATISES]; THE FEDERALIST NOS. 1 (Alexander Hamilton), 2 (John Jay).

13. *See* LOCKE, TWO TREATISES, *supra* note 12, at 164-65.

14. A less literal reading of the social contract might see it as simply requiring citizens to accept as a quid pro quo that rights carry corresponding duties to the polity. Even in this theoretical sense, individuals had to be self-sufficient to be able to perform the duties demanded.

15. *See* LOCKE, TWO TREATISES, *supra* note 12, at 164-65.

individuals who possessed three key attributes: (1) they were self-sufficient; (2) they were individualistic; and (3) they were rational.

The liberal emphasis on autonomy has been critiqued from several different perspectives.[16] For the purpose of exploring how liberal theory affects children, two particular critiques emerge. First, a power-based critique attacks the failure of liberal theory to account for power differences. Second, a communitarian critique questions the emphasis on individual, as opposed to communal, rights and duties.

A. A POWER-BASED CRITIQUE

Ironically, liberal theory creates rights to protect the powerful but leaves few protections for the vulnerable. If only fully independent, rational individuals possess rights, those who can't make decisions for themselves have few rights. Consequently, children get fewer rights to protect their diminished capacity.[17]

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16. Realists have argued that autonomy fails to describe the actual condition of individuals. *See, e.g.*, James Boyle, *Is Subjectivity Possible? The Post Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 511-13 (1991); Fitzgerald, *supra* note 2, at 30; Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

Feminists have criticized liberal autonomy for failing to account for women's interests in relationships. *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 967 (1984); Minow, *supra* note 2, at 17; Frances E. Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497, 1505 (1983); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 582-84 (1986).

Finally, critical race theorists focus on the way liberal autonomy perpetuates racial inequality. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356-66 (1988); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2378 (1989); Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 79 (1993); *cf.* Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2134 (1989).

17. Although some constitutional rights have been extended to juveniles, *see, e.g., In re* Gault, 387 U.S. 1 (1967) (extending the right to notice, counsel, confrontation, cross-examination and the privilege against self-incrimination to juveniles), children generally have diminished rights. *See generally, e.g.*, H.L. v. Matheson, 450 U.S. 398 (1981) (upholding a parental notification requirement before adolescents can have an abortion); Parham v. J.R., 442 U.S. 584 (1979) (permitting children to be committed to mental institutions without the same procedural protections as adults); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (denying children accused of crimes the right to trial by

One of the founding fathers of liberalism, John Locke, recognized that children posed particular problems for liberal political philosophy.[18] In order to justify his view of liberty as inherent in the human condition, Locke argued that humans were born both free and rational;[19] however, Locke also wanted to preserve the nearly absolute dominion of parents over their children.[20] He therefore maintained that children were subject to parental control because they lacked the ability to reason that would develop with age. Liberty inhered in the human condition because of the inborn capacity to develop reason, but full liberty did not arise until reason was fully developed at adulthood. By expressly connecting liberty to rationality, Locke laid the foundation for limiting the rights of the most vulnerable citizens.[21]

Early liberals were aware of the problems faced by the relatively powerless. Both John Stuart Mill and James Madison recognized the danger inherent in the "tyranny of the majority"[22] and the control of powerful factions.[23] Perhaps because liberalism arose as a critique of monarchy,[24] however, thinkers like James Madison were primarily concerned with limiting govern-

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jury); Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (holding that "[t]he state's authority over children's activities is broader than over like actions of adults."); Moe v. Dinkins, 669 F.2d 67 (2d Cir. 1982) (per curiam) (denying the right to marry to adolescents). Similarly, contrast *Chandler v. Miller*, 65 U.S.L.W. 4243 (1997) (holding that candidates for state office could not be required to submit to drug testing), with *Vernonia School District v. Acton*, 115 S. Ct. 2386 (1995) (holding that junior high student athletes could be required to submit to drug testing).

18. *See* LOCKE, TWO TREATISES, *supra* note 12, at 34-45.

19. *See id.*

20. *See id.*

21. When rights are based on autonomy, any group labeled as incapable receives diminished rights. *See generally* Martha Minow, *Interpreting Rights: An Essay For Robert Cover*, 96 YALE L.J. 1860, 1868-71 (1987) (describing diminished rights for children); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1174-80 (noting that an individualistic approach to family law has tended to subordinate wives and children); Boris Feldman, Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1645-47 (1979) (noting widespread disenfranchisement of mentally disabled persons).

22. JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 89 (A.D. Lindsey ed., Dutton 1951) (1859) (describing "tyranny of the majority" as a "social tyranny" that "enslav[es] the soul").

23. *See* THE FEDERALIST NO. 10 (James Madison) (denouncing the destructive power of factions).

24. *See* LOCKE, TWO TREATISES, *supra* note 12, at 164-65 (criticizing the foundation of Sir Robert Filmer's absolute monarchy argument by rejecting the notion that "men are not naturally free" and favoring governance by the "consent of men").

ment power. Although Madison worried about private factions seizing control of government for selfish purposes, he did not create rights to balance power among individuals in the private sector.[25] As a result, government was not structured to protect the relatively powerless.[26] Instead, rights were designed to protect people from the government, not from other individuals or groups.[27] Although the reconstruction amendments later tried to balance power and equalize the protection provided by government, these amendments have not been construed to create affirmative rights that the government must protect.[28] In essence, liberalism assumes that limiting government power enables in-

25. *See* THE FEDERALIST NO. 51 (James Madison). Feminists criticize the dichotomy between the private sector and the public sector, noting that it has been used to excuse the subordination of women. *See generally, e.g.*, June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267 (1996); Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED 93-99 (1987); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319 (1993); Olsen, *supra* note 16, at 1501-07.

26. *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 154 (Forrest McDonald ed., Free Press 1986) (1913) (suggesting that the constitution constructed the government so as "to break the force of majority rule and prevent invasions of the property rights of minorities"); NEDELSKY, PRIVATE PROPERTY, *supra* note 11, at 1 (arguing that the government was designed to protect elites and their private property); Richard Hofstadter, *The Founding Fathers: An Age of Realism*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 62-63 (Robert H. Horwitz ed., 3d ed. 1986) (arguing that the framers were an upper-class elite who tried to provide some limited voice for the masses); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1061-62 (1996) (arguing that the constitution created a republican form of government to favor rule by elites, but that there was a limited form of equality also incorporated into the structure of government).

27. *See* THE FEDERALIST NO. 10 (James Madison) (arguing that factions are most dangerous when they comprise the majority and are able to use government power to oppress the minority).

28. *See, e.g.*, DeShaney v. Winnebago County Dept. of Social Serv., 489 U.S. 189 (1989). *But see* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 177 (1951) ("The equal protection of the laws is thus a command for the full or ample protection of the laws. It is basically an affirmative command to supply the protection of the laws."); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2344-47 (1990) (arguing that the constitution should be read to create affirmative rights of protection); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886-90 (1986) (comparing our Constitution with Germany's to suggest that our courts, like theirs, can find positive constitutional rights).

dividuals to fight out their differences among themselves.[29] That approach ignores power imbalances and consequently abandons those who are less capable of fighting for themselves.

Children, who lack both autonomy and power, are the losers in this version of liberalism. As a class, children range from infants who are completely dependent on others to seventeen-year-olds who are on the verge of maturity. Throughout this range, children lack legal autonomy to make their own decisions. Although a few exceptions are emerging for mature minors making health care decisions[30] and children who are tried as adults for some crimes,[31] the general rule is that minors may not contract and are not held responsible for their actions on the same terms as adults.[32] Indeed, there are sound arguments for treating children and adolescents differently from adults.[33] At some ages children arguably lack the cognitive capacity to reason,[34] the emotional maturity to exercise sound judgment,[35] the experience necessary to weigh likely consequences,[36] and the bargaining

29. *See* THE FEDERALIST NO. 10 (James Madison) (suggesting that a multiplicity of factions will guard against any particular one seizing control).

30. *See* Michelle Oberman, *Minor Rights and Wrongs*, 24 J.L. MED. & ETHICS 127, 131 (1996) [hereinafter Oberman, *Minor Rights*] (critiquing the mature minor doctrine as applied to health care decisions).

31. *See, e.g.*, 705 ILL. COMP. STAT. 405/5-4 (1995).

32. *See, e.g.*, DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 105-106 (2d ed. 1997).

33. *See* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1607 (1992).

34. *See, e.g.*, Jean Piaget, *Intellectual Evolution from Adolescence to Adulthood*, 15 HUMAN DEV. 1, 9-10 (1972) (discussing evidence that some skills do not develop until between the ages of 15-20, and then may be attributable to specialized training). *See generally* BÄRBEL INHELDER & JEAN PIAGET, THE EARLY GROWTH OF LOGIC IN THE CHILD (1964) [hereinafter PIAGET, LOGIC]; JEAN PIAGET, THE ORIGINS OF INTELLIGENCE IN CHILDREN (1952).

35. "[A]dolescents are in an odd position of appearing as adults but not having the developmental maturity to cope with adultlike expectations." Maryse Richards & Anne C. Petersen, *Biological Theoretical Models of Adolescent Behavior*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 48 (Vincent B. Van Hasselt & Michel Hersen eds., 1987). This difference rests on actual brain development. The prefrontal lobe of the brain does not develop fully mature electrophysiological activity until early adulthood. This portion of the brain is believed to control the "executive function" that enables individuals to "have adequate perspective in order to plan successfully and to anticipate the outcome of one's behavior." Sidney J. Segalowitz et al., *Cleverness and Wisdom in 12-Year-Olds: Electrophysiological Evidence for Late Maturation of the Frontal Lobe*, 8 NEUROPSYCHOLOGY 279 (1992).

36. *See* Ann Palmeri, *Childhood's End: Toward the Liberation of Children*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND

power to protect themselves from overreaching adults. Even seventeen-year-olds on the cusp of maturity lack the bargaining power of adults, in part because of legal restrictions on their capacity, and in part because of a lack of financial opportunities. Teens routinely are limited in their capacity to hold jobs and suffer from unemployment at levels nearly three times that of adults.[37] Because children and adolescents lack financial resources, their choices are quite limited. Both descriptively and legally children of all ages lack meaningful autonomy.

Without autonomy, they acquire few rights. Consequently, children have no right to exercise political power to protect their interests. Children and adolescents are completely disenfranchised. Although it is difficult to measure how much disenfranchisement costs them, statistics support the hypothesis that children do not fare well in society. Children comprise the largest segment of our poor citizens;[38] over one-fifth of them were living in poverty in 1994.[39] Unfortunately, the very youngest are the worst off: over twenty-five percent of children under age six were poor in 1994.[40] The declining welfare of children in the United States has been well documented.[41] Whatever increases in autonomy our children have gained, their welfare has not improved. With the passage of welfare reform, many experts pre-

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STATE POWER 105, 114-17 (William Aiken & Hugh LaFollette eds., 1980); Richards & Petersen, *supra* note 35, at 48 ("Young people experience pressure to behave the way adults do—in both the healthy and unhealthy ways—but usually lack the experience that facilitates the development of healthy, mature behavior.").

37. In 1995, teens experienced a 17.3% unemployment rate compared to a national average for 5.6% for individuals over the age of twenty. *See* STAFF OF HOUSE COMM. ON WAYS AND MEANS, 104TH CONG., 2ND SESS., 1996 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS 1164 tbl.F-3 (Comm. Print 1996) [hereinafter GREEN BOOK].

38. *See id.* at 1223 tbl.H-1.

39. *See id.*

40. *See id.* at 1218 tbl.G-36.

41. For an analysis of the variety of ways in which the welfare of children is declining, see Jane Maslow Cohen, *Competitive and Cooperative Dependencies: The Case for Children*, 81 VA. L. REV. 2217, 2231-35 (1995). *See generally* W. NORTON GRUBB & MARVIN LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN (Univ. of Chicago Press 1988) (1982); SYLVIA ANN HEWLETT, WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN (1991); VIVIAN A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985); Victor R. Fuchs & Diane M. Reklis, *America's Children: Economic Perspectives and Policy Options*, 255 SCIENCE 41 (1992).

dict that the welfare of the nation's poorest children will decline even further.[42]

Although few would dispute the declining welfare of children, some might be skeptical as to the causes. For instance, the growing impoverishment of children might be explained by the increasing numbers of children living in single-parent households. In 1994, 47.2% of the children living in female-headed households lived in poverty.[43] However, it is legislatures that decide how to respond to such social conditions. Whatever the cause of child poverty, the legislatures have not leapt to the protection of children. At one point in our history, the elderly were vastly overrepresented in the poor population. The response of the New Deal and the Great Society was to pass Social Security and Medicare legislation to decrease the number of aged poor.[44] Faced with a comparable crisis for children, Congress has responded with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which *decreases* support to the poorest members of society: children dependent on single parents, typically mothers.[45]

Why is there such a disparity in how legislatures treat the elderly and children? One explanation recurs: the elderly vote in disproportionately high numbers and comprise one of the nation's largest and most powerful lobbying groups.[46] In contrast, chil-

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42. *See, e.g.*, Testimony of David T. Ellwood before the Senate Finance Committee Regarding Welfare Reform; *Edelman Decries President's Betrayal of Promise "Not to Hurt Children"; Calls Spurious Welfare Legislation a Moral Blot on Nation*, PR NEWSWIRE, July 31, 1996, *available in* LEXIS, News Library, Curnws File (noting Marian Wright Edelman's prediction that welfare reform would "make more than one million additional children poor"). In 1997, only half of the parents who left the welfare rolls were able to find jobs. *See* Jason DeParle, *Welfare Reform Nets Real Change: Big Drop in Caseloads Reported*, N.Y. TIMES, *reprinted in* DENV. POST, Jan. 14, 1998, at A-21.

43. GREEN BOOK, *supra* note 37, at 1223.

44. *See* Social Security Act, 42 U.S.C. § 301 (1994); Medicare Act, 42 U.S.C. § 1396 (1994); *see also* H.R. REP. NO. 615 (1935), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY 145, 146-7 (Robert B. Stevens ed., 1970) (acknowledging the economic predicament of the elderly and proposing an old age pension plan, with federal matching funds); S.R. REP. NO. 1513 (1964), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES, *supra*, at 711 (noting that older people need insurance protection against the "crushing burden of hospital costs" and calling for federally subsidized medical expenses).

45. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601 (1996).

46. *See* Lynne M. Casper, *Projections of the Voting-Age Population for*

dren cannot vote and are incapable of organizing themselves into an effective lobby.[47]

B. A COMMUNITARIAN CRITIQUE

Communitarians criticize liberal theory for focusing on individuals.[48] Liberal political theory inaccurately sees people as isolated individuals without connections to other groups like families and religious organizations. Concentrating on individual rights places both the individual and the community at risk. Individuals are harmed in two ways. First, the failure to impose duties on the community fails to protect the vulnerable. Second, the community is not held accountable for its role in shaping individuals.

Individuals, especially children, are endangered by a theory that presumes they are completely self-sufficient. Children then have no right to demand any support from the community. For example, the Supreme Court has refused to recognize a right for children to be educated,[49] to be fed or sheltered,[50] or to be protected from violence and abuse.[51]

States: November 1994, in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 453 (1994); *Voting and Registration in the Election of November 1990, in supra* (1994) (reporting that approximately 60% of the elderly vote); Albert B. Crenshaw, *Assessing the Political Power of Seniors: Although Still Strong, the Elderly and Their Groups Are Increasingly on the Defensive*, WASH. POST, April 29, 1992, at R4 (noting that the American Association of Retired People had a membership of 33 million and annual revenues of $300 million in 1992).

47. For a discussion of the relationship between elderly voting power and children, see, for example, Cohen, *supra* note 41, at 2243-45; Paul E. Peterson, *An Immodest Proposal*, 121 DAEDALUS 151, 170 (1992).

