MODERNIZING CAPACITY DOCTRINE

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Abstract

Federal capacity doctrine—or the rules establishing whether and how children's civil litigation proceeds—has largely remained the same for more than a century. It continues to presume that all children are incapable of directing their own cases, and that adults must litigate on children's behalf. But since that time, our understanding of children, and of adolescents in particular, has significantly evolved. This Article contends that it is well beyond time to modernize the capacity doctrine to better account for the capabilities of adolescents and support their transition to adulthood.

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INTRODUCTION

In 1958, the late Congressman John Lewis wanted to sue to integrate the all-white Troy State University, which had ignored his application for admission.[1] Dr. Martin Luther King and Reverend Ralph Abernathy, impressed by the determination of "the boy from Troy" (as King called Lewis), agreed to provide financial and legal support.[2] But Lewis was still a legal minor.[3] Thus, he needed his parents to bring the suit on his behalf.[4] Lewis's parents initially expressed reluctant support for the plan, but ultimately changed their minds, fearing violence, loss of credit, loss of his father's job as a school bus driver, and loss of their tenant farm in their majority-white Alabama county.[5] Lewis never filed the case.

Nearly fifty years later in New York, Barbara Ellis sued the McDonald's Corporation, alleging sexual harassment and violation of child labor laws at her workplace.[6] Noting minors' general lack of legal

1. JOHN LEWIS WITH MICHAEL D'ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT 66–69 (1998). Although Congressman Lewis was eighteen at the time, he remained an unemancipated minor under Alabama law. Forty-seven states lowered the age of majority to eighteen following the Twenty-Sixth Amendment's ratification in 1971, which gave individuals ages eighteen and older the right to vote in federal elections. 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 14:2, at 980 (rev. 2d ed. 2005), *see* NATIONAL SURVEY OF STATE LAWS 502 tbl.34 (Richard A. Leiter ed., 5th ed. 2005). The age of majority remains twenty-one in Mississippi and nineteen in Alabama and Nebraska. MISS. CODE ANN. § 1-3-27 (2021); ALA. CODE § 26-1-1 (2020); NEB. REV. STAT. § 43-2101 (2020). The traditional age of majority under common law was twenty-one. *See* State v. Taylor, 214 A.2d 362, 368 (Conn. 1965); Gastonia Pers. Corp. v. Rogers, 172 S.E.2d 19, 20 (N.C. 1970).

2. LEWIS, *supra* note 1, at 68–69.

3. *Id.* at 69.

4. *Id.*; Vann R. Newkirk II, *How Martin Luther King Recruited John Lewis*, ATLANTIC (Feb. 2018), https://www.theatlantic.com/magazine/archive/2018/02/john-lewis-martin-luther-king-jr/552581/ [https://perma.cc/RC2C-TZFL].

5. LEWIS, *supra* note 1, at 69–70.

6. Ellis v. McDonalds Corp., No. 05-CV-3961, 2005 WL 2155547, at *1 (E.D.N.Y. Sept. 7, 2005). Ellis did not include her age in her complaint but repeatedly referred to herself as a child. *Id.*

capacity, the court directed Ellis to retain counsel.[7] When Ellis failed to do so, the court dismissed the case.[8]

When we think of civil litigants, we commonly think of adults. But children, too, have legal rights and are entitled to pursue legal remedies.

Legal capacity doctrine today is embodied primarily in Federal Rule of Civil Procedure 17(c)–a rule that has remained virtually unchanged since 1912.[9] No coherent jurisprudence has developed regarding Rule 17(c) since it would have governed young Congressman Lewis's ability to sue Troy State on his own behalf nor since it prevented Barbara Ellis from pursuing her claims. As a result, the questions John Lewis's and Barbara Ellis's cases raised persist. When should a person, though legally still a child, be permitted to bring her own case? When a child and a parent disagree about whether a remedy should be pursued, who decides? And what obligations do courts have to engage parents and secure legal representation for minors who seek to proceed alone? Currently, courts answer these questions in a largely ad hoc manner, sometimes allowing children to bring their own cases,[10] and other times dismissing them for want of capacity,[11] with no legal standard connecting or even explaining the disparate decisions.

Children have been at the forefront of strategic litigation to confront critical injustices[12] including racial segregation,[13] sexual assault and harassment in schools,[14] human trafficking,[15] government inaction in the

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7. *Id.*

8. *Id.* at *2.

9. FED. R. CIV. P. 17(c); FED. EQUITY R. 70 (1912) (repealed 1938), *reprinted in* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 269 (3d ed. 1922); 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE App. C (3d ed. 2020) (documenting no substantive changes to Rule 17(c) since its adoption); *see also infra* note 63.

10. *See, e.g.*, J.A.W. v. Evansville Vanderburgh Sch. Corp., 323 F. Supp. 3d 1030, 1032 & n.1, 1033 (S.D. Ind. 2018) (permitting a seventeen-year-old to challenge his school district's refusal to allow him to use the restroom that matched his gender identity); *infra* Section I.B.2.

11. *See, e.g.*, Pierson v. Allison, No. 08cv208, 2009 WL 3049220, at *4 (S.D. Miss. Sept. 17, 2009) (dismissing a minor's claim challenging conditions of confinement for lack of counsel and lack of adult representative).

12. *See* BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT 8 (2008) (recounting numerous stories of children fighting injustices both within and outside of the courts); Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1568 (noting that children have been key to various social justice movements).

13. *See* Brown v. Bd. of Educ., 347 U.S. 483, 487 (1954), *supplemented by* 349 U.S. 294 (1955); Briggs v. Elliott, 98 F. Supp. 529, 530–31 (E.D.S.C. 1951), *vacated*, 342 U.S. 350 (1952).

14. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) (establishing children's right to protection from sexual harassment in schools under Title IX).

15. *See* Complaint for Damages for Childhood Sexual Abuse, Child Sexual Tourism, Production and Distribution of Child Pornography, Witness Tampering, Intentional and Negligent Infliction of Emotional Distress & Demand for Jury Trial at 3–4, Roe v. White, No. 03-cv-04035

face of climate change,[16] the failure to meet the educational needs of students with disabilities,[17] and discrimination against transgender students.[18] And litigation has resulted in the Supreme Court's recognition and development of children's constitutional rights.[19] Because of their legal minority,[20] however, children generally lack the legal capacity to advance civil claims themselves.[21] Instead, children generally must rely upon adults—usually their parents—to bring civil claims on their behalf.[22]

Capacity doctrine, or the rules establishing whether and how children's litigation proceeds,[23] is rooted in Rule 17(c) on the federal level, and most states apply close approximations of the rule.[24] Courts

(N.D. Cal. Sept. 4, 2003), ECF No. 1 (initiating a class action lawsuit by minor victims of sex trafficking seeking civil damages against their traffickers).

16. *See* Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020). *See generally* John Schwartz, *Court Quashes Youth Climate Change Case Against Government*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/2020/01/17/climate/juliana-climate-case.html [https://perma.cc/98HD-76LC] (discussing the Ninth Circuit Court of Appeals' *Juliana* opinion).

17. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017) (holding that the right to a free and public education requires students' individual education plans to be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"); *see also* Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 179–82 (1982) (holding that the Education of the Handicapped Act confers a substantive right to a free and public education upon children with disabilities).

18. *See* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1038–39 (7th Cir. 2017).

19. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that students had a constitutional right to express their disapproval of the Vietnam War by wearing a small band of black cloth without disrupting school activities); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that state officials compelling students to recite the Pledge of Allegiance violated the students' First Amendment rights); *see also* discussion *infra* Section I.A (discussing children's legal rights).

20. Minority is "[t]he quality, state, or condition of being under legal age." *Minority*, BLACK'S LAW DICTIONARY (11th ed. 2019). "The age of majority is the age at which the disabilities of minority are removed and the young person legally becomes an adult, free of parental authority and control, and entitled to the full enjoyment of all civil rights and decision-making authority over his or her own life." KRAMER, *supra* note 1, § 14:2, at 979–80 (footnote omitted).

21. *See Capacity*, BLACK'S LAW DICTIONARY, *supra* note 20 (defining capacity as a party's "ability to sue or be sued," which is determined by a party's "satisfaction of a legal qualification, such as legal age or soundness of mind").

22. FED. R. CIV. P. 17(c); Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 841 n.44 (1977) (noting that because children lack the capacity to decide how best to protect their own interest in litigation, children's "interest is ordinarily represented in litigation by parents or guardians").

23. 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL § 17.21[3][a] & n.16 (2020), Lexis+ (discussing the rule that minors generally lack the capacity to sue and required procedures in minors' cases).

24. *See* discussion *infra* Section I.B and note 64.

also draw on constitutional guarantees of due process, the right of access to the courts, and parents' liberty interests when applying the rule.[25]

As it has been for the past one hundred years, capacity doctrine is defined today by blunt distinctions and broad generalizations. It treats children as a unified group and presumes that all children are equally unable to represent their own interests before courts.[26] Capacity doctrine further presumes that to protect their interests, all children need adult, non-lawyer representatives to make decisions for them within civil cases.[27] These historic presumptions, rooted in common law traditions, were established for children's protection: adult representatives stand in for child litigants and make decisions that children are unprepared to make for themselves.[28]

Although appealing in their apparent simplicity, the bright line that capacity doctrine draws between "children" and "adults" contravenes contemporary understandings of adolescence as a distinct stage of psychosocial and moral development.[29] Moreover, capacity doctrine's presumption that all children need adult representatives to direct their litigation stands at odds with the growing patchwork of circumstances in which courts and legislatures have granted children the capacity to represent their own litigation interests. States have authorized children to independently pursue cases seeking judicial bypass of parental consent requirements for abortion procedures[30] and civil protection orders against

25. *See* discussion *infra* Sections I.B, II.D.

26. *See infra* Section I.

27. *Id.*

28. *See, e.g.*, Hunter v. N. Mason High Sch., 529 P.2d 898, 899 (Wash. Ct. App. 1974) ("The legal disabilities of minors have been firmly established by common law and statute. They were established for the protection of minors, and not as a bar to the enforcement of their rights." (citing 43 C.J.S. *Infants* § 19 (1945))), *aff'd*, 539 P.2d 845 (Wash. 1975); 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1541 (3d ed. 2020) ("Specifically, Rule 17(c) is designed to protect the interests of an infant or incompetent by assuring adequate representation.").

29. *See infra* Sections II.A, II.B.

30. Thirty-seven states require parental notice or consent as a prerequisite to a minor accessing abortion procedures; thirty-five such states created judicial bypass proceedings to allow minors to seek exemption from these requirements. Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175, 176 (2011). In the vast majority, minors have the right to represent their own interests and to appointed counsel to assist them. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(D) (2020) (minor seeking judicial bypass has right to represent himself and may request appointed counsel); IOWA CODE § 135L.3.3 (2021) (same); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 2020) (same); 18 PA. STAT. AND CONS. STAT. ANN. § 3206(e) (West 2020) (same); S.C. CODE ANN. § 44-41-32(3) (2020) (same); Chart of State Judicial Bypass Procedures (2020) (on file with Author).

dating and sexual abuse.[31] Likewise, the extension of the right to counsel in juvenile justice proceedings has brought the expectation in some states that minors will defend their own interests in these cases.[32] These developments, however, have been piecemeal—tied to specific legislative reforms and particular constitutional rights—and disconnected from any broader conceptions of children's and adolescents' ability to participate in court processes and the relative benefits and drawbacks of children assuming this responsibility.

Capacity doctrine has not yet developed a cogent framework for determining when children, particularly adolescents, should take charge of their cases and when that authority remains better reserved to parents or other adults acting on children's behalf.[33] This gap in capacity doctrine mirrors incongruities in constitutional law, which finds children to be capable of adult-like decision-making in the contexts of reproductive rights and the right to counsel, but not in the context of criminal culpability and punishment.[34] In the absence of a cogent framework to explain them, such inconsistencies lead to the criticism that the doctrine is solely political.[35] Furthermore, lacking clear guidance, courts are left to reinvent the wheel seemingly every time children's litigation arises. This fractional, disconnected process has left capacity doctrine in disarray.

The question of whether and under what circumstances children may advance their own claims takes on greater urgency in light of federal doctrine that results in the routine dismissal of cases brought by adults on

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31. *See, e.g.*, CAL. CIV. PROC. CODE § 372(b)(1) (West 2020) (allowing minors to request protection orders against harassment); D.C. CODE § 16-1003(a) (2021) (same); MINN. STAT. § 518B.01, subdiv. 4(a) (2020) (same); VT. STAT. ANN. tit. 15, § 1103(a) (2019) (same); *see also* Lisa V. Martin, *Restraining Forced Marriage*, 18 NEV. L.J. 919 app. 4 (2018) [hereinafter Martin, *Forced Marriage*] (compiling state laws granting minors capacity to seek civil protection orders); Lisa Vollendorf Martin, *What's Love Got to Do with It: Securing Access to Justice for Teens*, 61 CATH. U. L. REV. 457, 458–59 (2012) [hereinafter Martin, *Securing Access*] (evaluating the accessibility of the civil protection order remedy for minors).

32. *See* Margareth Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 81 (2018).

33. The term "capacity" is used to describe the law's granting or withholding of authority from children in a number of contexts. *See, e.g.*, WOODHOUSE, *supra* note 12, at 26–27, 35–36 (discussing children's capacity or competence to testify as witnesses under evidence law and conceptualizing children as having needs-based and capacity-based rights, the latter of which "reflect and respond to the child's development and recognize children's agency and voice even before children reach the state of maturity that allows them to make decisions without adult assistance and guidance"). This Article focuses on the subset of capacity rules and practices contained within civil procedure doctrine.

34. *See* discussion *infra* Section I.A.

35. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 617–18, 620 (2005) (Scalia, J., dissenting) (criticizing the Court's different treatment of adolescents in the contexts of abortion and juvenile justice).

children's behalf. Capacity doctrine's stricture that children must have adult litigation representatives causes children's cases to be dismissed when they attempt to bring claims on their own, as Barbara Ellis attempted to do.[36] But federal courts have also held that adults bringing claims on behalf of children cannot do so pro se, and routinely dismiss claims brought on behalf of children for lack of counsel.[37] As courts have shown little willingness to appoint lawyers for children whose parents cannot afford to retain counsel, the ability of children from low- and moderate-income households to enjoy meaningful legal rights during childhood may depend on children representing themselves.[38]

Capacity doctrine need not be in such disarray, at least regarding adolescents. In recent years, advances in scientific understanding of child and adolescent socio-cognitive development and increasing attention to adolescent decision-making in constitutional jurisprudence and state law have generated several robust theories about how adolescents differ from younger children, and how adolescents should be supported in their transition to adulthood.[39] Each of these theories has useful insights that could help unify and guide capacity doctrine's treatment of adolescents, yet none have been fully applied to the question of adolescents' procedural capacity to date.

Building from these theories, this Article contends that whereas capacity doctrine historically presumes that adults should speak for all children in courts, regardless of their age, contemporary understandings of adolescents' reasoning abilities, identity development, and need for growth as citizens suggest that older adolescents should be presumed able to direct their own litigation interests when they wish, with adults playing

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36. *See also* Matos for Rosario v. N.Y. City Bd. of Educ., No. 96 CIV. 4621 (DLC), 1997 WL 375599, at *1-2 (S.D.N.Y. July 7, 1997) (dismissing case filed by minor to challenge her permanent suspension from school for failure to appear by an adult representative and counsel).

37. *See, e.g.*, Osei-Afriyie *ex rel.* Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876, 879, 882–83 (3d Cir. 1991); Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 60 (2d Cir. 1990); Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986); Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 FLA. L. REV. 831, 837 (2019) (referring to this concept as the "counsel mandate," and recommending that courts discard it in this context).

38. *See, e.g.*, Shepherd v. Wellman, 313 F.3d 963, 970–71 (6th Cir. 2002) (upholding district court decision not to appoint counsel and dismissing case brought by parent on behalf of a child); Dunbar v. Colasanto, No. 305CV1234, 2006 WL 798883, at *1 (D. Conn. Mar. 24, 2006) (denying appointment of counsel and dismissing action brought by nonattorney parent on behalf of minor children); Burr v. Chitty, No. 04-CV-2562-G, 2005 WL 264943, at *1–2 (N.D. Tex. Feb. 3, 2005) (denying appointment of counsel and questioning whether a parent, as representative and not party in the case, even has the power to request an attorney on behalf of a child litigant). *But see* Brown v. Ortho Diagnostic Sys., Inc., 868 F. Supp. 168, 169, 172 (E.D. Va. 1994) (appointing counsel to represent minor plaintiff and parent in products liability action).

39. *See* discussion *infra* Part II.

a supportive, second-chair role. This Article further recognizes the important role that parents play as advisors to their children, and consequently posits that adolescents who are content to have adults lead should be permitted to have that additional support, and that, unless it risks harm, courts should engage parents when a child seeks to advance her claim alone. To ensure that all children have access—rather than just a privileged few—courts should appoint counsel for children who cannot afford to retain them rather than dismissing children's claims.

This Article proceeds in three parts to examine capacity doctrine in light of the evolving recognition of child development and children as legal persons. Part I evaluates children as civil litigants, first introducing the doctrine of legal capacity and considering developed exceptions that imbue children with the authority to advance their own cases, and then situating this doctrine within the broader context of the law's treatment of children as rights holders and persons entitled to remedies. This section demonstrates that, like children's legal rights, generally, procedural capacity doctrine has developed incrementally and without an overarching theory of when children need adult assistance and when children can take the lead. Moreover, the establishment of capacity exceptions invites examination of the value that adult representatives bring to minor litigants and what might be lost when minors proceed alone with only counsel to advise them.

Part II interrogates several pivotal theories that illuminate children as litigants, analyzing the insights that contemporary scientific, theoretical, and doctrinal justifications for extending and restricting children's legal rights bring to the development of a contextualized framework for evaluating procedural capacity. Part II concludes that although each of these theories offers critical suggestions for a capacity framework, none provides the full answer. Part III then draws upon elements of those theories to propose a framework for modernizing capacity doctrine in a way that both advances contemporary accounts of adolescents as rights-exercisers and persons entitled to remedies and protects adolescents' interests.

I. THE CAPACITY DOCTRINE MORASS

As a general matter, children are persons under the law and, like adults, are entitled to legal protection and standing to seek redress before the courts.[40] Children are likewise persons under the Constitution and

40. *See, e.g.*, Sorensen v. Sorensen, 339 N.E.2d 907, 912 (Mass. 1975) (declaring "[c]hildren enjoy the same right to protection and legal redress for wrongs done [to] them," and "only the strongest reasons, grounded in public policy, can justify limitation or abolition of [children's] rights"); *see also* Petersen v. City & Cnty. of Honolulu, 462 P.2d 1007, 1009 (Haw.

enjoy constitutional rights.[41] Capacity doctrine essentially serves as a gatekeeper for children's claims, dictating whether and under what conditions cases brought by and on behalf of children may proceed. Yet, capacity doctrine is underdeveloped and riddled with inconsistencies.[42] The morass within capacity doctrine is critical because children's legal rights are meaningless if they cannot be enforced. Consequently, capacity doctrine must be untangled to make children's rights meaningful.

Two primary problems contribute to the current capacity doctrine morass. First, the blunt distinctions and broad presumptions drawn by Federal Rule of Civil Procedure 17(c) fail to account for the unique circumstance of adolescents and leave unresolved whether and under what circumstances adolescents can advance civil claims on their own. It is left entirely to judges to identify child litigants who might warrant different treatment and determine the criteria with which to make such determinations, or to simply apply the rule verbatim to all children without distinction. Second, children's claims brought by adult representatives are routinely dismissed by federal courts for lack of counsel, under a common law rule prohibiting such adults from advancing children's claims pro se. Children advancing their own claims do not face this prohibition because they represent their own interests. Thus, so long as federal courts continue to impose this counsel mandate

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1969) ("[I]n general, minor children are entitled to the same redress for wrongs done them as are any other persons."); Wilbon v. D.F. Bast Co., 382 N.E.2d 784, 790–91 (Ill. 1978) ("[A] minor should not be precluded from enforcing his rights unless clearly debarred from so doing by some statute or constitutional provision."); Norris v. Mingle, 29 N.E.2d 400, 402 (Ind. 1940) ("[A] minor should not be precluded from enforcing his rights unless the same are clearly barred on account of some statutory or constitutional provision."); Lee v. Comer, 224 S.E.2d 721, 722–23 (W. Va. 1976) ("We perceive no reason why minor children should not enjoy the same right to legal redress for wrongs done to them as others enjoy.").

41. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."); Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 511 (1969) (declaring that children are "persons" under the Constitution); *In re* Gault, 387 U.S. 1, 13 (1967) ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."). Children's legal rights are not the same as adults', and no overarching theory has emerged to govern or explain the extension or withholding of rights to children. *See, e.g.*, Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1393 (2020) ("The law has not yet articulated a rationale to guide the determination of when children will be recognized as rights-bearers and when they will continue to be subject to parental and state authority.").

42. This Article focuses on capacity doctrine's treatment of children who seek to advance their own cases. Capacity doctrine's treatment of parents is also underdeveloped and riddled with inconsistencies. *See* Lisa V. Martin, *Litigation as Parenting*, 95 N.Y.U. L. REV. 442, 447–48 (2020).

for adults, the vindication of children's legal rights may depend upon children's capacity to represent themselves.

To help untangle this morass, this section first introduces legal capacity doctrine, evaluates piecemeal extensions of legal capacity to children, and examines courts' treatment of children within civil litigation as directive litigants. The section then explores precedents for extending decision-making rights to children in other legal contexts. This discussion demonstrates that in the context of both procedural capacity doctrine and children's decision-making rights in other contexts, courts and policy makers formulate children's legal rights and litigation authority without coherence.[43] In the capacity context, this incoherence creates inefficiencies for courts and unpredictability and unfairness for children regarding whether they can enforce their legal rights at all.

A. *A Critical Threshold Matter: Capacity Doctrine in Disarray*

Procedural capacity doctrine can be understood as simultaneously a manifestation of, a protective limitation upon, and a safeguard to effectuate minors' right of access to the courts.[44] As "the right conservative of all other rights," the right of access to the courts both enables minors to vindicate their legal rights and seek redress for harms

43. Scholars debate whether the resulting inconsistent treatment of children under the law is ultimately beneficial or detrimental to children. *See, e.g.*, Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547–49 (2000) (noting that the inconsistent treatment of children across policy contexts precludes a coherent image of legal childhood and arguing that in many contexts, the creation of different bright-line rules for different purposes advances children's interests and social welfare); Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision-Making*, 28 AM. J.L. & MED. 409, 432 (2002) (critiquing the lack of coherence within and among state laws governing children's decision-making authority regarding medical treatment); Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 277 (2006) (reviewing the different extensions of authority to children within different areas of the law and arguing for a consistent standard); Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1107 (2012) (arguing that the law has deemed maturity a pivotal construct for determinations regarding children but has developed it in piecemeal fashion, resulting in inconsistencies and incoherence); Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 57–58 (2016) (arguing that the varied treatment of children across legal contexts is consistent with and appropriately supports children's different rates of development of different capabilities); *see also* Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 258 (1979) ("To date, neither legislatures nor courts have developed a coherent philosophy or approach when addressing questions relating to children's rights. Different courts and legislatures have been willing to give some new rights to children, while denying them others, without explaining the difference in outcome." (footnote omitted)).

44. WRIGHT ET AL., *supra* note 28, § 1571 ("[Rule 17(c)] manifests a desire to protect the interest of infants and incompetent persons by assuring them proper representation in and access to a federal forum.").

done to them, and also ensures that when minors seek redress in courts, they are treated justly.[45] Deriving from the guarantees of due process, equal protection, free speech, and petition,[46] the Supreme Court has identified the right of access to the courts as "fundamental"[47] and among the "highest and most essential privileges of citizenship."[48] Although the Supreme Court has never ruled on the scope of the right during childhood, lower federal courts have recognized its significance for minors.[49]

45. Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907).

46. M.L.B. v. S.L.J., 519 U.S. 102, 123–24 (1996) (noting that because "access to judicial processes in cases criminal or 'quasi criminal in nature' [may not] turn on ability to pay," transcript fees for appeals of termination of parental rights decisions deprive indigent parents of the equal protection of the law (quoting Mayer v. Chicago, 404 U.S. 189, 196 (1971))); Smith v. Bennett, 365 U.S. 708, 710, 713–14 (1961) (holding that equal protection rights require courts to waive filing fees for criminal appeals for indigent defendants, as "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has" (alteration in original) (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956))); Boddie v. Connecticut, 401 U.S. 371, 374–76 (1971) (holding that impediments to court access that deny individuals the right to be heard violate due process rights, and that filing fees for divorce actions violate the due process rights of indigent spouses because marriage is a fundamental right and divorce cannot be accomplished outside of courts); Barbier v. Connolly, 113 U.S. 27, 31 (1885) ("[E]qual protection [ensures] . . . that all persons . . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts . . . ."); United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971) ("[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."); NAACP v. Button, 371 U.S. 415, 429 (1963) ("In the context of NAACP objectives, litigation . . . is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression."); *id.* at 430 ("[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513, 515 (1972) (holding that antitrust rules that preclude corporations' meritorious litigation unconstitutionally infringe on the right to petition).

47. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977) ("We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers . . . ."), *abrogated by* Lewis v. Casey, 518 U.S. 343 (1996).

48. *Chambers*, 207 U.S. at 148; *see also* Windsor v. McVeigh, 93 U.S. 274, 277, 280 (1876) (stating that the right of access to the courts "lies at the foundation of all well-ordered systems of jurisprudence" and is "'founded in the first principles of natural justice'" (quoting Bradstreet v. Neptune Ins., 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839))). Despite its designation of the right as "fundamental," the Supreme Court has not uniformly applied strict scrutiny to the right's deprivation for adults. Instead, the Court's scrutiny has fluctuated depending on the nature of the underlying right an individual approaches the courts to protect. Gary S. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 253–54 (1970) (noting that the right of "access to courts takes its specific importance and coloration from the right or interest it is being used to protect").

49. Ad Hoc Comm. of Concerned Teachers *ex rel.* Minor & Under-Age Students Attending Greenburgh Eleven Union Free Sch. Dist. v. Greenburgh No. 11 Union Free Sch. Dist., 873 F.2d 25, 31 (2d Cir. 1989) (appointing a nonguardian next friend as the adult representative for a minor

Beyond the Constitution, the right of access to the courts is guaranteed by many state constitutional provisions and codes, several of which explicitly extend the right to minors.[50] By articulating the procedures courts must follow in cases involving child litigants, capacity doctrine presumes that children may sue, imposes special conditions upon litigation involving children's claims, and facilitates children's access to the courts.[51]

Capacity doctrine operates on two fronts to protect children's interests within litigation: it defines which parties presumptively lack the authority to advance their legal claims, and it obligates courts to ensure that such parties' interests are adequately protected. The question of who should control litigation brought to advance a child's claims arises because children have "minority" status.[52] State statutory and common law define the bounds of minority,[53] primarily by establishing a bright-line age of

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in state custody who sued the public schools because "[t]he right of access to courts by those who feel they are aggrieved should not be curtailed; and this is particularly so in the instance of children who, rightly or wrongly, attribute such grievances to their very custodians" (quoting Child v. Beame, 412 F. Supp. 593, 599 (S.D.N.Y. 1976)); Sam M. *ex rel.* Elliott v. Carcieri, 608 F.3d 77, 91–92 (1st Cir. 2010) (concluding it better to appoint an adult representative who lacked a significant relationship to the child litigant than to dismiss the child's case entirely because "[i]mportant social interests are advanced by allowing minors access to a judicial forum to vindicate their constitutional rights through a Next Friend that the court finds has a good faith interest in pursuing a federal claim on the minor's behalf"); Gaddis v. United States, 381 F.3d 444, 453–54 (5th Cir. 2004) (en banc) ("This power to appoint guardians *ad litem* pursuant to Rule 17(c) is important not only to ensure that the minor's rights and interests are fully protected in cases where the minor is otherwise represented and there may be conflicts of interest, but also to ensure that the minor has proper access to the federal judicial system at all."); Chrissy F. *ex rel.* Medley v. Miss. Dep't of Pub. Welfare, 883 F.2d 25, 27 (5th Cir. 1989) (noting that "access to the courts by aggrieved persons should not be unduly limited," and thus, the court should on its own motion assess whether a guardian can adequately represent a minor where the court identifies a possible conflict of interests).

50. *See, e.g.*, Piselli v. 75th St. Med., 808 A.2d 508, 511, 517–18, 524–26 (Md. 2002) (analyzing in detail the history and purpose of Maryland's constitutional access to the courts/remedy guarantee and those of other states and holding that it requires the tolling of minors' tort claims until they reach majority) (interpreting MD. CONST. DEC. OF R. art. 19); *see also* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310–11, 1310 n.6 (2003) (evaluating forty states' constitutional provisions guaranteeing the rights of court access and to a remedy, and noting that courts have relied on such provisions to strike down laws allowing statutes of limitations to run on children's claims during their minority).

51. *See* FED. R. CIV. P. 17(c); Adelman *ex rel.* Adelman v. Graves, 747 F.2d 986, 989 (5th Cir. 1984) ("[T]he district court's primary concern in the instant case must be to assure, under Rule 17(c), that [the child's] interests in vindicating his statutory and constitutional rights are properly protected.").

52. *See supra* notes 20–22 and accompanying text.

53. FED. R. CIV. P. 17(b). Rule 17(b) provides in relevant part: "Capacity to sue or be sued is determined as follows: (1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile . . . ." *Id.*; *see also* Sara Jeruss, *Empty Promises? How State*

majority. In forty-seven states and the District of Columbia, children reach adulthood at age eighteen.[54] By contrast, two states—Alabama and Nebraska—set the age of majority at nineteen, and Mississippi retains the traditional common law age of twenty-one.[55]

Children's status as legal "minors" is intended to protect their interests by depriving children of the ability to take legal action for most purposes.[56] To this end, minors lack the legal capacity to sue and represent their own interests in civil litigation.[57] Instead, a minor's claims usually must be advanced by a capable adult acting on the minor's behalf.[58]

As part of courts' inherent authority to control the litigation before them, courts bear a special responsibility to ensure that minor litigants' interests are adequately protected.[59] Courts describe this obligation in lofty terms, portraying minors as "wards of [the] court,"[60] and extoling courts' obligations to exert "jealous care" that minors suffer "no injustice."[61] Courts' procedural rules regarding parties who lack capacity

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Procedural Rules Block LGBT Minors from Vindicating Their Substantive Rights, 43 U.S.F. L. REV. 853 app. at 905 tbl.1, 910 tbl.2 (2009) (including appendices comparing state capacity rules to Federal Rule 17(c) and presenting their text).

54. *See supra* note 1; D.C. CODE ANN. § 46-101 (West 2020).

55. ALA. CODE § 26-1-1(a) (2020); MISS. CODE ANN. § 1-3-27 (2021); NEB. REV. STAT. § 43-2101(1) (2020).

56. A prominent exception includes the entry of binding contracts for necessaries. *See* Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 52 (2012); Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J.L. & HUMANS. 37, 49 (2009) (tracing the history of restrictions on minors' right to contract as stemming from the notion that "because individual liberty is premised on the right of adults to freely exercise their facilities of decisionmaking and rational choice, it by definition cannot be extended to children, whose facilities are not yet mature"); 43 C.J.S. *Infants* § 322, Westlaw (database updated Dec. 2020).

57. 2 THOMAS A. JACOBS, CHILDREN AND THE LAW § 11:13, Westlaw (database updated May 2020) (discussing the general rule that unemancipated minors generally lack the capacity to sue).

58. MOORE ET AL., *supra* note 23, § 17.21[3][a] & n.16; WRIGHT ET AL., *supra* note 28, § 1570.

59. Coulson v. Walton, 34 U.S. (9 Pet.) 62, 84 (1835) ("It is the duty of the court to protect the interests of minors . . . ."); *see also* Bank of the U.S. v. Ritchie, 33 U.S. (8 Pet.) 128, 144 (1834) ("In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court.").

60. *See, e.g.*, Dacanay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978) ("It is an ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interests.").

61. Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123, 125 (2d Cir. 1998) (per curiam) ("[T]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him" (quoting Johns v. Cnty. of San Diego, 114 F.3d 874, 877 (9th Cir. 1997))), *abrogated in part by* Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007).

derive from courts' special responsibility to child litigants.[62]

Procedural capacity doctrine today remains virtually unchanged from 1912, when the Federal Equity Rules, the predecessors of the Federal Rules of Civil Procedure, were first adopted.[63] Federal Rule of Civil Procedure 17(c) and state procedural counterparts establish both who may sue on a minor's behalf and how courts must proceed when presented with a minor who lacks a representative.[64] The full text of Rule 17(c) provides:

> (c) Minor or Incompetent Person.
>
> (1) *With a Representative.* The following representatives may sue or defend on behalf of a minor or an incompetent person:
>
> (A) a general guardian;
>
> (B) a committee;
>
> (C) a conservator; or
>
> (D) a like fiduciary.
>
> (2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.[65]

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62. Garrick v. Weaver, 888 F.2d 687, 693 (10th Cir. 1989) ("Rule 17(c) flows from the general duty of the court to protect the interests of infants and incompetents in cases before the court.").

63. Gaddis v. United States, 381 F.3d 444, 452–53 (5th Cir. 2004) (en banc) ("The only historical note in the published rules indicates that Rule 17(c) 'is substantially former Equity Rule 70 (Suits by or Against Incompetents) with slight additions.'" (quoting FED. R. CIV. P. 17 advisory committee's note to 1937 rules)); Martin, *supra* note 42, at 452 n.50 ("The author's review of drafters' memos from the initial drafting and subsequent revisions of the Federal Rules of Civil Procedure uncovered no substantive discussion of the content of Rule 17(c) that would aid in its interpretation."); Wallace R. Lane, *Twenty Years Under the Federal Equity Rules*, 46 HARV. L. REV. 638, 655 (1933) (citing no cases discussing Rule 70 twenty years after its adoption and concluding that Rule 70 "require[d] no comment"); Wallace R. Lane, *Federal Equity Rules*, 35 HARV. L. REV. 276, 297 (1922) (citing no reported cases discussing Rule 70 ten years after its adoption).

64. In twenty-five states, capacity rules replicate Federal Rule 17(c) verbatim, or diverge from 17(c) in phrasing or scope, but include 17(c)'s essential content. Chart of State Civil Capacity Rules with FED. R. CIV. P. 17(c) (2020) (on file with Author). Approximately half of the remaining states grant courts the discretion to enter additional orders to protect a minor's interests. *Id.*; *see also* Jeruss, *supra* note 53, app. at 905 tbl.1, 910 tbl.2 (including appendices comparing state capacity rules to Federal Rule 17(c) and presenting their text).

65. FED. R. CIV. P. 17(c).

In this context, adult representatives are not attorneys—their job is not to actually conduct the litigation before the court.[66] Instead, adult representatives stand in a child litigant's shoes and make disinterested decisions on the child's behalf.[67] Although court interpretations of Rule 17(c) vary widely,[68] because adult representatives are tasked with protecting children's interests, courts generally prefer adults who have a strong ongoing relationship with the child for this role.[69] In practice, children's adult representatives are typically their parents.[70] Because of parents' common involvement in children's cases and constitutionally

66. Indeed, federal doctrine precludes adult representatives from proceeding *pro se* and requires them to retain counsel on behalf of the child litigant or face dismissal of the case. *See, e.g.*, Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986) (per curiam); Martin, *supra* note 37, at 447 ("Under current federal practice, courts routinely dismiss cases brought by parents pro se on behalf of minors for lack of counsel.").

67. Interestingly, the considered debates about whether such representatives should assert a child litigant's expressed wishes or the representative's own sense of the child's best interests that have shaped guardian ad litem practice in family courts have not informed the role of adult representatives in federal civil litigation. Garrick v. Weaver, 888 F.2d 687, 693 (10th Cir. 1989) ("Once appointed, the guardian ad litem is 'a representative of the court to act for the minor in the cause, with authority to engage counsel, file suit, and to prosecute, control and direct the litigation.'" (quoting Noe v. True, 507 F.2d 9, 12 (6th Cir. 1974) (per curiam))); 43 C.J.S. *Infants* § 426, Westlaw (database updated Dec. 2020) ("It is the guardian ad litem's duty to stand in the shoes of the child and to weigh the factors as the child would weigh them if his or her judgment were actually mature, and the minor was not in fact of tender years."); Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1846 (1996) ("[I]n litigation where the parent is bringing suit on behalf of the child, the parent's role as guardian, next friend, or guardian *ad litem* ordinarily contemplates that the parent . . . will be making decisions on the child's behalf, even though it is the child who is the [lawyer's] actual client . . . .").

68. Martin, *supra* note 42, at 471 (evaluating disparities in courts' interpretations of Rule 17(c)'s requirements regarding the appointment of adult representatives for children).

69. *See, e.g.*, Sam M. *ex rel.* Elliott v. Carcieri, 608 F.3d 77, 90 (1st Cir. 2010); T.W. *ex rel.* Enk v. Brophy, 124 F.3d 893, 897 (7th Cir. 1997).

70. *See* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 841 n.44 (1977) ("[C]hildren usually lack the capacity to make [decisions about their interests;] . . . their interest is ordinarily represented in litigation by parents or guardians."); Johnson v. Collins, 5 F. App'x 479, 485 (7th Cir. 2001) (order) ("To maintain a suit in a federal court, a child or mental incompetent must be represented by a competent adult, ordinarily a parent or relative."); Gonzalez-Jimenez de Ruiz v. United States, 231 F. Supp. 2d 1187, 1196 (M.D. Fla. 2002) ("Typically, 'the next friend who sues on behalf of the minor is that minor's parent.'" (quoting Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167, 1185 (S.D. Fla. 2000))), *aff'd sub nom.* Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000). Courts vary widely in the terminology they assign to parents serving in this role in federal courts, alternately referring to parents as "guardians," "next friends," and "guardians ad litem." Martin, *supra* note 42, at 454 & n.54 (noting review of federal cases brought on behalf of minors from 2015 to 2018 revealed that seventy-eight out of eighty-seven total cases identified were brought by parents); Moore, *supra* note 67, at 1846 ("[E]xcluding cases of inherent conflict such as custody, abuse or neglect, and termination of parental rights[], parents are expected not only to 'foot the bill [for counsel],' but also to play an active role in directing the course of the representation." (footnote omitted)).

protected rights to care and control of their children, questions of capacity often give rise to questions about parents' role in a child's case.[71]

In sum, capacity doctrine essentially requires courts to ensure that children have appropriate adult representatives;[72] appoint representatives where children lack them;[73] and by reviewing and ratifying settlement agreements[74] and attending to conflicts of interest[75] and failures to fulfill the role,[76] confirm that those representatives actually serve children's interests in the case.

At first blush, capacity rules appear to apply to children categorically, requiring adults to direct litigation for all minors—regardless of a child's age, maturity, the nature of the claim, or individual circumstances. Nothing in the text, comments, or legislative history of Federal Rule 17(c), for example, appears to contemplate that minors might seek to represent themselves before courts, nor considers how courts might respond where a minor and a parent disagree about whether litigation should proceed.[77] Yet, minors do approach the courts without adults for a multitude of reasons: absence of custodial parents,[78] knowledge or fear that parents would oppose the sought relief,[79] parents' actual

71. Martin, *supra* note 42.

72. *T.W.*, 124 F.3d at 897 (setting forth detailed criteria for evaluating the appropriateness of adult representatives for child litigants).

