

GIVE PARENTS THE VOTE

Joshua Kleinfeld & Stephen E. Sachs***

Many of America's most significant policy problems, from failing schools to the aftershocks of COVID shutdowns to national debt to climate change, share a common factor: the weak political power of children. Children are twenty-three percent of all citizens; they have distinct interests; and they already count for electoral districting. But because they lack the maturity to vote for themselves, their interests don't count proportionally at the polls. The result is policy that observably disservices children's interests and violates a deep principle of democratic fairness: that citizens, through voting, can make political power respond to their interests.

Yet there's a fix. We should entrust children's interests in the voting booth to the same people we entrust with those interests everywhere else: their parents. Voting parents should be able to cast proxy ballots on behalf of their minor children. So should the court-appointed guardians of those who can't vote due to mental incapacity. This proposal would be pragmatically feasible, constitutionally permissible, and breathtakingly significant: perhaps no single intervention would, at a stroke, more profoundly alter the incentives of American parties and politicians. And, crucially, it would be entirely a matter of state law. Giving parents the vote is a reform that any

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state can adopt, both for its own elections and for its representation in Congress and the Electoral College.

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INTRODUCTION

Perhaps the most vivid lesson of the COVID pandemic, from the standpoint of the democratic process, was the weak political power of children. When bars and restaurants reopened, schools stayed closed; when it became clear that children were less likely to infect others or become seriously ill themselves, schools stayed closed; when it became clear that school closures caused children significant harm, schools stayed closed; when it became clear that the poorest children were harmed most, schools stayed closed. The COVID closures were a singularly clear case of the balancing of interests that marks all politics: if some institutions would be allowed to open to keep society functioning, and others would have to stay closed for the sake of public health, politics would decide who'd bear the cost. In that balancing, children lost.

Yet the COVID experience really just made evident a larger political pattern. American policy is observably and significantly distorted by the political weakness of children. The performance record of American schools reflects that weakness; so does the limited supply of housing for new families, the rising cost of daycare and preschool, the state of public transportation and public parks, anemic support for working parents or responses to child poverty, and many aspects of crime and public-safety policy. As a structural matter, our political system routinely hands out benefits in the present while shifting costs to the future: consider growing public debt, unfunded entitlement programs, climate change, and other long-term economic and environmental concerns. The common thread is that, when policy contexts put children's interests particularly at stake, children lose. And why? "Kids don't vote."¹ And no one else can vote for them. In the hard calculus of democratic politics, that makes all the difference.

The most important thing to realize about this problem is its sheer scale. Roughly twenty-three percent of all American citizens, or *nearly a quarter*, are children under eighteen.² The tendency in the United

1 THE WIRE: *Final Grades*, at 23:22 (HBO television broadcast, aired Dec. 10, 2006) (presenting a political operative's advice on whether desperately scarce city funds should flow to police or schools); cf. Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1261 n.147 (2012) (describing the eighteen-year line in statewide or federal elections as "universal"); Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1473 & n.141 (2012) (noting that some states let seventeen-year-olds vote in primaries, but only if they'll turn eighteen by the general election).

2 See *Foreign-Born: 2020 Current Population Survey Detailed Tables, Table 1.1. Population by Sex, Age, Nativity, and U.S. Citizenship Status: 2020*, U.S. CENSUS BUREAU (Oct. 31, 2022) [hereinafter *Foreign-Born: 2020 Table 1.1*], https://www2.census.gov/programs-surveys/demo/tables/foreign-born/2020/cps2020/2020_asec_nativity_table1.xlsx [https://

States and elsewhere has been to accept as if a fact of nature that, as children can't vote for themselves, their interests will go proportionally underrepresented in politics (at twenty-three percent, radically underrepresented). But why? It is a fact of nature that children aren't ready to defend their own interests. Yet the overwhelming majority of these children have parents who are also citizens, who have the right to vote, and who legally represent their children in virtually every other circumstance. Why accept the assumption that these parents can vote only for themselves?

This Article is about that assumption. Today it's so unquestioned that even pointing it out can seem like a mere provocation rather than a serious policy proposal. Deep assumptions are like that: questioning them always seems crazy at first. The suggestion that women should be allowed to vote once spurred derision, until wave upon wave of people ready to challenge settled assumptions produced the Nineteenth Amendment. Of course, there's a crucial difference: unlike the women who demanded their right to vote, children *really are* incompetent to vote their interests, at least at a sufficiently young age. One might disagree whether eighteen is the right line, but surely something is: eight-year-olds aren't competent to vote.

So our claim isn't that children should be able to vote from birth; our claim is that their parents should cast votes for them. *State legislatures should change their election laws to let voting parents cast ballots for their too-young-to-vote children.* This Article's aim is to move this idea from provocation to serious policy proposal: one that's mandated as a matter of first principles, pragmatically feasible, robust to objections, and within each of the fifty states' individual legal control. Called "parent proxy voting," "parent voting," or sometimes "Demeny voting" after demographer Paul Demeny,³ the idea has been proposed in a few foreign countries⁴ and endorsed by commentators on both left

perma.cc/YC63-SFUG] (reporting that approximately 1,954,000 of 73,151,000 American children were noncitizens, and that approximately 22,157,000 of 325,268,000 Americans were).

3 See Paul Demeny, *Pronatalist Policies in Low-Fertility Countries: Patterns, Performance, and Prospects*, 12 POPULATION & DEV. REV. 335, 354 (Supp. 1986); Ross Douthat, *Power to the Parents*, N.Y. TIMES, Mar. 3, 2018, at SR9, <https://www.nytimes.com/2018/03/03/opinion/sunday/parents-teenagers-voting.html> [<https://perma.cc/DE9Q-DUM6>] (discussing the proposal under that name).

4 See, e.g., John Wall, *Why Children and Youth Should Have the Right to Vote: An Argument for Proxy-Claim Suffrage*, 24 CHILD., YOUTH & ENV'TS 108, 119 (2014) (describing proposal in German parliament); Leigh Phillips, *Hungarian Mothers May Get Extra Votes for Their Children in Elections*, GUARDIAN (Apr. 17, 2011, 2:39 PM EDT), <https://www.theguardian.com/world/2011/apr/17/hungary-mothers-get-extra-votes> [<https://perma.cc/43YU-MTVW>] (Hungary); Bengt Sandin & Jonathan Josefsson, *The Reform That Never Happened: A History of Children's Suffrage Restrictions*, in EXPLORING CHILDREN'S SUFFRAGE: INTERDISCIPLINARY

and right, from presidential candidate Cornel West to Vice President J.D. Vance.⁵ But it's largely remained an academic curiosity,⁶ without much analysis of its philosophical foundations, its legal underpinning, or its detailed implementation. Ideas about voting rights have always changed slowly. Yet the remarkable thing, we submit, shouldn't be the idea that parents might vote on behalf of their children, but that we have a group of citizens with legitimate interests constituting almost a quarter of the country, that they're plainly disadvantaged in the political process, and that we don't make the obvious repair.

Our proposal isn't only about children. Citizens with severe mental disabilities are similarly excluded from the ballot. They have real interests that deserve to be counted in a democratic republic, but they lack the ability or legal right to defend those interests through

PERSPECTIVES ON AGELESS VOTING 131, 140, 144 (John Wall ed., 2022) (Sweden); see also Johannes Jäger, *Family Voting as a Solution to Low Fertility? Experiences from France and Germany*, LIBR. CONG.: IN CUSTODIA LEGIS (Apr. 19, 2018), <https://blogs.loc.gov/law/2018/04/family-voting-as-a-solution-to-low-fertility-experiences-from-france-and-germany/> [<https://perma.cc/L8QX-LGJD>] (nineteenth- and twentieth-century proposals in France).

5 Compare, e.g., SYLVIA ANN HEWLETT & CORNEL WEST, *THE WAR AGAINST PARENTS: WHAT WE CAN DO FOR AMERICA'S BELEAGUERED MOMS AND DADS* 240–41 (1998), and Chrystia Freeland, *Giving the Young a Bigger Say*, N.Y. TIMES (Mar. 7, 2013), <https://www.nytimes.com/2013/03/08/world/americas/08iht-letter08.html> [<https://perma.cc/76QF-JUEV>] (discussing the Canadian economist Miles Corak), with Douthat, *supra* note 3, Jonathan V. Last, *Demeny Voting*, WKLY. STANDARD (July 7, 2011, 12:19 PM), <https://web.archive.org/web/20180308141935/https://www.weeklystandard.com/demeny-voting/article/576394> [<https://perma.cc/YA5N-JAMT>], and Ed Kilgore, *J.D. Vance: How About We Give Parents Extra Votes?*, N.Y. MAG.: INTELLIGENCER (July 26, 2021), <https://nymag.com/intelligencer/2021/07/j-d-vance-maybe-parents-should-get-more-votes.html> [<https://perma.cc/684P-Q6GX>] (discussing argument by then-Senator J.D. Vance).

6 For academic support of the proposal, as applied to children or to the mentally incapacitated, see Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1466 (1998); Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503, 505 (2000); ROBERT W. BENNETT, *TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY* 66–84 (2003); Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, 40 METAPHILOSOPHY 331, 347 (2009); Stephan Wolf, Nils Goldschmidt & Thomas Petersen, *Votes on Behalf of Children: A Legitimate Way of Giving Them a Voice in Politics?*, 26 CONST. POL. ECON. 356, 357 (2015); Neena Modi, *A Radical Proposal: To Promote Children's Wellbeing Give Them the Vote*, BMJ, May 2, 2018, at k1862; and compare Wall, *supra* note 4, at 109 (endorsing “a ‘proxy-claim’ vote” that children could “claim for themselves”). For academic criticism, see Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 JAMA 1345, 1347 (2004); Andrew Rehfeld, *The Child as Democratic Citizen*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 155 (2011); János Fiala-Butora, Michael Ashley Stein & Janet E. Lord, *The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities*, 55 HARV. INT'L L.J. 71, 99–100 (2014); Charles Kopel, Note, *Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy*, 17 YALE J. HEALTH POL'Y, L. & ETHICS 209, 243 (2017).

voting.⁷ And their numbers may not be small either—or, at least, won't remain so. (By 2050, when over a fifth of Americans may be over sixty-five,⁸ as many as fifteen million Americans may have dementia—nearly four percent of the entire population.⁹) Many of these citizens are under the legal care of court-appointed general guardians, who are already empowered to act for their charges, already obliged to look out for their interests, and already capable of voting in U.S. elections. These guardians could and should be permitted to vote on behalf of their charges.

We focus primarily on children, though, because they're far more numerous. Their share of the citizenry is so breathtakingly large that it's hard to think about it clearly—enough disenfranchised fellow citizens to elect *102 of the 435* representatives in the House. The number of citizen children is roughly sixteen times larger than the roughly 1.4% of Americans barred from voting due to felonies (long a *cause célèbre* among reformers)¹⁰ and six times larger than the number of noncitizens who lawfully and permanently reside in the United States (some of whom, of course, are children themselves).¹¹ Children and their parents together represent about forty-two percent of America's population but only one quarter of its voting-age population: the other fifty-eight percent of Americans have *three quarters* of the votes.¹²

7 “Mental disability” (or “severe mental disability”) and “mental incapacity” aren't quite coextensive as terms; we use them interchangeably here merely for ease of reference.