48. For a fuller discussion of communitarian critiques of liberal doctrine, see generally AMATAI ETZIONI, THE SPIRIT OF COMMUNITY: THE REINVENTION OF AMERICAN SOCIETY (1993); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 142-63 (Robert N. Bellah et al. eds., 1985); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162, 163 (1990). For a more specific communitarian critique in the context of families, see Hafen, *supra* note 2; Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 59-60 (1992) (suggesting that many rights can be exercised only in the context of the family).

49. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (holding that there is no fundamental right to education). Although the Court has held that states cannot exclude the children of undocumented aliens from public schools, that decision rests on antidiscriminatory principles rather than a substantive right to education. *See* Plyler v. Doe, 457 U.S. 202 (1982).

50. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972) (rejecting a claim to

Parents are supposed to supply these essentials. Rights theoretically carry corresponding duties, and the right to procreate justifies the duty to support one's children. However, the strong emphasis on individual freedom encourages individuals to advance their own personal interests and to minimize, if not discard, their duties. The difficulty in collecting child support payments illustrates the point. Students in my family law class often suggest that it should be considered unconstitutional to impose a duty to support a child if the father has requested an abortion. Their reasoning follows traditional liberal contractarian lines: no duties may be imposed without consent; a father who wanted the fetus aborted did not consent to the birth; hence, no duty to pay child support should arise. Some students even go so far as to argue that enforcing child support amounts to involuntary servitude under the Thirteenth Amendment. Although courts have resisted these arguments, the students' reasoning is consistent with liberal theory that views rights and duties as arising from consensual contracts.

The classic liberal response is to shift the consent phase of the contract back one step to the point of conception. By consenting to sex, men agree to abide by the duty to support any children that may result. Although this approach may impose an individual duty on parents to support their own children, it fails to provide much of a safety net for impoverished children. Those who acquire the duty to support children do not necessarily have the financial capacity to do so. Children have no right to be fed, educated, or nurtured; rather, individual parents have duties. If those parents are unable to perform their duties, children have no claims against the community. Thus, individual rights and duties fail to protect vulnerable children. Only more communal responsibility for children will assure that all children's needs will be met.

Concentrating on individual rights also assumes far greater autonomy than actually exists. Individuals, especially children, are shaped and influenced by others, but only individuals are accountable for the resulting behavior.[52] Children are endangered

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shelter as a fundamental interest); Dandridge v. Williams, 397 U.S. 471, 483 (1970) (holding that it was constitutional to limit the amount of welfare received by poor families regardless of family size).

51. *See* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 201 (1989) (holding that children did not have a fundamental right to have the state protect them from life-threatening child abuse, even when the state had knowledge of the threat).

52. *See* SANDEL, *supra* note 48, at 175-83 (arguing that real people are

when the community escapes responsibility for its role in molding children's behavior. The result is a peculiar kind of scapegoating where we punish children without changing the structures that induced them to misbehave. Gangs illustrate the point. One of my students described how her eight-year-old nephew had been intimidated with physical threats to pressure him to join a gang. When the child's parents complained to the police, they were told that the child should simply refuse to join the gang. That response left the child both unprotected from violent assault and distrustful of the police. Children are often pressured to join a gang for self-protection from other gangs, for social interaction, and by blackmail.[53] Once in a gang, escape is difficult, if not impossible, until the child grows old enough to move away. Consider the case of "Yummy" Sandifer.[54] At the age of eleven, Yummy killed a girl in a muffed gang shooting. In retaliation, the gang executed Yummy. Trapped in a gang culture, this child had few options. The state's response was to prosecute the youths who shot Yummy. Each of these children, however, was both a victim and a perpetrator of the gang culture.[55] Holding them individually liable for their actions without dismantling the social structure that contributed to their behavior is ineffective. We, as a community, have a duty to protect our children from gang recruitment. The focus on individual rights and responsibilities fails to hold the relevant groups accountable for their roles in shaping the lives of these children.

The community as a whole suffers from this intense focus on individual rights as well. Two related harms occur. First, when

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necessarily constrained by the formative influences of family and religion).

53. For an explanation of why children join gangs for protection and why they subsequently commit crimes out of a sense of obligation and a fear of painful or fatal chastisement, see generally David S. Rutkowski, Note, *A Coercion Defense for the Street Gang Criminal: Plugging the Moral Gap in Existing Law*, 10 NOTRE DAME L.J. ETHICS & PUB. POL'Y 137, 142-165 (1996). *See also* Frank E. Harper, *To Kill the Messenger: The Deflection of Responsibility Through Scapegoating (A Socio-Legal Analysis of Parental Responsibility Laws and the Urban Gang Family)*, 8 HARV. BLACKLETTER J. 41, 50 (1991) (explaining that youths join gangs for protection).

54. For a description of this case, see James Hill, *2nd Brother Gets Prison Term For Murder of Sandifer*, CHI. TRIB., Apr. 23, 1997, (Metro), at 1; George Papajohn, *Robert: Executed At 11; A Sad Life; 'Sick' Child Saw Life As 'Servin' Time'*, CHI. TRIB., Sept. 2, 1994, at 1; Maurice Possley, *Slain Boy's Troubled Life Revealed in Scars*, CHI. TRIB., Oct. 31, 1996, (Metro), at 1.

55. *See* Dan M. Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349, 357 (1997) (discussing gangs and peer influence on the decision to commit crimes); *see also* Harper, *supra* note 53, at 50; Rutkowski, *supra* note 53, at 155-65.

individuals seek their own personal benefit at the expense of others, the common good may be diminished. Second, concentrating on individuals creates a discourse of rights that tends to skew priorities. Interests that get labeled "rights" tend to be privileged over competing interests. The debate over funding public education illustrates both communal harms. As a nation, we all benefit from a well-educated populace both to sustain an educated electorate, and to support the economy. The more people who are capable of holding self-sustaining employment, the better off we all are.[56] Accordingly, the best strategy would seem to be investing in widespread, high-quality education for all children. However, individuals have a competitive edge if they can acquire a better education than their peers. This focus on individual gain, as opposed to the common good, has induced most states to fund public schools not with equitable grants from general state revenues, but with local property taxes that disproportionately benefit wealthy students and penalize the poor.[57]

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56. Arguably elites might benefit from having a marginally employable class to keep wage costs down, creating what Marx would call "the reserve army of the unemployed." Indeed, the now outdated Phillips curve predicted that low unemployment creates inflation. *See, e.g.*, A.W. Phillips, *The Relation Between Unemployment and the Rate of Change of Money Wage Rates in the United Kingdom, 1861-1957*, 25 ECONOMICA 283 (1958). Both the experience of high inflation coupled with high unemployment in the 1970s, and the current experience with low inflation and low unemployment have caused economists to rethink the Phillips curve. *See* MILTON FRIEDMAN, UNEMPLOYMENT VERSUS INFLATION? AN EVALUATION OF THE PHILLIPS CURVE (1975); James K. Galbraith, *The Surrender of Economic Policy*, AM. PROSPECT, Mar.-Apr. 1996, at 60-67. Even if we accept that some unemployment is inevitable in a modern economy, however, there are strong reasons why the unemployed should also be well educated. First it would be preferable to rotate the unemployed rather keeping a permanent underclass. In order to step into the market, the unemployed need to be educated. Second, the unemployed, just like those who work, need to be well educated to be good political citizens.

57. *See* NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEP'T OF EDUC., 1996 DIGEST OF EDUCATION STATISTICS 151 (1996) (showing that local funds accounted for 47.8% of public schools' funds for the 1993-94 school year); *id.* at 152 (revealing that the range in states' reliance on local funds for schools is .8% in Hawaii to 86.2% in New Hampshire); David Dormont, *Separate and Unequal: School District Financing*, 11 LAW & INEQ. J. 261, 271-72 (1992) (stating that 90% of all local funding for schools comes from property taxes). The variation between districts can be substantial. For example, in Illinois the average amount of money spent per student per year ranged from $2,617 in one district to $14,525 in another. *See* Rick Pearson, *Court Takes Pass on School Funding*, CHI. TRIB., October 19, 1996, § 1, at 1. Although some state courts have invalidated such differences on state constitutional grounds, at least nineteen states have rejected such challenges. *See* David J.

The Supreme Court rejected a challenge to this system, noting that there was no fundamental right to an education.[58] In the absence of such a right, the states were free to privilege wealthier students at the expense of both the community and the poorer students. Thus, the focus on individual rights harms the community by devaluing the common good and creating an inflexible hierarchy of rights.

Although the liberal emphasis on individual rights has harmed children both individually and communally, communitarian solutions that vest more power in the family or the state may also put children at risk. When communities are given more power to seek the common good, they may be tempted to sacrifice their least powerful members to do so. The classic example from literature is Agamemnon's sacrifice of his daughter, Iphigenia, to the gods in order change the weather so his fleet could sail to fight the Trojans.[59] All too often, it is children who are sacrificed for the interests of adults who can vote. Furthermore, communities differ over what constitutes the common good and what constitutes sacrifice. Consider, for example, the case of secondary education for Amish children. Although the Amish community may be better off educating its children in the traditional ways of agriculture and religion, the larger polity may be better off educating as many children as possible to compete in a global technological market. The next Amish child may be the next Einstein. As the Amish example suggests, even if we give preference to the common good, we must decide which community is to be benefited. Most of us are members of multiple communities that have differing goals and perspectives.

Sheikh, *Public School Finance Reform: Is Illinois "Playing Hooky"?*, 41 DEPAUL L. REV. 195 (1991).

58. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

59. *See* Euripides, *Iphigenia in Tauris*, *in* THREE PLAYS: HIPPOLYTUS, ALCESTIS 73-119 (Philip Vellacott trans., Penguin Books 1953). Indeed, daughter sacrifice is a common theme across cultures. The Bible tells the story of Jeptha's daughter who, like Iphigenia, is sacrificed to win a battle. In that story we are not even told her name, only that she is a virgin. *See Judges* 11:29-40. Similarly, several ancient religious cultures sacrificed virginal young women. *See* John Noble Wilford, *New Analysis of the Parthenon's Frieze Finds It Depicts a Horrifying Legend*, N.Y. TIMES, July 4, 1995, § 1, at 11. Occasionally, the human sacrifice is a son, as in the story of Abraham and Isaac. *See Genesis* 22:1-19. There, however, God relents and spares the boy. Powerful adult males are almost never sacrificed except as soldiers in battle. *See id.* at 22:20. Even then, the long tradition has been to use young men and boys. *See* Wilford, *supra*, at 11.

Merely pursuing the common good does not help us prioritize the needs of children.

Some communitarians take the criticism even further and question the entire value of rights.[60] They argue that because rights create vested interests, rights all too often represent the end of discourse about how competing claims should be handled. Hence, there should be no rights, merely an ongoing negotiation among members of the community.[61]

The problem with this view is that it ignores power imbalances just as much as classic liberal theory does. When individuals or groups are relatively powerless within their communities, they are unlikely to be heard in the ongoing discourse. For them, only rights entitle them to be heard and to have a fair share of influence. Their rights must be enforceable against more powerful individuals or groups that would shut them out. The right to vote is a classic example. It entitles the otherwise disenfrachised to engage in the discussion. The less power a segment of the population has, the more it needs rights or entitlements to protect it from the larger group.

Children need to be considered both as individuals and as members of various communities in order to meet their needs. Voting is the mechanism for resolving competing needs in a democracy. That tool is not available to children.

II. PRESERVING THE RIGHT TO VOTE FOR INSIDERS BY FOCUSING ON THE INCAPACITY OF OUTSIDERS

Nevertheless, it seems to make sense to limit the right to vote to those who are capable of exercising it. In fact, Locke was quite specific in tracing liberty to the ability to reason.[62] Unfortunately, this emphasis on capacity to vote has a long and sordid history as a pretext for subordinating unpopular groups. The worst taint arose in the context of slavery; enslaved blacks and free African-Americans had to be characterized as intellectually inferior to justify denying them liberties, including the right to vote. In order to enforce this image of ignorance, African-

60. *See generally, e.g.*, ETZIONI, *supra* note 48, at 4-11 (suggesting a moratorium on creating new rights and imposing duties without corresponding rights); GLENDON, *supra* note 48; HABITS OF THE HEART, *supra* note 48; Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 27 (1992).

61. *See, e.g.*, GLENDON, *supra* note 48, at 182.

62. *See* LOCKE, TWO TREATISES, *supra* note 12, at 129.

Americans were often legally barred from receiving an education.

Prior to the Civil War, most states directly prohibited blacks from voting.[63] Excluding slaves and former slaves from the vote complicated the system of representation, however. The federal government was faced with the question whether individuals who couldn't vote should be counted to determine the number of representatives a state had in Congress. Abolitionists and the free states did not want to increase the power of the slave states by counting African-Americans. Southern states wanted to count all residents. The compromise was to count each non-voter as three-fifths of a person.[64] Ironically, the effort to diminish southern power resulted in further subordination of African-Americans. An enslaved African-American was legally labeled not only as incapable of voting, but also as less than a full person. Further, the compromise had more than merely symbolic value. Because the slave states were permitted to partially count the enslaved, these states received more political power in Congress. Framing the right to vote in terms of capacity encouraged slave states to brand African-Americans as inferior and then rewarded these states with additional political power for doing so.

The most blatant attempt to enforce the stereotype of incapacity was a series of statutes that prohibited teaching blacks to read.[65] Even when schools were finally opened to African-Americans, they seldom were adequately funded or able to provide an education equivalent to that offered to white students.[66] Literacy tests then supplanted direct prohibition as a means of restricting access to the ballot;[67] often these were administered

63. Only Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont permitted African-Americans to vote on the same terms as whites. *See* Oregon v. Mitchell, 400 U.S. 112, 156 (1970). In New York blacks, unlike whites, were permitted to vote only if they owned property. *See id.*

64. U.S. CONST. art. I, § 2.

65. *See, e.g.*, 1823 Miss. Laws, ch. XI, at 62-63; 1847 Mo. Laws, §§ 1-2, at 103-04.

66. *See* Sweatt v. Painter, 339 U.S. 629, 632-33 (1950) (describing differences between African-American and white law schools in Texas and holding that petitioner could not be excluded from the white University of Texas Law School on the basis of race). *See generally* Robin D. Barnes, *Black America and School Choice: Charting A New Course*, 106 YALE L.J. 2375 (1997).

67. *See* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 8-9 (1992) (describing how southern states used literacy tests and discretionary application of them to exclude minority voters); FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON'T VOTE (1988) (suggesting that literacy tests, poll taxes, and limits on registra-

unfairly to ensure that African-Americans could not pass.[68] Consequently, slaves and former slaves were labeled intellectually inferior, and the label was then legally enforced. Disenfranchisement was a tool to keep African-Americans subordinated, so even after the passage of the Fifteenth Amendment, attempts were made to keep blacks from voting. Those who vote are full and equal members of the community, and excluding individuals from political participation is a powerful tool to stigmatize them.[69]

Stigmatizing groups is a common part of subordinating them, but even positive stereotypes can be damaging. Sometimes groups are simultaneously stigmatized and idealized.[70] For example, women in the nineteenth century were characterized as morally inferior,[71] emotional,[72] irrational, delicate,[73] pas-

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tion were designed to exclude African-Americans from the ballot); *see also* Gaston County v. United States, 395 U.S. 285 (1969) (holding that North Carolina's attempt to resurrect the use of literacy tests as a voter qualification was used as a mechanism to deny or abridge the right of African-Americans to vote, given the dual school system and the inferior education that North Carolina provided to African-Americans); Guinn v. United States, 238 U.S. 347 (1915) (striking down Oklahoma's "grandfather clause" that applied literacy tests only to those whose ancestors were citizens and allowed to vote in 1866).