73. Gardner *ex rel.* Gardner v. Parson, 874 F.2d 131, 140 (3d Cir. 1989) (concluding that Rule 17(c) requires courts to affirmatively ensure minor parties' interests are protected in the litigation, either by appointing a guardian ad litem or taking some other action).

74. *See, e.g.*, Dacanay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978) ("[F]rom the time of the early courts of chancery a guardian ad litem has been unable to bind a minor litigant to a settlement agreement absent an independent investigation by the court and a concurring decision that the compromise fairly promotes the interests of the minor . . . .").

75. *See, e.g.*, Kile v. United States, 915 F.3d 682, 687 (10th Cir. 2019) ("[A]bsent an apparent conflict of interest, the appointment of a guardian ad litem is not necessary where a parent is a party to the lawsuit and presses the child's claims before the court."); Chrissy F. *ex rel.* Medley v. Miss. Dep't of Pub. Welfare, 883 F.2d 25, 27 (5th Cir. 1989) ("[W]hen the complaint shows a conflict of interest between a general guardian and an infant, the court should, *on its own motion,* determine whether the infant's interests are adequately protected by the general guardian's representation.").

76. *See, e.g.*, Muse' B. *ex rel.* Hanna B. v. Upper Darby Sch. Dist., No. 06-CV-00343, 2007 WL 2973709, at *1 (E.D. Pa. Feb. 14, 2007) (recommending the appointment of a guardian ad litem to represent a child after the child's mother failed to communicate with the child's counsel and sought to undo a previously ratified settlement agreement), *aff'd*, 282 F. App'x 986 (3d Cir. 2008).

77. *See* FED. R. CIV. P. 17(c).

78. *See, e.g.*, S.B. v. United States, No. 19-CV-00069, 2019 WL 5802360, at *1–2 (W.D. Wash. Nov. 7, 2019) (granting relief for plaintiffs who were wards of their Tribe and alleged the Tribe negligently left them in the care of abusive parents and finding that no guardian ad litem was necessary because counsel adequately represented plaintiffs' interests).

79. *See, e.g.*, Collins v. York, 267 A.2d 668, 669–70 (Conn. 1970) (rejecting a minor's petition for a writ of habeas corpus, which challenged the state's power to detain her indefinitely and was opposed by her parents).

disagreement that suing best serves children's interests,[80] parents' inability to bring suit,[81] parents' fear of any court involvement (for example, because they lack legal immigration status or anticipate retribution),[82] or parents' lack of knowledge about the litigation or the events motivating it.[83]

Moreover, in recent decades, the federal courts have adhered to a common law rule mandating that adult representatives bringing claims on behalf of children must retain counsel.[84] This "counsel mandate" stems in part from the historic prohibition against the unauthorized practice of law—nonlawyers cannot act as counsel for another before the courts.[85] Federal law has long guaranteed the rights of parties to represent their own interests without counsel; however, this guarantee does not apply to adults seeking to advance children's claims.[86] Although such adults are charged with making decisions on behalf of children within a case, the counsel mandate decrees that such adults are not authorized to present children's claims to courts as a lawyer would.[87] Thus, if no adult can afford to retain counsel for a child, that child's only viable option may be to vindicate her own claim pro se.[88]

In fact, courts and legislatures have extended litigation capacity to children in a handful of circumstances. Although these grants of authority

80. *See, e.g.*, Buckholz v. Leveille, 194 N.W.2d 427, 429 (Mich. Ct. App. 1971) (holding that a minor over the age of fourteen has the right to sue over the objection of his parents under Michigan capacity doctrine).

81. *See, e.g.*, N.B. v. Barr, No. 19-CV-1536, 2019 WL 4849175, at *7 & n.6 (S.D. Cal. Oct. 1, 2019) (appointing a next friend from an advocacy organization to represent a minor where the minor's father was deceased and the mother lived in Guinea).

82. *See, e.g.*, *supra* text accompanying notes 1–3.

83. This Article focuses largely on cases brought by or on behalf of minor plaintiffs, but capacity concerns are at play when minor parties are defendants as well. For example, in a case brought against minor children and their grandmother to challenge an award of worker's compensation benefits following their father's death, the court noted, "The record in this case shows that no one gave a thought to the appointment of a guardian ad litem until after judgment was rendered below." Roberts v. Ohio Cas. Ins., 256 F.2d 35, 37, 39 (5th Cir. 1958); *see also* Varner v. Holley, 854 A.2d 520, 524 (Pa. Super. Ct. 2004) (overturning conviction of minor respondent for contempt for violating civil protection order because minor lacked an adult representative when he consented to the issuance of the order against him).

84. Martin, *supra* note 37, at 834 (evaluating the application and impact of the counsel mandate).

85. *See, e.g.*, Iannaccone v. Law, 142 F.3d 553, 558 (2d. Cir. 1998) ("[B]ecause pro se means to appear for one's self, a person may not appear on another person's behalf in the other's cause. A person must be litigating an interest personal to him."); Martin, *supra* note 37, at 839–53 (exploring the legal foundations for the counsel mandate).

86. 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

87. Martin, *supra* note 37, at 845–49.

88. *See supra* note 66.

frequently advance important interests, they have been established piecemeal and often based on underdeveloped rationales. Consequently, these contextualized extensions of capacity have failed to generate a broader, more nuanced theory of when children should advance their own claims.

1. Capacity Based on the Substantive Claim

Courts and legislatures have extended some grants of capacity based on the substantive right at issue. First, the Supreme Court's recognition of children's constitutional rights to reproductive privacy and representation by counsel in juvenile proceedings have resulted in grants of capacity to children in such cases. In the abortion context, for example, states that require parental consent as a prerequisite to minors' access to abortion procedures must also enable minors to seek court waivers of parental consent.[89] Because parents' knowledge of such "judicial bypass" litigation itself could subvert the very privacy rights at issue in the case, courts may be precluded from notifying parents about these claims.[90] Moreover, because judicial bypass cases seek to vest children with decision-making authority in lieu of their parents, parents should not serve as litigation representatives for their children in such cases.[91] Pursuant to these constitutional parameters, most states with parental consent prerequisites to abortion procedures have granted minors the legal capacity to pursue claims for judicial bypass of parental consent requirements on their own.[92]

In addition, state laws extend legal capacity to qualifying minors to pursue several civil legal remedies on their own, without the involvement

89. Bellotti v. Baird, 443 U.S. 622, 634, 643 (1979) (plurality opinion).

90. M.S. v. Wermers, 557 F.2d 170, 176 (8th Cir. 1977) ("[N]otification to the parents of the guardian ad litem proceeding would compromise appellant's claimed right of privacy before it could be established . . . ."); *see* Foe v. Vanderhoof, 389 F. Supp. 947, 956–57 (D. Colo. 1975) (finding the state did not have a compelling interest to justify parental consent requirement imposed on minors seeking abortions); T.H. v. Jones, 425 F. Supp. 873, 875–76 (D. Utah 1975) (holding that a state regulation prohibiting Planned Parenthood from providing family planning assistance to minors without parental consent violates the minor's right to privacy), *aff'd in part*, 425 U.S. 986 (1976).

91. *See M.S.*, 557 F.2d at 176 (finding parents should not be appointed as guardians in litigation challenging a grant of parental veto power).

92. Out of the thirty-five states that created judicial bypass proceedings, twenty-nine permit minors to represent themselves, twenty-six appoint counsel for minors who wish to be represented, and five mandate the appointment of counsel for minors in such cases. Chart of State Judicial Bypass Procedures (2020) (on file with Author); *see* Wendy-Adele Humphrey, *Two-Stepping Around a Minor's Constitutional Right to Abortion*, 38 CARDOZO L. REV. 1769, 1786 (2017); Rebouché, *supra* note 30, at 176.

of an adult representative.[93] Several states permit minors to represent their own interests in cases relating to their own children, including actions to establish paternity and enter child support, custody, and visitation orders,[94] and in adoption and termination of parental rights proceedings.[95] Moreover, a handful of states permit some minors to seek civil protection orders on their own to protect themselves from intimate partner violence, sexual assault, and stalking, depending upon their age and relationship to the perpetrator.[96]

The extension of capacity to minors to pursue these additional case types advances state policy goals of encouraging youth to ensure their health and well-being and that of their own children, which also animate states' extension to minors of other decision-making rights.[97] Granting

93. Relatedly, some states appoint counsel to represent children's expressed interests (rather than their best interests, as perceived by a guardian ad litem) within child abuse and neglect cases the state brings against their parents. CHILD WELFARE INFO. GATEWAY, DEP'T OF HOUS. & HUM. SERVS., REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS 2, 4 (2018), https://www.childwelfare.gov/pubPDFs/represent.pdf [https://perma.cc/26RE-54KW].

94. *See, e.g.*, D.C. CODE § 16-914(a-3)(1) (2021) (granting minor parents the right to initiate custody proceedings); Smith v. Langford, 255 So. 2d 294, 296 (Fla. Dist. Ct. App. 1971) (stating that the state rule allowing a representative to sue on behalf of a minor does not act as a bar to an action brought by a minor in their individual capacity); KRAMER, *supra* note 1, § 14:2, at 982–83.

95. *See, e.g.*, *In re* Adoption of A.L.O., 132 P.3d 543, 545–46 (Mont. 2006) (describing a state statute that allows minors to consent to termination of their parental rights in adoption proceedings so long as they are represented by counsel); *In re* Adoption of D.N.T., 843 So. 2d 690, 709–10 (Miss. 2003); Seymore, *infra* note 161, at 128–33 (finding that minors' relinquishment of parental rights is governed by the same procedures as adults' in a majority of states and evaluating the fifteen states that have different or additional requirements for minor parents); Manian, *infra* note 160, at 172, 174.

96. CAL. CIV. PROC. CODE § 372(b)(1) (West 2020) (permitting minors twelve and older to file against defendants with whom they share any qualifying relationship); D.C. CODE § 16-1003(a) (2021) (permitting minors twelve and older to file against dating partners, and minors sixteen and older to file against defendants with whom they share any qualifying relationship); MINN. STAT. § 518B.01, subdiv. 4(a) (2020); MO. ANN. STAT. § 455.035 (West 2020) (permitting minors seventeen and older to file against all qualifying relationships); N.H. REV. STAT. ANN. § 173-B:7 (2020) (permitting all minors, regardless of age, to file against respondents in all qualifying relationships); OKLA. STAT. ANN. tit. 21, § 142A-4 (West 2020); OR. REV. STAT. § 163.763(2)(a) (2019); UTAH CODE ANN. § 78B-7-102(3)(d), (5)(a) (LexisNexis 2021); VT. STAT. ANN. tit. 15, § 1103(a) (2021); WASH. REV. CODE § 26.50.020(1)–(3) (2019). Other states such as New Jersey have adopted court policies and procedures that encourage courts to permit minors to seek civil protection orders without notifying their parents. *See* STATE OF N.J. DOMESTIC VIOLENCE PROCS. MANUAL § 2.1.3.A (CONF. OF FAM. PRESIDING JUDGES & DEP'T OF L. & PUB. SAFETY 2008) ("A victim may be below the age of 18, may sign the Complaint/TRO and does not need the consent of a parent or guardian to file or withdraw a complaint or to request a modification of an existing order."). *See generally* Martin, *Forced Marriage*, *supra* note 31, app. 4 (summarizing state statutes granting minors legal capacity to seek restraining orders on their own); Martin, *Securing Access*, *supra* note 31 (analyzing the accessibility of civil protection orders to teenagers).

97. *See supra* notes 153–74 and accompanying text. These goals also are advanced by state laws that emancipate minors upon the birth of a child.

minors the right to seek civil protection orders, for example, serves state interests in "protect[ing] victims' rights of privacy," "encourag[ing] abused teens to seek help,—even those who otherwise would not come forward if forced to disclose their situation to their parents or anyone else in their personal lives"—and "protecting teenagers from dating violence."[98] By contrast, scholars have critiqued state policies that allow minors to relinquish their parental rights and consent to the adoption of their children by affidavit and in adoption proceedings as insufficiently protective of minor parents, who may be vulnerable to coercion or misrepresentation by state actors and adoptive parents.[99]

In addition to categorical legislative grants of capacity to minors to advance particular claims, courts are typically empowered to grant minor litigants the capacity to represent themselves within individual cases. Although Federal Rule 17(c) and most states' rules of civil procedure presume that all minors' cases should be advanced by adults, courts often retain discretion to determine that some other arrangement adequately protects a minors' interests.[100] Rule 17(c)(2) directs that courts "must appoint a guardian ad litem—*or* issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.[101] The Rule provides no guidance as to what might constitute "another appropriate order."[102] Nonetheless, in several cases, court orders permitting minor parties to direct their own cases have been found appropriate to protect minors' interests under Rule 17(c)(2).[103]

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98. J.L. v. G.D., 29 A.3d 752, 755, 758 (N.J. Super. Ct. Ch. Div. 2010) (holding a minor could litigate her claim for a civil protection order against her former boyfriend without notifying or involving her parents and appointing an attorney to advance her interests before the court); COUNCIL OF D.C., COMM. ON PUB. SAFETY & THE JUDICIARY, REPORT ON BILL 17-55, THE "INTRAFAMILY OFFENSES ACT OF 2008," at 3 (Nov. 25, 2008), https://lims.dccouncil.us/downloads/LIMS/18480/Committee_Report/B17-0055-CommitteeReport1.pdf [https://perma.cc/EP5Z-MP5M] (explaining in support of legislation that granted minors twelve and older the capacity to pursue civil protection orders that "[d]istrict teens need as much assistance as possible to deal with dating violence").

99. *See* Manian, *infra* note 160, at 131–32; Seymore, *infra* note 161, at 101–02.

100. Most states grant courts the discretion to enter additional orders to protect a minor's interests such as that found in Rule 17(c)(2). Chart of State Civil Capacity Rules with FED. R. CIV. P. 17(c) (2020) (on file with Author). *But see, e.g.*, Klak v. Skellion, 741 N.E.2d 288, 290 (Ill. App. Ct. 2000) (dismissing a claim to establish parentage brought by a seventeen-year-old on her own behalf with counsel because a minor does not have the legal capacity to initiate or pursue litigation in her own name under Illinois law).

101. FED. R. CIV. P. 17(c)(2) (emphasis added).

102. *Id.*

103. *See, e.g.*, M. S. v. Wermers, 557 F.2d 170, 176 (8th Cir. 1977) ("On remand, the District Court is free to appoint a guardian ad litem capable of preserving appellant's anonymity or to appoint no guardian at all if it should choose to reconsider its finding that a guardian ad litem is necessary.").

Children have often sought to represent their own interests in federal courts to advance rights of privacy in reproduction,[104] but also have attempted to bring a range of other civil cases alone. Minors have filed cases on their own seeking compensation for victimization through sex trafficking under the Child Abuse Victims Rights Act[105] and physical mistreatment and abuse under the Federal Tort Claims Act (FTCA).[106] Minors have sued to assert the right to seek asylum against parents' wishes.[107] And minors have brought their own cases to challenge civil and constitutional rights violations by: school districts (including for failures to provide adequate educational support,[108] policies prohibiting students from using the restrooms that match students' gender identities,[109] and rules precluding distribution of student publications[110]); police officers and municipalities for police brutality;[111] and state and county officials for conditions of confinement.[112]

In making case-specific determinations of whether to grant a minor capacity, federal courts have sometimes looked to the nature of the claims at stake. Courts have cited favorably that a minor raised only constitutional claims,[113] sought only declaratory or injunctive relief and not monetary damages,[114] and asserted only her own constitutional and statutory rights.[115] None of these courts offered a detailed rationale for the import of these factors within a particular case, nor a theory for prioritizing these factors over others within capacity doctrine, generally.

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104. *See supra* notes 89–91 and accompanying text.

105. 18 U.S.C. § 2255; *see, e.g.*, Roe v. White, No. C 03-04035 CRB, 2005 WL 8165883, at *1 (N.D. Cal. Oct. 3, 2005).

106. Ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.); *see* S.B. v. United States, No. 19-CV-00069, 2019 WL 5802360, at *2 (W.D. Wash. Nov. 7, 2019) (holding in an FTCA lawsuit that no guardian ad litem was necessary because counsel adequately represented plaintiff's interests).

107. Polovchak v. Meese, 774 F.2d 731, 732 (7th Cir. 1985).

108. Matos *ex rel.* Rosario v. N.Y.C. Bd. of Educ., No. 96 CIV. 4621, 1997 WL 375599, at *1 (S.D.N.Y. July 7, 1997).

109. J.A.W. v. Evansville Vanderburgh Sch. Corp., 323 F. Supp. 3d 1030, 1036 (S.D. Ind. 2018).

110. Jacobs v. Bd. of Sch. Comm'rs, 490 F.2d 601, 603 (7th Cir. 1973), *vacated*, 420 U.S. 128 (1975).

111. *See* J.K.G. v. Cnty. of San Diego, No. 11CV305, 2011 WL 5218253, at *1 (S.D. Cal. Nov. 2, 2011) ("Deputy . . . 'punched Plaintiff in the face twice . . . .'").

112. Pierson v. Allison, No. 08cv208, 2009 WL 3049220, at *4 (S.D. Miss. Sept. 17, 2009); Hendrickson v. Griggs, 672 F. Supp. 1126, 1130–32 (N.D. Iowa 1987); Doe v. Borough of Clifton Heights, 719 F. Supp. 382, 383 (E.D. Pa. 1989), *aff'd*, 902 F.2d 1559 (3d Cir. 1990).

113. Rotzenburg v. Neenah Joint Sch. Dist., 62 F.R.D. 340, 341 (E.D. Wis. 1974).

114. *Id.*

115. T.H. v. Jones, 425 F. Supp. 873, 877 (D. Utah 1975), *aff'd in part*, 425 U.S. 986 (1976).

2. Capacity Based on Individual Criteria

Other extensions of capacity to minors by courts are based on perfunctory descriptions of additional criteria. My research of the limited body of caselaw in which courts have considered whether to grant minors capacity suggests that the most critical factors to a court's determination are the minor's age and whether the minor is represented by counsel.[116] In the rare cases in which courts granted capacity and discussed their reasoning beyond these factors,[117] the court cited the minor's capability,[118] "understanding of the legal and personal implications of this action,"[119] voluntary participation in the case,[120] and access to other supportive adults.[121] In nearly all federal cases that my research uncovered in which courts permitted minors to advance their own claims, the minors were represented by counsel and at least fifteen or older.[122]

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116. Courts often reference counsel as an explicit factor in decisions to grant capacity. *See, e.g.*, S.B. v. United States, No. 19-CV-00069, 2019 WL 5802360, at *1 (W.D. Wash. Nov. 7, 2019) (finding the appointment of a guardian ad litem for minor plaintiffs unnecessary because counsel had "vigorously advocated" for them); J.A.W. v. Evansville Vanderburgh Sch. Corp., No. 18-CV-37, 2018 WL 2688187, at *2 (S.D. Ind. June 5, 2018) (citing the minor plaintiff's representation by "experienced and suitable counsel"); T.H. v. Jones, 425 F. Supp. 873, 877 (D. Utah 1975) (granting capacity in part because minor "plaintiff is represented by able and experienced counsel"), *aff'd*, 425 U.S. 986 (1976); Rotzenburg v. Neenah Joint Sch. Dist., 62 F.R.D. 340, 341 (E.D. Wis. 1974) (finding minor plaintiffs' interests adequately protected by their attorney); Baird v. Bellotti, 393 F. Supp. 847, 850 n.5 (D. Mass. 1975) (finding the minor plaintiff's "interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel"), *vacated*, 428 U.S. 132 (1976).

117. Although two of these cases entailed challenges to parental consent requirements for abortion, and thus the Supreme Court's test in *Bellotti v. Baird* and state judicial bypass statutes ultimately replaced the standards in these cases, the factors the courts articulated remain useful as they provide rare insight into how courts determine whether to grant capacity to minors in the absence of any guidance—the circumstance in which most capacity rulings continue to be made.