8 JONATHAN VESPA, LAUREN MEDINA & DAVID M. ARMSTRONG, U.S. CENSUS BUREAU, DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060, at 1 fig.1 (2020).

9 Compare Karlawish et al., *supra* note 6, at 1345, with VESPA ET AL., *supra* note 8, at 4 tbl.1 (projecting a population of 388.9 million Americans in 2050).

10 See Christopher Uggen, Ryan Larson, Sarah Shannon & Robert Stewart, *Locked Out 2022: Estimates of People Denied Voting Rights*, SENT'G PROJECT (Oct. 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/> [<https://perma.cc/9EE7-U69L>] (estimating the number of disenfranchised felons at 4.4 million in 2022).

11 See HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., IF11806, CITIZENSHIP AND IMMIGRATION STATUSES OF THE U.S. FOREIGN-BORN POPULATION 1 (2023) (reporting 12.9 million lawful permanent residents in 2022).

12 Compare *Foreign-Born: 2020 Table 1.1*, *supra* note 2 (reporting total population of 325,268,000 and child population of 73,151,000), with *America's Families and Living Arrangements: 2020, Table A3. Parents with Coresident Children Under 18*, by Living Arrangement, Sex, and Selected Characteristics: 2020, U.S. CENSUS BUREAU (Dec. 2020), <https://www2.census.gov/programs-surveys/demo/tables/families/2020/cps-2020/ta3.xls> [<https://perma.cc/26HB-5LDM>] (reporting approximately 63,133,000 coresident parents of children under eighteen). These statistics on coresident parents don't distinguish by citizenship—making them conservative estimates, as virtually all noncitizens in America are adults. See *Foreign-Born: 2020 Table 1.1*, *supra* note 2 (reporting 91.2%).

It's likely, of course, that parents already think about their children when voting. But each parent is just one vote; the children themselves don't weigh in the political calculus. The result is undercounting. When state governors decide on school closures during COVID, when D.C. legislators restrict access to childcare,¹³ or when U.S. senators reimpose tariffs on baby formula,¹⁴ they can write off the citizens most affected by their policies (children) and just balance the votes lost from their parents (nineteen percent of citizens) against those gained from everyone else (fifty-eight percent).¹⁵ But that's only because twenty-three percent of the population doesn't count. The magnitude of this undercounting is so extreme that one should take a deep breath and ask what could possibly justify a political process which excludes children's interests if there's any other choice available.

It's also important to see clearly the status quo. The illusion is that current law is neutral—that it makes no decision about representing children—and that our proposal would disturb this baseline. In fact, our political system *already* counts children for purposes of determining each state's seats in Congress and electoral votes for the President, as well as in drawing legislative district lines.¹⁶ But because children can't vote, their numerical influence just flows to the median

13 See Timothy B. Lee, *The Well-Meaning, Very Bad Plan to Make Day Care Workers Get College Degrees*, SLATE (Feb. 9, 2023, 2:00 PM), <https://slate.com/business/2023/02/dc-childcare-daycare-college-degree-requirement-criticism.html> [<https://perma.cc/ZH7P-JS4Y>].

14 See Liz Essley Whyte, Kristina Peterson & Jesse Newman, *Baby Formula Imports to Be Hit by Tariffs*, WALL ST. J., Dec. 29, 2022, at A2, <https://www.wsj.com/articles/baby-formula-imports-to-face-tariffs-again-in-2023-11672233735> [<https://perma.cc/57LV-GPB5>].

15 See sources cited *supra* note 12.

16 Seats in the House of Representatives are apportioned to states based on “their respective numbers, counting the whole number of persons in each State,” which includes children. U.S. CONST. amend. XIV, § 2. House and Senate numbers are then combined to apportion the Electoral College. *Id.* art. II, § 1, cl. 2. District lines for Congress are likewise drawn to equalize the districts’ population, under a principle of “equal representation for equal numbers of people,” *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964), so children help fill up the numbers needed for a congressional district, reducing the number of adult voters actually consulted in choosing that district’s representative. So too for state legislative districts, which are almost always drawn to equalize population, not the population of voting-age citizens. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (requiring that state legislative seats “must be apportioned on a population basis”); see also *Evenwel v. Abbott*, 578 U.S. 54, 60, 63–64 (2016) (noting that all states currently use “total-population numbers” for this purpose, and refusing to mandate equalization of “voter-eligible population” instead). The Supreme Court has permitted other bases for equalization only in special circumstances, such as when temporary military personnel severely distorted the population numbers in Hawaii. See *Burns v. Richardson*, 384 U.S. 73, 93–94 (1966); *Evenwel*, 578 U.S. at 60.

adult voter who lives in their district. In substance, then, proxy voting for children is what we have today: we already let other people vote for children, we just insist that they be strangers. For example, the children who lived in Connecticut in 2020 earned the state an extra House seat, but they couldn't vote for the seat; other people did.¹⁷ The most powerful voter in America is a childless adult in a district with plenty of children.

The status quo also means that a household of six Americans—say, two parents, three children, and an incapacitated grandparent—wields the same political power within their district as a neighboring household of only two adults. That's obviously unfair. And it gives the lie to claims that letting parents vote for their children would be unfair to the childless. A family of six “*contains more human beings* than a family of two”; if our proposal gives these extra citizens their proportional influence in the political system, that's hardly “some shady sleight of hand.”¹⁸ Our proposal doesn't give parents extra votes for being parents, the way Oxford and Cambridge graduates used to get extra votes in England—or, for that matter, the way equal-population districts give extra voting power to the childless today.¹⁹ Instead, our proposal recognizes that these other citizens *exist*, that they *matter* politically, and that their interests are better represented by the people closest to them than by strangers. Our proposal isn't about extra *votes* for parents. It's about extra *people*. It restores the otherwise broken promise of “one person, one vote.”²⁰

Once one understands the status quo, the choice isn't between counting children and not counting them, or between avoiding a policy decision about them and forcing one. The choice is between counting children for their numbers but discounting their interests, and counting children for their numbers and their interests both. Our proposal wouldn't increase any state's share of seats in Congress or the Electoral College; again, children already count for that purpose.

17 *Child Population Data*, U.S. DEP'T OF HEALTH & HUM. SERVS.: CHILD.'S BUREAU, <https://cwoutcomes.acf.hhs.gov/cwodatasite/population/index> [https://perma.cc/UT5E-V8Y7] (search “Year: 2020” and “State: Connecticut”) (reporting 743,209 children in Connecticut); *Historical Apportionment Data (1910–2020)*, U.S. CENSUS BUREAU (Apr. 26, 2021), <https://www.census.gov/data/tables/time-series/dec/apportionment-data-text.html> [https://perma.cc/C8R6-WQXM] (reporting an average Connecticut population per 2020 House seat of 721,660).

18 See Matthew Yglesias, *The Case for Letting Children Vote*, VOX (Nov. 28, 2015, 9:00 AM EST), <https://www.vox.com/2015/11/28/9770928/voting-rights-for-kids> [https://perma.cc/8WEZ-8NGA].

19 See Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1276 (2002).

20 Gray v. Sanders, 372 U.S. 368, 381 (1963).

We'd simply reassign children's *existing* political power to their parents, rather than to random and unrelated adults.

Faced with a reform of this magnitude, it's natural to wonder about the details: "Would parents fill out multiple ballots?" "What if they disagree about how to cast them?" "What about orphans?" "What about children who are citizens but whose parents aren't?" And so on. We offer detailed answers below, but the short answers are as follows. We argue that, if someone is unable to vote for reasons of age or incapacity, and if she has a parent or guardian who under her state's law *is* eligible to vote and who's generally charged with her care and able to act in her name, then this parent or guardian should be able to cast a proxy vote on her behalf. In other words, three relationships are at issue here: between parent and child, between polity and child, and between polity and parent—and, in the case of mental incapacity, a similar triangle of relationships between polity, guardian, and charge. There must be two people bound to a community and a community to them, and bound to each other so deeply that the one has moral and legal responsibility not only to look after the other's interests but to determine what those interests entail.

As to mechanics, we suggest that parents be added to the rolls as proxy voters in advance, through the voting registration process. When it comes time to vote, a parent could cast a ballot marked with the number of people it represents. For example, a single parent with one child could receive a ballot indicating that it counts for two. When there's more than one parent registered, each would cast a fractional vote: two parents with one child would cast one-and-a-half votes each, so that three total votes are cast by a family of three. (One person, one vote.) Admittedly, such fractional voting is unfamiliar. But the math is simple and would be automated, the information needed is readily available to state governments already, and the injustice of the current system is plain.

Indeed, the problem is one of such screaming, urgent magnitude that the most important response to objections of detail is to ask: What would you do instead? Refusing to account for a quarter of the population's interests is so great a democratic failure that the only justification for doing nothing is that nothing can be done. A country isn't morally obligated to do the impossible. But in this case, there's a solution. We should give parents the vote.

I. THE AFFIRMATIVE CASE

Our argument rests on a few assumptions, and it clarifies things to state them up front.

First, we assume that voting and majority rule are central to representative democracy, that one purpose of voting is to protect the

interests of the polity's members, and that protecting those interests effectively usually means representing them proportionally. These assumptions might seem obvious, but academic philosophy has developed so many theories of democracy that downplay voting, downplay interests, or downplay majority rule that it's necessary to make the assumptions explicit.²¹ For present purposes, we just set these theories aside. Using majority rule to resolve competing claims on the state (which we call "interests" by way of shorthand) is the central feature of democratic *practice* everywhere, and we're comfortable assuming that the practice is conceptually justified. Democracy might have other facets as well, which some of the academic theories highlight. But so long as a democracy is at least *partly* designed to defend voters' interests by taking proportional account of them in voting, then

21 Some versions of deliberative democratic theory, for example, emphasize public deliberation about policies without committing to majority votes to decide whose position prevails. See generally James Bohman & William Rehg, *Introduction to DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS*, at ix (James Bohman & William Rehg eds., 1997) (defining deliberative democracy as "the idea that legitimate lawmaking issues from the public deliberation of citizens"). On these theories, parents might do enough to *state* their children's interests in public; it wouldn't matter whether children were proportionally represented in the voting booth. Likewise, some wisdom-of-crowds, Condorcet-style theories of democracy, see, e.g., ROBERT E. GOODIN & KAI SPIEKERMANN, *AN EPISTEMIC THEORY OF DEMOCRACY* 5 (2018), emphasize the importance of polling a large community. But these theories need only a critical mass of voters to weigh in; if your sample size is large enough, not much would be lost by leaving children out. Meanwhile, expressive theories of democracy, see, e.g., RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 187 (2000), see voting as serving primarily to affirm citizens' equality or dignity. Those theories wouldn't need proxy voting either; if the point of voting is to assure citizens that they're equals whose opinions have value, it's not unreasonable to ask children to wait for adulthood to be treated as equals. Highly skeptical accounts of voting that emphasize voters' political ignorance, or even treat elections as the result of manipulation or chance rather than of people more or less voting their interests, wouldn't see this manipulation and randomness as reduced by giving parents the vote. See, e.g., JASON BRENNAN, *AGAINST DEMOCRACY* 19 (2016); GARETT JONES, *10% LESS DEMOCRACY: WHY YOU SHOULD TRUST ELITES A LITTLE MORE AND THE MASSES A LITTLE LESS* 6 (2020); ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 3 (2013). Finally, some accounts of "democracy" define it functionally in terms of liberal rights, simply minimizing the significance of majoritarianism and voting, until the concept of democracy is bent almost beyond recognition. See, e.g., PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 202, 30 (1997) (presenting a conception of republicanism which "breaks with any notion of democracy that would consecrate majority opinion" by presenting "the instruments of democratic control, participatory or representative," as only "a means of furthering liberty"). Many of these theories are interesting on their own terms, but none of them can explain precisely the things that most need to be explained: why a society might rely on majoritarian voting to resolve fundamental disputes and, equally, why a society might put the principle of collective self-determination at the ground level of political organization.

one needs an explanation of why children's interests should get a less-than-proportional share.