68. *See Literacy Tests and Voter Requirements in Federal and State Elections: Hearings on S. 480, S. 2750 and S. 2979 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 87th Cong. 672 (1962) (1959 Report by U.S. Commission on Civil Rights: Proposal for a Constitutional Amendment to Establish Universal Suffrage) ("In its investigations, hearings, and studies the Commission has seen that complex voter qualification laws, including tests of literacy, education, and 'interpretation,' have been used and may readily be used arbitrarily to deny the right to vote to citizens of the United States.").

69. For example, Burke noted that Catholics were really only "half citizens" so long as they were denied suffrage. BURKE'S POLITICS: SELECTED WRITINGS AND SPEECHES OF EDMUND BURKE ON REFORM, REVOLUTION, AND WAR 509 (Ross J.S. Hoffman & Paul Levack eds., 1959); *see also* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 27 (1991) ("Without the right [to vote] one was less than a citizen."); James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893 (1997) (arguing that a full vote is a measure of full citizenship).

70. For example, Chinese and Japanese immigrants were stereotyped both positively and negatively in ways that contributed to subordination. *See generally, e.g.*, Sumi K. Cho, Model Minority Mythology and Affirmative Action—Supreme Stereotypes of Asian Americans (Aug. 21, 1997) (unpublished manuscript, on file with author); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997); Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U.L. REV. 811 (1996).

71. For example, Rousseau argued that women were morally inferior, in-

sive,[74] simple-minded, weak,[75] timid,[76] and child-like,[77] and these stereotypes reinforced the opposition to suffrage.[78] Even those who placed women on a pedestal did so to create a separate private sphere outside of politics: women were simply too sweet, naive, and sentimental to vote. Participating in politics would corrupt them, the argument went. Thus women were denied the vote both because they were deemed inferior to men, and because they occupied a special role in the home. However, the generalizations about women as pure, kind, honest, and noble allowed

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capable of controlling their sexual desires and, therefore, a threat to political society, which must be conducted solely by men, outside the influence of women who would weaken them. *See* JEAN-JACQUES ROUSSEAU, EMILE OR ON EDUCATION 360 (1979); *see also* HORACE BUSHNELL, WOMEN'S SUFFRAGE: REFORM AGAINST NATURE 142 (Zenger Pub. Co. 1978) (1869) (arguing that women should not be granted suffrage because "women often show a strange facility of debasement and moral abandonment.... Men go down by a descent... women, by a precipitation.").

72. *See* BUSHNELL, *supra* note 71, at 139-40 (referring to women as excitable, excessive, and uncontrollable and discussing how overheated they would be if they were granted the vote).

73. *See* JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 61 (1991) (quoting a letter John Adams wrote to a friend on May 26, 1776, noting that women were too delicate for experience in business and politics and that they needed to devote their attention to their children); BUSHNELL, *supra* note 71, at 138, 167.

74. *See* HOFF, *supra* note 73, at 101 (quoting an article in the October 18, 1802 edition of the *True American* suggesting that women merely voted as their male relatives suggested, giving disproportionate political power to men with female relatives); *see also* BUSHNELL, *supra* note 71, at 21 (suggesting that women lack authority).

75. *See* Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 486 (1997) (quoting the statements made by John R. Cooke at the Virginia Constitutional Convention of 1829-30).

76. *See id.*

77. Several commentators have documented the tendency to characterize women as childlike, both in legal and social contexts. *See, e.g.*, Catharine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and* Gender, 2 CARDOZO WOMEN'S L.J. 109, 112 (1994); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 813-14 (1990); Sarah A. DeCosse, *Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment*, 10 L. & INEQ. J. 285, 305 (1992); Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue*, 1990 DUKE L.J. 321, 363.

78. *See* SARA HUNTER GRAHAM, WOMAN SUFFRAGE AND THE NEW DEMOCRACY 21 (1996) (describing antisuffragists who depicted women as "undependable, impulsive, and easily corruptible"). *See generally* BUSHNELL, *supra* note 71 (arguing that women should not vote because it was against their nature); Cogan, *supra* note 75, at 486-90 (documenting the way women's role in the separate family sphere was used to defeat woman suffrage in the nineteenth century).

suffragettes to argue that women would clean up the sordid world of politics.[79] Eventually these positive stereotypes enabled women to prevail, and the vote, which had been formally extended to African-American men in 1870,[80] was extended to women in 1920.[81]

This piecemeal approach to suffrage illustrates an irony of our democracy: we have never established a right to vote for all.[82] Historically, we have conferred the right to vote on a select group, purposely excluding others.[83] Although a few of the colonies initially permitted all males to vote, by the time of the Revolutionary war, most colonies limited the vote to property-owning white males.[84] There were two rationales for the property requirement: (1) only property holders were independent enough to resist corruption; and (2) only property holders had a sufficient stake in the polity to wield their votes responsibly. Women were precluded from voting because their property was owned either by their fathers or their husbands; however, no explanation was offered why adult unmarried women who owned property could not vote. Gradually, states began elimi-

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79. *See* AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920, at 42-74 (1965).

80. U.S. CONST. amend. XV, § 1.

81. U.S. CONST. amend. XIX.

82. "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population . . . . But there is no constitutional right to vote, as such. . . . If there were such a right, both the Fifteenth Amendment and the Nineteenth Amendment would have been wholly unnecessary." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring).

83. *See, e.g.*, Condon v. Reno, 913 F. Supp. 946, 963 (D.S.C. 1995) (describing the history of excluding outsiders from the vote). For particular explanations of how the denial of suffrage operated to subordinate women, see generally Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103 (1994); Louisa S. Ruffine, *Civil Rights and Suffrage: Myra Bradwell's Struggle for the Equal Citizenship for Women*, 4 HASTINGS WOMEN'S L.J. 175 (1993); Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175 (1993).

84. *See* J. Morgan Kousser, *Suffrage*, *in* 3 ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 1236, 1237 (Jack P. Green ed., 1984) ("Pennsylvania in 1776 and New Hampshire in 1782 went furthest, substituting a taxpaying for a property qualification. Adult males could satisfy the requirement by paying a fixed-amount poll or capitation (head) tax. Notorious in the twentieth century as a southern suffrage restriction, the poll tax was initially a liberalizing provision."); *see also* Cogan, *supra* note 75, at 473, 476.

nating the property requirement in the first half of the nineteenth century.[85] Nevertheless, those who occupied lower status, such as people of color and women, continued to be disenfranchised.

Originally, the women's rights and abolitionist movements were united in seeking rights for both women and African-Americans.[86] However, these groups were easily divided on sexist and racist lines once the Republicans drafted the Fifteenth Amendment to guarantee the vote for black men, but not women.[87] Instead of standing together, some suffragette leaders made racist arguments that women were more capable of voting than former slaves and formed alliances with racist Democratic party leaders who had supported slavery.[88] Although some black leaders like George Downing made sexist claims, others like Frederick Douglass supported women's suffrage, and wanted to maintain the coalition between blacks and women.[89] The Republicans who drafted the Fourteenth and Fifteenth Amendments were less concerned with the rights of either blacks or women than with manipulating the voting rules to assure a Republican majority.[90]

Incremental change was both easier to accomplish and less threatening, so each small expansion of the franchise was limited to the particular group that had garnered sufficient political and moral support to be included. This narrow focus on particular groups required the same general principle to be reestablished for each outsider group and fostered infighting among the varying groups of outsiders.[91] This infighting is particularly harmful

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85. Cogan, *supra* note 75, at 477-81.

86. The abolitionist and women's rights movements shared an agenda from 1848 until the schism over the Fifteenth Amendment in 1869. *See* BETTINA APTHEKER, WOMAN'S LEGACY: ESSAYS ON RACE, SEX, AND CLASS IN AMERICAN HISTORY 11 (1982).

87. *See id.* at 13 (noting that "unity was effectively broken by the combined impact of racism in the women's movement, racist and male supremacist practices in the abolitionist ranks, and the machinations of Republican politicians").

88. *See id.* at 45. Particularly troubling was their alliance with George Francis Train, a racist populist that helped them in the Kansas campaign for suffrage. *See id.* at 43-44; *see also* ANGELA Y. DAVIS, WOMEN, RACE & CLASS 81-82 (1981).

89. *See* DAVIS, *supra* note 88, at 77-86.

90. *See* APTHEKER, *supra* note 86, at 43-44; DAVIS, *supra* note 88, at 74-75.

91. *See, e.g.*, Lind, *supra* note 83, at 166 ("[If suffragists] had to choose between votes for Black men and votes for women, [they] would choose the

for those caught in the intersection among groups. For example, when the debate about the Fifteenth Amendment was cast as a conflict between the right of African-American men to vote and the right of women to vote, African-American women were placed in an untenable position. Since they were both African-American and female, this false dichotomy pressured them to choose between parts of their identity.[92]

The struggle for enfranchisement was full of racist and sexist images partly because the vote was assumed to rest on notions of capacity. If incapacity justifies disenfranchisement, then those who are politically opposed to expanding the franchise for selfish political reasons have an incentive to define outsiders as incapable. This focus on capacity obscures more important reasons for granting the franchise. Outsider groups need the vote in order to protect themselves from powerful insiders who use government power to subordinate them. Thus Frederick Douglass argued that the plight of blacks was so dire that they had to get the vote in order to survive the violent rampages and economic re-creation of slavery by another name.[93] That overwhelming need justified an incremental approach to the franchise if necessary. In essence, Douglass recognized that the vote is a mechanism to balance power.

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latter."); Jules Lobel, *Losers, Fools & Prophets: Justice As Struggle*, 80 CORNELL L. REV. 1331, 1364-65 (1995) ("[M]ost of the prominent pre-war abolitionists plac[ed] women's rights on the back burner to avoid complicating and possibly derailing the right for black suffrage."); Elizabeth Cady Stanton, *Gerrit Smith on Petitions*, *in* ELIZABETH CADY STANTON, SUSAN B. ANTHONY: CORRESPONDENCE, WRITINGS, SPEECHES 119-24 (Ellen Carol DuBois ed., 1981) (protesting the refusal to extend suffrage to women in the reconstruction amendments with racist language and examples).

92. For a discussion of the problems these false dichotomies cause various groups, and women of color in particular, see ELIZABETH V. SPELLMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 179 (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 121 (1989); Celina Romany, *Ain't I a Feminist?*, 4 YALE J.L. & FEMINISM 23, 24 (1991). *See also* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 64-74 (1984) (describing the different choices African-American women made when confronted with franchise amendments that seemed to pit black males against females); Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 261 (1996) (explaining that African-American women were left out of both the Civil Rights and Suffrage movements of the nineteenth century); Lind, *supra* note 83, at 160-166, 176 (describing the conflict between abolitionists and suffragists).

93. *See* DAVIS, *supra* note 88, at 82-86.

It took a civil war and two constitutional amendments, however, to extend the vote to former slaves. Even then, the Fifteenth Amendment formally enfranchised African-American males, but purposely excluded women.[94] Rather than creating universal suffrage, the Fifteenth Amendment prohibited race discrimination in voting. The Nineteenth Amendment mimicked the Fifteenth Amendment language when it extended the vote to women, prohibiting discrimination on the basis of sex.[95] The Twenty-Sixth Amendment repeated this language when it guaranteed the vote for eighteen year-olds.[96] None of the amendments created a fundamental right for all to vote.

Universal suffrage is essential if citizens are to recognize the government as legitimate.[97] Otherwise, the government is an oligarchy—a government without representation and consent of the governed. Instead of establishing the broad principle of universal suffrage, the various franchising amendments operated as piecemeal efforts to appease the demands of particular subsets of the outsider population. No universal franchise emerged because different constituencies disagreed about how to define the capacity to vote. Varied results were assured once the Constitutional Convention compromised by adopting varied state standards for voting.[98]

Ostensibly the Guarantee Clause is the best vehicle with which to raise the issue of universal suffrage.[99] Article IV of the Constitution guarantees "to every State in the Union a Republican form of government."[100] Explaining this clause, James Madison defined a republican form of government as "[one] which derives all its powers directly or indirectly from the great body of

94. U.S. CONST. amend. XV, § 1; *see also* Lind, *supra* note 83, at 153-65 (giving a detailed account of the Republican power struggle during Reconstruction and why it motivated the legislature to extend the franchise to African-American men but not to women); *id.* at 165-66 (describing how the insertion of the word "male" into the Fifteenth Amendment caused suffragists to oppose its passage).

95. U.S. CONST. amend. XIX.

96. U.S. CONST. amend. XXVI, § 1.

97. *See* JOHN STUART MILL, *supra* note 22, at 350.

98. U.S. CONST. art. I, § 2, cl. 1.

99. Although the Guarantee Clause applies only to the states and not the federal government, changes in voter qualifications at the state level also change the qualifications in federal elections because the constitution provides for the federal government to use state criteria. *See* U.S. CONST. art. I, § 2.

100. U.S. CONST. art. IV, § 4.

the people . . . ."[101] Republics gain their legitimacy from inclusiveness: "It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it . . . ."[102] Without universal suffrage, some individuals are unrepresented and therefore are denied a truly republican form of government. For example, children are neither proportionally represented nor allowed to vote, so arguably they do not have a representative government.

Early challenges to malapportionment argued that disproportionate representation violated the Guarantee Clause.[103] Unfortunately, the Supreme Court rejected such claims as nonjusticiable political questions.[104] Although a number of scholars have called for a more active role for the Guarantee Clause,[105] and Justice O'Connor has hinted that it might be appropriate in some cases,[106] so far the Court has used the Guarantee Clause only to sustain challenged state actions.[107] When the Court finally recognized that voters had a right to complain about dispropor-

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101. THE FEDERALIST No. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

102. *Id.*

103. *See generally* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding the Guarantee Clause to raise a nonjusticiable political question when it challenged the legitimacy of a government not elected according to the state constitution); South v. Peters, 339 U.S. 276 (1950) (per curiam) (rejecting a Guarantee Clause claim for redistricting as a political question); Colegrove v. Green, 328 U.S. 549 (1946) (rejecting the Guarantee Clause claim as a political question when it challenged the apportionment of congressional districts in Illinois).

104. *See Luther*, 48 U.S. at 39; *Colgrove*, 328 U.S. at 552; *South*, 339 U.S. at 277.

105. *See* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 299 n.74 ("[T]he Court would have been better off in *Baker* to hold that malapportionment was justiciable under the guaranty clause . . . rather than under the equal protection clause."); *see also* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849 (1994) (arguing that the Court should hear cases under the Guarantee Clause); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (arguing that the Guarantee Clause should be used to protect states' rights).

106. *See* New York v. United States, 505 U.S. 144, 184-85 (1992).

107. *See generally, e.g.*, Forsyth v. Hammond, 166 U.S. 506 (1897) (holding that a federal court did not have the power to review a state court decision validating annexation proceedings); Foster v. Kansas *ex rel* Johnston, 112 U.S. 201 (1884) (holding constitutional a state statute regulating the removal of individuals from office).

tionate representation, it relied on the Equal Protection Clause rather than the Guarantee Clause.[108]

Equal protection doctrine requires that those excluded from the vote must show first that the exclusion was purposeful, and then that it was not justified.[109] Hence, the outsiders must demonstrate that they are sufficiently like the insiders who can vote. To the extent that the outsiders actually are different from the current voters, they are caught in a bind. Because outsiders are different, the current voters are unlikely to represent outsider interests, but outsiders lack the "requirements" for the franchise. Equal protection cannot protect children because they are not identical to adults.

Children are denied the vote because they are considered irrational, emotional, inexperienced, immature, and uneducated.[110] All of those critiques assume that the vote is merely a measure of capacity for political autonomy. If, however, the vote is a mechanism to balance power to assure that outsider interests are included in the political negotiations, then children need the vote.