118. *See* Foe v. Vanderhoof, 389 F. Supp. 947, 957 (D. Colo. 1975) ("She . . . is capable of bringing the action on her own behalf.").

119. *Id.*; *J.A.W.*, 2018 WL 2688187, at *2; *cf. Baird*, 393 F. Supp. at 850 n.5 (noting the minor plaintiff "is of ample intelligence to, and in fact does, fully understand the nature of this action").

120. *Baird*, 393 F. Supp. at 850 n.5.

121. *Foe*, 389 F. Supp. at 957 (finding that minor plaintiff's interests were "sufficiently protected by her attorneys and social worker").

122. S.B. v. United States, No. 19-CV-00069, 2019 WL 5802360 (W.D. Wash. Nov. 7, 2019); *J.A.W.*, 2018 WL 2688187; Doe v. Borough of Clifton Heights, 719 F. Supp. 382 (E.D. Pa. 1989), *aff'd*, 902 F.2d 1559 (3d Cir. 1990); Rotzenburg v. Neenah Joint Sch. Dist., 62 F.R.D. 340 (E.D. Wis. 1974); *Foe*, 389 F. Supp. 947; T.H. v. Jones, 425 F. Supp. 873 (D. Utah 1975), *aff'd*, 425 U.S. 986 (1976); *Baird*, 393 F. Supp. 847; Jacobs v. Bd. of Sch. Comm'rs, 490 F.2d 601 (7th Cir. 1973), *vacated*, 420 U.S. 128 (1975); Hendrickson v. Griggs, 672 F. Supp. 1126 (N.D. Iowa 1987); Doe v. Pickett, 480 F. Supp. 1218 (1979).

My research identified only two federal cases in which a minor younger than fifteen sought to advance her claim without an adult. Noe v. True, 507 F.2d 9, 10 (6th Cir. 1974) (per curiam)

Some of these minors also were accompanied by other adults, such as social workers, who did not seek to play a formal role within the case.[123] Conversely, in all of the cases that my research uncovered in which courts dismissed claims brought by children for lack of capacity, children lacked counsel.[124]

The salience of legal representation for courts is further demonstrated by courts' continued adherence to the counsel mandate, which requires that claims brought by adults on behalf of children be advanced by counsel.[125] Court reasoning in support of the mandate often declares children "entitled" to legal representation to ensure that their interests are best protected, yet the lack of a right to counsel in civil proceedings makes this a moral entitlement at best.[126] Moreover, courts' frequent derision of parents' ability to protect children's interests in a case may suggest that courts see little harm in the absence of an adult representative when counsel is involved.[127]

Yet, representation by counsel is an unjust proxy for capacity. In courts throughout the United States, self-representation has become commonplace as a result of the persistent dearth of free and low-cost legal services and the unaffordability of legal fees for most litigants.[128] As

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(a fourteen-year-old challenging statute prohibiting the state Bureau for Social Services, as her legal guardian, from consenting to an abortion on her behalf); Matos *ex rel.* Rosario v. N.Y.C. Bd. of Educ., No. 96 CIV. 4621, 1997 WL 375599, at *1 (S.D.N.Y. July 7, 1997) (a fourteen-year-old challenging her expulsion and the failure to provide educational supports). I also identified one state case brought by a minor younger than fifteen. P.F. v. Walsh, 648 P.2d 1067, 1068 (Colo. 1982) (en banc) (a thirteen-year-old filing a habeas petition to challenge his "voluntary" commitment by his parents).

123. *See, e.g.*, *Foe*, 389 F. Supp. at 957.

124. *See, e.g.*, *Matos*, 1997 WL 375599, at *1; Pierson v. Allison, No. 08cv208, 2009 WL 3049220, at *4 (S.D. Miss. Sept. 17, 2009); Ellis v. McDonalds Corp., No. 05-CV-3961, 2005 WL 2155547, at *1 (E.D.N.Y. Sept. 7, 2005).

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

126. Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990); *see* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25–27 (1981) (holding that individuals generally do not have a right to counsel in civil proceedings; the right might exist where the deprivation of liberty is at stake); Turner v. Rogers, 564 U.S. 431, 441–43 (2011) (stating that individuals do not have a blanket right to counsel in civil contempt proceedings that might lead to incarceration).

127. Martin, *supra* note 37, at 853–54.

128. ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES 13 (Mar. 2018), https://repository.library.georgetown.edu/bitstream/handle/10822/761858/Houseman_Civil_Legal_Aid_US_2017.pdf?sequence=5&isAllowed=y [https://perma.cc/VTB9-F29L]; LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 19 (2009) ("Nationally, there are *well over ten times more* private attorneys providing personal legal services to people in the general population than there are legal aid attorneys serving the poor." (footnote omitted)); JOY MOSES, CTR. FOR AM. PROGRESS, GROUNDS FOR OBJECTION: CAUSES AND CONSEQUENCES OF AMERICA'S PRO SE CRISIS AND HOW TO SOLVE THE PROBLEM OF UNREPRESENTED LITIGANTS 3–4 (2011), https://cdn.americanprogress

children are more likely to live in poverty than adults,[129] it is unsurprising that scores of children's cases are dismissed from the courts each year when parents fail to retain counsel.[130] Requiring children to appear with counsel would direct children to do—with presumably far fewer financial and social resources—what their parents often cannot.[131] As a practical matter, requiring children to retain counsel as a condition of capacity would exclude most children from the courts.

Beyond individual case determinations, several among the minority of states that do not follow Federal Rule 17(c) expressly cede some level of control over their cases to minor litigants age fourteen and older. Twelve states entitle minors over age fourteen to select or nominate their adult representatives;[132] in four of these states, minors may be able to do so without notice to or consent of their parents.[133] These policies impact federal litigation as well because capacity is governed by state law,[134] and some federal courts choose to apply state law when determining the appointment of adult representatives under Rule 17(c).[135]

At least one state court connected such policies allowing adolescents to select their representatives with minors' broader right of access to the courts, and held that adolescents may exercise this right over their

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.org/wp-content/uploads/issues/2011/06/pdf/objection.pdf [https://perma.cc/4KDE-RQNQ]; Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, A.B.A. J. (July 22, 2010, 1:36 PM), https://www.abajournal.com/news/article/middle-class_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid [https://perma.cc/QA6E-W8G9]; Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 749–52 (2015) (summarizing recent research on *pro se* litigation and access to counsel).

129. BERNADETTE D. PROCTOR ET AL., U.S. DEP'T OF COM., REP. NO. P60-256, INCOME AND POVERTY IN THE UNITED STATES 14 (2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf [https://perma.cc/Z4PB-TGLL]. More than 30 million children—over 40% of all children in the United States—had family incomes below 200% of the federal poverty level, *id.* at 17 tbl.5, meaning their family earned no more than $48,500 per year for a family of four, *see* Annual Update of the HHS Poverty Guidelines, 80 Fed. Reg. 3236, 3237 (Jan. 22, 2015) (reporting the federal poverty level as $24,250 per year for a family of four).

130. Martin, *supra* note 37, at 853–54.

131. *See* Martin, *supra* note 37, at 855–58 (evaluating multiple barriers to securing counsel for low- and moderate-income parents).

132. ALA. R. CIV. P. 17(d); CAL. CIV. PROC. CODE § 373(a) (West 2020); MICH. CT. R. 2.201(E)(2)(i); MONT. CODE ANN. § 25-5-301(2) (West 2019); NEV. REV. STAT. ANN. § 12.050.2 (LexisNexis 2020); OR. R. CIV. P. 27B(2)(a); UTAH R. CIV. P. 17(c)(l); WASH. REV. CODE ANN. § 4.08.050(2) (West 2020); MINN. R. CIV. P. 17.02; MO. ANN. STAT. § 507.130 (West 2020); N.D. CENT. CODE § 28-03-01 (2019); S.C. R. CIV. P. 17(d)(3); Jeruss, *supra* note 53, at 875–76.

133. *See* MINN. R. CIV. P. 17.02; MO. ANN. STAT. § 507.130; N.D. CENT. CODE § 28-03-01; S.C. R. CIV. P. 17(d)(3); Jeruss, *supra* note 53, at 876.

134. FED. R. CIV. P. 17(b)(1).

135. Federal courts diverge as to whether courts' appointment of next friends and guardians ad litem is a "procedural" or "substantive" matter, and thus whether state or federal law governs the process under *Erie* doctrine. *See* WRIGHT ET AL., *supra* note 28, § 1570 (describing how courts diverge in choosing federal or state law when applying Rule 17(c)); Martin, *supra* note 42, at 452 & nn.50–51, 453 & n.52 (collecting cases).

parents' objection.[136] *Buckholz v. Leveille*[137] entailed a constitutional challenge by a high school junior to his indefinite suspension for failure to abide by the school dress code, which required him to cut his hair to a certain minimum length.[138] The trial court dismissed the case in light of his parents' objection to the lawsuit.[139] The Michigan Court of Appeals reversed and remanded for a hearing on the merits, reasoning that Michigan's procedural rule authorizing minors over fourteen to nominate their adult representatives demonstrates a recognition that such minors "are sufficiently mature to exercise a greater degree of control over the prosecution or defense of the case," and "a clear intention" to permit such minors "to institute and prosecute suits in this state absent any consent by, and in fact contrary to the wishes of, the minor's parents."[140] Parents may override the wishes of a child fourteen and older to bring a claim only where the subject matter is "so peculiar to parental control that their consent is necessary in order that this suit be continued."[141] The *Buckholz* court thus understood Michigan's capacity rule as not only permitting minors fourteen and older a voice in their litigation but also elevating such minors' right of access to the courts above rights their parents might assert to control the litigation in most cases.

B. *Legal Precedents for Children's Independent Decision-Making*

Outside of civil procedure doctrine, constitutional and statutory law carve out a limited, patchworked sphere of independent decision-making for children. Moreover, juvenile, criminal, and family courts all have vested children with decision-making authority over cases against or involving them.

The Supreme Court has extended several constitutional rights to children that contain a decision-making component, including free speech,[142] substantive due process rights to privacy in the decisions to

136. *See* Buckholz v. Leveille, 194 N.W.2d 427, 428 (Mich. Ct. App. 1971) ("[A] 16-year-old minor may continue, in his own name, a lawsuit against the wishes of his parents.").

137. 194 N.W.2d 427 (Mich. Ct. App. 1971).

138. *Id.* at 427.

139. *Id.* at 428 (quoting the trial judge saying, "This court will not substitute its judgment for that of the boy's parents.").

140. *Id.* at 428–29.

141. *Id.* at 429.

142. Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 794–95 (2011) (holding that state prohibition of minors' rental or purchase of violent video games unlawfully infringe upon minors' First Amendment); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (extending children limited rights to free expression and association in schools); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that children are entitled to freedom from compulsion to salute the flag and recite the pledge of allegiance in schools). Children's rights are not co-extensive with adults'. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 410 (2007) (limiting students' free speech rights in public schools).

have an abortion[143] and purchase contraceptives,[144] and the privilege against self-incrimination.[145]

The Court has imposed special conditions on children's exercise of decision-making rights in recognition of children's custodial status and need for protection.[146] For example, because of children's "peculiar vulnerability," "their inability to make critical decisions in an informed, mature manner," and "the importance of the parental role in child rearing,"[147] states may impose preconditions on children's exercise of their privacy right to obtain abortion procedures that could not be imposed upon adults—namely, parental consent and notification requirements.[148] To exercise their right without parental consent in such states, children must demonstrate maturity or that an abortion serves their best interests.[149]

At the same time, the Supreme Court has held that decisions made by children and adults should have categorically different penal consequences in light of children's developmental differences from adults. Children's under-developed capacity for reasoning and judgment and increased amenability to reform makes children's criminal conduct categorically less blameworthy than that of adults.[150] Thus, the Court's Eighth Amendment jurisprudence limits the range of punishments that states can impose for children's offenses, prohibiting the imposition of capital punishment and restricting sentences of life without parole for

143. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (prohibiting parents from possessing an absolute veto over children's exercise of privacy rights); Bellotti v. Baird, 443 U.S. 622, 643–44 (1979) (concluding that children must have the opportunity to bypass parent consent prerequisites to abortion procedures by demonstrating maturity or that the procedure serves their best interests).

144. Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (plurality) (holding that minors' right to privacy under the due process clause includes the right to purchase contraceptives).

145. *In re* Gault, 387 U.S. 1, 31–57 (1967).

146. *See, e.g.*, Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179, 233 (2017) ("Characterizations of children's vulnerability to physical or psychological harm play an essential jurisprudential role in justifying or restricting state action that may limit or expand the constitutional rights of others, such as parents, guardians, or the children themselves.").

147. *Bellotti*, 443 U.S. at 634–35.

148. *Id.* at 643. The Supreme Court struck down spousal notification requirements for adults. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992).

149. *Bellotti*, 443 U.S. at 649. But parents may not be given an absolute veto. *Id. See also* H.L. v. Matheson, 450 U.S. 398, 409 (1981) (upholding parent notification requirement for access to contraceptives to an immature, dependent minor who was not shown to be at risk of harm from notification).

150. Miller v. Alabama, 567 U.S. 460, 465 (2012); Graham v. Florida, 560 U.S. 48, 74 (2010); Roper v. Simmons, 543 U.S. 551, 571 (2005).

children younger than eighteen.[151] Critics, perhaps most notably the late Justice Antonin Scalia, deride the Court's jurisprudence regarding punishment and abortion as fatally flawed and essentially political in that it finds minors sufficiently capable of mature decision-making for some purposes and not for others.[152]

In addition to constitutional rights, children enjoy rights under state laws and policies to make independent decisions in a number of circumstances.[153] Children in some states have the right to marry, sometimes without parental consent.[154] Moreover, states permit minors to make independent decisions regarding medical treatment in several contexts,[155] including consenting to treatment for issues related to mental health and substance abuse,[156] reproductive health,[157] and sexually

151. *Miller*, 567 U.S. at 465 (prohibiting mandatory sentences of life without parole as punishment for offenses committed by juveniles); *Graham*, 560 U.S. at 82 (precluding sentences of life without parole for non-homicide offenses committed by juveniles under 16); *Roper*, 543 U.S. at 578 (prohibiting execution as punishment for offenses committed by minors).

152. *Roper*, 543 U.S. at 617 (Scalia J., dissenting).

153. States also provide pathways for emancipating children from most or all of the restrictions of minority before they have reached legal adulthood. Sanford N. Katz et al., *Emancipating Our Children—Coming of Legal Age in America*, 7 FAM. L.Q. 211, 214 (1973). The grounds for and impacts of emancipation vary greatly by state. Lauren C. Barnett, Comment, *Having Their Cake and Eating It Too? Post-emancipation Child Support as a Valid Judicial Option*, 80 U. CHI. L. REV. 1799, 1803–05 (2013); NAT'L L. CTR. ON HOMELESSNESS & POVERTY ET AL., ALONE WITHOUT A HOME: A STATE BY STATE REVIEW OF LAWS AFFECTING UNACCOMPANIED YOUTH 111–16, 405 app. 19 (Feb. 2019), http://nlchp.org/wp-content/uploads/2019/04/AWAH-report.pdf [https://perma.cc/A74R-4NE7]. Significantly, although emancipated minors often enjoy the capacity to represent their own interests in legal proceedings, they may be precluded from accessing certain remedies *Compare* D.M.H. *ex rel.* Hefel v. Thompson, 577 N.W.2d 643, 646 (Iowa 1998) (providing that emancipated minors can sue in their own names), *and* W. Shield Investigations & Sec. Consultants v. Superior Ct., 98 Cal. Rptr. 2d 612, 621–22 (Ct. App. 2000) ("Once emancipated, a minor is under no legal disability with respect to bringing his or her own claims."), *and* Lee v. U.S. Fid. & Guar. Co., 433 So. 2d 903, 904 (La. Ct. App. 1983) ("Regardless of the form of emancipation, an emancipated minor has the legal capacity to sue."), *with* ARK. CODE ANN. § 9-15-201(d)(2), (4) (2009) (requiring that an adult file a claim for a civil protection order on behalf of a married minor).

154. TAHIRIH JUSTICE CENTER, UNDERSTANDING STATE STATUTES ON MARRIAGE AGE AND EXCEPTIONS 1 (May 24, 2018), https://www.tahirih.org/wp-content/uploads/2016/11/2018-State-Marriage-Age-Requirements-Statutory-Compilation.pdf [https://perma.cc/2J9P-FT3H]. *See generally* Vivian Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage Age Requirements*, 92 B.U. L. REV. 1817 (2012) (analyzing the legal and social history of marital age and its regulation).

155. Parents must consent to and dictate the medical care and treatment of children. *See generally* Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311. Yet, at least one state has recognized mature minors to have the "right to dominion over one's own person" under common law, which includes rights to make decisions about medical care. *In re E.G.*, 549 N.E.2d 322, 325–28.

156. *See* Hartman, *supra* note 43, at 419–21, 419 n.66 (reviewing state statutes).

157. Hartman, *supra* note 43, at 418–19 & nn.56–61. *See generally* Michele Goodwin &

transmitted infections.[158] In addition, states empower minors to make independent parenting decisions about their own children, including acknowledging parentage,[159] consenting to their medical care,[160] placing them for adoption,[161] and applying for public benefits to support them.[162]

Like minors' constitutional rights, these policies largely have developed incrementally and without a unifying vision for when children should make their own decisions, free from parental control.[163] Collectively, the policies seem animated by a shared aim to encourage minors to take care of their health and well-being and protect the interests of their own children.[164] Similar justifications support the long-standing

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Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 HARV. J. L. & GENDER 503 (2011) (evaluating differential authority granted to minors and the control afforded parents over minors' medical decision-making under state laws).

158. *Minors' Access to STI Services*, GUTTMACHER INST. (Aug. 1, 2020), https://www.guttmacher.org/state-policy/explore/minors-access-sti-services [https://perma.cc/J6J3-36YB] (finding that "[a]ll 50 states and the District of Columbia allow most minors to consent to testing and treatment for sexually transmitted infections (STIs)," 18 states allow (but do not require) physicians to inform parents that the minor is seeking or receiving STI services when they deem it in the best interests of the minor, and 1 state requires physicians to notify parents if a child receives a positive HIV test result).

159. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.1009 (West 2020); VT. STAT. ANN. tit. 15C, § 304(d) (2020); OR. REV. STAT. ANN. § 432.098(2)(a) (West 2020); MASS. GEN. LAWS ch. 209C, § 11(a) (2020).

160. Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127, 143 (2016) (finding that thirty states explicitly authorize minor parents to make treatment decisions on behalf of their children).

161. *See, e.g.*, *In re* T.W., 551 So. 2d 1186, 1195 (Fla. 1989) (noting state's adoption act does not require a minor parent to obtain a parent's consent before placing a child up for adoption). *See generally* Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99 (2013).

162. Unless they meet statutory exceptions, minor parents must reside with a parent or guardian and remain in school to receive TANF (often known as "welfare") benefits, but this restriction does not apply to a minor parent's receipt of other benefits such as Medicaid, WIC, or SNAP ("food stamps") on behalf of a child. 42 U.S.C. § 608(a)(4), (a)(5)(A)(i); Sarah Katz, *When the Child Is a Parent: Effective Advocacy for Teen Parents in the Child Welfare System*, 79 TEMP. L. REV. 535, 546–47 (2006).

163. *See supra* note 41 and accompanying text.