Second, we assume that there will always be *some* sort of voting age—and, for present purposes, we're agnostic as to what it should be. If the voting age were twelve, there'd be eleven-year-olds who'd have interests, who'd be unrepresented, and whose parents ought to be able to cast their votes. There's some debate now as to whether the voting age should be lowered to sixteen.²² Like any age-based threshold, the debate is an exercise in line drawing based on how children typically mature, and nothing in our argument commits us to any position on these matters. If the supporters of a sixteen-year line argue that sixteen- and seventeen-year-olds have interests that ought to be heard at the polls, we wouldn't disagree—we'd just extend the point by an extra sixteen years.

Third, we assume that there will always be some limits on which *adults* are eligible to vote—and again, for present purposes, we're agnostic as to what those should be. Every democracy excludes some people from the polls: a German living in Germany doesn't get to vote in Brazil. In the modern United States, noncitizens are generally excluded from voting;²³ in many states, felons are excluded too.²⁴ While we'll explore some arguments about adult suffrage, we take no position as to its proper limits. *However* the relevant group of adult voters is defined, some of those adults will have children who are also members of the political community, and those parents should be entitled to cast their children's votes.

So our argument is theoretically minimal in the following sense: We assume that one purpose of voting is defending proportionally represented interests, and we take no position on a variety of other theoretical or policy questions, including when a person should be considered old enough to vote or which adults should be allowed to vote. The only questions, from our standpoint, are (1) why children should be excluded from those citizens whose interests count; (2) why, if their interests *do* count, their voting parents should be unable to represent them; and (3) why, if children can be so represented, the same arrangement shouldn't be extended to adult citizens who lack mental capacity.

22 See, e.g., H.R.J. Res. 16, 118th Cong. (2023) (proposing a constitutional amendment to that effect); Hamilton, *supra* note 1, at 1453.

23 See Virginia Harper-Ho, Note, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 271–72 (2000).

24 See *Restoration of Voting Rights for Felons*, NAT'L CONF. ST. LEGISLATURES (Oct. 18, 2024), <https://www.ncsl.org/elections-and-campaigns/felon-voting-rights> [<https://perma.cc/93J4-5D27>].

A. *Why Children?*

At its core, the argument for representing children is a simple one. Children are members of the political community. Like other members, they need the franchise to protect their distinct interests in the political system. We limit children's right to vote, not because they're without a claim to representation, but because they're without capacity to represent themselves. Yet if that's the only reason, then we ought to do what we do to protect those without capacity in virtually every other legal context: let their proper representatives act in their place.

Or put the point this way: in a democratic system, denying citizens the right to vote requires *justification*. Demands for justification have a way of shaking up dogmatism. To the critic of our proposal, the question is "How do you *justify* letting child citizens be unrepresented?" The answer can't be "There's no need," because the policy consequences of leaving children unrepresented are manifest. The answer can't be "There's no alternative," because parent proxy voting *is* an alternative. The answer could be "The risks and costs of parent proxy voting outweigh the benefits," but this ignores the sheer scale of the representation problem when a quarter of the citizenry lacks the vote. At the end of the day, what could possibly justify a democracy's leaving a massive group of citizens unrepresented, and their interests visibly underweighed in the political process, if a solution is on hand?

1. Membership in the Political Community

That children count as members of our political community ought to be obvious, and our argument here is accordingly brief. Children are citizens in the same relationship to their government as all citizens: they owe it allegiance, are subject to its jurisdiction and bound by its laws, and have a right to its protection.²⁵ When abroad, they maintain their legal status as U.S. citizens²⁶ and remain subject to those laws that apply to U.S. citizens in foreign countries.²⁷ For most

25 Cf. U.S. CONST. amend. XIV, § 1 (guaranteeing "any person within [a state's] jurisdiction the equal protection of the laws"); 22 U.S.C. § 1731 (2018) (according the same protection abroad to naturalized citizens as to natural-born citizens); 22 C.F.R. § 71.1 (2024) (assigning such protection duties to the Foreign Service).

26 See 22 C.F.R. § 51.28 (2024) (entitling children to passports).

27 Cf. *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (noting that "citizens of the United States in foreign countries" remain subject to U.S. legislative and judicial jurisdiction); *U.S. Citizens and Residents Abroad—Filing Requirements*, IRS (Aug. 19, 2024), <https://www.irs.gov/individuals/international-taxpayers/us-citizens-and-residents-abroad-filing->

children, citizenship starts at birth,²⁸ but whether born into it or naturalized, they can pass on citizenship to their own children.²⁹ In brief, children are *governed* by the American political system, subject to its decisions and entitled to its equal concern.

In addition to these legal facts, the vast majority of American children spend their lives within the territory and immersed in the culture of the United States. Their membership in the political community is a matter of experience as well as law: they're formed by the country's culture and to some extent contribute to forming that culture as well, just as people form and are formed by the languages with which they grow up. It just wouldn't make sense to imagine America's political community as one to which children are strangers.

Special cases, of course, strain our intuitions. A child who leaves the country as an infant and lives his life abroad might retain the rights and obligations of citizenship, while a lawful permanent resident who's lived in America as long as he can remember might lack them. Political communities are social categories as well as legal ones, and the social connections present in central cases of political membership can be frayed or absent in marginal ones. But while it's interesting to puzzle over special cases, the vast majority of American children share both legal and cultural ties to the rest of us. They are members of the American political community if anyone is. If our government's "just powers" derive from "the consent of the governed,"³⁰ then children are among "the governed" who must consent to the government too—and if they can't do so directly, we should think about what might be done instead.

2. Membership and the Franchise

The rights and interests of all citizens matter in a republic, because it's for the sake of its citizens that a just government exists at all ("to secure these rights, Governments are instituted among Men").³¹ That's what Americans since the Founding have understood a "Republican Form of Government"³² to mean. But that idea wasn't typically understood at the Founding to entail a right to *direct the course of*

requirements [<https://perma.cc/S3CT-BKYJ>] (noting that U.S. citizens abroad, including "children and other dependents," may need to file income tax returns).

28 See U.S. CONST. amend. XIV, § 1 (guaranteeing citizenship to "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof"); 8 U.S.C. § 1401 (2018) (providing for citizenship at birth); *id.* § 1431 (providing automatic citizenship for certain children after they are born).

29 See § 1401(c)–(h).

30 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

31 *Id.*

32 U.S. CONST. art. IV, § 4.

government through voting.³³ On the Founding picture, voting wasn't so much a right of citizenship as a *mechanism* by which to safeguard against tyranny—necessary for that purpose, but properly limited to those thought to have the wisdom and sense of responsibility necessary to govern well, which to the Founding generation meant limitations of race, sex, and property ownership, among other things.³⁴ So there was a tension in the Founding-era picture: republican government exists for all, which requires that some should vote, but that doesn't mean that all or even most *should* vote, even if those who vote should do so with the welfare of all in mind.

The country's history didn't, and maybe couldn't, sustain this half-a-right model of voting. Those entrusted with the vote *didn't* always weigh others' interests, or didn't weigh them enough, or just didn't understand what those interests really were. As a result, the Founding model of voting was put under continuous pressure over the course of 250 years of history. No fewer than seven of the seventeen constitutional amendments since the Bill of Rights—the Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth—in one way or another expanded the right to vote, as did an array of state and federal statutes that have also stood the test of time.³⁵ It's no disservice to the Founders to see that this aspect of their original vision has changed by force of positive law. If the country's Constitution still reflected the idea that, say, only property owners deserved political rights, or that only they had the wisdom to deliberate about public affairs, then it wouldn't make sense to separately provide for the interests of children: we'd already be trusting those with property to weigh the interests of all those without.

33 See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000). For classic discussions of Founding-era thinking on republican government and the franchise, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77–78 (1980); HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 3, 60–61, 168–74, 190–95 (1967).

34 See sources cited *supra* note 33.

35 See U.S. CONST. amend. XIV, § 2 (decreasing a state's representation in the House in proportion to its abridgment of the voting rights of male citizens aged twenty-one or older); *id.* amend. XV, § 1 (forbidding abridgment of a citizen's right to vote "on account of race, color, or previous condition of servitude"); *id.* amend. XVII, cl. 1 (providing for the direct popular election of senators); *id.* amend. XIX, cl. 1 (forbidding abridgment of a citizen's right to vote "on account of sex"); *id.* amend. XXIII, § 1 (apportioning presidential electors to the District of Columbia); *id.* amend. XXIV, § 1 (forbidding abridgment of a citizen's right to vote in federal elections "by reason of failure to pay any poll tax or other tax"); *id.* amend. XXVI, § 1 (forbidding abridgment of the right to vote "on account of age" for citizens "eighteen years of age or older"); see also, e.g., Enforcement Act of 1870, ch. 114, 16 Stat. 140 (providing for the enforcement and protection of voting rights); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101–10702) (same).