Lack of political power both reflects and magnifies societal subordination. As the Supreme Court has noted, "To the extent that a citizen's right to vote is debased, he is that much less a citizen."[111] The disenfranchised are stigmatized at the same time they are excluded from political discourse. Children are harmed when their interests are not adequately represented in legisla-

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108. *See, e.g.*, Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1996) (striking down a districting plan because race was the predominant factor); Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995) (requiring plaintiffs to prove race is the predominant factor in the drawing of district lines); Shaw v. Reno, 509 U.S. 630, 642 (1993) (remanding the case to determine whether bizarre shape of voting district suggested racial gerrymandering); Reynolds v. Sims, 377 U.S. 533, 561 (1964) (holding Alabama apportionment scheme violated Equal Protection Clause); Baker v. Carr, 369 U.S. 186, 226 (1962) (holding that whether a state apportionment scheme violated the Equal Protection Clause presented a justicable question).

109. *See* Rogers v. Lodge, 458 U.S. 613, 617 (1982) (requiring proof of express intent to dilute minority votes because equal protection claims require proof of "discriminatory intent"); City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion) (requiring proof of invidious racially discriminatory purpose to invalidate a multimember district).

110. The closest analogy may be to the mentally disabled. Some states permit mentally challenged individuals to vote and at least one commentator has argued that they are entitled to vote. *See generally* Feldman, *supra* note 21.

111. Reynolds v. Sims, 377 U.S. 533, 567 (1964).

tures. Once again, incapacity effectively has rendered them second-class citizens.

III. CHILDREN'S RIGHTS

Children have diminished rights because they lack autonomy, but without autonomy they need more rights to protect them. So far, there are at least two strategies to resolve this dilemma. First, we could increase the autonomy of minors by creating children's rights. For several years now, scholars have been debating the nature and extent of children's rights.[112] Second, we could create a system of substantive entitlements for children. For example, the United Nations Convention for the Rights of the Child suggests guarantees of housing, nourishment, and education.[113]

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112. *See, e.g.*, Sharon Bishop, *Children, Autonomy and the Right to Self Determination, in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 154 (William Aiken & Hugh LaFollette eds. 1980) [hereinafter WHOSE CHILD?] (arguing that parental power to control children is limited in that it must be used to foster future autonomy of child); *see also* LAURA M. PURDY, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN (1992) (evaluating arguments that children should have equal rights); COLIN A. WRINGE, CHILDREN'S RIGHTS: A PHILOSOPHICAL STUDY (1981) (distinguishing between various kinds of children's rights, including autonomy rights and rights of protection); Fitzgerald, *supra* note 2 (arguing for a substantive right both to financial support and protection from abuse); Bruce C. Hafen & Jonathon O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L. L.J. 449 (1996) (criticizing autonomy rights for children); John Holt, *Liberate Children, in* WHOSE CHILD?, *supra*, at 84 (arguing that children should have the opportunity to have all rights and duties available to adults); Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367, 395-98 (proposing children's right to state provided child support); Sharon Elizabeth Rush, *The Warren and Burger Courts on State, Parent, and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology*, 36 HASTINGS L.J. 461, 501 (1985) (arguing for children to have the same constitutional rights as adults unless "demonstrable evidence exists to justify treating the child differently."); Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321 (1996) (critiquing the overuse of rights to protect children's interests); Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 21 (1994) (arguing for positive rights for children that are defined by children's needs).

113. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 24, 27, 28, U.N. Doc. A/44/49 (1989) [hereinafter Convention]. For a description of the convention, see THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO "TRAVAUX PREPARATOIRES" 10-11 (Sharon Detrick ed., 1992); IMPLEMENTING THE

A. GREATER AUTONOMY FOR CHILDREN

One approach to assisting children has been to expand the definition of autonomy to allow mature children to make more decisions for themselves. For example, reproductive rights give adolescents more control over their sexual lives. Increased autonomy for adolescents is a mixed bag, however.[114] First, standards of maturity are hard to establish for a population that varies dramatically between exercising considered judgment and rebellious risk-taking. As a result, we tend to define adolescents who agree with societal norms as "mature," and those who disagree as "immature."[115] One example of this arbitrary labeling is that almost all girls who ask for court-approved abortions are deemed mature,[116] while many children who ask to discontinue life-saving treatment are considered immature.[117] Part of the problem is that adolescents often are capable of abstract thinking, but lack emotional control.[118] Their lack of impulse control and perspective, coupled with their heightened susceptibility to peer pressure, often makes them bad decisionmakers.[119] It is nearly impossible to determine which adolescents are good decision makers at which times because no clear standard of maturity exists.

Second, even when adolescents are mature enough to make sensible decisions, they are unlikely to have resources that en-

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CONVENTION ON THE RIGHTS OF THE CHILD: RESOURCE MOBILIZATION IN LOW-INCOME COUNTRIES 109, 145 (James R. Himes ed., 1995).

114. Indeed, recent research on statutory rape suggests that sexual autonomy paints too rosy a picture of adolescent sex. *See* Oberman, *Minor Rights, supra* note 30.

115. *Cf. id.* at 46-53.

116. *See id.* at 51-52; Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 87 (1995).

117. *Cf.* Oberman, *Minor Rights*, *supra* note 30, at 53 n.217.

118. *See* Fred Danner, *Cognitive Development in Adolescence*, *in* THE ADOLESCENT AS DECISION-MAKER: APPLICATIONS TO DEVELOPMENT AND EDUCATION 51, 56 (Judith Worrell & Fred Danner eds., 1989) (noting that Piaget's view that adolescents are able to generate hypotheses, reflect on themselves, and apply logic is inconsistent with adolescents' chaotic emotional and social lives).

119. *See* Patricia H. Miller, *Theories of Adolescent Development*, *in* THE ADOLESCENT AS DECISION-MAKER: APPLICATIONS TO DEVELOPMENT AND EDUCATION 13, 35-36 (Judith Worrell & Fred Danner eds., 1989) (noting that because adolescents are egocentric, strongly influenced by peers, and believe they are indestructible, they "believe that they will not become pregnant even if birth control devices are not used or believe that they can drink and drive without having an accident.").

able them to bargain for fair results. Although studies show that some teens can exercise sound judgment,[120] they rarely have the ability to protect themselves when dealing with more powerful adults or groups. Currently, we permit children to have rights only in a limited privatized setting where children are seen as strong enough to assert their own adversarial rights against others.[121]

Third, autonomy rights often carry corresponding duties that adolescents are ill-equipped to fulfill. For example, teens who buy cars may not be able to make the payments without compromising their school performance.[122] Similarly, even mature teen parents rarely have the resources to support themselves and their offspring. Ironically, the children's *rights*

120. Although Piaget originally posited that children reached the most advanced stage of abstract thinking, called the stage of formal operations, at around age fourteen, *see* PIAGET, LOGIC, *supra* note 34, at 291, subsequent studies have suggested that most children "show relative lack of certain decision making skills" including the ability to imagine "risks and future consequences," "recognize the need for independent professional opinions," and understanding conflicts of interest. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, HOW OLD IS OLD ENOUGH? THE AGES OF RIGHTS AND RESPONSIBILITIES 28-29 (1989) [hereinafter HOW OLD?]; *see also* Duane F. Alwin, *Aging, Personality, and Social Change: The Stability of Individual Differences Over the Adult Life Span*, *in* LIFE-SPAN DEVELOPMENT AND BEHAVIOR 135, 161 (David L. Featherman et al. eds., 1994) (noting studies show a high degree of stability in intelligence scores even before early adolescence); Alan S. Kaufman & Jim Flaitz, *Intellectual Growth*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 205, 214 (Vincent B. Van Hasselt & Michel Hersen eds., 1987) (describing Piaget's theory of the most advanced stage of intellectual development, the formal operations period, as beginning between the age of eleven and fifteen and noting that even adults do not "evidence the skills and insights characteristic of this stage of development").

121. *Cf.* Rodriguez v. Reading Hous. Auth., 8 F.3d 961 (3rd Cir. 1993) (holding that a minor cannot apply for public housing unless the minor is emancipated). The very idea of emancipation is problematic. One study suggested that most of the children who were emancipated chose that option at the urging of an adult such as a parent, step-parent, parole officer, or police officer. After emancipation, many children could not be found at all. Of those who could be located, most had dropped out of high school, were unemployed, and had no stable place of residence. Hence, children have the "right" to be impoverished and homeless. *See* Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239 (1992). For further critiques of emancipation, see generally Gregory A. Loken, *"Throwaway" Children and Throwaway Parenthood*, 68 TEMP. L. REV. 1715 (1995); Chadwick N. Gardner, Note, *Don't Come Cryin' to Daddy! Emancipation of Minors: When Is a Parent 'Free at Last' from the Obligation of Child Support?*, 33 U. LOUISVILLE J. FAM. L. 927 (1995).

122. *See* Betsy White, *A Teacher Says No to Teenagers' Jobs*, CHI. TRIB., July 18, 1989, at C1.

movement may have been more successful at creating children's *responsibilities*.[123]

Historically, granting the vote to a younger population meant redefining that group as adults for most purposes. Thus when the voting age was lowered to eighteen, eighteen-year-olds were deemed to be adults who no longer needed parental support and were bound by their contracts. However, calling eighteen-year-olds adults did not mean that they no longer needed funding for college education, render them more employable, or give them greater bargaining power. Accordingly, they carried adult responsibilities without adult resources.

Whatever the value of increasing autonomy for teens, it is not a solution for pre-adolescent children.[124] Although we may quibble about the age at which we draw the line, at some point children are simply too young to have developed either the judgment or the requisite bargaining power to rely solely on their autonomous decisions about their welfare. As a result, the literature suggesting a political role for children characterizes itself as "facetious" or a "thought experiment."[125] After all, few of us are, or ever have been, fully autonomous actors. Both as children and as adults, our choices always are constrained because we all live in a world populated by others. As Kathryn Abrams

123. The most dramatic increase in juvenile responsibilities has been the widespread practice of treating children as if they were adults in criminal settings. *See* Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.L.-C.R. L. REV. 507, 515 (1995) (documenting that more juveniles are being tried as adult criminals). For a discussion of this phenomenon see, for example, Kent v. United States, 383 U.S. 541, 566-67 (1966) (listing the determinative factors to be considered when deciding whether to transfer juveniles to adult court); George Bundy Smith & Gloria M. Dabiri, *The Judicial Role in the Treatment of Juvenile Delinquents*, 3 J.L. & POL'Y 347, 364-65 (1995) (noting the "get tough" public sentiment toward delinquency and a series of "get-tough" approaches to the treatment of young offenders); Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1256 (1996) (supporting a discretionary transfer approach that makes adult criminal discipline a last resort for juvenile offenders). At least one scholar has suggested that teens should not be executed because they are too young to vote. *See* Timothy P. O'Neill, *Is It OK to Execute Murderers Too Young to Vote?*, CHI. TRIB., Dec. 8, 1987, § 1, at 16.

124. Most of the developmental literature seems to indicate that cognitive decisionmaking skills are not fully developed until some time in adolescence, usually around age fourteen. *See* HOW OLD?, *supra* note 120, at 28-29.

125. *See* Peterson, *supra* note 47, at 156.

suggests, we can exercise only partial autonomy.[126] The younger we are, the less autonomy we possess.

B. SUBSTANTIVE ENTITLEMENTS FOR CHILDREN

If children lack the autonomy necessary for rights, then perhaps we should find a different source for the rights children require to protect their interests. Barbara Woodhouse has suggested that rights should be based on needs.[127] She uses as her model the United Nations Convention on the Rights of the Child that creates substantive entitlements to items like nourishment and education.[128] One advantage of this model is that it addresses the communitarian critique by requiring signatory states to assure minimal levels of welfare for children,[129] which squarely places some responsibility for children on the larger community.

Although laudable, that approach fails to account for at least four problems. First, need is not self-defining. One person's definition of need is another's definition of luxury. The politically powerful may be tempted to label the needs of others as mere luxuries. Accordingly, it is hard to gauge the extent or the limits of rights that are derived solely from needs. Second, all nations have limited resources, and a general right to nourishment or education fails to provide a method for prioritizing competing needs. Third, substantive entitlements not only fail to prioritize among needs, but they also fail to allocate the burdens of payment among the various groups that might be obligated. The duty to provide necessary food or education could be allocated to parents, local communities, religious organizations, or the state. Fourth, a generalized substantive entitlement is almost impossible to enforce. The entitlements do not bind nations to

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126. For a discussion of the idea of partial autonomy, see Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 346-48 (1995).

127. *See* Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 420 (1996).

128. *See* Convention, *supra* note 113, at art. 24, § 2 ("States . . . shall pursue full implementation of this right [to the highest attainable standard of health] and, in particular, shall take appropriate measures: . . . To combat disease and malnutrition . . . through the provision of adequate nutritious foods and clean drinking-water . . . ."); art. 28, § 1 ("States . . . recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: . . . Make primary education compulsory and available free to all . . . .").

129. *See id.*

commit any of their resources to children, so no viable enforcement mechanisms exist.

C. THE VALUE OF THE VOTE FOR CHILDREN

Vesting children with either autonomy rights or substantive entitlements would not give them the power they need for political interest group bargaining. Legislatures would remain free to restrict or eliminate those rights and entitlements. The franchise, on the other hand, would give voters the power to: (1) define which members of the community count; (2) assure that individuals and groups get an equal share of a representative's attention and services; (3) enable individuals to band together to negotiate for their collective interests; and (4) enable individuals to influence public policy. When children are denied access to the political system, they are stigmatized as non-entities:

> 'No living creature can be recognized as one of the people, if that living creature has not rational faculties by which it can either consent or refuse to become the subject of government.' If '[o]xen and horses cannot give their consent to government . . . neither can madmen, idiots, or immature children give their consent; and therefore, it follows, on account of this natural incapacity, that none of these can be recognized as people.'[130]

Before children can be taken seriously, they need to be counted as valuable members of the political community. We call such members voters.

Voters also garner more of a representative's time and attention. Various issues compete for the attention of politicians, and politicians are most responsive to input that could affect their political future. Although the most influential voices are unfortunately those that are best funded, politicians also respond to large quantities of votes. Children need to be counted in the vote in some way both to get their issues on the agenda, and to have their perspectives on those issues heard.

Of course, the most effective lobbying groups are those that are well-organized. That is a problem for children given their lack of resources and, depending on their age, lack of organizing abilities. Strong lobbies are not always organized by their individual constituents, however. Sometimes lobbies are created and maintained by volunteers or professionals who recruit indi-

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130. 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 726 (statement of William Greene), *quoted in* Cogan, *supra* note 75, at 494.

vidual supporters and serve their interests. That is largely the method of the American Association of Retired Persons, for example. However, if the individuals to be served wield few votes, those who would organize on the individuals' behalf have limited incentive and capacity to serve them.

Finally, the vote reinforces the individual's capacity to influence social policy. Policymakers and elected officials pay close attention to the opinions of their constituents; on contested issues, politicians often "count noses." Because children are excluded from that count, they are denied any input into social policies. Children often write their senators or congressional representatives, but I suspect that they may be taken less seriously than the letters and complaints of adult constituents who can vote.

Of course the vote alone is rarely sufficient to transform a relatively powerless minority into a powerful political player. The Fifteenth Amendment did not magically solve the problems of racism, nor did the Nineteenth Amendment eliminate sexism. However, the vote is one crucial step toward empowerment.

IV. ONE CHILD, ONE VOTE: PROXY VOTING FOR CHILDREN

A. POLITICAL POWER WITHOUT AUTONOMY

How can children exercise political power when they have no autonomy? Legal rights have long been thought to depend on autonomy and choice. The entire idea of rights deriving from a social contract assumes citizens' capacity to evaluate and willingly enter the contract. As a result, dependents have long been thought to have few, if any, rights. The problem with this theory, of course, is its characterization of the relationship between rights and reason. Merely because parties have a diminished capacity to reason should not mean that they have lesser rights of protection.