164. Caitlin M. Cullitan, *Please Don't Tell My Mom! A Minor's Right to Informational Privacy*, 40 J.L. & EDUC. 417, 444 (2011) (discussing that states have eliminated parental consent requirements for sexually transmitted infections to encourage minors to seek treatment); Rhonda Gay Hartman, *Adolescent Decisional Autonomy for Medical Care: Physician Perceptions and Practices*, 8 U. CHI. J. INTERDISC. LEGAL STUD. 87, 92–93 (2001) (noting that states have lowered or eliminated the age of minors' consent to encourage teens to access mental-health services); Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075, 2123 (1996) (noting that mature-minor statutes encourage minors to seek medical care that they would avoid if parental consent were required).

common law doctrine enabling minors to contract for necessaries and recent policies extending the privilege to student loans.[165]

Juvenile, criminal, and family courts grant children the authority or at least the opportunity to convey their own interests to the courts in several circumstances. First, where courts transfer juvenile cases to adult criminal courts, minors are treated just like adult defendants.[166] Furthermore, in many states, the juvenile justice system lacks a formal role for parents or other adult representatives for children.[167] This omission leaves minors to direct their own juvenile cases,[168] as where parents play no formal role in juvenile delinquency proceedings, attorney ethics place the responsibility for decision-making squarely with the child.[169] The treatment of minors in the adult criminal and some juvenile

165. KRAMER, *supra* note 1, § 14:2 at 982.

166. *See* PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 3 (Sept. 2011), http://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf [https://perma.cc/XYU3-TCMB].

167. *See In re* Gault, 387 U.S. 1, 35 (1967); *see also* Etienne, *supra* note 32, at 68–69 (2018) (arguing that, in *Gault*, the Court treated the parental rights as a collateral and secondary function of the accused juvenile's rights, and ultimately "the Court failed to articulate a vision— either positive or normative—of what that role might be").

168. The Supreme Court noted that some children have difficulty working with counsel to this end. Graham v. Florida, 560 U.S. 48, 78 (2010)*; see also* Etienne, *supra* note 32, at 81 (exploring possible contributors to failure of courts to ensure juveniles have the support of adult decision-makers in juvenile courts). A few states recognize parents as parties and even according parents a separate statutory right to counsel. Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 252 & n.31, 254 & n.38 (2005) (identifying statutes extending the right to counsel to juveniles and their parents in Connecticut, Illinois, Minnesota, South Carolina, and Utah, and statutes allowing for the appointment of separate counsel for parents in the event of a conflict of interest with the child in Arizona, Georgia, Massachusetts, Missouri, Nevada, and Oklahoma).

169. David R. Katner, *Revising Legal Ethics in Delinquency Cases by Consulting with Juveniles' Parents*, 79 UMKC L. REV. 595, 601–02 (2011) (noting that the ABA Model Rules, including Rule 1.1.4, nowhere impose an obligation for attorneys to consult with the parents of a minor client); Henning, *supra* note 168, at 255–59 (identifying an academic and professional consensus that lawyers representing mature juveniles should be client-directed); Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 76 (1984) (presenting the idea that lawyers should represent the stated wishes of mature children rather that the lawyer's own conception of the child's "best interests"); IJA-ABA JOINT COMM'N ON JUV. JUST. STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 3.1(a) (1979). Although, in practice, parents often do participate in delinquency proceedings in these states, the scope and nature of parents' involvement varies by jurisdiction, and perhaps even by judge. Etienne, *supra* note 32, at 69. The lack of structural assurance of adult guidance in the juvenile delinquency context may result from simple oversight, overemphasis on minors' autonomy, lack of care or concern for minors involved in the system, understanding the child's involvement in the system as a parenting failure, or a conclusion that minors' interests are adequately protected by counsel. Etienne, *supra* note 32, at 81 (exploring possible contributors to failure of courts to ensure juveniles have the support of adult decision-

justice systems as competent decision-makers presents a clear departure from the norms of the civil justice system. Whereas the civil justice system presumes minors need decision-making support from adults who know them well *in addition to* counsel, the criminal and sometimes juvenile justice systems presume that minors are prepared to make case-related decisions on their own.[170]

Separately, states provide children a means to express their views within cases about them in family courts by appointing attorneys or guardians ad litem to represent children's interests in abuse and neglect and often in custody proceedings.[171] Best practices suggest that as children mature, attorneys and guardians ad litem should advocate in support of children's expressed interests, not what the attorney or guardian believes the child's "best interests" require.[172] Such practices encourage older children to decide what they want court outcomes to be and provide an opportunity for older children to communicate such preferences to the courts.

In extending decision-making authority to children, these constitutional doctrines, state statutes, and court practices not only distinguish children from adults but also distinguish children from one

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makers in juvenile courts); *cf. In re* Gault, 387 U.S. 1 (1967) (describing historic justifications for court approaches to juvenile delinquency cases and stating that if a child's "parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene.").

170. Etienne, *supra* note 32, at 69.

171. Federal child welfare funding is conditioned on states appointing advocates for children in abuse and neglect proceedings. 42 U.S.C. § 5106a(b)(2)(B)(xiii); *see generally* Children's Bureau, *Representation of Children in Child Abuse and Neglect Proceedings: State Statutes 2017*, https://www.childwelfare.gov/pubPDFs/represent.pdf [https://perma.cc/95NZ-EMVG] (stating that statutes allow for the appointment of counsel or a guardian ad litem for children involved in abuse and neglect proceedings); *but cf.* Alicia LeVezu, *Alone and Ignored: Children without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J. C. R. C. L. 125, 132–33, 136 (2018) (presenting findings of empirical study documenting frequent failure of Washington State courts to appoint advocates for children despite legal mandate). Separately, most states authorize family courts to appoint counsel or guardians ad litem to represent the interests of children in child custody cases. *See, e.g.*, *Charts 2019: Family Law in the Fifty States, D.C., and Puerto Rico*, 53 FAM. L.Q. 353, 358–64 (2020) (tracking "Custody Criteria," including whether courts are authorized to appoint an attorney or guardian ad litem to represent children's interests in the case).

172. *See, e.g.*, Martin Guggenheim, *The Right To Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 76 (1984) (seminal article presenting the idea that lawyers should represent the stated wishes of mature children rather that the lawyer's own conception of the child's "best interests"); American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases* (Aug. 2003) available at: https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/child_representationcustodycasestandardsofpractice/ [https://perma.cc/XXA9-RA8U]; American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (Feb. 1996), https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/standards_abuseneglect.pdf [https://perma.cc/3G8U-PS3W] (outlining the standards and duties of lawyers who represent children in custody cases).

another. By conditioning certain legal and procedural rights on a child's age and maturity, law and practice recognize the legal status and interests of adolescents to differ from those of younger children.[173]

C. *The Implications of Capacity Doctrine's Deficiencies*

In short, the historic bright-line rule categorically depriving minors of legal capacity before the courts has given way to limited, varying grants of capacity to minor litigants to assert their own interests before courts. Courts make capacity determinations in a hodgepodge of ways—sometimes based upon the underlying substantive law, sometimes upon individual criteria that a particular court finds important in a case. No overarching theory of capacity has emerged to guide these determinations.

Federal Rule 17(c)'s text and inherent powers doctrine accommodate this nuance: each charges courts with the categorical responsibility to provide special protection to child litigants and the discretion to tailor those protections to the context of a minor's case. Yet, as statutory and case-specific grants of capacity have developed in isolation from one another and in service of myriad policy goals, capacity doctrine lacks a unifying framework and vision for evaluating when and under what circumstances minors should be empowered to proceed alone. This ambiguity creates uncertainty for minors about the viability of the courts as a forum for their concerns and generates unfairness, as minors who appear before certain judges or certain courts or with privately retained counsel have readier access than those who must do otherwise.[174] Moreover, these developments in capacity doctrine generate new questions about what support courts should provide when minors seek to represent their own interests, the value that adult representatives contribute to minor litigants, and when representation by counsel alone is sufficient to protect children's interests.

II. THEORIES OF CHILDREN'S ROLES AS CIVIL LITIGANTS

This Article contends that a unified framework is needed within capacity doctrine to enable courts to evaluate fairly and expediently the appropriate support for a minor litigant who seeks to proceed alone. In doing so, capacity doctrine must account for the inequitable barriers that may exclude from the civil justice system minors from poor, racial minority, and other marginalized communities. This Part investigates several theories that directly bear upon these concerns but generally have

173. Scott, *supra* note 43, at 547–48; Hamilton, *supra* note 43, at 57–58; Hartman, *supra* note 43, at 429, 431.

174. *See* Martin, *Securing Access*, *supra* note 31, at 508 (describing the barriers that ambiguities in capacity doctrine create to minors' access to civil justice).

not been applied to capacity doctrine to date. An exhaustive account of any of these theories is beyond the scope of this Article. Instead, this Part considers the perspectives of representative proponents of each to introduce a variety of insights that can inform the project of modernizing capacity doctrine. Although each of these theories offers critical insights that could contribute to the development of a modernized capacity framework, none provides a full answer.

A. *Child Development Theory*

Scientific and legal theories focused on child development suggest that capacity doctrine should account for the physical stages of human maturation and aim to support children in their progression toward adulthood. First, scientific child development theory enables the drawing of reasoned distinctions between the authority granted to children and adults and to children of different ages, as it provides research-based insights into the relative neurological and psychological abilities of children as they mature.[175] Child development research demonstrates that as children age, they mature both cognitively—developing capacities for "logical reasoning about moral, social, and interpersonal matters"—and psychosocially—developing capacities to manage "impulse control," "future orientation" . . . and susceptibility to peer influence."[176] Importantly, these capacities develop at different rates. By ages fifteen to sixteen, children exhibit logical reasoning and information processing skills equivalent to adults'.[177] By contrast, children's psychosocial

175. "Developmental psychology, broadly defined, concerns the scientific study of changes in physical, intellectual, emotional, and social development over the life cycle." Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, *in* YOUTH ON TRIAL 9, 21 (Thomas Grisso & Robert G. Schwartz eds., 2000). The Supreme Court has cited child development science in articulating the scope of children's legal rights in the criminal context in several recent cases. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016); Miller v. Alabama, 567 U.S. 460, 471–72 (2012); J.D.B. v. North Carolina, 564 U.S. 261, 272, 273 n.5 (2011); Graham v. Florida, 560 U.S. 48, 68 (2010); Roper v. Simmons, 543 U.S. 551, 569–70 (2005). The Court also has considered children's maturity in the contexts of abortion and civil commitment. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion); Parham v. J.R., 442 U.S. 584, 602 (1979). *See generally* Emily Buss, *Developmental Jurisprudence*, 88 TEMPLE L. REV. 741 (2016) [hereinafter Buss, *Developmental Jurisprudence*] (critiquing the Court's use of child development research); Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009) (same).

176. Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCH. 583, 585–86 (2009) (citations omitted); *see also* Elizabeth S. Scott et al., *Evaluating Adolescent Decisionmaking in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 228, 230–31 (1995) (arguing that "the evaluation of adolescent legal capacity appropriately considers judgment as well as reasoning and understanding," and that factors including peer influence, risk perception and tolerance, and temporal perspective may negatively impact youth choices).

177. *See* Steinberg et al., *supra* note 176, at 586–87 (collecting and reviewing studies).

development continues through adolescence and into young adulthood, leaving children susceptible to risky behavior influenced by psychosocial factors throughout adolescence.[178]

Professors Laurence Steinberg, Elizabeth Scott, and others argue that the differential rates at which these components of child development occur support varying the treatment of adolescents for different policy purposes.[179] Adolescents' cognitive abilities justify authorizing adolescents to make decisions in contexts such as medical care, legal proceedings, and participation in research studies, which permit "more deliberative, reasoned decision-making, where emotional and social influences on judgment are minimized or can be mitigated, and where there are consultants who can provide objective information about the costs and benefits of alternative courses of action."[180] Under these conditions, adolescents are as capable of making mature decisions as adults.[181]

Conversely, "in situations that elicit impulsivity, that are typically characterized by high levels of emotional arousal or social coercion, or that do not encourage or permit consultation with an expert who is more knowledgeable or experienced," such as the contexts in which most adolescent crimes occur, adolescents are not as capable as adults of making mature decisions.[182] In these circumstances, adolescents' psychosocial immaturity warrants treating them differently than adults, including exempting children categorically from the harshest forms of criminal punishment.[183] In short, child development theory's scientific insights suggest that adolescents aged fifteen or sixteen and older are cognitively ready to engage in the reasoned decision-making required to

178. *See id.* at 587.

179. *Id.* at 593 ("Developmental science can and should contribute to debates about the drawing of legal age boundaries, but research evidence cannot be applied to this sort of policy analysis without a careful and nuanced consideration of the particular demands placed on the individual for 'adult-like' maturity in different domains of functioning."); Elizabeth Scott et al., *Brain Development, Social Context, and Justice Policy*, 57 WASH. U. J.L. & POL'Y 13, 20–21, 25, 35–36, 36 n.91 (2018) (reviewing studies demonstrating that "when teenagers are emotionally aroused, they tend to make impulsive, short-sighted choices and engage in risky behaviors that they might understand are ill-advised when considered in a neutral setting," when an adult is present, or when they have time to deliberate).

180. Steinberg et al., *supra* note 176, at 592 (collecting and reviewing studies).

181. *See id.*; Scott et al., *supra* note 179, at 34 ("[B]y mid-adolescence, individuals have the cognitive capacity to make rational decisions that is similar to that of adults. A teenager can understand and process information, engage in hypothetical thinking to compare alternative options and make reasoned decisions. In short, when not subject to exogenous influences that undermine rationality, the normative adolescent usually is a competent decision-maker." (footnote omitted)).

182. Steinberg et al., *supra* note 176, at 592; *see* Scott et al., *supra* note 179, at 25–27, 35.

183. Scott et al., *supra* note 179, at 14.

advance civil claims, especially when they have the support of counsel or other experienced advisors.

Second, child development theory encourages the creation of policies that support children in their ongoing development toward adulthood.[184] Professor Emily Buss argues that extending children legal autonomy rights supports children's development by giving children practice with decision-making[185] and ensuring that outcomes advance children's self-identified developmental needs.[186]

Buss argues that, to maximize developmental benefits, a child should only be granted a decision-making right if the child is prepared to self-initiate the exercise of the right (that is, assert the right and act on their choice independently).[187] Adult assertion of children's rights does not provide developmental value. Under these circumstances, children do not gain experience with decision-making, and outcomes reflect adults' views, not children's.[188] Requiring self-initiation limits the exercise of autonomy rights to children who have developed their identities.[189] Although a child will disagree with adult authority figures earlier in life, the decision to act on her own views, "declare them publicly, and accept the consequences of those actions" demonstrates that a child's views and her "understanding of self in relation to those views" have matured.[190] Achievement of this level of self-understanding warrants transferring decision-making control from a parent or the state to the child.[191]

Notably, Buss argues that extension of autonomy rights to a child should not be conditioned on a child's ability to bring a claim to court by himself, because the skills required for litigation "do not bear directly on the developmental issues implicated in the rights exercise."[192] Yet, the logic behind Buss's self-initiation principle is separately relevant to whether a child should be granted the capacity to assert her own interests

184. Indeed, Buss has called for the creation of a "developmental jurisprudence"—a lens by which to view the law—which aims "to minimize the developmental harm [law] imposes and maximize the developmental benefits [law] provides." Buss, *Developmental Jurisprudence*, *supra* note 175, at 752.

185. Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 35. Buss focuses her discussion on autonomy rights, which are allocated between child, parent, and state, as distinguished from needs-based rights, which are allocated only between parent and state and not the child herself. *Id.* at 36.

186. *Id.* at 35 (stating that children can best "perceive their emerging identities," and are therefore best positioned to assess those needs).

187. *Id.* at 36.

188. *Id.* (noting that adults are unlikely to distinguish their choices from children's).

189. *Id.* at 37 (arguing that it is "[o]nly after a child has developed a sense of herself as an individual with distinct views and aptitudes will she be inclined to attempt to act on choices that diverge from those made on her behalf by those 'in charge.'").

190. *Id.* at 38.

191. *Id.*

192. *Id.* at 37.

in court. A child who makes his way to the courts without an adult representative demonstrates a strength of commitment to his beliefs about the rightness of his cause that justifies allowing the child to speak to the court in his own voice and not through the voice of an appointed adult. Courts should still consider appointing counsel for such children to ensure they are able to effectively present their cases, but the additional layer of protection of an adult representative may not be required.

Moreover, as Buss argues regarding the exercise of underlying rights, imposing a self-initiation requirement as a prerequisite to granting children litigation capacity would "ensure[] that children are not forced to take positions, prematurely, on matters of considerable importance to their individual and familial identity."[193] Contrary to Justice William O. Douglas's famed call in his dissent to *Wisconsin v. Yoder*[194] for courts to elicit children's views in cases brought to assert parents' rights,[195] Buss contends that compelling children to reveal their own opinions at a court's behest will neither provide the valuable decision-making experience that rights exercise offers, nor necessarily reveal children's genuine views, but only "impose the costs of the rights exercise on children before they are prepared to incur them."[196] This suggests that courts might do more harm than good to a child's development by forcing her to declare her own view of the case when a parent brings a claim on her behalf.

Finally, to maximize developmental benefits, Buss argues that children's autonomy rights should be crafted to maximize children's ability to choose and act independently while minimizing the risks of harm from their decisions.[197] To this end, Buss calls for preserving a continued protective role for parents throughout adolescence, even as control increasingly shifts to children as they age.[198]

Together, these child development theories offer several insights for capacity doctrine: (1) children ages fifteen or sixteen are capable of adult-like reasoned decision-making; (2) granting children the authority to exercise rights when they seek to do so supports children in their process of developing into adults; (3) requiring children to exercise capacity before they are ready may do more harm than good; and (4) cementing a role for experts and parents improves children's decision-making and reduces attendant risks of harm. Child development theories do not suggest how capacity doctrine should reconcile the benefit to children of expert guidance with the dearth of free and affordable legal services. Nor

193. *Id.* at 42–43.
194. 406 U.S. 205 (1972).
195. *Id.* at 242 (Douglas, J., dissenting).
196. Buss, *supra* note 185, at 43.
197. *Id.* at 35.
198. *Id.* at 43.

do such theories assist in defining the role that parents might play in litigation brought by a child who does not desire parental support.

B. *Attributability Theory*

Attributability theory suggests that capacity doctrine should impose protective restrictions on children until the choices they make are their own. Like child development theory, political attributability theory further advises that capacity doctrine should support children in their journey toward adulthood by assisting them in independent decision-making and not requiring children to submit to adult authority when children are ready to make decisions alone. Unlike child development theory, political attributability theory does not promote reasoning ability as a legitimate threshold for extending rights to children because a range of facility with reasoning exists among adults, and rights are not allocated differently among adults on this basis.

Philosopher Tamar Schapiro articulates attributability theory as she undertakes an ethical examination of the legal system's paternalistic treatment of children in light of Kantian political ideals.[199] Kantian political theory posits that ensuring individuals' freedom—that is, "independence from being constrained by another's choice"—is the sole legitimate basis for the state.[200] To Kant, "each person is a sovereign authority whose consent is not to be bypassed."[201] Although Kant himself excluded women, children, and those without independent economic means from full citizenship in the state,[202] Schapiro works from a modern understanding of children as citizens to interrogate the justifications for their unequal treatment under the law.[203]

Rather than defining children by their ability or inability to reason, as child development science might, Schapiro proposes that we understand children as "emerging persons" who are still developing their individual perspectives and do not yet have a will that demands deference.[204]

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199. Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575, 575, 578 (2003).

200. Frederick Rauscher, *Kant's Social and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 1, 2016) (quoting 6 IMMANUEL KANT ET AL., GESAMMELTE SCHRIFTEN [COLLECTED WRITINGS] 237 (2010)), https://plato.stanford.edu/archives/spr2017/entries/kant-social-political/ [https://perma.cc/734W-EB27].

201. Tamar Schapiro, *What Is a Child?*, 109 ETHICS 715, 715 (1999).

202. *See* Rauscher, *supra* note 200.