Or if we saw political power as a special reward for service to the republic, and so restricted voting to veterans or the like, our proposal for representing children would likewise have no place. Indeed, if voting were still the preserve of the wise, and we just relied on the voting age to establish who's wise enough to govern, then that age might be set *higher* than it is.³⁶ Instead, our country lowered the voting age during the Vietnam War not so much out of respect for the new voters' *wisdom* but in acknowledgment of their *interests*—reflecting the country's sense that eighteen-year-old Americans shouldn't be drafted to fight in a war that they couldn't vote against.³⁷

In other words, after 200 years of expanding the franchise by statute and constitutional amendment, our country's foundational law has come to reflect a different view of voting than the Founders had. Voting is more than a protective mechanism to be deployed only as necessary and entrusted only to the wise. We've over time built into our law—into the Constitution itself—the premises of modern universal suffrage: that no one group of citizens can be trusted with the interests of all; that citizens' interests can't be protected without the right to vote; and that, barring special cases, the rights of citizenship include a right to defend one's interests by voting. In other words, the right to have one's interests count, something the Founding generation saw, is inextricably linked to the right to vote, something they didn't see. To have interests that must be protected is to have a right to protect those interests at the polls. In this is an implicit theory of how political power is supposed to work in a democratic society: The power of the community isn't just impressed on each individual citizen; it's also impressed by that individual back on the sovereignty of which they're a part. A government doesn't just exercise power over its people; the people equally exercise power over it. But this model only works if membership in the political community generally carries the right to vote.

Is membership in the political community necessary and sufficient for the right to vote? It may well be necessary. Imagine a German living in Germany (near, say, an American military base) who demanded the right to vote in a U.S. presidential election. He might claim, with good reason, that the outcome of the U.S. election affects him. He might display extensive knowledge of American policy debates and a strong commitment to America's national welfare. But

36 See Stefan Olsson, *Children's Suffrage: A Critique of the Importance of Voters' Knowledge for the Well-Being of Democracy*, 16 INT'L J. CHILD.'S RTS. 55, 68–69 (2008) (arguing that 30-year-olds have substantially greater political knowledge than younger voters).

37 See Katharine Silbaugh, *More than the Vote: 16-Year-Old Voting and the Risks of Legal Adulthood*, 100 B.U. L. REV. 1689, 1719 (2020) (describing “[t]he slogan of the movement” as “old enough to fight, old enough to vote”).

his demand would still be bizarre, just as it'd be bizarre for an American Germanophile to demand a vote in German elections. The premise of democratic self-government is that *members* of the political community have a say in its direction, a say that nonmembers don't have regardless of their commitments, their knowledge, or even their interests.

In many cases, membership is also thought to be *sufficient* for the vote. Imagine we discovered our vote-counting software to have a persistent glitch, deleting the ballot of anyone whose Social Security number ends in four. Statisticians might assure us that nothing important is likely to change; these digits are randomly distributed, so the glitch makes no on-average difference to candidates, campaigns, or election results. Yet this randomly selected tenth of Americans would have both a legal and a moral claim that the software be repaired, even at some expense—a claim of right, independent of any effect on election outcomes. Their right to vote follows from their position as members of the political community; voting is more than just a device for polling a crowd.

This right to be considered by the processes of government belongs to children as well. Even more than adults, children depend for their well-being on collective goods like safe streets and well-managed schools, goods whose existence can depend on political choices. Their claim to protect their interests at the polls is no weaker than that of adults. And children are far too massive a group—*nearly a quarter* of the citizen population—for their claim to be sniffed at as a low priority or set aside for the sake of administrative convenience. If we don't think that the median voter over twenty-one can be trusted with the interests of eighteen-, nineteen-, and twenty-year-old draftees, why would we think that the median voter over eighteen can be trusted with the interests of everyone younger?

3. Citizenship and Competence

While children are incapable of protecting their interests at the polls, this fact in no way diminishes either their status as members of the polity or the urgency of their political interests. The standard reason to exclude the young from voting—indeed, the only standard reason—is that they tend not to be *competent*: their judgment is immature, their knowledge is limited, and they often don't perceive their best interests or how best to pursue them. But despite these limitations, children aren't *subjects*, but *citizens*, with the same right as other citizens to have their interests considered equally.

The bonds of political membership don't depend on questions of competence. Consider, by way of comparison, an adult citizen who fell into a temporary coma. It'd be absurd to say that his citizenship or

membership in the political community was extinguished by the coma and then reactivated upon waking—as absurd as saying one ceases to be a citizen while asleep. Nor did he forfeit and then regain his right to be a part of the “consent of the governed.” He lost legal and factual competence for a time, which meant there was no way for him to *exercise* his rights as a citizen. For that reason he might have lost temporarily his legal right to cast a ballot, in the sense that officials could have lawfully refused a request to send an absentee ballot to his hospital room. But he remained a member of the political community throughout, with a right to be considered by the processes of government. And if there *had* been a way for the doctors to have restored his competence for a few hours on election day, the government would have had no reason not to let him vote or to forbid him from protecting his interests at the polls.

Children are members of the political community in the same way. They, too, are only temporarily incompetent. And if there *were* a way for society to enable them to protect their own interests at the polls—or a magic pill that for a few hours on election day gave them the maturity, understanding, and experience of those much older—we’d have little reason not to let them make use of it. In the meantime, just because children (like some other citizens) can’t “understand and value the process of voting,” that doesn’t mean they lack “the same interest as others in the value of the franchise.”³⁸ Indeed, children may have more interest than most in the value of the franchise, as it can reshape the nature of the society in which they’ll grow up.

Indeed, if one needed any further evidence of children’s membership in the political community, one need only look at the debates over child voting that we have already. Whenever an argument is made that, say, young teenagers should have the vote, the response is almost always the obvious one: that young teenagers lack the knowledge, wisdom, or maturity to cast a ballot. The response is virtually *never* that young teenaged citizens are outside the American political community or have no right to equal consideration by our political system. So if we can find a way for them to be considered by our political system without giving them the right to vote, why not use it?

4. Representation by Proxy

Like the adult in the coma, children have a wide variety of rights they can’t *exercise*. But we don’t therefore bar them from the benefit of those rights—say, forbidding them from ever getting a medical

38 CLAUDIO LÓPEZ-GUERRA, DEMOCRACY AND DISENFRANCHISEMENT: THE MORALITY OF ELECTORAL EXCLUSIONS 73 (2014) (discussing the mentally incapacitated).

procedure that requires consent or serving as the plaintiff in a lawsuit. Instead, we let their parents or proper guardians act in their place, defending the children's interests when the children can't act for themselves. The same considerations should lead us to accept such representation in voting.

As Joseph Fishkin notes, some kind of virtual representation is "inevitable" in a democracy: It's "an inescapable component" of any system that denies the vote to three-month-olds or to the comatose.³⁹ By the nature of things, some Americans "are necessarily represented only virtually in the halls of government."⁴⁰ Indeed, we recognize this every time we draw district lines by population: when lobbying for new highways or other legislative goodies, each equal-population district has equal voting power, and the interests of those who can't vote are at least partly "represented by those who can."⁴¹ The only question is whether they'll be represented by an unknown median voter or by someone closer to home.

For this reason, proxy voting isn't an illegitimate attempt (as Jason Karlawish argues) to transfer the "obligations and opportunities" of citizenship that "cannot be delegated, such as submitting to a military draft or serving on a jury."⁴² While a government should spread the burden of military service equally among those capable of serving, and while it should try defendants impartially before a "fair cross section of the community,"⁴³ neither the military nor the jury is there to ensure that each citizen's *interests* are proportionately reflected. That's why, for example, we allow various exclusions from the draft or from jury service, and why those eligible for those exclusions don't thereby lose their right to vote.⁴⁴ That's also why we don't ask those incapable of

39 Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681, 1686, 1687 n.19 (2018).

40 *Id.* at 1686.

41 Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1640 (1993). Nor is our argument limited to political systems with single-member districts. A further advantage of parent voting is that it makes other voting systems, such as multimember districts or proportional representation, even more representative. To paraphrase an example from Fishkin, *supra* note 39, at 1721, imagine two districts of 10,000 people, one with 4,000 children and the other with 1,000 only. If both districts were combined into one multimember district, or if the voting system were switched to proportional representation, then the 9,000 adults in one region could reliably outvote the 6,000 adults in the other. By contrast, if parents were to vote on behalf of their children, then each district of 10,000 people would cast 10,000 votes, with equal legislative influence under any of these voting systems.

42 Karlawish et al., *supra* note 6, at 1347.

43 *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

44 See *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (permitting some to be excluded from juries "on the basis of their inability to serve as jurors"); 50 U.S.C. § 3806 (2018) (describing various draft exemptions); cf. Richard M. Re, Note, *Re-Justifying the Fair Cross Section*

serving to hire like-minded substitutes,⁴⁵ and why we don't throw children into the jury pool or the draft lottery and force their parents to serve in their stead. By contrast, proportional interests matter enormously in elections, which is why we might want a proper representative to vote for each child.

In many respects, children's position today is analogous to that of women before suffrage: a large group with distinct interests that go unaddressed or undervalued in a system that fails to represent them proportionally. The difference is that women *can*, and children *can't*, represent their own interests themselves. If there were no good way to design around that incapacity, the children's interests might be thwarted, simply because no one can demand the impossible. But that's a little like saying that no one has a right to a medicine that hasn't yet been invented. Once the medicine is available on the shelf, the arguments for refusing it fade away.

B. *Why Parents?*

Why should parents be their children's representatives at the polls? The argument is grounded partly in parents' moral duties and personal connections to their children. Yet it's also partly grounded in existing law, which in dramatic fashion *already* puts its trust in parents as the general guardians of their children's interests. When that parent is already a voting member of the body politic, she should also have the right to cast a ballot for her children.

1. Parents as Proxies

The idea that one person might cast another's ballot may seem extraordinary. But existing law gives parents an extraordinary level of authority, and it imposes on them equally extraordinary duties. The law trusts parents to decide, with relatively limited state supervision, "where children will live, where they will go to school, what religious practice they will follow and what medical treatment they will receive."⁴⁶ Parents may "bind children to some contracts, permit minors to marry, make legal claims for children, exercise constitutional rights on their behalf, or even waive some constitutional rights."⁴⁷ Even the most substantial of these decisions doesn't depend

Requirement: Equal Representation and Enfranchisement in the American Criminal Jury, 116 YALE L.J. 1568, 1592 (2007) (noting that "courts have repeatedly and uniformly denied [fair cross-section] claims on behalf of age-defined groups").

45 See, e.g., 50 U.S.C. § 3807 (2018) (forbidding substitutes in the draft).

46 SAMUEL M. DAVIS, ELIZABETH S. SCOTT, WALTER WADLINGTON & CHARLES H. WHITEBREAD, *CHILDREN IN THE LEGAL SYSTEM* 101 (3d ed. 2004).

47 Rutherford, *supra* note 6, at 1507 (footnotes omitted).

on the child's consent. Subject to narrow best-interest constraints, for example, a parent may send an unwilling child to boarding school or authorize a doctor to perform on them a painful but medically appropriate surgery. At the same time, parents are duty bound to provide for their children's health, education, and daily needs—obligations that can't easily be severed by the parent, that can often be overwhelming, and that must be performed on pain of criminal charges.

We know of no other interpersonal relationship under law that carries either this level of authority or this scale of duty. Most human relationships impose no affirmative legal duty to aid others, let alone to provide comprehensively for their welfare. Some relationships carry substantial legal duties—those between spouses, between doctors and patients, between lawyers and clients, and so on—but these duties are typically few in number, small in scope, severable, and voluntary. Other relationships are characterized legally as *in loco parentis* (such as a boarding school to its pupils or foster parent to his charge), but authority in these cases is more limited: neither a boarding school nor a foster parent chooses a child's religion, for example. Indeed, the very term *in loco parentis* uses the parent-child relationship as the relevant model, rather than the other way around.