We should think of rights as mechanisms to balance power, not as chosen options.[131] For example, several scholars have argued that the right to have an abortion is not so much an unfettered right of personal choice, as a necessary means to assure

131. For example, women need to be able to control their reproductive destiny in order to participate economically, socially, and politically on the same terms as men. Accordingly, abortion rights are more logically based in equal protection than privacy and autonomy.

that men and women have equal opportunities.[132] Similarly, most procedural due process rights can be characterized as attempts to balance the powers of litigants.[133] Voting rights are also mechanisms to balance power.

If rights are designed to balance power, we must be careful about the way we define and exercise power. Robert Dahl defines power as the ability to get another to do something he would not otherwise do.[134] Of course, there are many different ways to induce others to act. We can try to coerce them, in which case power means the capacity to dominate, restrict, or limit others. This kind of power envisions hierarchies that place some individuals in control of others.[135] Children seem unlikely candidates for hierarchical power. They could not command the respect of those they sought to rule and arguably would be incapable of sensibly exercising such hierarchical power. The novel *Lord of the Flies* captures our fears of a world in which children exercise power over others to terrorize them and satisfy their own arbitrary pleasures.[136] We need not necessarily control others to change their behavior, however. Another kind of power is the power to persuade.[137] Through appeals to virtue, fairness, or self-interest, we can convince others to act in ways they otherwise

132. *See, e.g.*, Rhonda Copelon, *Beyond the Liberal Idea of Privacy: Toward a Positive Right of Autonomy*, *in* JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING 287, 296 (Michael W. McCann & Gerald L. Houseman eds., 1989) (arguing that the concept of gender equality provides a better framework for feminist goals than privacy); Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979) (arguing that anti-abortion laws violate the Equal Protection Clause by placing special burdens on pregnant women); Rutherford, *supra* note 48, at 73-74 (comparing the lives of Benjamin Franklin and his sister to demonstrate that reproductive freedom is necessary to assure equal opportunities for men and women); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335-36 (1985) (suggesting that the right to an abortion should be grounded in equal protection rather than privacy).

133. *See, e.g.*, Rutherford, *supra* note 48, at 39-41 (discussing how various jurisdiction cases balance power between the litigants).

134. *See* Robert A. Dahl, *The Concept of Power*, *in* POLITICAL POWER: A READER IN THEORY AND RESEARCH 79, 80 (Roderick Bell et al. eds., 1969).

135. *See* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 152 (A.M. Henderson & Talcott Parsons eds., 1947) ("'Power' . . . is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance . . .").

136. WILLIAM GOLDING, LORD OF THE FLIES (1959).

137. For a discussion of the power of persuasion, see DENNIS H. WRONG, POWER: ITS FORMS, BASES AND USES 32-34 (1979).

would not have acted. Persuasion requires strong rhetorical skills, a well-developed capacity to reason, and adequate access to those we seek to persuade.[138] Children themselves are unlikely to be able to exercise the power to persuade in the political process, but they can be given indirect access through others who act in their behalf.

Power can also be conceived in a less hierarchical way—power to accomplish something, as opposed to power over others.[139] Unlike hierarchical power, the power to accomplish may be embedded in a network, and the person with the most power may not be the one at the top of the hierarchy, but the one in the middle of the net with the most connections or relationships. Networked power is paradoxical because those involved in multiple relationships have more connections to get help, but also are tied to more people who have demands and needs. Thus, networks of relationships can be both a resource and a hindrance. Children can and should have the benefit of the power that derives from their relationships and enables them to grow into relatively autonomous adults.

Although children may have difficulty exercising power over others, they can exercise the power that comes from relationships. The best way to harness this power for children is through representation by their parents. Indeed, the idea of democracy through representation has very traditional roots in our American polity.

B. REPRESENTATION: VOTING BY PROXY

As the federalists who drafted the Constitution noted, the nation is far too expansive and populated to be run by a series of town meetings.[140] Not every citizen can directly participate in political decisions. Consequently, the new government was set up as a representative one. The disputes about representation centered not on whether it should exist, but on how large the congressional districts should be[141] and how the representatives should be apportioned.[142] The large states argued for votes proportionate to either taxes or the number of free inhabitants,

138. *See id.* at 33.

139. *Cf.* Palmeri, *supra* note 36, at 117-21 (arguing that there are two kinds of liberty: freedom from constraint and freedom that enables or empowers and that the freedom to accomplish is the kind appropriate for children). Palmeri may have derived her view from Isaiah Berlin. *See generally* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118-72 (1969).

while the small states wanted equal votes for each state.[143] Painfully aware of the revolutionary demand for representation, the founders were committed to broad-based popular representation in at least one house of Congress.[144] In order to avoid controversy over the nature of the representatives chosen, the Constitution adopted the criteria for states to use in selecting representatives.[145]

The way we choose our representatives affects how they view their duties. To understand these duties, however, we also must consider what we mean by "representation." Different political philosophers use different definitions. For some, representation is merely a mechanism to authorize the government to act on behalf of consenting individuals;[146] once authorized, representatives have few duties. Others see representation as creating advocacy for particular political units like states or cities.[147] Still others see it as advocacy of specific interests.[148] These various definitions turn on whether we expect politics to function as a deliberative debate by wise politicians who will independently discover the public good in the course of their debates, or as a bargaining bazaar in which various groups negotiate for acceptable results.

The distinction between deliberative politics and interest representation is too sharply drawn. Although elements of both are found in our system, neither alone adequately describes our form of political representation. Some deliberative debate occurs

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140. *See* THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).

141. *See* THE FEDERALIST NO. 35, at 214 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 10, at 82-83 (James Madison) (Clinton Rossiter ed., 1961).

142. For a description of the debate over representation in the constitutional convention, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 56-93 (1996).

143. *See id.* at 60-61.

144. *See* THE FEDERALIST NO. 54 (James Madison).

145. *See* U.S. CONST. art. I, § 2. For an interesting discussion of the history of this provision, see JACK N. RAKOVE, *supra* note 142, at 106.

146. *See* THOMAS HOBBES, LEVIATHAN 218 (C.B. Macpherson ed., Penguin Books 1968) (1651).

147. *See, e.g.*, Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 445 (1989).

148. For a discussion of Burke's views that the elected represent fixed interests, see HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 174-78 (1967). For a more modern view of representing interests, see LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 94-99 (1994).

in which our representatives are charged with exercising their sound judgment. They are more than mere automatons who cast ballots for predetermined interests. However, representatives do consider the various interests of their constituencies, and the relative strengths of those interests is crucial. Voting for a representative is like giving the representative a proxy to vote on our behalf. We choose our proxy holder both because we trust her judgment and because she holds the other proxies of those who share our interests.

Those who advocate a purely deliberative democracy, in which elites act out of public concern for the best interests of all, believe that representatives represent the polity as a whole, rather than a particular subset.[149] The founders were justifiably skeptical of this notion. Madison doubted that politicians would always be wise or virtuous,[150] and he doubted that it was possible or desirable to have uniformity.[151] Accordingly, representatives could not act for the entire nation, but rather must represent particular subsets. Indeed, if the founders had accepted a purely uniform view of representation, they would have had no cause for the Revolution.[152] The war grew out of a concern that the colonies were unrepresented in Parliament; if all the members of Parliament represented the interests of the entire empire, then the colonies should not have been concerned about being excluded from Parliament. The cry of "no taxation without representation" only made sense if the Colonies thought their particular interests needed to be represented.

Not all individuals or interests were to be represented, however. The idea that only autonomous individuals can be represented in the political process can be traced back to Hobbes.[153] Hobbes saw representation as a way for the representative to bind those she represented.[154] Because no one could be bound without consent, it would be impossible to represent someone incapable of

149. *See, e.g.*, BURKE'S POLITICS, *supra* note 69, at 116.

150. *See* THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961) ("Enlightened statesmen will not always be at the helm."); THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

151. *See* THE FEDERALIST NO. 10 (James Madison).

152. *See* SHKLAR, *supra* note 69, at 39, 42-46.

153. *See* HOBBES, *supra* note 146, at 218.

154. *See id.* at 218.

consent. Hobbes expressly applied this principle to children, whom he believed could be cared for, but not represented.[155]

For theorists like Hobbes who think that representation is merely a form of authority, the representative has few duties to her constituents once she has been authorized by an election. Continuing contact with constituents is unnecessary because the representative is to exercise her own judgment;[156] therefore, the representative need not be particularly similar to her constituents.

In contrast, our founders saw representation as a form of mirroring.[157] Representatives should be as much like those they represent as possible. The legislature should be a microcosm of the nation. As the federalist John Adams expressed at the time of the American Revolution, the "assembly should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason, and act like them. . . ."[158] Representatives should not only express their constituents' views, but should also be as similar to them as possible. Some anti-federalists took this notion quite literally: "The very term, representative, implies, that the person or body chosen . . . should resemble those who appoint them . . . . [A] stranger to the country [should] be able to form a just idea of their character, by knowing that of their representatives. They are the sign—the people are the thing signified."[159] For these purposes, then, personal characteristics such as race, religion, gender, or age may be important measures of the sufficiency of the representative because "[s]ympathy was most likely to exist . . . when electors and the elected *shared* underlying traits."[160]

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155. *See id.* at 219.

156. Modern scholars are quite critical of this focus on the formalities of election to the exclusion of accountability while in office. *See, e.g.*, Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409 (1993) (suggesting that representation is an ongoing relationship between the constituents and their representatives that continues after the moment of election).

157. For discussions of the concept that legislatures should mirror their constituencies, see PITKIN, *supra* note 148, at 60-91; RAKOVE, *supra* note 145, at 203-43.

158. 4 JOHN ADAMS, THE WORKS OF JOHN ADAMS 205 (Boston, Little Brown 1851).

159. Essay of Brutus (November 15, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 377 (Herbert J. Storing ed., 1988) [hereinafter THE ANTI-FEDERALIST].

160. RAKOVE, *supra* note 145, at 204.

This view presents both problems and opportunities for children. Taken literally, if the representative must mimic the characteristics of her constituents, then the representative for children should be a child. However, as Lani Guinier has suggested, focusing on these surface similarities is not sufficient because representatives are to be judged not on their physical characteristics, but on their ability to represent their constituents' interests.[161] Thus, mirroring viewed more generally calls for proportional representation.[162]

Thus, a third group of theorists sees representatives not as reflective of their constituents, but as advocates for particular interests.[163] Under this view, what counts is how well a representative can advance the interests of those who elected her. It is largely irrelevant whether the representative resembles her constituents. Instead, she must be able to articulate reasoned arguments. For example, Alexander Hamilton thought that "[m]echanics and manufacturers will always be inclined . . . to give their votes to merchants" because the latter would adequately represent their interests, but be more articulate.[164] For a few theorists, like Burke, it does not matter whether the interests are represented proportionally, but rather that the viewpoints are presented to the assembly.[165] However, for most proponents of interest representation, including the founders, the numbers matter very much.[166] As John Adams explained, "[E]qual interests among the people should have equal interests in the representative body."[167] Interests cannot be adequately represented unless the affected groups have enough power to get their ideas considered seriously. More than mere power is at stake; as John Stuart Mill argued, democracies are legitimate only insofar as they include an adequate cross-section of the

161. *See* GUINIER, *supra* note 148, at 67 (arguing that "[d]epending on black politicians . . . is naive" and results in tokenism that cannot be fully effective to advance the interests of African-Americans).

162. *See* PITKIN, *supra* note 148, at 61.

163. *See id.* at 168-89.

164. THE FEDERALIST NO. 35, at 214 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

165. *See* PITKIN, *supra* note 148, at 171-77.

166. *See* MILL, *supra* note 22, at 350 (referring to "representation in proportion to numbers" as the "first principle of democracy"); GUINIER, *supra* note 148, at 122 (arguing that "the aggregating rule is proportionality rather than winner-take-all").

167. ADAMS, *supra* note 158.

populace.[168] Excluding any significant portion of the population from representation makes democracy a form of tyranny.

Children may be too immature both to vote and to hold political office.[169] How, then, can we take their interests into account? The answer is to create proxies, so that their interests and voting power are expressed through others. Proxies are a common system for delegating the right to vote.[170] In fact, the entire representative system of democracy can be seen as giving elected representatives proxies to vote for their constituents.[171] Although not explicitly called proxy voting, this sort of indirect representation was built into the original Constitution. For example, senators were to be chosen not by the people directly, but by the state legislatures.[172] Similarly, the president is not elected directly by the voters, but by the electoral college.[173] Just as members of Congress can vote on behalf of the populace, proxy-holders could vote on behalf of children. The proxy-holder would simply be another kind of representative who exercises political power on behalf of children.

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168. *See* MILL, *supra* note 22, at 346-350 (arguing that proportionate representation of all minorities is essential to the very idea of democracy).

169. *See* U.S. CONST. art. I, § 2, cl. 2 (establishing 25 as the minimum age for a state representative); U.S. CONST. art. I, § 3, cl. 3 (mandating that a Senator be at least 30 years old); U.S. CONST. art. II, § 1, cl. 5 (requiring the President to be at least 35); U.S. CONST. amend. XXVI (allowing citizens age 18 and over to vote).

170. *See, e.g.*, MODEL BUS. CORP. ACT § 7.22 (1985); DEL. CODE ANN. tit. 8, § 212 (1991).

171. *See* PITKIN, *supra* note 148, at 85. *See also* Frank I. Michelman, *Family Quarrel*, 17 CARDOZO L. REV. 1163, 1169 (1996) (referring to political representatives as "elected parliamentary proxies"); Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 668 (1990) (referring to votes as a "proxy function").

172. *See* U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

173. *See* U.S. CONST. art. II, § 1, cl. 2. These electors are not bound to vote for any particular candidate for president and occasionally vote contrary to the popular vote cast in their state. In 1956, 1960, 1972, 1976, and 1988 at least one elector failed to vote for the candidate who carried the popular vote in his state. *See* AMERICA VOTES 21: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 14, 20, 22, 28, 30 (Richard M. Scammon & Alice V. McGillivray eds., 1994). At least twice, the winner of the popular vote has not been elected president by the electoral college. In 1876, Rutherford B. Hayes was elected president over Samuel J. Tilden who received more popular votes. Similarly, in 1888, Benjamin Harrison became president, defeating Grover Cleveland, who carried more popular votes. *See* U.S. GOV'T PRINTING OFFICE, NOMINATION AND ELECTION OF THE PRESIDENT AND THE VICE PRESIDENT, S. DOC. NO. 102-114, at 394 (1992).

In one crucial way, those who vote on behalf of children would differ from other political representatives. Unlike the general populace, which chooses the legislators who will represent it, children could not choose their proxy-holders. As a consequence, the proxy-holders would not be politically accountable for their votes. Hence, the proxy-holders would be "virtual" representatives rather than actual representatives. As Burke defined it, "virtual representation" exists when "there is a communion of interests and a sympathy in feelings and desires between those who act in the name of... people and the people in whose name they act, though the trustees are not actually chosen by them."[174] Virtual representation has a mixed history at best. Sometimes, it has been an excuse to exclude outsiders by pretending that their interests are adequately represented by insiders. For example, it was argued that men virtually represented women before the passage of the Nineteenth Amendment.[175] Virtual representation should not be used to disenfranchise outsiders who could choose their own representatives, nor to assign insiders to represent outsiders. However, when actual representation is impossible, virtual representation is better than no representation at all. The focus, then, should be on fairly choosing the virtual representatives or proxy-holders.

Who should hold proxies for children? I suggest the following criteria: (1) the representative should have a stake in a very substantial shared venture with the child; (2) the representative should be personally familiar with the needs and circumstances of the child; (3) the child should have ready and frequent access to the representative so the child can express herself in her own terms whenever possible; (4) the representative should be accountable to the child in some fashion, either emotionally or legally; and (5) the representative should share an emotional bond with the child that promotes caring, sympathy, and empathy.