203. Schapiro, *supra* note 199, at 578 (identifying animating questions as including: "Why think of children as second-class moral and political citizens—as persons with whom we do not stand in fully reciprocal relations?" and "What, then, is the idea of majority supposed to pick out, such that it could be the basis for dividing the human community into two unequal classes of persons?").

204. *Id.* at 590; *cf.* Scott et al., *supra* note 183, at 228 (arguing that the immaturity of adolescent judgment should be considered in determining adolescent legal capacity because "the

Schapiro argues that only concerns about attributability, or the extent to which a child's choices are her own, justify the withholding of rights and privileges from children that we extend to adults.[205] Concerns about proficiency, or a child's inability to make good choices[206] do not justify withholding rights and privileges because adults have varying levels of proficiency in decision-making.[207]

To Schapiro, "To treat someone like an adult is to treat her as the ultimate source of her words and deeds, as the final authority to whom those words and deeds are attributable."[208] Children's views are treated as having "consultative" and not "authoritative" force because children are not yet fully subject to their own authority, and thus children's choices cannot be attributed to them.[209] Childhood is better understood as a stage during which persons are developing their own authority and establishing "a deliberative perspective which speaks for them," rather than a condition in which a requisite proficiency is lacking.[210] From this perspective, we do not violate children as persons by restricting their actions and choices for their own protection because those actions and choices are not a deliberate product of children's own wills.[211]

As children approach adulthood, they begin to establish authority over parts of themselves.[212] Where children have achieved sovereignty over some "domain of discretion," adults should not subject children to control.[213] With this progression in mind,like Buss, Schapiro argues that adult interventions into children's decision-making must promote "the child's capacity to govern herself."[214] Adults must allow children to develop "as deliberators" and must not assert their authority over matters children can decide for themselves.[215]

In sum, attributability theory promotes ceding control to children gradually as children increasingly "author" their choices and supporting children in developing and exercising their own authority. It suggests that capacity doctrine should respect children's decisions when children establish an individual deliberative perspective and own their choices.

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values and preferences" underlying adolescent decisions "are presumed to reflect common age-linked developmental characteristics that predictably will change").

205. Schapiro, *supra* note 199, at 579.

206. *Id.* at 580–81 (whether meaning they "make bad choices, or tend[] to make choices badly"),

207. *Id.* at 589.

208. *Id.* at 588.

209. *Id.* at 576, 588.

210. *Id.* at 589.

211. *Id.* at 590.

212. Schapiro, *supra* note 201, at 734.

213. *Id.* at 735–36.

214. Schapiro, *supra* note 199, at 592.

215. Schapiro, *supra* note 201, at 735–36.

Attributability theory does not illuminate how courts might determine whether children have reached this threshold of moral, authored decision-making.[216] One answer might lie in Buss's self-initiation prerequisite, as taking the steps required to bring a case before the courts suggests a level of deliberation and commitment that at least invites principled decision-making. Attributability theory further suggests (like Buss) that capacity doctrine should disaggregate the issues of whether a child needs additional support to effectively present her case and whether a child should be permitted to voice her own perspective. Like child development theory, attributability theory does not provide insights into how capacity doctrine should be constructed to ensure equity in access to the courts between minors with different life circumstances.

C. *Democratic Theory*

Viewed broadly, capacity doctrine not only determines whether individual children have access to the courts, but also contributes to a well-functioning democracy by helping children develop as political actors and enabling law and government institutions to incorporate children's perspectives.[217] The ideas of several contemporary democratic theorists suggest that capacity doctrine should be constructed to facilitate children's litigation, advance children's political development, and protect children's interests.[218]

The late Professor Sidney Verba posited that, to rule by the consent of the governed rather than by coercion, democratic government must be perceived as legitimate.[219] For a democracy to be perceived as legitimate, it must be viewed as fair; for a democracy to be viewed as fair, its policies and procedures must treat people equally.[220] Moreover, people must identify themselves with the state, as part of the polity; to promote self-

216. Indeed, critics argue that attributability theory imposes a standard for what counts as autonomous, moral decision-making that most children and adults fail to meet consistently, as adults often make choices based on instinct and rarely at the highest levels of principled reasoning. *See* Samantha Godwin, *Children's Capacities and Paternalism*, 24 J. ETHICS 307, 319 (2020).

217. *See* Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 937 (2012) (arguing that the movement away from adjudication is a problem for democracy because adjudication makes valuable contributions to democracy, including encouraging public input into governing norms and holding powerful interests to account).

218. Andrew Rehfeld, *The Child as Democratic Citizen*, 633 THE ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCI. 141, 143 (2011).

219. Sidney Verba, *Fairness, Equality, and Democracy: Three Big Words*, 73 SOC. RSCH. 499, 499–500 (2006).

220. *Id.* at 499–501.

identification, the government must be responsive to the values and interests of all citizens.[221]

Historically, democratic theorists ignored children.[222] Children's kinetic state of ongoing development is incongruent with the static insider–outsider notions of citizenship that prevail within democratic institutions.[223] Thus, as children are excluded from voting and holding office, children were not viewed as political actors.[224] Scholars increasingly have challenged this view, highlighting the ways in which children already engage in the polity through protest, involvement with civic and service organizations, engaging in discourse, and shaping policy making.[225] These scholars argue that for democracy to fulfill its normative ideal of justice and ensure its continued vitality, children must be included within the polity and their voices must be heard.[226]

Democratic theorists disagree about not only whether but how and when children should be extended political power.[227] Professor Andrew Rehfeld accepts "political maturity" as a "justifiable prerequisite for citizenship" for the good of the polity as a whole because it ensures that citizens have some chance of making the good choices that democracy demands of them.[228] Conditioning citizenship on the achievement of political maturity also ensures that citizens know their own preferences and thus have the opportunity for participation to advance their interests.[229]

Children's claim to inclusion within democratic institutions before they have achieved political competence strengthens where children have fundamental rights at stake or if justice requires providing children opportunities to participate.[230] Moreover, as children develop, democratic institutions must "cultivate [children's] political maturity," that is, prepare children for full citizenship by providing them with opportunities for active political participation.[231] In doing so, institutions should protect

221. Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 27 (2006).

222. Rehfeld, *supra* note 218, at 145 ("[M]ost political philosophers ignore the moral and political status of children.").

223. *Id.* at 143.

224. Jessica Kulynych, *No Playing in the Public Sphere: Democratic Theory and the Exclusion of Children*, 27 SOC. THEORY & PRAC. 231, 264 (2001); Anu Toots, Natalie Worley, and Anna Skosireva, *Children as Political Actors*, *in* SAGE HANDBOOK OF CHILD RESEARCH 54, 54 (Melton, et al. eds., 2014).

225. Kulynych, *supra* note 224, at 263; Toots et al., *supra* note 224, at 65.

226. Kulynych, *supra* note 224, at 245–46.

227. *Id.* at 232–35.

228. Rehfeld, *supra* note 218, at 147.

229. *Id.*

230. *Id.* at 152–53.

231. *Id.* at 151.

the polity from any risks of harm generated by children's inclusion before they have fully matured.[232]

Especially because children are disenfranchised, initiating litigation is a critical means of expressing children's political voice.[233] Professor Alexandra Lahav argues that litigation is central to democracy's functioning because "it helps to enforce the law; it fosters transparency by revealing information crucial to individual and public decision-making; it promotes participation in self-government; and it offers a form of social equality by giving litigants equal opportunities to speak and be heard."[234] The litigation of children's claims communicates their needs and interests to the polity and provides children with the opportunity to contribute to public discourse, shape the development of the law to incorporate their perspective, and hold wrongdoers accountable for misconduct.[235]

Moreover, because litigation formally treats litigants equally, regardless of social status, "litigation promotes equal concern and respect for all and makes sure that the law is applied equally to all."[236] Yet, guarantees of formal equality in access to courts ring hollow if litigants lack the means to actually advance their claims before courts.[237] Ensuring material equality between litigants "requires giving some participants in the legal system, especially low-income and marginalized people, additional resources so that they can litigate on equal footing."[238]

In sum, these democratic theorists promote institutional policies that are fair, egalitarian, promote the self-identification of citizens with the polity, ensure the polity is responsive to the interests of all its members, and develop the political competency of children as they develop into adults. Because it determines children's ability to participate in litigation, capacity doctrine has the potential to shape children's perceptions of the

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232. *Id.* at 154.

233. Verba, *supra* note 219, at 507–08 (identifying several means of expressing political voice including "adult suffrage," contributing to and volunteering with political causes and campaigns, contacting elected officials, petitioning the government, protesting, and initiating legal claims).

234. ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION 1–2 (2017) (emphasis omitted); *see* Resnik, *supra* note 217, at 972.

235. *See* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1660 (2016) (arguing that litigation serves a critical performative function for democracy that promotes rule of law values by allowing recognition of grievances by a government official, promoting transparency and the production of reasoned arguments and proofs, aiding in the law's enforcement, and enabling citizens to serve as jurors).

236. Lahav, *supra* note 235, at 7.

237. *Id.* at 128 ("A right to pursue a remedy, without the ability to pursue it in fact, is an empty right.").

238. *Id.* at 117.

legitimacy and fairness of the courts.[239] Capacity doctrines that exclude children arbitrarily and treat children inequitably may undermine children's faith in the legal system and deter future engagement with the courts. The work of these democratic theorists suggest that capacity rules should be constructed to promote children's participation in ways that protect their interests, cultivate their political maturity, and mitigate any risks of harm created by extensions of political power to children. Although these theorists do not advise precisely when it is appropriate to extend political power to maturing children or how to mitigate harms risked by children's empowerment, Rehfeld argues for the adoption of bright-line standards rather than tests purporting to measure maturity to promote reliability and fairness.[240]

D. *Parental Rights Theory*

Parental rights theory and Supreme Court due process jurisprudence suggest that, unless doing so poses a risk of harm to a child or would undermine the exercise of the right the child seeks to vindicate, capacity doctrine should generally provide an opportunity for parents to play an advisory role for child litigants, and when a child seeks and is permitted to proceed alone, provide another forum for parents to convey their perspectives to the court. Parental rights theory and Supreme Court doctrine offer little guidance about resolving decision-making conflicts between parents and children on matters involving important rights on both sides.

Parental rights theory focuses on another critical difference between child and adult litigants beyond cognitive functioning, attributability, and suffrage: children's custodial status and parents' attendant rights to direct children's upbringing. Parents enjoy fundamental liberty interests in the care, custody, and control of their children, which generally reserve to fit parents the right to make important decisions about their children.[241]

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239. The court has recognized how children's perception of the judicial system may be impacted if children are not given access to the courts because of their age.

> Courts must stand prepared to protect the rights of all citizens, including teen-agers. Denying a teen-aged litigant access to our courts simply because he happens to be a minor not only tends to lessen the confidence of young people in our legal system but adds credence to the existence of the 'generation gap.' And it may even help widen that gap.

Buckholz v. Leveilee, 194 N.W.2d 427, 427 (Mich. Ct. App. 1971).

240. Rehfeld, *supra* note 218, at 149.

241. Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (identifying a "fundamental liberty interest of

Vesting parents with primary decision-making authority regarding their children protects children from their own immaturity and state overreach,[242] fosters pluralism of thought and values, ensuring that children do not become "mere creatures of the state," and reserves important decisions about children to those who know them best.[243] Parental authority is limited by the police and *parens patriae* powers of the state, which empower the state to override parental decision-making to protect children or the broader populace from harm.[244] Nevertheless, the state may not "infringe on the fundamental right[s] of parents . . . simply because . . . a 'better' decision could be made."[245] Courts must presume that parents act in their children's best interests and, absent a finding of unfitness, must accord parents' decisions "special weight."[246] Contemporary parental rights theory essentially posits that

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natural parents in the care, custody, and management of their child"); Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."). To date, the Supreme Court has explicitly recognized parents' decision-making authority to extend to children's education, medical care, religious and moral upbringing, discipline, and visitation with nonparents. *Troxel*, 530 U.S. at 70 (parents' decisions regarding children's visitation with nonparents must be accorded "special weight"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that parental liberty to direct children's upbringing and education encompasses choice to send child to private school and precludes state from outlawing nonpublic schools); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (concluding that prohibiting the teaching of languages other than English in public schools unconstitutionally infringed on parents' liberty interest in controlling "the education of their own" children); *Parham*, 442 U.S. at 588 & n.3, 604, 620–21 (upholding statute permitting parents or guardians to "voluntarily" commit their children because of deference owed to parental decisions regarding a child's medical care); Ginsberg v. New York, 390 U.S. 629, 636–37, 639 (1968) (holding that state restrictions on the sale of obscene material to minors were justified by the state's interest in supporting parents in rearing and ensuring children's well-being).

242. Restrictions on state interference with parenting stem from the Due Process Clauses of the Fifth and Fourteenth Amendments, which limit the actions of both the federal and state governments, including the courts. U.S. CONST. amends. V, XIV, § 1.

243. *Pierce*, 268 U.S. at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *see* Bellotti v. Baird, 443 U.S. 622, 637 (1979) (plurality opinion) ("The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."); *Parham*, 442 U.S. at 602 ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

244. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control."); Zucht v. King, 260 U.S. 174, 176–77 (1922) (noting that the state police power justifies the imposition of a vaccination requirement for school attendance).

245. *Troxel*, 530 U.S. at 72–73.

246. *Id.* at 68–69.

vesting parents (rather than the state) with primary decision-making authority over their children best serves children's interests.[247]

For children, parents' protected authority means that until children reach the age of legal majority, their parents' decisions generally bind them, even when children disagree.[248] Yet, as the law increasingly recognizes children as persons entitled to independent rights and, sometimes, decision-making authority, so too expands the range of circumstances in which both children and parents have protected legal rights at stake.[249] As both parents' and children's constitutionally protected rights have been identified incrementally, their contours remain undefined—especially at their intersection.[250]

Because parental rights doctrine itself fails to articulate how courts should resolve disputes between parents and children about the exercise of important rights, it has little guidance for how capacity doctrine should do the same.[251] Nonetheless, the significant respect accorded to parents' authority within constitutional doctrine emerges in capacity jurisprudence. Because parents typically do advance their children's claims, courts take note when parents do not appear in a child's case.[252]

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247. *See generally* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005) (arguing for robust parental rights to protect against undue state interference and protect children's interests).

248. *Parham*, 442 U.S. at 603 ("Simply because the decision of a parent is not agreeable to a child . . . does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."). Judge Andrew Kleinfeld famously posited that parental authority exists wherever it is not restricted. Andrew J. Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L.Q. 409, 413 (1970) ("Parental power probably cannot be defined except as a residue of all power not lodged elsewhere by the law. . . . Much authority of this sort supports the general proposition that except where there is some authoritatively expressed public policy to the contrary, parental power extends to all areas of a child's life.").

249. *See supra* Section I.A.

250. *Troxel*, 530 U.S. at 78 (Souter, J., concurring) ("Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child . . . ."); Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 151–52 (2018) ("Currently, there is no consistent definition of the parental right or its elements."); Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 59 (2011) ("[T]he Supreme Court has articulated no singular analytic framework for evaluating the constitutional rights of minors. Instead, the Court has resolved these cases in a piecemeal fashion . . . ."); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1085–86 (describing the "magnitude and contours" of the substantive right to parent as "notoriously indistinct").

251. The Author's research uncovered only one case that addressed this question directly. Buckholz v. Leveille, 194 N.W.2d 427, 428–29 (Mich. Ct. App. 1971) (holding that under Michigan's procedural capacity rule, "a 16-year-old minor may continue, in his own name, a lawsuit against the wishes of his parents").

252. *See* Bank of the U.S. v. Ritchie, 33 U.S. (8 Pet.) 128, 144 (1834) ("It is not error, but it is calculated to awaken attention that, in this case, though the infants, as the record shows, had

A few courts have more explicitly connected litigation decisions with parents' protected authority, concluding parents have a superior right to serve as children's representatives,[253] identifying procedural litigation decisions—including those that result in the dismissal of claims—as "parental policy decisions" upon which federal courts should not enter,[254] and concluding that courts should not readily interfere with such decisions because "it may be presumed that a parent acts in the best interest of the child," and courts should avoid "step[ping] between the parent and [the] child."[255] But this perspective is a minority view—although federal courts tend to expect parents to appear in their children's

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parents living; a person not appearing from his name, or shown on the record to be connected with them, was appointed their guardian ad litem."); Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167, 1185 (S.D. Fla.) ("The participation of a non-parent next friend should give the Court some pause, but may be appropriate in certain circumstances."), *aff'd*, 212 F.3d 1338 (11th Cir. 2000).

253. *See* Jeffery v. O'Donnell, 702 F. Supp. 513, 515–16 (M.D. Pa. 1987) (affirming the plaintiffs' rights to represent their children in a homeschooling case because parents enjoy a "substantial right" to choose their children's education); *see also* Developmental Disabilities Advoc. Ctr., Inc. v. Melton, 689 F.2d 281, 285–86 (1st Cir. 1982) (holding that a nonparent next friend could not bring a case on behalf of a child whose mother objected to the lawsuit where the mother was an appropriate representative under Rule 17(c) and there was no evidence that the mother's decision "abused her trust").

254. Hunt v. Yeatman, 264 F. Supp. 490, 492 (E.D. Pa. 1967) (declining to permit a mother to intervene and supplant a child's father as next friend in the case) ("We are not persuaded that a Federal Court has the power to enter upon an exploration of the domestic-relations aspects of this matter, the parental policy decisions as to whether, and where, the child should sue. And it is likewise beyond our competence to accord to either parent the controlling voice in such decisions."). At least one court has identified decisions to sign liability waivers as an exercise of parents' constitutionally protected authority. *See* Sharon v. City of Newton, 769 N.E.2d 738, 746–47, 749 (Mass. 2002) (affirming father's prospective release of minor's claims against city as valid despite minor's repudiation of release upon reaching majority) ("Merav's father signed the release in his capacity as parent because he wanted his child to benefit from participating in cheerleading . . . . He made an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole. In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts."). *But see* Apicella v. Valley Forge Mil. Acad. & Junior Coll., 630 F. Supp. 20, 24 (E.D. Pa. 1985) ("Jerry Apicella's claims are not affected by the release signed by his parents. Under Pennsylvania law, parents do not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship.").

255. Seibels, Bruce & Co. v. Nicke, 168 F.R.D. 542, 544 (M.D.N.C. 1996) (designating the child's father as litigation representative despite his prior failure to respond to the complaint because "[n]othing else appearing, it may be presumed that a parent acts in the best interest of the child," "[t]here may well be solid reasons why the parent does not file an answer on the minor's behalf," and "a federal court should, as a matter of sound policy, be cautious in attempting to step between the parent and [the] child" (footnote omitted)).

cases, courts' understanding of parents' formal role in their children's litigation remains murky and rarely invokes constitutional concerns.[256]

Moreover, parental rights theory highlights that, as capacity doctrine presumes that children cannot make litigation decisions for themselves, someone else must do so for them.[257] Supreme Court doctrine concludes that parents are generally better suited than the state to make decisions on their children's behalf because they know them best and are motivated by affection to do what they think is best for a child.[258] Indeed, contemporary parental rights theory posits that empowering parents is the best way to protect a child. As Professor Martin Guggenheim asserts: "[W]e serve children best when we allow parents, above all other possible candidates, including state officials or judges, decision-making power for children when children are denied the power to make decisions for themselves."[259] In the capacity doctrine context, permitting a child to litigate a claim without a parent's knowledge could risk hardship for a family that neither the child nor a court would predict and could risk destabilizing a child's relationship with the parent. Turning to parents also helps courts ensure that cases are brought out of concern for the minors' interests and that children are not misused to advance others' political interests.[260]

256. *See* Martin, *supra* note 42, at 459–61 (identifying that courts alternately describe parents as guardians, next friends, guardians ad litem, and "other representatives" for child litigants under Rule 17(c) and apply different standards to assess parents' qualification to serve in these roles, all of which impose essentially the same responsibilities upon parents).