The unique legal relationship between parents and children is grounded in equally unique moral and personal ties. We don't mean to whitewash the complexities and failures of real-life relationships, and we'll later consider at length the objection that parents may be too flawed to serve as their children's proxies. Even so, the mental transformation that parenthood often brings—the sense of love and jeopardy, and a remaking of one's own interests so profound that many parents find it difficult to distinguish their children's interests from their own—has few parallels in other relationships in most people's lives. This fact is relevant to representation. As Joseph Fishkin remarks, it's precisely because parents' "interests are deeply intertwined with those of their children" that we currently "expect parents to vote" to protect those interests.⁴⁸

In more prosaic terms, parents make enormous investments of time and money in their children. For a middle-income family in the United States (between \$59,200 and \$107,400 of household income per year), the cost of raising a child to age eighteen is approximately \$285,000.⁴⁹ In other words, even before paying for college, middle-

48 Fishkin, *supra* note 39, at 1693.

49 Mark Lino, *The Cost of Raising a Child*, U.S. DEP'T OF AGRIC. (Mar. 8, 2017), <https://www.usda.gov/media/blog/2017/01/13/cost-raising-child> [https://perma.cc/P4GX-4MRN].

class parents spend on the average child something between two-and-a-half and four-and-a-half years of their incomes. Parents also spend a great deal of time each day caring for their children, with each parent spending an average of 2.25 hours each day for children under six (mothers spending even more than fathers) and an average of 1.4 hours per day for all children under eighteen.⁵⁰

Among other things, these choices of how to devote scarce time and money demonstrate the depth of *contact* between parents and children and the degree to which parents *know* their children and their interests, something highly relevant to representation in voting. Jane Rutherford argues that a child's voting proxy should "have a stake in a very substantial shared venture with the child"; "be personally familiar with the needs and circumstances of the child"; "be accountable to the child in some fashion, either emotionally or legally"; "share an emotional bond with the child that promotes caring, sympathy, and empathy"; and have "ready and frequent" interaction with the child "so the child can express herself in her own terms whenever possible."⁵¹ All of these factors support a parent's claim to vote on a child's behalf.

The parent-child relationship is unique as a matter of law, morality, and psychology. Legally speaking, it may be a familiar *type* of relationship: a parent is a fiduciary for a child, duty bound to act for the child's benefit. But no other fiduciary relationship under law is as comprehensive or as demanding or arises from a moral and personal relationship as profound. Two features set the parent-child relationship apart: that one person serves as another's *general* guardian, with a comprehensive duty and authority to promote the other's interests across all domains, and that this general guardian has not only the duty and authority to promote the beneficiary's interests but exclusive or near-exclusive responsibility to decide what those interests entail. It's the depth and strength of this extraordinary relationship that entitles a parent to cast a child's vote.

To be clear, the point here isn't to claim that parents have more wisdom than other adults and so deserve more influence at the polls. That isn't a crazy argument. Edmund Burke once described society as a "partnership . . . between those who are living, those who are dead, and those who are to be born."⁵² Parents—especially those caring for their own aging parents as well as their children—are almost uniquely

50 *Average Hours per Day Parents Spent Caring for and Helping Household Children as Their Main Activity*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/charts/american-time-use/activity-by-parent.htm> [<https://perma.cc/N3E5-WHTS>].

51 Rutherford, *supra* note 6, at 1503.

52 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 96 (L.G. Mitchell ed., Oxford Univ. Press 2009) (1790).

positioned to appreciate that intergenerational contract. But this isn't our argument. Rather, our claim is that parents *already* have the power and duty, under existing law and for good and substantial moral reasons, to identify and act upon their children's interests. This is the premise of parental authority in schooling decisions, medical decisions, and beyond; our proposal simply extends its logic to the voting booth. Unlike virtually any other person who might act for another, a parent casting a vote for her child is properly regarded as voting *on behalf of* her child, even if she marks the ballot in a different way than her child might. And that's also why we couldn't just appoint some other person as proxy, to discern which candidate a child currently supports or to guess at which candidate the child might support in the future. We need someone who already serves as a *general* guardian, capable of deciding what another's interests actually are.

2. Parents as Voters

Identifying parents' extraordinary relationship to their children is the first step. The second is recognizing that these parents are already themselves full voting members of the same political community as their children. We *already* trust them, not only to take full responsibility for and to act upon their children's interests in the private sphere, but also to weigh in on every issue placed before the voters in the public sphere. If we already trust parents with the authority and obligation to direct the course of political power, as well as to act for their children's benefit and in their names, then it's hard to say why we wouldn't trust them to do both at once—to cast ballots for themselves and for their children as well.

Some arguments might go even farther, letting parents serve as proxy voters regardless of whether they can vote on their own. Why, for example, should a resident immigrant who lacks the right to vote, but whose child is a U.S. citizen, not vote on her child's behalf? We think there could be reasonable disagreement on this point; indeed, many states in the nineteenth century did allow resident noncitizens to vote.⁵³ Again, for present purposes we're agnostic on the precise scope of the political community or on which narrow exclusions from universal suffrage the state should permit.

Yet we think the better argument, founded on principles of self-government, is that a proxy must be a rightful voter herself. As mentioned above, a German couple living in Germany wouldn't be allowed to vote in American elections, even if their knowledge,

53 See Harper-Ho, *supra* note 23, at 273–85.

interests, and commitments rivaled those of many Americans. The same is true if the German couple visited America as tourists—and also (under current law) if they emigrated to America and obtained the status of permanent residents without citizenship. Granting someone the franchise represents a community's judgment that the grantee knows and cares about that community, takes its norms and well-being to heart, and understands it well enough to know what voting one way or another represents. It also represents a commitment by the community to protecting that person *as* a member and to considering her interests as one of their own. Most of the time we don't police these lines very carefully, for the same reasons we've abandoned literacy tests or similar devices: we don't trust that officials will enforce them accurately or evenhandedly, or that those who pass them will reliably protect the interests of those who don't. But we still retain a few rough and evenhanded tests for competence and maturity, such as age or incapacity—and also some rough and evenhanded tests for loyalty, knowledge, and membership, such as citizenship or residence.

However broadly, then, one thinks the franchise should be shared—whether it should be limited to citizens or to permanent residents, whether becoming a citizen through naturalization should be easy or difficult, and so on—political self-determination can't exist without *some* way of designating “We the People” and without allowing only those who compose “We the People” to make the relevant political decisions. Otherwise the political decision isn't actually *self* determination. If ordinary British subjects living in Britain could vote in American elections, America wouldn't be self-determining; in fact, it wouldn't be clear that we still had a “Republican Form of Government”⁵⁴—or, indeed, that we'd won the Revolutionary War. Whatever definition of the political community you choose, letting nonmembers vote in American elections, even on behalf of members, is in tension with a self-determining “We the People.”

As things stand today, children are at most “virtually represented” by the entire adult voting public, in much the same way that American colonists were claimed to be virtually represented in Parliament.⁵⁵ By contrast, when children are represented by their parents—general guardians who are already trusted to define their children's interests and to act in their children's names to pursue those interests—this representation is as actual as it can be. Indeed, many of those skeptical of proxy voting might argue that children are already represented well enough, merely by their parents' having the vote. If so, that can only be because parents are *already* using their own individual ballots as

54 U.S. CONST. art. IV, § 4.

55 On virtual representation, see ELY, *supra* note 33, at 82–83.

fiduciaries of their children, choosing the kind of country in which they want their children to grow up. But that kind of representation is far from proportional: parents might vote with their children in mind, but when it comes to raw numbers of votes—the currency that matters to politicians—a quarter of the population still doesn’t count. When a child is a member of the political community, with interests that the political community must in justice take into account, and when the child’s parent is a member of the same political community with a right to vote there, we see little reason why the parent should be forbidden to vote on her child’s behalf.

C. *Mental Incapacity*

As argued above, we should allow parent voting when (1) a member of the political community *would* be able to vote, but for her age, (2) that member has a general guardian empowered to define and act upon her interests, and (3) that general guardian is a voting member of the same political community as the child. We see those arguments as applying equally to those denied the vote for mental incapacity.

While the details depend on state law, many states restrict the franchise on grounds of incapacity, defined in various ways.⁵⁶ For example, some states “preclude[] registration by persons who have been adjudicated as ‘insane’ or mentally incompetent or incapacitated or who are under a guardianship order.”⁵⁷ And many such voters are in practice barred from voting not by the law but by the incapacity itself: those who are sufficiently mentally impaired might not be capable of casting a meaningful ballot, whatever the state might say.

Yet though they may lack the right or ability to vote, the mentally incapacitated *are* counted for purposes of districting and apportionment in Congress and the Electoral College. This creates the same structural problem we saw above for children: these citizens count for purposes of distributing political power, but they have no way to direct that power to protect their interests. (In the context of “prison gerrymandering,” there are familiar arguments that the census

56 See Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 975–79 (2007); *Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1189 (2008) (arguing that state definitions can be “vague, confusing, or downright discriminatory”); see also U.S. ELECTION ASSISTANCE COMM’N, OMB CONTROL NO. 3265-0015, REGISTER TO VOTE IN YOUR STATE BY USING THIS POSTCARD FORM AND GUIDE 3–22 (2024) [hereinafter REGISTER TO VOTE IN YOUR STATE], (describing limits in various states); cf. 52 U.S.C. § 20507(a)(3)(B) (2018) (listing “mental incapacity” as a permissible ground for removal from the voter rolls for federal elections).

57 Karlawish et al., *supra* note 6, at 1346.

inflates the electoral power of rural districts where prisons are located;⁵⁸ the same objections should apply to counting children or the mentally incapacitated only to enhance a stranger's votes.)

As Martha Nussbaum observes, current law leaves many citizens "simply disqualified from the most essential functions of citizenship. They do not count. Their interests are not weighed in the balance."⁵⁹ In other words, "'one person, one vote' . . . is not being observed where people with profound cognitive disabilities are concerned."⁶⁰ And even where "a concerned parent or other guardian votes in the interests of a person with a disability, she still has but a single vote, hers, and yet there are two people with that interest, not one."⁶¹

If membership in the political community implies a right to protect one's interests at the polls, the obvious question is whether the mentally incapacitated count as members of the American political community. And the answer is perfectly clear. They are citizens. They are subject to our laws and have a claim on our protection. Neither their status as members of the polity nor the urgency of their interests is diminished by their incompetence. Indeed, precisely because they're so vulnerable, their interests are *especially* in need of protection, even as compared to children. Not only will children eventually grow up and gain the ability to protect their own interests, but children typically have voting parents, who naturally care about them and to whom politicians may feel obligated to pay lip service. That isn't as true of the mentally incapacitated, who often find themselves without a natural protector.