Although these are new criteria, they resemble criteria that are prevalent in our history and legal culture. For example, Madison suggested that representatives should know their constituents, should be accountable to them, and would necessarily

174. BURKE'S POLITICS, *supra* note 69, at 494.

175. *See* HOFF, *supra* note 73, at 101-02. Hoff also notes that when Susan B. Anthony voted in an election in 1872, she was arrested for violating a federal statute that prohibited white men from canceling out black votes by casting more than one ballot. The implication is that when a woman votes she is merely increasing the political power of men in her family. *See id.* at 152-53.

have some affection for them.[176] Similarly, the anti-federalists' anxiety about the large size of congressional districts reflected their demand that representatives should be accessible and share genuine sympathy and feeling for their constituents.[177] Although federalists mocked the anti-federalists for emphasizing the importance of a strong emotional connection between representatives and constituents,[178] emotional connections to voters have long historical roots going back to Burke.[179] In advancing affection and sympathy for children, I mean something more personal than Burke's demand that representatives be aware of their constituents' feelings, however. I speak of personal connections. Perhaps the closest description comes in modern relational feminist literature that stresses nurturing, empathy, and context.[180] A strong emotional bond may minimize the risk of either callous assumptions or self-interested disregard.

More than empathy is required, though. The representative must also know the precise circumstances of the child. For example, a relative living at a distance may love a child but lack the day-to-day knowledge of what a child needs in her life. Such knowledge must be built on the constant contact that enables children to express themselves freely and often. Without such contact, representatives are likely to misunderstand the child's perspective or to freeze the child at a young age, losing track of how a child's needs change.

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176. *See* THE FEDERALIST NO. 57 (James Madison).

177. *See* Letter from the Federal Farmer (December 31, 1787), *in* THE ANTI-FEDERALIST, *supra* note 159, at 264-70.

178. *See* RAKOVE, *supra* note 145, at 241-42.

179. *See* BURKE'S POLITICS, *supra* note 69, at 494; *see also* PITKIN, *supra* note 148, at 183-84.

180. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (suggesting that men and women have different forms of moral reasoning, with women concentrating more on relationships and empathy); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984); Judith Areen, *A Need for Caring*, 86 MICH. L. REV. 1067 (1988) (arguing that justice must include caring); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (arguing that law should incorporate empathy and context); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099 (1989) (calling for reform to be responsive to multiple voices and communities); Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 1989 ETHICS 229 (suggesting that distinguishing between the ethic of justice and the ethic of care obfuscates attempts to improve moral and political theory).

The best representatives will have a personal stake in improving the children's circumstances, preferably through living with them. Those who live together share the same standard of living and often experience some of the same problems. In fact, the Constitution presumes that residence is a measure of shared interests when it groups voters by states and congressional districts.[181] Families share interests to a greater extent than residents in voting districts because they share both residence and kinship bonds.[182] Those who do not have a personal stake in the children's welfare may be less zealous in pursuing it, and may even discount the extent of children's needs. Courts have often used this notion of a shared stake in an enterprise to measure how suitable a representative is.[183] For example, the Supreme Court has refused to permit "mere 'strangers'" to represent other taxpayers in challenging the validity of a tax.[184] Although we apply stricter limits on who can represent us in litigation, we should require some kind of a stake or shared interest to hold a proxy vote for children. Shared residence may be the best evidence of such a shared interest.

Finally, representatives of children should have some moral or legal duty to the children that renders them accountable. For example, parents are legally obligated to support their children and trustees owe fiduciary duties to their beneficiaries. Accountability in this sense reflects a long-term connection that justifies a proxy. However, children should not have a claim to sue proxy holders for their votes. Permitting such litigation would be far too divisive. Nevertheless, parents should inform their

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181. *See* U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 3, cl. 3. For a discussion and critique of residential voting districts as interest groups entitled to representation, see GUINIER, *supra* note 148, at 121, 124, 127-37.

182. Lani Guinier draws the analogy between geographic districting and families: "[M]embership in the territorial constituency is like membership in a family, with the former imposed by residence and the latter by kinship. Like family, geographic districts may not reflect conscious choice; as 'compulsory constituencies,' they nevertheless reflect ties that bind." GUINIER, *supra* note 148, at 129.

183. *See, e.g.*, United States Parole Comm'n v. Geraghty, 445 U.S. 388, 399-400 (1980) (explaining that the "personal stake" requirement relating to the case-or-controversy doctrine is met in class actions simply by class certification notwithstanding the subsequent loss of a "personal stake" by the class representative); LaDuke v. Nelson, 762 F.2d 1318, 1325 (9th Cir. 1985) (explaining that the certification of a class "is not sufficient in itself to bestow standing on individuals or a class who lacked the requisite personal stake at the outset" of the litigation).

184. Richards v. Jefferson County, 517 U.S. 793, 1786 (1996).

children whether they voted and how they voted. Ideally, parents would use proxies to educate their children about political issues and voting. We could foster this educational function by permitting children to accompany their parents while they voted. Although such methods of accountability are far from perfect, at least they would give children some input in predictable ways.

Practically, these criteria mean that in most cases the proxy for children's votes would be held by the parent or parents with whom the children reside. Parents who live with their children share the same standard of living and neighborhood. They interact with the children on a daily basis and are therefore more likely to be emotionally involved, aware of the children's needs and perspectives, and available to listen. Because their lives are intimately intertwined with the children economically, they have a personal, as well as an altruistic, stake in advancing the children's financial welfare. Thus, if a child lives with both parents, each parent should get a proxy worth one-half vote for each child. If the parents live apart, then the parent with whom the child primarily resides should get a proxy worth one vote for each child. Note that I distinguish here between residence and legal custody; sometimes a parent may have legal custody rights, as in joint custody, without actually holding primary residential responsibility for a child.[185] Such a parent would not have a proxy. Only parents who hold primary residential responsibility for children would have proxies, both because they would have a greater shared stake in the child's financial welfare, and because they would be more accessible and more likely to know precisely what the child needs.

Giving proxies to parents to vote on behalf of their children is consistent with current law, which presumes that parents act in the best interest of their children.[186] For example, parents are

185. For examples of state statutes that differentiate between joint custody and primary residential custody, see COLO. REV. STAT. § 19-1-103 (1996); IOWA CODE § 598.1 (1992); KAN. STAT. ANN. § 60-1610 (1989); N.J. STAT. ANN. § 9:2-4 (1992). *See also* In re the Marriage of Carol J. Allison, 887 P.2d 1217, 1228 (Mont. 1994) (denying the petition of a father with joint custody to change the primary residential custody of his children from his wife to himself).

186. *See* Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, in* WHO SPEAKS FOR THE CHILD: THE PROBLEMS OF PROXY CONSENT 153, 154 (Willard Gaylin & Ruth Macklin eds., 1982) ("To be an *adult who is a parent* is to be presumed in law to have the capacity, authority, and responsibility to determine and to do what is good for one's children.").

presumed to act in their children's best interest when they consent to medical treatment,[187] bind children to some contracts,[188] permit minors to marry,[189] make legal claims for children,[190] exercise constitutional rights on their behalf,[191] or even waive some constitutional rights.[192] In each of these instances, we permit or even require parents to act for their children who are too young to make decisions for themselves. Parents are at least as compe-

187. *See* Parham v. J.R., 442 U.S. 584, 620-21 (1979) (permitting parents to commit their children to a mental health facility without a hearing); Hart v. Brown, 289 A.2d 386, 391 (Conn. Super. Ct. 1972) (holding that parents could consent to a kidney transplant from one minor child to another).

188. The general rule is that minors' contracts may be rescinded within a reasonable time after majority. RESTATEMENT (SECOND) CONTRACTS § 14 (1981). Nevertheless, courts have permitted parents to bind their minor children to contracts in some circumstances. *See, e.g.*, Shields v. Gross, 563 F. Supp. 1253, 1253 (S.D.N.Y. 1983) (binding actress Brooke Shields to the contract her mother made for her while Brooke was a minor); Peck v. Dill, 581 So. 2d 800, 804 (Ala. 1991) (holding that a child was bound by the subrogation clause in his parents' insurance contract); Doyle v. Giuliucci, 401 P.2d 1, 3 (Cal. 1956) (holding that a minor is bound by an agreement signed by a parent to have medical malpractice claims submitted to arbitration); McKinstry v. Valley Obstetrics-Gynecology Clinic, 405 N.W.2d 88, 99 (Mich. 1987) (holding that parents can enter into arbitration agreements on behalf of minor patients); Hamrick v. Hospital Serv. Corp., 296 A.2d 15, 17 (R.I. 1972) (binding a child to a subrogation clause of a medical service contract his parents had signed).

189. *See, e.g.*, ARK. CODE ANN. § 9-11-104 (Michie 1987) (allowing parents of minors who marry without parental consent to set aside the marriage); CONN. GEN. STAT. ANN. § 46b-30 (West 1995) (prohibiting the issuance of a marriage license to any applicant under age eighteen without written parental consent); Moe v. Dinkins, 669 F.2d 67 (2d Cir. 1982) (per curiam) (refusing to permit a minor to marry without parental consent even though she argued that consent was wrongfully withheld).

190. *See, e.g., In re* Chicago, Rock Island and Pac. R.R. Co., 788 F.2d 1280, 1283 (7th Cir. 1986) (holding that legal action may be maintained on behalf of the minor by his natural parent); Stevenson v. Hawthorne Elementary Sch., 579 N.E.2d 852, 855 (Ill. 1991) (holding that a mother was entitled to maintain a tort action on behalf of her minor child).

191. *See* Eisenstadt v. Baird, 405 U.S. 438, 446 n.6 (1972); Callahan v. Woods, 658 F.2d 679, 687 (9th Cir. 1981) (holding that a father could assert his child's constitutional right to freedom of religion); *In re* Baby K., 832 F. Supp. 1022, 1030-31 (E.D. Va. 1993) (explaining that a parent may assert a child's constitutional right to life).

192. *See* Beldon v. State, 657 N.E.2d 1241, 1244 (Ind. Ct. App. 1995) (holding that a sixteen-year-old's guilty plea was defective because a child cannot unilaterally waive his constitutional rights). *But see In re* East, 663 N.E.2d 983, 985 (Ohio Ct. App. 1995) (noting that "no case in Ohio 'has held that a parent can waive the constitutional right of a minor in a Juvenile Court or criminal case'" (quoting *In re* Collins, 253 N.E.2d 824,827 (Ohio Ct. App. 1969)).

tent to vote for their children as they are to make medical decisions for them.

Nevertheless, the presumption that parents will act in the best interest of their children is troubling. We know that some parents act selfishly and neglect or abuse their children. Indeed, some of the very cases cited to establish the presumption have bothersome facts.[193] Consequently, it might seem that courts or other agencies should evaluate the quality of familial relationships before granting proxies. Significant risks arise from such state evaluations of families, however, because the state may misjudge families that vary from some unstated norm.[194]

Part of the problem is that we do not have any universal standard for what constitutes children's "best interest." Appropriate standards vary dramatically based on the culture in which children are living. For example, the Amish believe that a high school education may corrupt their children, while others believe that education is the key to their children's future. Even definitions of abuse and neglect are subject to cultural variation.[195] In a multicultural society, the solution has been to dele-

193. *See* Parham v. J.R., 442 U.S. 584, 611 (1979) (raising the possibility that the parents dumped a healthy adolescent into a psychiatric facility); *Moe*, 669 F.2d at 68 (hinting that the mother opposed her pregnant teenaged daughter's marriage to protect the mother's welfare check); *Shields*, 563 F. Supp. at 1253-54 (posing the question whether Shields's stage-door mother was so bent on making her daughter a star that she was willing to sell her daughter's nude pictures for a pittance). Of course, it may be that the issue of whether the parents act in their children's best interest only arises in the litigated cases.

194. *See* Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 888-89 (1975) (suggesting that the state may be culturally biased in the way it labels neglected children); Rutherford, *supra* note 48, at 59-60 (noting the risk that courts may misjudge families that look "different").

195. For example, most American jurisdictions consider ritual female circumcision to be physically abusive, although it is considered appropriate in some cultures. *See generally, e.g.*, Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155 (1985); Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. J. 367 (1989); William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337 (1984-85); Lori Ann Larson, *Female Genital Mutilation in the United States: Child Abuse or Constitutional Freedom?* 17 WOMEN'S RTS. L. REP. 237 (1996); Note, *What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944 (1993). Similarly, there are cultural disputes about where to draw the line between abuse and discipline. *See* Dumpson v. Daniel M., *cited in* JUDITH AREEN, CASES AND MATERIALS ON FAMILY

gate these decisions to parents, intervening only when the health or safety of the children requires it. Indeed, the freedom of parents to raise their children as they see fit has been elevated to the level of a fundamental constitutional right.[196] Inevitably, some parents will abuse the right to act on behalf of their children. For example, selfish parents, or parents who simply equated their children's financial interests with their own, might vote against a school funding referendum to reduce their own tax burden even though they believed the referendum would benefit their own children.

In an imperfect world, then, the question must be whether children as a group would be better off with or without voting proxies for their parents. Currently, neither children nor their parents can vote on behalf of children, so all children are excluded from the political bargaining process. Under the proposed system, children would be able to participate through their parents. Although some parents would abuse the proxies, many would use them to benefit their children. Those children with responsible parents, presumably the majority, would be better off. The children whose parents misused the vote would be balanced by those with similarly situated parents who voted in children's best interest. The system would only harm the majority of children if the bad parents outnumbered the good ones; in that case, however, we should rethink our entire system of privatized family law that vests parents with the authority to raise their children.[197]

We vest parents with power not because we believe parents are perfect, but because we prefer family decisions to institutional or governmental ones. Few of us trust relatively impersonal bureaucracies to care or provide for our children. Thus, we face a difficult decision about who should exercise the proxies for the children who need them the most: those not in the care of their parents. Many children are now wards of the state, living in foster homes or institutions.[198] In other contexts, we have chosen to cre-

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LAW 1399 (3d ed. 1992) (describing an unreported case in which an immigrant father was convicted for child abuse because his cultural standards for physical discipline were considered "excessive" by American standards).

196. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923).

197. *See generally* Krause, *supra* note 112, at 395-98 (proposing more communal duties for supporting children); Minow, *supra* note 2 (arguing that privatizing the rights of children excludes them from the public forum); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (critiquing the change from public to private ordering in family law).

198. 4.3% of all children lived away from their parents in 1995. *See* GREEN

ate institutional guardians for such children.[199] It would be dangerous to permit such guardians to exercise proxies on behalf of these children, however. Institutional guardians lack many of the proposed criteria for effective proxy-holders. They do not have a personal, emotional commitment to the children and may hardly know them. They often come from different socioeconomic classes and fail to fully understand the perspectives of the children. They are not readily accessible to the children and have insufficient knowledge of the children's daily lives and experiences.[200] They are accountable to almost no one, and by virtue of their role as guardian for so many different children, will be tempted to vote their proxies for the children as a group, rather than for the interests of the individual children involved. Indeed, vesting so many votes in a single source would be dangerous, and might even induce unscrupulous politicians to seek the office of guardian just for political power. In the case of children placed in stable family foster care, a residential guardian like a grandparent might be an appropriate proxy-holder; however, that would not work for unstable family foster care arrangements or for institutionalized children. Instead, such proxies would have to be assigned to the individual who best meets the criteria for each particular child. The best proxy-holders would know and live with the children, be emotionally involved, available, and accountable to the children. Proxies would grant children access to a key element in the political bargaining process—the vote.

C. THE CONSTITUTIONALITY OF PARENTAL PROXY VOTING

1. Is Proxy Voting for Children Constitutionally Compelled?

The Supreme Court recognizes three constitutional claims for voting rights violations: denial of the right to vote;[201] violation

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BOOK, *supra* note 37, at 1181.