257. GUGGENHEIM, *supra* note 247, at 42 ("The immutable truth of childrearing is that someone has to be in charge.").

258. *See* Bellotti v. Baird, 443 U.S. 622, 637 (1979) (plurality opinion) ("The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."); Parham v. J.R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *see also* GUGGENHEIM, *supra* note 247, at 46 ("[T]he core of the parental rights doctrine guarantees children at least that the important decisions in their lives will be made by those who are most likely to know them best and to care the most for them.").

259. Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J. F. 942, 944 (2018), http://www.yalelawjournal.org/forum/the-not-so-new-law-of-the-child [https://perma.cc/S9D6-87ZG].

260. *See, e.g.*, T.W. *ex rel.* Enk v. Brophy, 124 F.3d 893, 897 (7th Cir. 1997) (reasoning that parents and others close to children are more likely to have children's interests at heart); Tinsley v. Flanagan, No. CV-15-00185-PHX, 2016 WL 8200450, at *4 (D. Ariz. May 13, 2016) (noting the challenge of identifying next friends motivated by purely political purposes); Martin, *supra* note 42, at 461, 465–69.

Although the Supreme Court has never considered whether parents should be entitled to a decision-making role in children's litigation,[261] the Court has recognized that courts should hear parents' views regarding their children's legal claims.[262] In a significant footnote in *Smith v. Organization of Foster Families for Equality & Reform*,[263] the Supreme Court noted that the appointment of independent counsel for a class of child plaintiffs does not vest that counsel with sole authority to determine the children's best interests.[264] Instead, the Court permitted foster parents, as guardians of the children, to assert the children's rights in support of their challenge to state child welfare removal procedures in addition (and in contradiction to) the position asserted by the children's counsel.[265] The Court reasoned:

> [I]t would be most imprudent to leave entirely to court-appointed counsel the choices that neither the named foster children nor the class they represent are capable of making for themselves, especially in litigation in which all parties have sufficient attributes of guardianship that their views on the rights of the children should at least be heard.[266]

The significance and reasoning of *Smith*'s footnote 44 readily extends to contexts beyond child welfare.[267] *Smith* recognizes that representations made on children's behalf reflect the subjective judgment of the speaker, that parents' views regarding their children's rights and legal claims have value, and that parents should be entitled to present those views to the court, regardless of whether parents are serving as their children's

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261. Gaddis v. United States, 381 F.3d 444, 452 (5th Cir. 2004) (en banc) ("[T]he Supreme Court has never construed, interpreted, or applied [Federal Rule of Civil Procedure] 17(c) in any opinion."). More recently, the Supreme Court passed on the opportunity to determine whether parents have a right to represent their children's interests without counsel in litigation brought to advance the child's rights under the Individuals with Disabilities Education Act (IDEA) because it held that the statute accords parents independent standing to bring claims under the IDEA. Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 526, 535 (2007).

262. Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 841 n.44 (1977).

263. 431 U.S. 816 (1977).

264. *Id.* at 841 n.44 (noting it appropriate that counsel was appointed given the potential for conflicts of interests between the children and the other parties in the case, which included the state, foster parents, and biological parents, and stating that "[i]t does not follow, however, that that independent counsel, who is not a guardian *ad litem* of the children, is solely authorized to determine the children's best interest").

265. *Id.*

266. *Id.*

267. *See, e.g.*, Muscato *ex rel.* Butler v. Moore, 338 P.3d 643, 646–47 (Okla. Civ. App. 2014) (affirming the entry of a civil protection order sought by a mother on behalf of her fourteen-year-old daughter and holding that because parents enjoy constitutionally protected authority to decide with whom their children associate and communicate, it was for the mother to consent to the contact with her daughter and appropriate for the court to weigh the mother's view of the threatening nature of the conduct, even if it did not appear threatening to her daughter).

representatives in the case. By contrast, the *Buckholz* court (in the hair grooming case) brushed aside the parents' view and instead framed the dispute before the court as solely between the child and the school.[268] Although the court recognized the issue of whether a child must follow a school dress code to fall within parental control, the court declared it "quite obvious" that the parents "were not exercising that right at the time plaintiff was dismissed from school," presumably because the child had long hair despite the parents' expressed wishes that he adhere to the dress code.[269] This framing allowed the court to sidestep the issue of whether the child or the parent had a superior right to control the child's appearance and exclude the parents' perspective from the case.

In sum, parental rights theory suggests that parents generally should direct their children's civil litigation. As compared to other adults, a parent should have a superior right to serve as a child's litigation representative. When a child appears before a court without a parent, courts generally ought to notify and involve parents, rather than substituting courts' judgment for parents about what best serves a child.

E. *New Best Interests Theory*

New best interests theory cautions against reliance upon vague notions of "maturity" or bright-line age restrictions within capacity doctrine and suggests that in determining whether to extend children litigation capacity, legislators and courts should consider the extent to which that capacity would advance children's interests in "relationships with parents as well as with children and other adults; exposure to new ideas; expressions of identity; personal integrity and privacy; and participation in civic life."[270]

In articulating their "new law of the child," Professor Anne Dailey and Dean Laura Rosenbury promote a view of children as "full members of society" rather than "lesser adults," seeking to move past what they perceive as the overly narrow focus on children's dependence and autonomy within the law's current treatment of children.[271] In particular, they critique parental rights theory as constructing "children predominantly as objects of control, rather than as people with values and interests of their own,"[272] and as overprioritizing parents' rights to the detriment of children's interests.[273] From this perspective, Dailey and Rosenbury would likely reject attributability theory's conception of

268. Buckholz v. Leveille, 194 N.W.2d 427, 429 (Mich. Ct. App. 1971).

269. *Id.*

270. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1454, 1456, 1465, 1484 (2018).

271. *Id.* at 1451, 1527–28.

272. *Id.* at 1471.

273. *Id.*

children's still-developing values and identities as unworthy of respect, as they emphasize that children have interests "in the here and now" that warrant consideration.[274]

To this end, Dailey and Rosenbury promote the use of a more robust "best interests of the child" standard that would require courts, legislators, and administrators to weigh five "broader" interests of children-as-children when establishing and applying legal standards relating to children, including: "relationships with parents as well as with children and other adults; exposure to new ideas; expressions of identity; personal integrity and privacy; and participation in civic life."[275] These concerns should be considered in addition to children's developmental needs, to emphasize children's interests in the "here and now" and not just as future autonomous adults.[276]

Dailey and Rosenbury are skeptical of bright-line age-based classifications for children, arguing that the variety in designations of age for adulthood and authority for children throughout the law demonstrates that political and social concerns drive these determinations.[277] Likewise, they criticize reliance on vague standards of "maturity" when assessing children's capacity in contexts such as judicial bypass proceedings, arguing that the notion of "maturity" is subjective and becomes a proxy for conscious and unconscious judicial preferences for or against certain groups or value judgments about children's choices, rather than a reflection of child development.[278]

Like democratic theory, new best interests theory promotes children's interests in participating in civic society and politics and recognizes that children have widely variant opportunities for participation.[279] But new best interests theory goes further to highlight that civic engagement may have particular salience while children are children. To this end, it argues

274. *Id.* at 1498, 1505 ("Although children's characters undoubtedly evolve, the fact that they are transitory need not imply that they are not deserving of recognition or respect. Instead, space exists between formed and unformed characters, and children possess strong values and commitments in this liminal space.").

275. *Id.* at 1452, 1456, 1484.

276. *Id.* at 1481.

277. *Id.* at 1451, 1466.

278. *Id.* at 1454, 1466. Dailey and Rosenbury draw a parallel between the lack of content within standards of "maturity" and of the classic "best interests of the child," which has been widely criticized as a vehicle for subjectivity in child custody and child welfare cases. *Id.* at 1466, 1469; *see, e.g.*, Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1509, 1526 (1996) (arguing that deciding what the best interests of a child are can be subjective).

279. Dailey & Rosenbury, *supra* note 270, at 1451, 1504 (identifying differences in opportunity for civic engagement based on "race, ethnicity, class, gender, sexual orientation, religion, and many other dimensions of children's lives").

for expanding voting to some children and reforming voting more broadly to better take account of children's interests.[280]

Moreover, new best interests theory posits that children warrant increased protection against state discrimination and heightened concern for equality because inequality undermines both children's present well-being and future lives.[281] By way of example, Dailey and Rosenbury laud the Second Circuit Court of Appeals' emphasis of Jayvon Elting's minority in its affirmance of an emotional damages award compensating him after he was beaten by police during an arrest for a crime he did not commit.[282] The court found Elting's youth significant because the incident caused Elting to "los[e] trust in the police" and inflicted "a deeper and [more] lasting impact" than it would have on an adult.[283]

New best interests theory's concern for children's equality and civic engagement would support extending capacity to some children. As the theory holds parents and the state responsible for facilitating children's civic engagement and holds the state responsible to remove concrete barriers to children's participation, it would likely encourage courts to take an activist approach to their duty to protect child litigants and promote carving out a supportive role for parents where parental involvement served children's interests.[284] And just as new best interests theory recognizes that not all children should vote (as some would just be "puppets of their parents or others adults") it would recognize that not all children should be granted capacity to litigate.[285]

But new best interests theory neither suggests any benchmarks for assessing when a child is prepared for civic engagement through litigation, nor when courts should accept claims made on children's behalf as reflecting children's own views, nor when (if ever) children's separate views should be solicited.[286] Finally, new best interests theory

280. *Id.* at 1451.

281. *Id.* at 1535–36 (identifying education as a context in which equality is of particular concern for children).

282. *See* Dancy v. McGinley, 843 F.3d 93, 100, 115 (2d Cir. 2016); Dailey & Rosenbury, *supra* note 270, at 1504.

283. *Dancy*, 843 F.3d at 115.

284. Dailey & Rosenbury, *supra* note 270, at 1451, 1526.

285. *Id.* at 1505.

286. *Id.* at 1487. Dailey and Rosenbury highlight that children and parents may have different views more often than constitutional doctrine assumes, yet at times also seem to conflate the perspectives of children and parents. For example, they describe *Prince v. Massachusetts* as a case in which "nine-year old Betty Simmons sought to defend her right to distribute religious materials on the streets of Brockton, Massachusetts as an ordained minister of the Jehovah's Witness faith," but *Prince* was brought by Betty's aunt and custodian, not by Betty, to challenge Betty's convictions for violations of Massachusetts child labor laws. Dailey & Rosenbury, *supra* note 270, at 1498; 321 U.S. 158, 159 (1944). Similarly, Dailey and Rosenbury describe *Pickup v. Brown* as a case in which children alleged that a state law prohibiting conversion therapy violated

does not suggest how to reconcile conflicts between or prioritize among the five priority interests it identifies, nor how to give those interests sufficient content within legal frameworks to prevent them from becoming proxies for judicial bias or impermissible value preferences, as Dailey and Rosenbury argue maturity has become.

F. *Child Well-Being Theory*

Child well-being theory suggests that child well-being should be the lodestar for a modernized capacity framework and would encourage the framework to incorporate scientific child development findings, support adolescents in decision-making while minimizing the risk of harm, promote the parent-child relationship, and advance social welfare and racial justice.

Professors Clare Huntington and Elizabeth Scott posit that contemporary legal regulation of children and allocation of decision-making authority over children are "grounded in the overarching goal of promoting child wellbeing."[287] The continued "regime of strong parental rights" and the "opaque pattern of children's rights" can be explained by the observation that "[i]n both domains, the law generally promotes child wellbeing, is increasingly informed by developmental research, and usually enhances social welfare."[288] The aim of promoting child well-being "knits together" the interests of parents, children, and the state, rather than placing them in opposition to one another,[289] and "elevates the goal of promoting racial justice as essential to a legitimate and just scheme of regulation."[290]

To Huntington and Scott, child well-being justifies the extension of some rights and not others to young people. Well-being supports granting adolescents legal rights to: (1) provide them opportunities to exercise agency (and thereby prepare for adulthood) where their choices do not risk harm, and (2) equip them with the authority to avoid serious harm.[291] By contrast, child well-being supports withholding legal rights from younger children because their immaturity undermines their ability to

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their constitutional rights, but this case was brought by the minors' parents on the minors' behalf. Dailey & Rosenbury, *supra* note 270, at 1499, 1499 n.202; 42 F. Supp. 3d 1347, 1349 (E.D. Cal. 2012), *aff'd*, 740 F.3d 1208 (9th Cir. 2014). Because the minors' parents speak for minors in cases of this posture, absent direct court inquiry, it cannot be discerned whether the positions taken on the minors' behalf reflect the minors' own views, or simply the minors' parents' views advanced in the minors' names.

287. Huntington & Scott, *supra* note 41, at 1377.

288. *Id.* at 1377.

289. *Id.*

290. *Id.* at 1378.

291. *Id.* at 1377–78, 1432.

exercise them in a safe and self-interested way and risks harm to themselves and to others.[292]

Child well-being theory also supports robust deference to parents as decision makers for their children. Such deference promotes child well-being by encouraging the stability of the parent-child relationship (thereby promoting healthy child development) and by ensuring that decisions about children are made by those best positioned and most motivated to advance children's interests.[293] Huntington and Scott recognize parental rights to "serve a particularly important protective function for families of color and low-income families, who have been the focus of zealous state intervention."[294] Yet, child well-being theory would restrict parental authority beyond what pure privacy commitments might suggest since inflicting or creating a risk of serious harm for a child does not advance well-being.[295]

Child well-being theory provides a plausible explanation for the present state of capacity doctrine and offers several suggestions as to how courts should fill persistent gaps. The theory justifies extending increased agency to minor litigants according to their socio-cognitive abilities in a way that ensures that minors will not cause harm.[296] Procedural rules that generally require minors to have adult representatives and allow minors fourteen and older to choose those representatives can be understood as advancing child well-being by giving adolescents a measure of independent authority while assuring they benefit from adult advisors' judgment. Likewise, where depriving minors of the capacity to bring suit independently poses harm to child well-being, as when minors seek court protection from dating violence or pursue judicial bypass procedures, legislatures and courts empower minors to proceed alone. Furthermore, child well-being theory supports carving out a role for parents in their children's cases, particularly in matters such as juvenile justice proceedings that disproportionately impact low-income and racial minority youth, save where doing so would risk substantial harm to the child. Even where parents are unsuitable to serve as children's representatives, the framework justifies giving parents opportunities to express their views about children's legal rights and interests to ensure the court has the benefit of parents' perspective. Finally, child well-being theory supports establishing a capacity framework that advances racial justice and social welfare by ensuring access to justice for low-income

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292. *Id.* at 1432–33.

293. *Id.* at 1416–17 ("Based on a large body of research, it is clear that a strong, stable parent-child relationship is critical for healthy child development, and the disruption and destabilization of this relationship threatens serious harm to the child." (footnote omitted)).

294. *Id.* at 1377.

295. *See id.* at 1418.

296. *See supra* Section II.A.

minors, who are disproportionately racial minorities, and who have the least access to the resources necessary to successfully navigate the legal system.

Child well-being theory does not advise how courts would assess what best serves well-being when particular parents and children disagree about whether a child should bring a case, nor how to reconcile different well-being accounts presented in a particular case. Since the notion of well-being itself is subjective, a judge faced with a child like John Lewis would have to determine whether (the teenaged) Lewis's pursuit of justice or his parents' concerns about persecution provide the more compelling account of well-being. As scholars have thoroughly examined in the child custody context, such determination would result from the judge's own subjective viewpoint of what best serves the child's interests.[297]

III. MODERNIZING CAPACITY DOCTRINE

The core of capacity doctrine today remains rooted in blunt distinctions: it applies to children as a group, who presumptively lack capacity as a group. It presumes that all children need adult representatives in litigation and concerns itself mostly with assessing which adults are appropriate to serve in this role. Although apparently administratively simple, these conceptually clear categories of "child" and "adult" are at odds with contemporary understandings of adolescence in science, political theory, and law, and the more nuanced reality of some courts' and some codes' treatment of adolescents as capable litigants.[298]

And although capacity doctrine presently confers crucial agility in granting courts the discretion to issue undefined additional orders to protect child litigants' interests, it provides no guidance as to how a court should navigate two particularly daunting circumstances: a minor seeking

297. *See, e.g.*, Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 LAW & CONTEMP. PROBS. 226, 229–30 (1975); John Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 2 (1987).

298. Scott, *supra* note 43, at 47–9; Hamilton, *supra* note 43, at 57, 60–61; Hartman, *supra* note 43, at 433–32; Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1269 (2000) (urging "a paradigmatic shift in thinking about adolescence that entails a legal framework predicated on adolescent decisional ability"); Lisa Vollendorf Martin, *What's Love Got to do with It: Securing Access to Justice for Teens*, 61 CATH. U. L. REV. 457, 460 (2012) (encouraging the extension of standing and capacity to adolescents to pursue civil protection orders independently). Scholars recently have further identified and advocated for the distinctive legal treatment of "emerging adults" aged 18–25. Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131,1136 (2020) (evaluating legal developments carving out distinctive treatment for "emerging adults," aged 18–25); *see also* Wayne R. Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent*,76 MD. L. REV. 405, 407–08 (2017) (arguing for the extension of minors' rights to disavow contracts to the age of 21).

to advance her claims alone or a dispute between a minor and his parents about whether to bring a case. Lacking guidance and any discernable consensus about the factors courts should consider in such circumstances, courts must reinvent the wheel as these issues arise. These ad hoc determinations exacerbate the disparities already rife within the justice system, permitting minors with greater social and economic capital to access the courts in ways that those with fewer privileges and resources cannot. Drawing from the theories Part II explored, this Part proposes a modernized framework to guide courts in exercising their discretion to determine whether to extend litigation capacity to minors in individual cases and how (and whether) to account for the perspectives of parents in such cases.

A. *Animating Principles*

Two central principles animate the modernized capacity framework this Article proposes. First, adolescents aged fifteen and older who wish to lead their cases generally should be permitted to do so with appropriate support. Second, courts generally should engage parents to provide them with notice of and the opportunity to be heard in the case, unless doing so risks harm to a child or would nullify the vindication of the right the child seeks.

1. Adolescents Who Wish to Should Lead with Support

If there is one point of consensus among the disparate child law doctrines introduced in Part I and the theories examined in Part II, it is that as children approach adulthood, they should be increasingly supported in making independent decisions and their perspectives should be given increased weight.[299] These principles emerge scattershot in existing capacity doctrine: for example, they inform states policies granting adolescents the authority to seek civil protection orders on their own and to select their adult representatives in civil litigation.[300] To better and more broadly account for this consensus, courts should interpret their authority to "issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action" to encompass a default rule that permits minors fifteen and older to advance their claims on their own with appropriate support when they seek to do so.[301] This rule would clarify existing capacity doctrine, which recognizes courts' authority to permit minors to proceed alone but casts that outcome as

299. *See* Parham v. J.R., 442 U.S. 584, 604 (1979); Bellotti v. Baird, 443 U.S. 622, 651 (1979) (plurality opinion); H.L. v. Matheson, 450 U.S. 398, 412–13 (1981).

300. *See supra* Part I.A.

301. FED. R. CIV. P. 17(c)(2).

exceptional and a matter of discretion.[302] Courts should incorporate this new rule for several reasons.

First, child development science resolves capacity doctrine's central concern—whether an individual is actually capable of advancing her own interests—in favor of children fifteen and older. At this age, concerns about children's functional abilities to assert their own interests and make reasoned decisions become less salient as most children demonstrate equivalent abilities as adults regarding the types of cognitive and social processing central to litigation-related decision-making.[303] For the same reasons, as children reach age fifteen, categorical distinctions between "children" and "adults" become less justifiable.