Often, but not always. Many mentally incapacitated people have general guardians, recognized by the court system, with personal and legal relationships resembling those between parents and children. The general guardian sometimes *is* a parent, in the case of children with serious mental impairments, or the guardian might otherwise be in a close familial relationship with the mentally impaired person, as in the case of an adult child caring for aging parents. Like parents, these general guardians may have close personal relationships with their charges, along with the power and duty to provide daily care, order medical procedures, make financial and legal arrangements, and generally determine their charges' interests and act in their names to pursue them. In short, the relationship between mentally

58 See Samantha Osaki, Lalita Moskowitz & Mario O. Jimenez, *New Census Bureau Data Offers a Chance to Dismantle Prison Gerrymandering*, ACLU (June 21, 2021), <https://www.aclu.org/news/prisoners-rights/new-census-bureau-data-offers-a-chance-to-dismantle-prison-gerrymandering> [https://perma.cc/M9RT-HQC4].

59 Nussbaum, *supra* note 6, at 347.

60 *Id.*

61 *Id.*

incapacitated people and their court-appointed general guardians may resemble that between parent and child: again, an extraordinary kind of relationship in which one person has not only a *general* duty and authority to promote another's interests across all domains but also an exclusive or near-exclusive responsibility to decide what those interests entail. Of course, not every incapacitated person has a court-appointed guardian, and not every person under such guardianship is ineligible to vote; both facts and law may vary from person to person and from state to state.⁶² But where this *is* the case, and when the general guardian has a right to vote, the arguments given above for proxy voting apply here too.

The similarities shouldn't be overstated. Nearly every child begins life with living parents, and usually it isn't too difficult for the state to identify them; the guardian of a mentally incapacitated person may need to be formally assigned, typically by a court. Compared to children, the mentally incapacitated are far more likely to be under the care of institutional actors and thus not to have particular citizens as their general guardians. A social worker or therapist who works with a mentally incapacitated person, to maintain the professional distance required to do the job of a social worker or therapist well, can't be the equivalent of a family member caring for her parent or sibling. Neither can a mental hospital or nursing home, which has an unavoidably bureaucratic relationship to the people who pass through its doors.

As we discuss further below, such institutional actors can't and shouldn't be able to vote as proxies—not only because of longstanding and justified rules entitling only natural persons to vote, but also because they aren't genuinely in the right kind of relationship to the people for whom they care. So incapacitated persons under institutional care may have to rely, in the end, on virtual representation by others. But our proposal advances their interests nonetheless, because those interests are often tightly connected to the interests of incapacitated citizens who *do* have general guardians capable of wielding the vote. Adopting a system of proxy voting for the mentally incapacitated would be a major advance over the status quo, even for those unable to benefit from it directly.

Even given all of these benefits, some argue that proxy voting would demean the dignity of those adults represented by proxy, substituting another's decision for the "person's own choice."⁶³ For competent adults who'd otherwise be voting on their own, it'd indeed be a grave insult, as well as a rights violation, to take their votes away

62 See Hurme & Appelbaum, *supra* note 56, at 933, 945–46, 950–57.

63 Fiala-Butora et al., *supra* note 6, at 100.

and give them to someone else to use. But we take as given that those Americans who'd be affected by proxy voting *already* aren't "allowed to vote," which is the relevant source of any stigma.⁶⁴ As long as the government is restricting the franchise on the basis of mental incapacity, proxy voting is plainly a better response than the status quo.

II. IMPLEMENTATION

A. *The Core Case*

A state or local government could implement parent voting in many different ways. But because the details of the system are often grounds for hesitation, we offer a walk-through of the proposal as we envision it in a typical case.

The process would start with recordkeeping and registration. For a wide variety of legal purposes, governments *already* keep records about who a child's parents are. Think, for example, of birth certificates, taxes, Social Security benefits, census information, legislative districting, school enrollment, and so on. Someone has to have authority to give consent for a shot or a surgery; someone has to have authority to open a bank account or to distribute the funds. When disputes arise, as in the case of child custody after divorce, we resolve them through a long-established and substantial body of state law. (The same is true for the court-approved guardians of the mentally incapacitated, who must be explicitly empowered by the state.) Assembling the relevant information isn't always a trivial task, as it may be stored in separate and differently formatted databases. But the information itself is already in the government's hands.

We propose adding this information about parentage or guardianship to the voting rolls. Just as voters in forty-nine out of fifty states must register in advance to vote,⁶⁵ parents could register in advance as proxy voters, listing the children for whom votes would be cast. The state might then require a verification procedure: a parent might, for example, provide part of the child's Social Security number, as is already often required when voters register themselves,⁶⁶ along with the sort of information necessary to register the child for public school. (For example, in Cambridge, Massachusetts, the public schools require a birth certificate or passport to verify the child's age, as well as guardianship papers if the parents or guardians aren't listed

64 *Id.* (emphasis omitted).

65 North Dakota is the exception. See *Voter Registration: North Dakota*, VOTESMART, <https://justfacts.votesmart.org/elections/voter-registration/ND> [https://perma.cc/FM5C-U2Z4].

66 See 52 U.S.C. § 21083(a) (5) (A) (i) (II) (2018).

on the birth certificate.⁶⁷) Some of this could be more or less automatic: For example, the relevant agency might be required to attach a registration form to the forms for obtaining a birth certificate, school enrollment, or change of address,⁶⁸ and there could be standard procedures to alert local election officials when an address changes or when a state court issues a judgment depriving someone of parental rights. Indeed, when a child turns eighteen her parents' proxy registration could be used to register the new voter automatically in her own right. A similarly automatic process could notify local election officials when someone is appointed guardian to a mentally incapacitated person or when someone's incapacity is resolved and his right to direct his own affairs restored.

When it comes time to vote, states could provide proxy voters with a separate proxy ballot, just as they provide Democratic or Republican voters with separate Democratic or Republican ballots in partisan primaries. These ballots could indicate in a machine-readable way the number of dependents on whose behalf they're being cast. Dependents who are registered as having only a single proxy (children of a single parent, say) would count as one full vote on their proxy's ballot, while those registered as having two separate proxies would count as half a vote for each. A sole-custody mother of one child could receive a ballot indicating that she's voting for two, herself and a sole-proxy dependent; two parents with one child could receive ballots indicating that they're voting for themselves and for one shared proxy dependent, so that each ballot counts for one and a half. This fractional voting is admittedly unfamiliar. But it is principled: it ensures that the proxies are free to disagree with one another and, vitally, that every child or mentally incapacitated person counts as *one* full vote in the end. Fractional voting also presents no insurmountable logistical challenges. The math is easy and could be handled by computer, as it usually is already, with the marked ballots providing for easy verification later on.

Through the ballots' design, a state might give a proxy the ability to request multiple ballots, which she might cast with different votes. (That possibility will likely be rare, but it might be important for someone who wants to act on her dependents' preferences even when they disagree with her own, a possibility we discuss below.⁶⁹) For paper ballots, for example, the simplest solution may be just to have election officials, on request, fill in bubbles or add permanent preprinted labels

67 See *K-8 Registration*, CAMBRIDGE PUB. SCHS., https://secure1.cpsd.us/forms/K_8_Registration_Packet.pdf [<https://perma.cc/3WEV-S79M>]; see also Bennett, *supra* note 6, at 536.

68 See HEWLETT & WEST, *supra* note 5, at 241.

69 See *infra* subsection II.B.4.

indicating each ballot's number of adult votes (zero or one), sole-dependent votes, and shared-dependent votes, and hand out separate ballots where necessary. This information would already be in the voting rolls, it'd provide a verifiable paper trail, and computers could automatically confirm (as they do already) that the number of registered voters who came to the polls matched the appropriate number of votes cast.⁷⁰ Returning to the example of a sole-custody mother of one child, she could get a single ballot marked to indicate that she's an adult voting for herself and for one sole-proxy dependent, which the voting software would count as two. Or, if she chose to cast separate ballots, the first could be marked as representing the adult voter only, and the second could be marked to show a sole-proxy dependent only—which, again, both the registration records and the computer tallies would count as two voters and two votes. This model is simple enough to extend to more complicated family structures,⁷¹ and it could easily be applied to prerequested absentee or mail-in ballots, depending on what the state allows in the ordinary course. Finally, in case of any recordkeeping errors or disputes in the registration process, proxy voters could cast provisional ballots, just as ordinary voters do.⁷²

B. Objections to the Core Case

A reform as substantial as parent voting will surely give rise to objections. Below we address a series of objections that occurred to us; others may occur to you. Our goal here isn't to guarantee that the proposal is ironclad, but just to show that it's robust as against some of the most natural counterarguments and concerns.

1. Will Parent Voting Make Any Difference?

The point of parent voting is partly to redeem a right, but also to get politicians to change their behavior, pursuing the interests of those unrepresented. Will it really make any difference? On one argument,

70 See, e.g., U.S. ELECTION ASSISTANCE COMM'N, VOTING SYSTEM SECURITY MEASURES ("Common procedures include . . . [v]erifying [that] the total number of voted ballots matches the total number of voters.").

71 If two parents are registered as having three children, for example, and the mother is registered as having one child in sole custody from a previous marriage, she might choose to request a single ballot marked to represent one adult voter, one sole-proxy child, and three shared-proxy children—for a total of 3.5 votes, corresponding with the number of votes authorized by the registration records. (A jurisdiction that lets parentage or guardianship be divided among three or more people could have more bubbles for that purpose, and so on.)

72 See 52 U.S.C. § 21082(a) (2018).

if parents are already “a substantial portion of the electorate,” maybe “[t]he one vote” belonging to each parent already gives politicians enough “incentive to talk to them.”⁷³ And given how many parents there are, “[e]xtra votes would do no obvious harm in this respect, but neither would they likely heighten the candidate incentive.”⁷⁴

As to the mentally incapacitated, a similar argument points out not how many guardians there are, but how few. Proxy votes for guardians won’t protect anyone’s interests, some critics allege, because the mentally incapacitated are such a “miniscule minority” that their votes couldn’t make politicians “more responsive to the social choices expressed”—especially as the guardians are “voting and articulating political preferences” already.⁷⁵

We have precisely the opposite empirical intuition from these critics. It’s hard for us to believe that American politicians, who measure each congressional district to a nicety and whose antennae quiver with each new poll result, would ignore even a percentage point or two of additional votes (as in the case of the mentally incapacitated), let alone the simply astonishing numbers of children who would be added to the voting pool with parent voting. Children are roughly twenty-three percent of citizens, but because they’re not on the voter rolls right now (and thus not counted in the denominator), adding them in every state would expand the franchise by an even larger fraction, nearly twenty-eight percent.⁷⁶ We simply can’t believe that the largest expansion of the franchise since the Nineteenth Amendment would fail to make *any* difference to politicians’ incentives and calculations.