199. For examples of state statutes describing the duties of the Public Guardian, see ALASKA STAT. § 13.26.380 (Michie 1996); FLA. STAT. ANN. § 744.704 (West 1997); ILL. COMP. STAT. 5/13-5 (West 1996); ME. REV. STAT. ANN. tit. 18-A, § 5-607 (West 1964); TENN. CODE ANN. § 34-7-104 (1996); WYO. STAT. ANN. § 3-7-103 (Michie 1997).

200. *See* Margaret O'Brien Steinfels, *Children's Rights, Parental Rights, Family Privacy, and Family Autonomy, in* WHO SPEAKS FOR THE CHILD: THE PROBLEMS OF PROXY CONSENT 230 (Willard Gaylin & Ruth Macklin eds., 1982) (critiquing professionals as proxy holders for children because "professionals may lack the resources, skills, and intimate knowledge of the child necessary to represent and meet his or her interests").

201. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon,

of the principle of one person, one vote (dilution);[202] and racial gerrymandering.[203] In theory, children might claim both denial and dilution, but the former claim is not likely to be successful because the Court is unlikely to rule that children have a constitutional right to vote in the first place. When the Court refers to a fundamental right to vote,[204] it does not mean that the government must provide every citizen voting rights. Instead, it means that voting is important enough to require government to extend the vote evenly in accordance with the Equal Protection Clause.[205] Hence, even denial claims tend to be viewed as equal protection problems. Equal protection affords little safety for children, who are different from adults, and therefore subject to different rules.[206]

The Twenty-Sixth Amendment also seems to undercut the argument that proxy voting for children is constitutionally required. The Amendment prohibits vote discrimination on account of age against individuals who are at least eighteen years old.[207] Implicitly, that language seems to permit discrimination against younger individuals. States are not *required* to exclude younger voters, though. As one court explained it, "[The Twenty-Sixth Amendment] does not preclude, however, a state

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286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

202. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568-76 (1964) (requiring that state legislative districts be reapportioned to achieve one person, one vote); Gray v. Sanders, 372 U.S. 368, 379-81 (1963); Baker v. Carr, 369 U.S. 186 (1962) (holding one person, one vote claims justiciable).

203. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

204. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966); *Reynolds*, 377 U.S. at 561-62; Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

205. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1460-61 (2d ed. 1988).

206. *See* Oregon v. Mitchell, 400 U.S. 112 (1970). In that case, Congress had enacted legislation mandating that states permit 18-year-olds to vote. *See id.* at 117. The Supreme Court struck down that portion of the legislation noting that the Equal Protection Clause did not require such a result. *See id.* at 130. Congress was permitted to require the 18-year-old vote in national elections. *See id.* The courts have consistently rejected equal protection challenges to laws that apply a different rule to children. *See, e.g.*, D.W. v. Poundstone, 165 F.R.D. 661, 675 (M.D. Ala. 1996), *aff'd sub nom.* D.W. v. Rogers, 113 F.3d 1214 (11th Cir. 1997) (holding that preferential admission for adults to the state mental institution did not violate the Equal Protection Clause because adults do not have the same support structures as children); Moe v. Dinkins, 669 F.2d 67 (2d Cir. 1982) (per curiam) (holding that it does not violate due process to restrict minors' right to marry).

207. *See* U.S. CONST. amend. XXVI.

from extending the right to vote to persons younger than eighteen."[208] In essence, the Twenty-Sixth Amendment leaves to the states the decision of whether to provide voting power to children. Parental proxies are merely one mechanism states *could* use to extend the vote to those under the age of eighteen.

Minors might seem to have a stronger argument for proxy voting based on the principle of one person, one vote, which makes "equal representation for equal numbers of people the fundamental goal . . . ."[209] The one person, one vote rule protects against vote dilution: "[I]f a State should provide that the votes of citizens . . . should be given two times, or five times, or 10 times the weight of votes of [others] . . . it could hardly be contended that the right to vote . . . had not been effectively diluted."[210] That is precisely what happens to individuals in families. Adults without children comprise only thirty-four percent of the population, but they control forty-six percent of the votes. That extra voting power effectively dilutes the votes of everyone else.

Consider, for example, two households. One consists of two parents and their two children, or four individuals. The other consists of two adult individuals. Currently, the four individuals in the first household only have two votes. Two of the individuals are excluded from political influence. In the other household, both the individuals have votes and no one is excluded. While the adults without children will vote based on their own needs and preferences, the adults with children will essentially split their votes in half so they represent their own needs and the needs of their children. Consequently, the voting power available to the childless individuals is almost double the voting power available to the individuals living with children.[211] Parental proxy voting provides a remedy: The balance of power shifts to equalize the votes on a *per capita* basis.

Nevertheless, the Court may not be sympathetic to this argument. Its approach will depend on how it defines the principle of one person, one vote; there is some debate over whether this

208. Wesley v. Collins, 605 F. Supp. 802, 813 (M.D. Tenn. 1985), *aff'd* 791 F.2d 1255 (6th Cir. 1986).

209. Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

210. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

211. According to 1990 Census data based on the average congressional voting district, individuals in childless households as a group have approximately 140% of the voting power of households with children. *See supra* notes 8-10 and accompanying text.

principle means one person, one vote—or one *voter*, one vote.[212] This problem arises from the fact that children and resident aliens are disenfranchised. Accordingly, in creating legislative districts, it is unclear whether we should count all the people who live there or only the voters. The answer depends on how we define the right to vote. If it means the right to be represented and to have equal access to our representatives, then we should count all residents, including children and aliens. If, however, the right to vote is the right to preserve a particular balance of power among existing voters, then we should only count registered voters. This issue came to a head in *Garza v. County of Los Angeles*.[213] The Ninth Circuit held that children and resident aliens should be included because one person, one vote was meant to protect individuals' access to their representatives, whether they were entitled to vote or not. That ruling both helped and hurt children's claim for enfranchisement. It establishes the principle that children need to be represented in the political process, and counts them as individuals for one person, one vote purposes. However, it assumes that children validly are excluded from the franchise and that any resulting harm can be addressed by apportionment. Although the Supreme Court has not specifically addressed the issue raised in *Garza*, it has held that it is permissible to count only registered voters.[214] Thus, it seems unlikely that the Court will hold that states must extend the vote to children either directly or through proxies.

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212. *See, e.g.*, Aide Cristina Cabeza, *Total Population: A Constitutional Basis for Reapportionment Reaffirmed in* Garza v. Los Angeles County, 13 CHICANO-LATINO L. REV. 74 (1993); Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479 (1993); Carl E. Goldfarb, *Allocating the Local Apportionment Pie: What Portion of Resident Aliens?*, 104 YALE L.J. 1441 (1995); John B. Manning Jr., *The Equal Protection Clause in District Reapportionment: Representational Equality Versus Voting Equality*—Garza v. County of Los Angeles, 25 SUFFOLK U. L. REV. 1243 (1991); Dennis L. Murphy, Garza v. County of Los Angeles: *The Dilemma over Using Elector Population as Opposed to Total Population in Legislative Apportionment*, 41 CASE W. RES. L. REV. 1013 (1991); Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J.L. & PUB. POL'Y, 521 (1994).

213. 918 F.2d 763 (9th Cir. 1990).

214. *See* Burns v. Richardson, 384 U.S. 73, 92-93 (1966).

2. Does the Constitution Permit Children to Vote, Directly or Indirectly?

Opponents of parental proxies would have to base any constitutional challenges on one of the three categories of voting violations: denial, dilution, or gerrymandering. Extending the vote to children through their parents neither denies anyone the vote nor gerrymanders any particular district. Accordingly, any constitutional complaint is likely to allege that parental proxies dilute the vote and violate the principle of one person, one vote.

The general rule is that political entities can expand,[215] but not contract, the electorate.[216] The proper constitutional standard for expansion of the franchise is the rational basis test, which permits states to expand the franchise so long as they have a rational reason for doing so.[217] Any stricter standard would "leave the scope of the franchise static and virtually unchangeable."[218] Some school districts have taken advantage of this rule to permit noncitizens with children in the school system to vote in school board elections.[219] In fact, several states permitted resident aliens to vote at one time.[220] Permitting children to vote

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215. *See, e.g.*, Duncan v. Coffee County, 69 F.3d 88, 94-98 (6th Cir. 1995) (permitting a school district to expand its franchise to include county residents because they had a substantial interest in the school district); Glisson v. Mayor of Savannah Beach, 346 F.2d 135, 136-37 (5th Cir. 1965) (permitting a city to expand the franchise to nonresidents who owned property in the city); Brown v. Board of Comm'rs, 722 F. Supp. 380, 400 (E.D. Tenn. 1989) (permitting a city to expand the franchise to include nonresidents); Snead v. City of Albuquerque, 663 F. Supp. 1084, 1087-89 (D.N.M. 1987), *aff'd*, 841 F.2d 1131 (10th Cir. 1987) (permitting nonresident taxpayers to vote in municipal bond elections). *But see* Locklear v. North Carolina State Bd. of Elections, 514 F.2d 1152, 1155 (4th Cir. 1975), *aff'd*, 529 F.2d 515 (4th Cir. 1975) (holding that statute permitting city residents to vote in county school board elections diluted the county votes).

216. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 630-33 (1969) (holding that a school district could not exclude those who did not own property within the district from voting).

217. *See Duncan*, 69 F.3d at 94. *But see Locklear*, 514 F.2d at 1155 (holding that only a compelling state interest would justify the expansion of the franchise when there was a claim of geographical vote dilution).

218. *Duncan*, 69 F.3d at 95.

219. *See* N.Y. EDUC. LAW § 2590-c(4) (McKinney 1978-79); *see also* Ambach v. Norwick, 441 U.S. 68, 81 n.15 (1979) (noting that the New York State Education Commissioner has interpreted New York statutes to permit alien parents to participate in school boards). The statute was amended in 1980 to limit voting to citizens. *See* N.Y. EDUC. LAW § 2590-c(4) (McKinney 1980).

220. *See* CONG. GLOBE, 35th Cong., 2d Sess. 981 (1859) (speech by Senator Bingham condemning Oregon for permitting resident aliens to vote and not-

through their parents is merely another valid expansion of the franchise. As one court explained it: "Merely expanding the voter rolls is, standing alone, insufficient to make out a claim of vote dilution .... If a political entity ... [lowers] the voting age, it ... dilutes the votes of those already registered .... But it does not do so unconstitutionally ...."[221]

Not surprisingly, the childless may be opposed to such a shift, arguing that they should not be penalized for their choice not to have children. Proxy voting acts as a penalty, however, only if disproportionate voting power is an entitlement. Childless individuals enjoy enhanced voting power because some citizens (children) are excluded from the franchise. Similarly, most voters enjoyed enhanced voting power because informal registration policies at the state and county levels historically made it difficult for working class and poor people to register to vote.[222] These privileged voters had no grounds to complain when registration policies were changed to be more open to working class and poor voters.[223] Although the electoral power of existing voters

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ing four other states that permit resident aliens to vote, including Indiana, Michigan, Minnesota, and Wisconsin); *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 63-70 (1996); Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931). Several commentators suggest expanding the franchise to include resident aliens. *See* Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259 (1992); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

221. *Duncan*, 69 F.3d at 94-95.

222. *See* PIVEN & CLOWARD, *supra* note 67, at 196-200; Dayna L. Cunningham, *Who Are To Be the Electors?: A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 386 (1991) (describing the reasons why decades of attempts at reforming the voter registration system failed for so long); Mark Thomas Quinlivan, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. PA. L. REV. 2361, 2372-75 (1989) (describing laws that disenfranchise voters, particularly minorities, the young, and the urban poor, by making it difficult to register to vote).

223. *See* PIVEN & CLOWARD, *supra* note 67, at 220-21, 237-39 (discussing the reform efforts and movement toward motor voter laws). These efforts came to fruition in the National Voter Registration Act of 1993, 42 U.S.C. § 1973 (1994). For a discussion of the legislative purpose, see H.R. REP. NO. 103-9, at 2-5 (1993). Federal courts have consistently upheld the motor voter law. *See* Association of Community Org. for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995); Condon v. Reno, 913 F. Supp. 946 (D.S.C. 1995); Association of Community Org. for Reform Now v. Miller, 912 F. Supp. 976 (W.D. Mich. 1995), *aff'd*, 129 F.3d 833 (6th Cir. 1997).

may have been diminished by motor voter laws, those voters had no vested right to retain their disparate voting power. Similarly, childless households have no vested right to retain their increased voting power. Although the Supreme Court consistently has permitted those who have been excluded from the franchise[224] and those who have diminished voting power[225] to get remedies, it has never created vested constitutional rights in permanently excluding the unrepresented and underrepresented. Therefore, a law to expand the franchise to children through proxies would be both desirable and constitutional, because neither the Constitution nor sound public policy requires that we give disproportionate electoral power to childless individuals.

3. Is Proxy Voting for Children Constitutionally Permitted?

Childless voters might argue that although the state could choose to extend the franchise to younger voters directly, it cannot create proxies without violating the principle of one person, one vote. After all, taken very literally and mechanically, proxy voting seems to give some individuals more say in the political process than others because parents may cast more than one vote. If, however, children are viewed as persons with a right to be represented in the political process, then the principle of one person, one vote authorizes, if not requires, such proxies. That principle emerged from a commitment to "achieving . . . fair and effective representation for all citizens."[226] Without proxies, twenty-six percent of our citizens are left without a vote or any form of representation whatsoever. Proxies will not result in any given legislative district being overrepresented or underrepresented relative to its population. Hence, it will serve rather than violate both the letter and the spirit of the one person, one vote requirement.

Although proxies seem novel, the entire system of representative government is really just a system of proxies. Legislators

224. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 630-33 (1969) (holding that a school district could not exclude nonparents and individuals who do not hold property from voting).

225. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (invalidating vote dilution on equal protection grounds); Baker v. Carr, 369 U.S. 186 (1962) (establishing the principle of one person, one vote); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (invalidating racial vote dilution on Fifteenth Amendment grounds).

226. *Reynolds*, 377 U.S. at 565-66.

are given proxies by their constituents to vote on their behalf.[227] Similarly when voters elect delegates to presidential nominating conventions, they give their delegates proxies to vote on their behalf. Although these proxies may be limited to a particular candidate on the first ballot, thereafter the delegate is free to exercise his or her own judgment without any accountability. Delegates are not subject to any electoral control once the convention goes past the first ballot and they routinely negotiate with each other to throw their votes behind a given candidate as a second choice. As a result, single delegates or groups of delegates often control many votes at once. In essence that amounts to proxy voting.

The alternative to including children through proxies is to completely exclude them from the political participation. Although the current Court is unlikely to require proxy voting for children, the more important point is that such proxies are constitutionally permissible. Thus, if a political subdivision like a school district chooses to adopt it, it should survive constitutional scrutiny.

D. THE WISDOM OF PARENTAL PROXIES

Parental proxies would shift the balance of power in the electorate because it would add votes for the twenty-six percent of the population currently disenfranchised. Of course parents will differ about what is in the best interest of their children. For example, parents in affluent suburbs may vote for candidates who support local funding for schools. In contrast, parents who live in poorer urban areas may prefer candidates who support statewide funding for schools. In another scenario, two parents may differ about how the proxy vote for the same child should be cast, with each parent casting their additional half-vote differently. Nevertheless, such an increase in the franchise would likely shift power.

Four sorts of concerns arise from this shift of power: (1) that the increased voting power will be used to advance purely selfish interests; (2) that the proxies will have adverse consequences that outweigh the value of the proxies; (3) that the power will be misallocated to unworthy recipients; and (4) that any shift in power is unnecessary and ineffective.

227. *See supra* note 150 and accompanying text.