As a practical matter, it is unlikely that children under fifteen will have the resources and wherewithal to take the steps required to present themselves before a court. My research found only three cases in which a minor younger than fifteen sought to advance a claim alone.[304] The default presumption should not apply to children younger than fifteen in light of the wide range of socio-cognitive functioning before that age, although a younger minor who presents herself before a court demonstrates advanced capabilities in the process. Nonetheless, even with the adoption of this default rule, courts would retain the same discretion to issue appropriate orders to protect the minor's interests in the case. Courts could continue to exercise this discretion to permit a minor younger than fifteen to represent the minor's own interests, and might wish to do so in cases involving exigent circumstances. As in all cases involving child litigants, the court's response to a case initiated by a child younger than fifteen should not be dismissal but rather a careful inquiry into how the child came to approach the court alone and what support the court should marshal to enable the child to pursue the remedy.[305]

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302. *See* Roberts v. Ohio Cas. Ins., 256 F.2d 35, 39 (5th Cir. 1958) ("We spell out the [Federal Rule of Civil Procedure 17(c)] to mean: (1) as a matter of proper procedure, the court should usually appoint a guardian ad litem; (2) but the [c]ourt may, after weighing all the circumstances, issue such order as will protect the minor in lieu of appointment of a guardian ad litem; (3) and may even decide that such appointment is unnecessary, though only after the [c]ourt has considered the matter and made a judicial determination that the infant is protected without a guardian."); M.S. v. Wermers, 557 F.2d 170, 174 (8th Cir. 1977) ("Appointment of a guardian ad litem is considered to be discretionary under the Federal Rules, provided the District Court enters a finding that the interests of the minor are adequately protected in the event it does not make such appointment.").

303. *See supra* Section II.A.

304. *See supra* note 122.

305. *See* Gardner *ex rel.* Gardner v. Parson, 874 F.2d 131, 140 (3d Cir. 1989) (noting that courts fail to meet their obligations under Rule 17(c) through inaction and that courts must not dismiss children's cases for procedural deficiencies but issue orders to ensure children's interests are adequately protected); Adelman *ex rel.* Adelman v. Graves, 747 F.2d 986, 989 (5th Cir. 1984)

Second, conditioning litigation capacity on a child affirmatively pursuing that authority enables such requests to serve as a proxy for a child's "maturity" or "readiness" to assume this responsibility. A child's demonstration of such initiative justifiably serves this function because it shows the strength of the child's commitment to the enterprise and his ideals, his belief in the need for the remedy, and his readiness to publicly adopt an independent position that may vary from the values of his family or community.[306] These considerations demonstrate "maturity" more reliably than a court's independent divination of a particular child's capability and mitigate the risk of bias dominating such assessments.

Relying upon initiative as a prerequisite also narrows the circumstances in which courts would need to assess a child's capacity to act alone. This limitation not only conserves judicial resources but also avoids the risk that a child might feel pressured to lead her case before she is ready.[307] Further to this end, an initiation prerequisite respects the balance a child chooses to strike between standing true to his own values and demonstrating loyalty to his family and community, preserves the child's agency to maintain these relationships, and prevents courts from unnecessarily disrupting this balance.[308]

Courts concerned about whether a case actually accords with a child's views have other opportunities to identify misalignment. For example, minors convey their disagreement with claims initiated by their parents through testimony as witnesses in the case.[309] Furthermore, the mandate that children's federal claims must be advanced with counsel assures attorney representation when children's claims survive dismissal. In such

("We hold only that the district court's primary concern in the instant case must be to assure, under Rule 17(c), that Daniel's interests in vindicating his statutory and constitutional rights are properly protected.").

306. *See supra* Sections II.A–B.

307. *See supra* Sections II.A–B, and E–F (to the extent that self-initiation promotes the child-parent relationship and knits together the interests of children, parents, and the state).

308. *See supra* Sections II.A–B.

309. At the state level, a number of such cases involve parents' claims for civil protection orders to protect children from romantic partners contrary to their children's wishes. *See, e.g.*, Richards *ex rel.* Makayla C. v. McClure, 858 N.W.2d 841, 845, 849 (Neb. 2015) (overturning harassment protection order obtained by mother on behalf of her daughter for lack of evidence; trial court identifying the issue in the case as "whether a parent of a minor can secure a harassment protection order against someone when the parent considers the conduct harassment, but clearly the minor does not"); Muscato *ex rel.* Butler v. Moore, 338 P.3d 643, 646–47 (Okla. Civ. App. 2014) (affirming protection order obtained by mother on behalf of daughter against mother of daughter's friend and concluding that the harassment finding was justified even if minor did not perceive conduct as threatening); *In re* R.T.T., 26 S.W.3d 830, 838 (Mo. Ct. App. 2000) (per curiam) (dismissing a child protection order obtained by a father on behalf of his daughter against her boyfriend because the evidence demonstrated that the relationship was consensual and nonabusive and stating that "[t]here is no indication that the legislature intended these statutes to be used by a parent as a means of controlling the actions of that parent's child").

cases, even when a minor has an adult representative, she is also the lawyer's client.[310] Ethical rules require counsel to consult with child clients regarding decisions in their case to varying degrees depending on the child's maturity,[311] and to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[312] Thus, the actions attorneys take in children's cases must be informed by both adult representatives' and children's views.

Third, some claims are exigent and cannot wait until adulthood. Constitutional doctrine and (some) state policies already recognize judicial bypass and civil protection order proceedings as involving claims appropriately falling under a child's control, in part because of their exigency. Other claim types warrant similar treatment, including not only conditions of confinement and discrimination but also claims that will expire during a child's minority.[313] Adopting the proposed default rule obviates the need to undertake the project of claim-based capacity reform by enabling children to pursue the claims that feel pressing to them. Moreover, since courts routinely deny children court access if their adult representatives cannot afford counsel, the default rule further ensures that children who seek to exercise their right of access to the courts during childhood have at least one viable means of doing so.

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310. Professor Nancy Moore points out that in such circumstances, both the adult representative and the child may be the lawyer's clients. Moore, *supra* note 67, at 1827–31. The Model Rules suggest that a lawyer should consult with both the child and the adult representative in such cases. The Comment to Rule 1.14 provides:

> [2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.
>
> . . . .
>
> [4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

MODEL RULES OF PRO. CONDUCT r. 1.14 cmt. (AM. BAR ASS'N 1983).

311. *See* MODEL RULES OF PRO. CONDUCT r. 1.14(a).

312. *Id.*

313. *See, e.g.*, Gallo v. United States, 331 F. Supp. 2d 446, 448 (E.D. Va. 2004) ("Dismissal would be a particularly harsh result in this case because any subsequent claim filed by M.G. after dismissal of this action would be effectively barred by the statute of limitations. Infancy does not toll the statute of limitations under the Federal Tort Claims Act. Therefore, M.G. would not be able to litigate her claim on her own behalf when she reaches adulthood." (footnote and citation omitted)).

Fourth, adopting a bright-line rule in favor of granting capacity to minors fifteen and older would create clear expectations for courts and minors, thereby increasing the transparency and predictability of capacity doctrine. Increasing transparency and predictability generates a perception that the process is fair by communicating the basis for treating some children differently than others.[314] Predictability may encourage children considering civil justice remedies to seek relief by informing them in advance of the conditions under which they will be permitted to proceed, as the prospect of total uncertainty about whether they will be permitted to pursue their claims alone may deter some children from approaching the civil justice system altogether.

Fifth, a default rule in favor of minors seeking to advance their own claims generally benefits minors by helping to prepare them for adulthood and citizenship and by giving them a forum to directly voice their concerns to democratic institutions.[315] It further benefits the law by increasing opportunities for courts to take account of children's concerns in interpreting and applying doctrine, and democracy itself by facilitating developing citizens' participation.[316] For these presumptive benefits to attach to a particular case, the claims must indeed be the child's own and not of others using the child as a vehicle or a foil. Attorneys' ethical commitments, including of candor to the tribunal and of restricting the control that nonlitigants—even those paying legal fees for another—can exercise over a case provide some assurance that a child's desire for relief is sincere and protects against the misuse of children as unwitting stand-in parties for another's cause.[317]

Finally, the default rule's admonition that interested minors should lead *with appropriate support* is not simply duplicative of courts' existing obligations to ensure that child litigants' interests are adequately protected. Rather, it encourages a particularized assessment of what form of adult involvement would best enable the minor to successfully direct his own case. For most—if not all—children, that support includes counsel. Counsel provides children with the professional expertise in the legal system, the law, and potential negative outcomes from pursuing litigation that empirical data demonstrates will allow children to operate at the height of their cognitive capacities.[318] Moreover, the importance federal courts have placed on attorney representation to date in granting individual minors the capacity to advance their own claims and in mandating that adults bringing claims on behalf of children retain counsel demonstrates a widespread judicial perception that attorney

314. *See supra* Section II.C.
315. *See supra* Sections II.A, C, E–F.
316. *See supra* Section II.C.
317. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.3, 5.4(C).
318. *See supra* Section II.A.

representation equips older children to direct their own cases successfully and is generally essential to children's litigation.[319] To ensure that courts are equally accessible to every child, courts must appoint counsel when children appear unrepresented. Preconditioning capacity on attorney representation without appointment of counsel would limit the practical availability of litigation to a privileged few children with independent wealth, extraordinary sophistication, or relationships with savvy adults who can connect them with well-resourced advocacy organizations.

In addition to counsel, courts should encourage child litigants to identify supportive adults whom they trust to serve as informal advisors in their case. Appointing a formal representative such as a next friend or guardian ad litem would undermine the child's decision-making authority and role in the case and thus thwart the purpose of extending capacity to the child. Yet, courts and scientists recognize that children's decision-making is aided by guidance from experienced adults.[320] Providing advice comprises a central component of attorneys' duties to their clients, and attorneys are well-positioned to assist clients in decision-making by sharing their expertise on the law, legal procedures, and court practices, as well as their judgment about the available alternatives and possible outcomes in the case.[321] But in assisting their clients with decision-making, attorneys cannot offer the benefit of a deep knowledge of the client's life circumstances, experiences, relationships, values, and goals.[322] Children themselves have these insights, as might other adults with longstanding relationships with a child outside of the justice system. Such adults can support a child's decision-making in a case by contributing their perspective on the implications of these nonlegal factors to the legal team. Typically, parents are best suited to fulfill this role.

2. Courts Should Engage Parents

In tandem with a default rule granting capacity to older children, courts should generally seek to engage the parents of children who appear in court alone—with some important exceptions. This engagement would

319. *See supra* Section I.B. *See generally* Martin, *supra* note 37 (discussing the federal courts' attachment to the counsel mandate).

320. Noe v. True, 507 F.2d 9, 12 (6th Cir. 1974) (per curiam) ("While it would not be at all improper for the court, upon consideration, to appoint the child's attorney as her guardian ad litem, the mere presence of an attorney representing her in the action is insufficient of itself to protect her personal interests in the action."); *see supra* Section II.A.

321. MODEL RULES OF PRO. CONDUCT r. 2.1.

322. Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 576–78 (2008) (raising the concern that children's lawyers advocate from the perspective of their own worldview and professional orientation rather than that of the child or the child's family and community).

aim to provide parents with notice of the case and an opportunity to contribute their perspective on what serves their children's interests. Such engagement would not give parents a veto over an older child's claim. Although parents' constitutionally protected authority arguably gives parents a superior claim over other adults to decide whether and how to sue on a child's behalf,[323] parents' authority does not justify categorically denying a child her right of access to the courts. Instead, parental engagement would provide parents with an opportunity to raise their own interests in the child's case and, in doing so, offer the court their perspective on whether a claim is indeed a child's own desire, countervailing interests (including the parents' own) against permitting litigation to proceed before the child reaches majority, how to protect the child's broader interests (for example, in safety) during the pendency of the litigation and at its outcome, and, if a child is willing to accept it, provide the child with informal advice in the case.

Courts should not engage parents when doing so would frustrate the right the child seeks to vindicate or pose a risk of harm to the child. Courts have found the need to protect children's rights and interests in privacy to outweigh the benefits of parental notice and involvement in reproductive rights and civil protection order proceedings.[324] Similar concerns could arise in other contexts, for example, where a child who has not revealed his sexual orientation to his parents seeks to enjoin sexual orientation discrimination.[325] Moreover, courts should be attuned to the possibility that a child's appearance in court without a parent results from a rift or fear of harm that would make parental involvement inappropriate.[326] For all of these reasons, before engaging parents, courts should assess whether parental outreach would undermine a child's rights or pose a risk of harm to a child.

This general parent engagement practice should not require parents' actual participation. It may well be that some parents deliberately choose not to participate in their children's litigation—neither publicly supporting nor publicly opposing the case—to preserve the relationship with their child or out of concern for other matters, such as potential repercussions from the case. A parent's desire not to engage with a child's case should be respected and should not prevent a child from moving forward.

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323. *See supra* Section II.D.

324. *See supra* Section I.B.1.

325. *See* Jeruss, *supra* note 53, at 857.

326. Jordan Blair Woods, *Unaccompanied Youth and Private-Public Order Failures*, 103 IOWA L. REV. 1639, 1640 (2018) (arguing that the family-centered child welfare response to unaccompanied youth is misaligned with the reality that many such youth, especially LGTBQ youth, choose or are forced to leave home because of abuse or rejection by their families).

On the other hand, where parent engagement does not risk harm or nullify a child's legal rights, providing parents an opportunity to share their views with the court without making decisions for the child offers key potential benefits to the child and the court's assessment of the child's needs in the case. First and foremost, parents' knowledge of and affection for their children and understanding of the context of their children's lives make them uniquely suited to anticipate potential long-term benefits, risks, and consequences of potential case outcomes to their children. Parents may have important insights into the potential nonlegal consequences of pursuing litigation, concerns about others misusing the child in bringing a claim, or useful perspectives on the benefits and drawbacks of potential settlement agreements for a child. Although parents' absence from some cases may better serve a child's interests, in other cases, parents' absence may simply result from their inability to afford legal representation and the federal mandate that parents seeking to play a formal role retain counsel. Courts should not permit structural inequities to deprive some children of the benefit of parental guidance. Engaging parents could encourage them to serve an informal advisory role for a child who wants that support.

Secondarily, providing parents with an opportunity to engage respects and reinforces parents' childrearing role. Given their proximity to and general responsibility for their children, custodial parents reasonably would expect to know about their children's litigation and have the opportunity to participate. Fulfilling these expectations demonstrates institutional support for parents and may help motivate parents to continue the parenting endeavor.

Applying these principles, had the young John Lewis filed his case over his parents' objection with counsel Dr. King provided, the court would have presumed that Lewis had the capacity to bring the case on his own, notified his parents of the proceeding, and invited them to appear. Lewis's parents could have potentially objected to the lawsuit's timing during Lewis's minority, given their disagreement with the choice and their independent interest in making decisions about his education.[327] In considering any such objection to vesting Lewis with capacity, the court would have been required to balance the weight of Lewis's rights of access to the courts and to nondiscrimination with Lewis's parents' rights to care and control, especially given the potential severity of the harms they might have faced. Contemporary doctrine suggests that, in his case, Lewis would have had the stronger claim, given his age and the character of the rights at stake, but a court could reasonably have determined that the significant risk to Lewis's family (and Lewis himself) justified

327. In 1957, the age of majority in Alabama was twenty-one. Today, it is nineteen. ALA. CODE § 26-1-1 (2020).

deferring to his parents and dismissing the claim until Lewis reached majority. Had the court permitted Lewis to proceed, his parents' input could have assisted the court in its duty to protect Lewis's interests nonetheless by, for example, informing the court about specific risks or credible threats that would warrant the entry of measures to ensure Lewis's safety. That Lewis did not ultimately bring his case to court despite his life's work to make "good trouble"[328] is also telling in that it showcases the nonlegal and relationship-based calculations that minors and their parents routinely make regarding litigation and exemplifies how parents and children may come to align in decisions to sue or not to sue, even when their individual perspectives differ.

B. *Practical Prerequisites*

To have the opportunity to pursue legal claims, children must know how to access the courts in the first place. Otherwise, access to counsel may operate as a practical prerequisite to court access, even if not a legal requirement. Educating children about their rights and legal remedies through school curricula, peer-to-peer education programs, and extracurricular activities,[329] and educating professionals who work with children about legal information resources and community legal support[330] are important first steps to ensuring children have access to this threshold knowledge.[331] Moreover, expanding self-help litigation resources such as automated form pleadings[332] and court-based self-help

328. John Lewis, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html [https://perma.cc/DS7R-3MK9] ("Ordinary people with extraordinary vision can redeem the soul of America by getting in what I call good trouble, necessary trouble.").

329. For example, Break the Cycle offers school curricula, peer-to-peer education, and a youth movement centered on combatting dating violence and promoting healthy relationships. *Leadership & Education*, BREAK CYCLE, https://www.breakthecycle.org/leadership-education [https://perma.cc/K63R-ELDZ].

330. The National Education Association, for example, has developed guidance to educate teachers on students' rights to be free from discrimination and harassment. NAT'L EDUC. ASS'N, LEGAL GUIDANCE ON STUDENTS' RIGHTS: DISCRIMINATION AND HARASSMENT BASED ON RACE, RELIGION, NATIONAL ORIGIN, AND IMMIGRATION STATUS 2 (2018), https://neaedjustice.org/wp-content/uploads/2018/04/NEA-Legal-Guidance-on-Students-Rights-2018.03.13.pdf [https://perma.cc/KU4E-SUT8].

331. Some programs have brought legal clinics into high schools to give children greater access to legal protections and remedies, including the California Western School of Law's Community Law Project and the Chicago Law and Education Foundation. *Community Law Project*, CAL. W. SCH. L., https://www.cwsl.edu/clinics-and-programs/community-law-project [https://perma.cc/N368-CMZJ]; *Legal Clinics in High Schools, from Chicago Law & Education Foundation*, JUST. INNOVATION, https://justiceinnovation.law.stanford.edu/legal-clinics-in-high-schools-from-chicago-law-education-foundation/ [https://perma.cc/7U8Z-V9TY].

332. The Legal Services Corporation has spearheaded programs supporting the creation of automated forms. *See* LEGAL SERVS. CORP., https://www.lsc.gov/grants-grantee-resources/grantee-guidance/reporting-requirements/tig-reporting/document-assembly [https://perma.cc/3PDJ-GHL4].

centers[333] will assist children to present their claims before courts and invoke courts' special duty to assist them.

In addition, courts must dedicate resources to appointing counsel for children who seek to advance their claims alone. To expand the pool of available resources, courts could partner with bar associations, legal services organizations, and large law firms to develop pro bono representation projects focused on assisting child litigants.

CONCLUSION

Capacity doctrine is rooted in a rule that has not changed for over 100 years. Moreover, the doctrine has developed in an ad hoc fashion, at once generally assuming that children lack the ability to bring their own claims and crafting incoherent, disunified exceptions. As a result of its haphazard development, capacity doctrine fails to meaningfully attend to scientific, theoretical, and legal accounts of adolescence. In the end, children's ability to enforce their substantive rights falls prey to the vagaries of this incoherence.

Instead of continuing to determine capacity in this piecemeal fashion, courts should adopt a default rule favoring adolescents fifteen and older who seek to represent their own interests and should engage their parents as appropriate, without supplanting the adolescent's leading role. To ensure that the privilege to exercise capacity is available to all children rather than the fortunate few who can retain private counsel, courts should routinely appoint counsel to help children advance their claims. Modernizing capacity doctrine in these ways will assist children in overcoming capacity's critical threshold, making courts more accessible and the law more responsive to adolescents.

333. Self-help centers have been created within federal and state courts, sometimes through community partnerships. *See, e.g.*, *Federal Pro Se Legal Assistance Project*, CITY BAR JUST. CTR., https://www.citybarjusticecenter.org/projects/federal-pro-se-legal-assistance-project/ [https://perma.cc/H5HG-AV9P]; *Self Help Center*, D.C. CTS., https://www.dccourts.gov/services/family-matters/self-help-center [https://perma.cc/2GNT-SKDV].