True, this disagreement is empirical and predictive. But the critics’ arguments also display a striking analytical failure to think at the margin. Take the case of the mentally incapacitated. Suppose we gave their guardians and all their family members *no votes at all*—stripping them entirely from the voter rolls—on the theory that they ought to be spending all their time assisting their charges, not thinking about politics. Should we expect government policy to become more or less favorable to the interests of those lacking mental capacity? Or suppose we gave each guardian *ten thousand votes*, on the theory that protecting the mentally incapacitated shows great moral virtue and should be rewarded with equally great electoral influence. How would we expect policy to respond? So if we merely gave each guardian the ability to cast *one* proxy vote per charge, why wouldn’t we predict a

73 Bennett, *supra* note 6, at 562.

74 *Id.*

75 Fiala-Butora et al., *supra* note 6, at 101; accord Kopel, *supra* note 6, at 243.

76 See sources cited *supra* notes 2, 12 (reporting census figures).

proportionally sized change in the expected direction? If we had to guess, we'd expect proxy voting for guardians to produce just about as much of a government response as if the mentally incapacitated were suddenly capable of voting on their own. Likewise with children: a rational politician would give twice as much attention to a family of four with the right to cast four votes as to a family of four with the right to cast only two. Maybe politicians will be irrational, ignoring these extra chances to win; if so, they'll soon be replaced by politicians who won't.

2. Will Parents Represent Their Children Well?

Parents are flawed. Some of them won't care about their children's interests; others won't understand which candidates or policies might advance those interests. And some might even vote to promote their own interests against those of their children—say, to water down protections against child abuse. Can we trust parents to represent their children enough to let them direct their children's voting power?

This again is an empirical question, but the answer is plainly yes. We have to think at the margin and avoid the faux sophistication of an exaggerated skepticism. Some parents don't understand or care about their children's interests, but, to an overwhelming extent, most do—and they understand and care about those interests far more than complete strangers do. Remember, the status quo redirects children's voting power to the median voter in their district. So the question isn't whether some parents are flawed, or even whether many are; it's whether parents will better represent their children than a random voter would.

Consider, by way of comparison, the decisions parents already make in emergency rooms. Parents may not be political experts, but they aren't medical experts either. They might misperceive their children's medical interests or even make self-interested decisions actively harmful to their children (say, to keep down the cost). Yet we trust parents to make their children's medical decisions because they generally *do* care, quite intensely, about getting it right; because they can make intelligent decisions when adequately informed by doctors; because they know their children better than others do; and, crucially, because we don't trust anyone *else* to have their children's interests more at heart. As Rutherford puts it, “We vest parents with power not because we believe parents are perfect, but because we prefer family decisions to institutional or governmental ones”⁷⁷—and “[p]arents are

77 Rutherford, *supra* note 6, at 1509.

at least as competent to vote for their children as they are to make medical decisions for them.”⁷⁸

A harder question is whether parents will have the insight to focus on their children’s interests rather than on their usual partisan affiliations. A parent who voted Democrat or Republican before proxy voting will probably still vote the same way afterward; indeed, an adult who voted that way before having children might still vote the same way after having children. (We doubt many parents would select different candidates for themselves and for their children, though we think they should have the right to do so.) But, again, we have to think at the margin. Under our system of universal suffrage, relatively uninformed parents are going to be casting their own votes anyway, with our proposal or without it. The key question, then, is whether *on average* parents are more or less likely than nonparents to have considered their political engagement—not just in picking “D” or “R,” but in choosing primary candidates or nonpartisan school board members, answering ballot questions, and so on—in light of their specific children’s interests. That is, we should ask whether parents would make a better use of their children’s share of electoral influence than strangers would.

We haven’t yet come across a detailed argument on this point, but we see no reason to assume that the median adult voter would do better. In particular, we think it obvious that parents simply *know* more and *care* more about the circumstances of their individual children than median adult voters do. Many parents have had the experience, for example, of moving into a “good” school district and discovering that the schools aren’t really that well-run. Others find out that policies they thought were working well when they were single and childless actually don’t work very well for families. This isn’t to portray parents as special repositories of political information or virtue, but just to point out how democracy helps aggregate knowledge that’s spread out across the population. If children were capable of defending their interests themselves, we’d let them, but because they can’t, their parents are better positioned to do so than strangers are.

This same argument holds for guardians of the mentally incapacitated, who surely know the legal and policy regime faced by their charges better than the median adult does. It’s certainly possible, as Nussbaum notes, for a guardian simply to “vote his or her preferences and ascribe them to the person with a disability, thus doubling the guardian’s own vote.”⁷⁹ But the same goes for “many other areas where we currently permit surrogate arrangements”: For

78 *Id.* at 1507–08.

79 Nussbaum, *supra* note 6, at 347.

example, guardians could exercise “property rights” or make “health decisions” in their own personal interests, thus doubling their own fortunes, but we don’t leave these questions for strangers to decide instead.⁸⁰ Rather, we rely on a “decent guardian” to “keep those interests apart,”⁸¹ and if we doubted whether guardians tended to be decent, we’d limit their powers, not just deny them proxy votes. True, we can regulate a guardian’s conduct in managing property more easily than we can in the voting booth.⁸² But that difference is minor: the core fact is that guardians might abuse their position of trust in a wide array of ways, but the legal system trusts them nonetheless because they’re more likely to be faithful to their charges than a random member of the public would be. If that’s so, it’s unjustified to draw the line at voting when the alternative is to leave the charges’ interests out altogether.

One way to tell which of these arguments represent real concerns (and which represent status quo bias) is to imagine that we’d already adopted this system and that someone were proposing to repeal it. Would *taking away* proxy votes from the guardians of the mentally incapacitated, and not giving them to anyone else, make the mentally incapacitated better or worse off in our political system? Would politicians spend more or less time thinking about how to help children if their parents could no longer vote on their behalf (and if no one else could either)? Stating these questions is enough to answer them.

3. Is Parent Voting Unfair to the Childless?

In a world that gives parents extra votes, are childless adults *wronged*? Tom Ginsburg has argued that “[o]ver-weighting votes for those with families undermines the political rights of those who choose not to have families.”⁸³ But there’s nothing abusive about one person, one vote. When debating COVID closures, for example, there’s nothing wrong with weighing children’s interests in reopening playgrounds just as heavily as twenty-somethings’ interests in reopening bars. Counting every citizen equally and giving each of them equal political power is *justice*. If the result is that a somewhat more numerous interest group has somewhat more power in striking ordinary political bargains, that’s not an abuse of the less numerous group; that’s how democracy is supposed to work.

80 *Id.*

81 *Id.*

82 See Fiala-Butora et al., *supra* note 6, at 102; cf. Kopel, *supra* note 6, at 244.

83 Phillips, *supra* note 4 (quoting Ginsburg).

Right now the childless enjoy a political situation in which they don't have to contend with the interests of children proportionally represented. Furthermore, the childless get the extra voting power conferred by children in the apportionment process with no legal obligation to act for those children's welfare. In these circumstances, "[p]roxy voting acts as a penalty . . . only if disproportionate voting power is an entitlement."⁸⁴ There's no moral entitlement for the childless to win big political contests because the children on the other side don't count. There's no moral entitlement for the childless to retain the extra legislative seats and voting power that voteless children and the mentally incapacitated provide. Instead, this argument reminds one of the old saw that when you're accustomed to privilege, equality feels like oppression.

The fairness objection from the childless voter would have to be, not that the interests of children would now be represented, but that the wrong people would be representing them—that parents, rather than adults generally, would cast the children's votes. Yet the reason *why* adults generally wouldn't get to cast the children's votes is that the children are *someone else's children*. In representing those children's interests, a randomly chosen adult who lives in the same congressional district simply isn't similarly situated to the children's own parents. That's why it won't work to compare parent voting to "property qualifications to restrict the franchise," as Ginsburg does.⁸⁵ The argument for parent voting isn't that parents are *better* voters, the way property owners were once thought to be, but that parents are better representatives of *their children*.

Indeed, a similar complaint might be made about the right to child custody itself: "All the benefits go to parents!" Many childless couples deeply desire children, but they have no claim on the state to reallocate children away from the parents whose children they are. Other childless Americans might value a right to educate the next generation or to guide their upbringing, but those rights are restricted to parents without intending any offense to the wisdom or dedication of the childless. For the same reasons, it casts no aspersions on the worth or judgment of other citizens to trust parents, rather than median voters, to represent their children in the voting booth. It's simply that the median voters have no claim on the state to apportion to *them* the share of representation accorded to other people's children.

Even if parents are their children's best representatives, some critics argue that giving them proxy ballots would necessarily fail to

84 Rutherford, *supra* note 6, at 1515.

85 Phillips, *supra* note 4 (quoting Ginsburg).

“enhance the political rights of children” because, by definition, proxy voting hands power to someone *else* to “look out for those things that they [the parents] . . . wish to protect.”⁸⁶ It’s true that parent voting serves children by empowering their parents, rather than empowering children directly. But it doesn’t follow that parent voting fails to serve children’s political rights. Consider, by comparison, the right to sue. Imagine a world in which a child could *never* be a plaintiff, nor her parents on her behalf, even when her legal rights had been violated. In that world, at best, every child who had been legally wronged would have to hope that public enforcement authorities would take an interest in her case. Compared to that world, a world in which her parents have the right to litigate in her name significantly enhances *her* legal rights, even if that enhancement is accomplished through the means of empowering others. The same is true for the right to vote. Compared to our world, in which a nonvoter’s political influence is divvied up among everyone else in her congressional district, a world with parent proxy voting significantly enhances *her* political rights, reassigning her influence to those already committed to defending her specific interests.

At the level of practice, Andrew Rehfeld has argued that proxy voting would simply lead to transfers among adults; he predicts that the benefits to children would be swamped by “even greater targeted benefits for 30- to 50-year-olds (roughly the age of parents) that have nothing to do with children.”⁸⁷ But if the concern is that parents will be self-interested in voting, then presumably *nonparents* are at least as self-interested too. In that case the *absence* of proxy voting, which leaves nearly a quarter of the population wholly unrepresented in politics, should already have produced massive benefits for eighteen- to one-hundred-year-olds. So long as parents and guardians are at least moderately altruistic toward their charges, there’s little reason to expect the distortions introduced by parent voting to rival those the current system comfortably ignores.

Finally, consider how these unfairness arguments would have to be stated with respect to mental incapacity. “Giving the court-appointed guardians of the mentally incapacitated the right to cast their charges’ votes,” the argument might go, “is unfair to those who aren’t responsible for the care of someone who’s mentally incapacitated.” (Ah, those lucky duckies, the court-appointed guardians of the mentally incapacitated.) It shouldn’t be a hard question why *they*, and not *you*, might be asked to guard their charges’ interests at the polls. And if these claims of unfairness seem inapposite,

86 Rehfeld, *supra* note 6, at 155–56.

87 *Id.* at 156.

even grotesque, when directed toward these guardians, perhaps they should seem that way when directed toward parents too.