Interest group politics assumes that we all act in our own best interests and that the public good, if it exists, will emerge from carefully balancing the power among various groups. Power is difficult to balance perfectly, however, and the strong may impose inappropriate burdens on the weak. Parental proxies shift power so the childless may argue that parents will be able to push their costs onto those who declined to have children. The argument is likely to be that those who enjoy the benefits of a given project should pay the costs, both as a matter of fairness, and to ensure that there is a careful balance between costs and benefits. In economic terms, the complaint is that parents will have the political clout to externalize the costs of raising children. That argument makes sense only if we think of children as the mere personal preferences of their parents. In essence it treats children as if they were consumer goods that individual parents choose to acquire. If children are not merely the property of their parents, however, but rather full members of the community, then the community will have some responsibility for children as well. Children are an integral part of our social and economic lives. Today's children do not only become tomorrow's criminals; they also become society's workers, taxpayers, and leaders. If the economy is to have qualified workers who can contribute tax dollars toward tomorrow's needs, then the community needs to invest in those workers now. The childless, as well as parents, will receive the benefits from the next generation's taxes. In fact, to the extent that the cost of developing a competent workforce is thrust upon only a portion of the population (parents), the childless are free riders who do not bear their share of the cost of producing future workers. Investing in children is an investment in our communal future.

This problem is likely to be exacerbated as the baby boom generation ages. The aging population may be tempted to usurp a disproportionate share of the assets and push the costs of funding their programs onto subsequent generations. The generation sandwiched between supporting elderly parents and raising young children may become dramatically overburdened. To the extent conflicts develop between the elderly and children, disenfranchised children will be at a tremendous disadvantage.

The communal duty to children is not merely economic. Children not only contribute as future workers, they either enrich or debase our communal lives in childhood as well. They are just as entitled as any other group to have their needs and interests considered in the political bargaining process.

Although we may need to account for children's political interests, the childless may argue that parental proxies are far too broad because they enable parents to use their voting power on issues that do not affect children. This argument is illusory because all issues affect children either directly or indirectly. For example, if a political candidate advocates an increase in the defense budget, that affects children in two ways. First, children need to be safe from foreign invasion just as adults do. Second, decisions on defense spending affect other allocations such as educational spending. Consequently, it is unfair to exclude children's interests from the bargaining process on any issue.

Even if proxies are a good idea they may have some adverse consequences. Because proxy voting may shift some electoral power from the childless, it may be accused of being pronatalist. It would reward those who have more children with more political power. Given the financial cost and emotional effort required to raise children, however, it seems almost absurd to suggest that someone would consciously choose to have a child just to gain an extra vote.[228] The marginal value of the vote would be unlikely to exceed the costs incurred.

Although the costs would not be justified for any given individual, groups might seek to gain power by increasing population. Parental proxies do not create this problem, however. Those groups that seek to increase their power through pronatalist policies already have those policies in place. At most, proxies would create a slight incentive that may accelerate the process. Including children in political bargaining would provide benefits to widely varied communities, and the value of a single vote would not likely be worth the cost of additional children, unless there were already additional reasons for strong pronatalist policies. Hence the value of the proxies for children outweighs the slight concern about pronatalism.

Proxies may also unwittingly advance the interests of groups that already are committed to pronatal policies for other reasons. For example, many religious groups, including fundamentalist Mormons,[229] Roman Catholics, fundamentalist Chris-

228. The amount it costs to raise a child varies by income. Families with average annual incomes of $14,500 spend $104,400 to raise each child to age eighteen, while more middle class families with average incomes of $52,600 spend $219,810 to raise each child. *See* U.S. DEP'T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 1996 ANNUAL REPORT, PUB. NO. 1528-1996 tbl.7 (1996).

229. Although banned by the official Church of Latter Day Saints, funda-

tians, and orthodox Jews have doctrines that are pronatal in effect, if not in design.[230] Similarly, different ethnic groups have different birth rates.[231] Parental proxies would provide these groups with increased voting power. That leads to the concern that parental proxies would misallocate electoral power.

Opponents of parental proxies fear a shift in electoral power because the "wrong" people would be empowered. At best, this argument is elitist and favors hierarchical power. It assumes that those who currently hold power have a monopoly on reason and the capacity for self-government. One branch of liberal political theory expressly embraces this idea, that a natural aristocracy (those who possess superior reasoning power and wisdom) should represent the common people. These representatives do not consult the will of the people, but exercise their own superior skills for the benefit of the people. That was essentially the philosophy of Edmund Burke.[232] Any expansion of the franchise is necessarily a threat to the quality of government. Of course, that more nearly describes an oligarchy than a republican democracy.[233] Although there has been a modern resurgence of interest in the idea of deliberative democracy,[234] limiting the fran-

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mentalist Mormon communities continue to practice polygamy. *See, e.g., In re* Black, 283 P.2d 887, 907-08 (Utah 1955) (upholding a prosecution of neglect charges against a father of 26 children on the sole ground that he practiced religious polygamy).

230. Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702 (1984).

231. *See*, U.S. DEPARTMENT OF COMMERCE & ECONOMICS & STATISTICS, ADMIN. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1997: THE NATIONAL DATA BOOK 75 (1997).

232. BURKE'S POLITICS, *supra* note 69, at 397-98. For an excellent description of Burke's political philosophy of representation, see PITKIN, *supra* note 148, at 168-89. Accordingly, Burke favored restrictions on who could vote and was concerned about the competency of the electorate. *See id.* at 171.

233. For a discussion of the differences among these forms of government, see Aristotle, *The Theory of Citizenship and Constitutions*, *in* THE POLITICS OF ARISTOTLE 110-13 (Ernest Barker ed., 1962); see also THE FEDERALIST NO. 57 (James Madison) (responding to criticisms that the large congressional districts will render so few leaders relative to the number of citizens as to constitute an oligarchy).

234. *See generally* Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988); David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEX. L. REV. 1437 (1993); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994); Lani Guinier, *More Democracy*, 1995 U. CHI.

chise to assure the election of a natural aristocracy seems elitist in our modern multicultural society. Even Burke recognized that when a group has serious substantive grievances that are not being met, that group needs the vote.[235] Accordingly, although Burke disfavored universal franchise, he was in favor of securing parliamentary representation for the Catholics in Ireland.[236] Children, like the Catholics in Ireland, have serious substantive grievances that require the vote.

Assuming that those who fear the "wrong" people voting are acting from a principled view of representative politics may give them far too much credit. At its worst, this argument is a blatantly self-interested attempt to preserve privilege at the expense of others. It may even be a covert way to diminish voting power for minorities and the poor. Fears about the "wrong" people voting are not only elitist, however; they are exaggerated as well. Because poor families on average are slightly smaller than other families in the United States,[237] most of their electoral gains will be offset by similar gains by the middle class. Some groups that already vote in large numbers are also likely to be beneficiaries of the proxy system. For instance, orthodox religious groups often have large families that would carry extra votes. More importantly, however, fears of increased power for the "wrong" voters are elitist and anti-democratic. The existing power structure is not entitled to maintain its power at the expense of children, rich or poor, religious or secular.

A more justified criticism is that the proxy system may increase the electoral power of the most powerful. The poor are the least likely to vote, so the proxies of poor children may never be used.[238] Proxies will not change the practical reasons the poor

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LEGAL F. 1; Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Suzanna Sherry, *supra* note 16; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

235. *See* PITKIN, *supra* note 148, at 178.

236. *See* BURKE'S POLITICS, *supra* note 69.

237. "The average AFDC family is either about the same size or slightly smaller than the average non-AFDC family." JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 46 (1995). The average family on welfare has 1.8 children. *See* GREEN BOOK, *supra* note 37, at 473. The average family has 1.86 children. *See* U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, *Average Number of Own Children Under 18 Per Family by Type of Family: 1995 to Present* (1996) <http://www.census.gov/population/www/socdemo/hh-fam.html /rep96/96fm3.txt>.

238. *See* PIVEN & CLOWARD, *supra* note 67, at 212. Voter participation is

don't vote, such as lack of transportation or time off work to get to the polls. In contrast, parents who already vote will almost undoubtedly use their increased voting power. Hence, it is possible that the proxy system will entrench or expand power disparities. If part of the reason the poor do not vote is that no viable candidates represent their interests,[239] however, a proxy system may help. Currently, major political parties have little incentive to court the votes of the poor because they are unlikely to vote in sufficient numbers to affect elections. If poor single parents had a vote for each child, the typical single parent would have three votes: one for the parent and one for each child.[240] That kind of voting concentration should make the political parties more interested in recruiting the votes of poor single parents, both by providing practical help in getting to the polls and in offering more sympathetic candidates.

If single parents get more power under a proxy system, then some may complain that parental proxies gives disproportionate power to women. Currently, the vast majority of single parent homes are headed by women.[241] Widows outnumber widowers because women tend to outlive men[242] and dead dads cannot vote, even in Chicago. Similarly, women are more likely to receive residential custody of their children upon divorce because men do not generally object. In one study, divorcing parents were asked if they personally wanted to have sole residential custody of their children. Eighty-two percent of the mothers wanted to live with their children full time, but only thirty-two percent of the fathers did.[243] Parents agree on sole maternal custody seventy-two percent of the time.[244] Voting proxies for residential parents will only favor women so long as men choose not

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highly correlated to income. In 1994, only one-fifth of those with a family income of under $5000 voted, while a third of those with a family income of less than $14,999 voted, and half of those with a family income over $35,000 voted. *See* U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, *Characteristics of the Voting-Age Population Reported Having Registered or Voted: November 1994*, at tbl.1 (1996) <http://www.census.gov/population/socdemo/voting/profile/ptable1.txt>.

239. *See* PIVEN & CLOWARD, *supra* note 67, at 20-21.

240. The average welfare family consists of 2.8 people, or a parent and 1.8 children. *See* GREEN BOOK, *supra* note 37, at 473.

241. In 1995, 87% of children who lived with only one parent resided with their mothers. *See* GREEN BOOK, *supra* note 37, at 1181.

242. In 1990, women's life expectancy was 78.8 years, while men's was 71.8 years. *See* GREEN BOOK, *supra* note 37, at 955.

243. *See* DIVORCE REFORM AT THE CROSSROADS 47 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

244. *See id.* at 52-53.

to assume daily responsibility for their children. Both men and women would share the vote equally when they reside with their children.

However, there is an apparent inconsistency in the argument for parental proxies. If parents are adequate to virtually represent their children with proxies, why aren't children already represented? That critique assumes a purely deliberative view of politics. The theory is that a legislature acts as a forum to debate the best interests of the whole in light of separate interests.[245] That requires that each separate interest be presented to the legislature so that the legislators are sufficiently informed to make a sound decision. Under the deliberative view, the number of representatives is irrelevant because public-spirited legislators will judge the merits without regard to the electoral strength of the interests. Thus, those who believe that children are represented adequately reject a pluralist or interest group theory of politics. The pluralist view sees politics not as grand debate on social policy, but as the aggregation of competing demands of various interest groups that form shifting alliances.[246] Groups need proportionate voting strength and the power to affect future elections. Without such strength, representation risks becoming mere tokenism.[247]

Sometimes deliberative politics seems to work. The minority persuades the majority to treat it fairly. That is arguably what happened with the Civil Rights Act of 1964 and the subsequent voting rights acts.[248] But deliberative politics does not always

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245. *See* BURKE'S POLITICS, *supra* note 69, at 116 ("Parliament is not a *congress* of ambassadors from different and hostile interests . . . but . . . is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole . . . .").

246. *See* ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 46-47 (1985) (noting that decentralized power spread among a variety of political, religious, social, and cultural organizations was a necessary but not sufficient condition for democracy); ROBERT A. DAHL, MODERN POLITICAL ANALYSIS 37-41 (3d ed. 1976) (explaining that there is no prime mover that controls political influence, but that political influence is exerted by many different individuals and groups).

247. For a similar argument in the context of race, see Guinier, *Tokenism*, *supra* note 5, at 1110, 1123 (arguing that small numbers of African-American representatives risk becoming mere tokens who cannot adequately influence policy or build necessary coalitions). Guinier, however, does not think that merely getting proportionate representation is sufficient, since permanent minorities may still be frozen out of the legislative discourse. *See id.* at 1125.

248. Of course, implicit threats of unrest may have helped to persuade the majority. *See, e.g.*, ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 419-20 (1967) (discussing the how demon-

work. Sometimes wealthy, well-organized special interest groups form powerful lobbies to advance their interests.[249] Similarly, other positions fail not because the claims are inequitable, but because they are not backed by sufficient political power. Politics is neither purely deliberative, nor purely pluralist.[250] Appeals to virtue may persuade some political actors, but only if the appeals are strong enough to be heard and be influential. Voting power is one measure of political influence. We need parental proxies so that the interests of children are not only heard, but adequately represented in the political debate.

Finally, opponents may argue that the franchise is not a strong enough tool to change anything. The elderly not only had the votes, but they had the ability to organize themselves into one of the most powerful lobbying groups in the country. Public choice theorists have long posited that those who can organize realize the most gains.[251] Parental proxies will not enable children to organize on their own behalf or give them the resources they need to lobby. Proxies will, however, create the incentive for parents and political parties to organize and lobby on behalf of children. Imagine how much more powerful groups like the Childrens' Legal Defense Fund[252] would be if they could marshal

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strations contributed to the passage of the Civil Rights Act of 1964); Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1033, 1039 (1992) (reviewing GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991)). The Civil Rights Act may also have been an effort to maintain a Democratic coalition that consolidated Lyndon Johnson's political power.

249. *See, e.g.*, Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 37-38 (1996) (explaining how two concentrated interest groups, large landowners and environmentalists, compete for economic rents in the legislature); Enrico Colombatto & Jonathan R. Macey, *Path-Dependence, Public Choice, and Transition in Russia: A Bargaining Approach*, 4 CORNELL J.L. & PUB. POL'Y 379, 386 (1995) (explaining that public choice theory recognizes that well-organized special interest groups are better able to provide the political support that politicians need to survive than are highly diffuse, disorganized citizens).

250. Thus, Madison sought a balance between interest group representation and deliberation. *See* RAKOVE, *supra* note 142, at 239.

251. *See* William N. Eskridge Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 286 (1988) (noting that groups need to be well organized to garner much attention from legislatures); Daniel A. Farber & Phillip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878-79 (1987) (explaining that different public choice models agree that interest groups get a great deal of attention from politicians).

252. Any number of child organizations already exist to help children, including the Children's Rights Coalition, Children's Watch, and the National Association of Child Advocates.

millions of votes for their causes. Even if parental proxies would not actually increase power for children, however, they would serve a critical function. Parental proxies would undermine the connection between autonomy and rights, thereby opening the door to rights of protection for children.

CONCLUSION

Liberal theory focuses on autonomous individuals. That focus fails to account either for power imbalances or group obligations. Proxies for parents answer both the power-based critique and the communitarian critique. Proxies empower disenfranchised children, permitting them to be proportionately represented in the political discourse. Because the proxies are held by residential parents, proxies also reinforce the "idea of the family as an interdependent social group."[253]

Liberal theory vests rights only in autonomous individuals, so only the relatively powerful hold rights. Withholding the vote from those who have not developed the full capacity to reason excludes our most vulnerable citizens from the political bargaining process. The disenfranchised have no power. Hence children, who are by definition dependent, have few rights. The solution lies neither in lowering the age of autonomy nor in creating unspecified substantive rights. Instead, we should change how we think of rights. Rights should not be enforceable choices, but mechanisms to balance power.

The right to vote is one way to balance power. It enables voters to express preferences and bargain among those who have different demands. It has symbolic power as well, announcing which members of our society are important enough to be counted. Children are both formally excluded from voting and underrepresented. As a result, childless individuals have nearly double the voting power of individuals with children. Although it is difficult to prove that this disenfranchisement directly causes harm, children have not shared in the benefits that the elderly have managed to garner from the legislatures. Children need the vote, and the only sensible way to give them this power is to permit proxies for their parents.

253. Steinfels, *supra* note 200, at 235.