4. What if Parents and Their Children Disagree?

It's easy to suppose that parents and children, if given the chance, might cast their ballots differently. Imagine stick-in-the-mud parents who cast proxy votes for McCain, while their teenaged children are wild for Obama. Can it really be said that the parents' extra votes speak for the children, rather than just expressing the parents' own views? Are these in any sense the *children's* votes, rather than just extra votes for their parents?

This objection isn't unique to parent voting; it goes equally to decisions about children's schooling, religious observance, and medical care, and even to choices about how to dress and spend their free time. Indeed, it goes to a deep fact about human maturation, which is that the teenage years are ones in which people *become* autonomous—not in a moment, but in a gradual process that varies between individuals and develops in fits and starts. At the same time, one of the deep challenges of parenting is learning to raise a child to be free—capable of the self-knowledge, self-control, self-respect, and competence in the world to genuinely determine and take responsibility for their own lives. Sometimes that means making choices on the child's behalf, and sometimes it means deferring to the child's own judgments. Think, for example, of a child's wish to transfer schools or to quit a difficult undertaking, like playing a sport or learning an instrument. Parents might well reason that indulging the child's wish would, in the long run, reduce the child's options in the future, or that the most important lesson to learn from the situation is perseverance; they might, in the interests of the child's ultimate freedom, refuse to allow him to transfer or quit. But at some point, especially as the child becomes an older teenager, the balance of considerations shifts: the child is coming into adulthood, and the choice is one he is capable of making for himself.

Complicating this further, teenagers have the understanding to form and express sophisticated desires, but they might lack, in many cases, the maturity to recognize and act on their true interests—something they may only recognize later on.⁸⁸ They may not *feel* that

88 Consider the quotation apocryphally attributed to Mark Twain: "When I was a boy of fourteen, my father was so ignorant I could hardly stand to have the old man around. But when I got to be twenty-one, I was astonished at how much he had learned in seven years." *When I Was a Boy of Fourteen, My Father Was So Ignorant*, QUOTE INVESTIGATOR (Oct. 10, 2010), <https://quoteinvestigator.com/2010/10/10/twain-father/> [<https://perma.cc/XYG6-DTAX>].

their parents are acting in their interests, but this doesn't mean that they're right. That a child disagrees with a parent's decision is certainly an important fact for a good parent to consider, but it's far from the only thing to consider, whether in relatively trivial matters like choosing a car or in matters as personal and significant as consent to a medical procedure.

In other words, it's a fact of human nature that parents and children will clash over how to vote, just as they clash now over the myriad other choices that mark the transition from childhood to adulthood. There's no clean answer to the question of when a parent genuinely acts for her child rather than for herself, any more than there are clean answers to that question in decisions about where a child should go to school, practice her religion, or spend her free time. The underlying problem is one of profound difficulty, and the first thing to do in addressing it is to acknowledge that difficulty and not pretend there are easy answers.

That said, however, we think there are four factors that mitigate the difficulty in this case. First, precisely because maturity is so indeterminate, it helps to have clean lines. *The voting age is the line.* As in so many areas of life, especially where maturity is concerned, we use simple rules because the psychological and social reality is more complex than a legal system can deal with. Our laws already say to seventeen-year-olds, "You are entitled to vote for your candidate the moment you turn eighteen, but not a day before; until then others will decide which candidate is in your best interest." And if the voting age were sixteen, we'd say the same thing to fifteen-year-olds. All that our proposal does is specify that the "others" involved are parents rather than strangers. As long as there's a clear line at some reasonable point in the maturation process, there's no deep injustice to children who disagree with their parents' voting choices. They're only being asked to wait until the law says they're adults—something they do in many other domains, and which our society has always found acceptable.

Second, we think the objection trades on an unstated but crucial intuition, namely that some children are old enough to decide for themselves how to vote. The objection would have little force if the children in the example were seven-year-olds rather than teenagers: parents make all sorts of important decisions for seven-year-olds, because we trust parents to know how to act for these children better than the children do for themselves. If the real objection is that teenagers or older teenagers should be considered old enough to vote, we're happy to be agnostic: the ideal voting age doesn't say anything about the merits of parents' voting for those below it.

Third, we think the objection misunderstands the nature of the parent-child relationship. As we argue above, part of what marks the

parent-child relationship as virtually unique in law and life is that parents have the authority and responsibility not only to act on behalf of their children's interests, but to decide what their children's interests *are*. Parents *define* those interests; they don't just follow the child's or anyone else's instructions. That's why, for example, parents and only parents can determine their child's religious faith. Parents really do have the authority to take a position as to their child's political interests, which then defines their child's interests, even if it's contrary to the child's wishes.

Fourth, we think it advisable for states to make it possible, through the availability of multiple ballots, for a parent to choose to cast different votes for herself and for her child, reflecting the preferences of each. That allows a parent to let her minor child make his own voting decision if she thinks him mature enough to do so, or if she wants to make voting a learning experience or to show respect for her child's emerging views. But we also see that choice as one for the parent to make.

5. What if Parents Disagree with Each Other?

When a child has more than one parent, or a mentally incapacitated person more than one guardian, the parents or guardians might disagree on how to vote. While different jurisdictions might handle this problem differently, we think the easiest and most principled solution would be for each parent or guardian to make his or her own choice. Whenever more than one voter qualifies to act as proxy for the same person, the ballots they cast should be counted as fractional votes.⁸⁹

Fractional voting lets each parent cast the vote he or she thinks best, which upholds an important democratic principle. It also ensures that every child ultimately counts for one vote, which upholds another important democratic principle. And the alternatives aren't plausible. Some parental rights can only be exercised jointly, as when both parents have to consent to a child's passport application,⁹⁰ but there are obvious costs to requiring that a child's ballot bear both parents' signatures. Fighting about how to cast the vote might be personally costly to the parents, and if they can't agree on how to vote, the child loses representation entirely. Other parental rights can be exercised severally, as when one parent consents to a medical procedure over the other's objection.⁹¹ But there are also significant downsides to

89 Others who've studied the issue come to the same conclusion. See Bennett, *supra* note 6, at 536; Rutherford, *supra* note 6, at 1506; Wolf et al., *supra* note 6, at 366.

90 See 22 C.F.R. § 51.28 (2024).

91 See, e.g., Angeli v. Kluka, 190 So. 3d 700, 700–01 (Fla. Dist. Ct. App. 2016).

handing the child's full vote to whichever parent wins a race to the polls.

Fractional voting also has practical advantages. Though novel, it's trivial for computers to tabulate. Proxy ballots could easily be marked with the number and type of voters they represent, as discussed above.⁹² And parents would have a great deal of individual freedom to handle their proxy ballots as they see fit: they could agree with each other on how their children's votes should be cast, or they could go their own ways; they could ask their children for advice, or they could decide for themselves. These decisions, like so many others, would be left to the voters to work out.⁹³

6. Will Parent Voting Encourage Fraud?

Would a system that gives votes to parents encourage people to pretend to have extra children or to claim real children who aren't their own? Would it encourage guardians to exaggerate their charges' mental disabilities in order to steal their votes?⁹⁴ Fraud is possible in any voting system, but there's not much more reason to fear it here than elsewhere.

For one thing, existing enforcement systems make it difficult to accomplish. If it were easy to make up fake dependents, a lot of people would avoid a lot of taxes. But in fact the IRS already tracks down fake dependents, and there's a nontrivial risk of getting caught if dependents are made up out of thin air or already claimed by another filer. A similar enforcement process could be applied to voting. Also, states already have a variety of reasons to track whose children are whose—welfare benefits, school enrollment, and so on—as well as to keep tabs on who's lost the right to vote due to mental incapacity, or who serves as a mentally incapacitated person's guardian. Given the documentary requirements of the registration process, as well as the ability to match the number of votes to the number of voters, lying in these circumstances wouldn't be as simple as just making up a name and taking out a ballot. The risks of getting caught are significant, and the cost of getting caught is serious: voter fraud is already a crime.

92 See *supra* text accompanying note 71.

93 While the administrative difficulties would be relatively small, we note that every approach comes with tradeoffs. For example, in a fractional voting regime, if one parent votes but another stays home, then the children would have lost half of their voting power. But it's unreasonable to expect voting officials to keep track of which parents have or haven't appeared at the polls, and it's also part of the right of the nonvoting parent *not* to vote, making a choice to leave both his own and his children's share of representation up to other voters to allocate.

94 See, e.g., Kopel, *supra* note 6, at 243 ("People unjustly included in this class will simply lose their right to vote and see it pass to fellow citizens.").

The incentives aren't great, either. The inducement to fraud is typically financial, as in claiming extra children for tax benefits. All one gets in this case is an extra half ballot or so next November. That isn't much of a benefit relative to a meaningful risk of criminal prosecution.

Finally, it's not clear that proxy voting would make the fraud problem worse than it already is. According to some sources, a "major technique" of absentee voting fraud "involves third parties" (such as the staff of long-term care facilities) "casting ballots in the names of individuals who remain on the registration rolls."⁹⁵ That sort of fraud doesn't require judicial appointment as a guardian: fraudsters just take mentally incapacitated people's absentee ballots and fill them out themselves. If anything, having an orderly process by which parents and court-appointed guardians may vote on behalf of their children or charges could make fraud less rather than more common.

7. Why Hasn't Parent Voting Been Tried Before?

If parent voting is such a great idea, why hasn't some jurisdiction tried it already? Why aren't there easy historical or international examples to point to?

The primary reason, we suspect, is that true self-determination—politics genuinely controlled by "We the People" through voting—has always been a radical idea that many people resist. Earlier democracies pursued a relatively deliberative model of democratic governance, restricting the franchise to a select group of propertied and presumably well-educated men who had the leisure to debate the issues of the day. Even in a country as culturally and politically democratic as the United States, it took centuries to weaken qualifications based on property, race, sex, age, literacy, and so on. Only after suffrage was already universal—extended to virtually every citizen and made more or less an incident of citizenship—could it become plausible that parents might cast ballots on behalf of their children. And given the power of the familiar, many people have simply never considered the possibility of parent voting (perhaps including you, dear reader).

A second explanation is demographic. In a world where the overwhelming majority of adults were also parents, adult voting and parent voting looked pretty much the same. There were still some distortions (some families had more children than others), but the distortions weren't very noticeable. As recently as 1990, parents living with their children made up a majority of all adults.⁹⁶ Today, by contrast, 75% of adults don't have or don't live with their children,

95 Karlawish et al., *supra* note 6, at 1348; *see also id.* at 1349.

96 Rutherford, *supra* note 6, at 1466.

while children and their coresident parents make up 42% of all Americans but only 25% of American adults.⁹⁷ The decline of family formation has brought to the fore an issue that could previously pass without notice.

A third explanation is technical. While the idea of parent proxy voting is a simple one, figuring out how to implement it, how to deal with fractional voting, and how to address special cases was much less simple before the age of merged databases and computer voting systems. In an earlier era, the idea might well have run aground over uncertainty about how to make it work. Today we have the technology; the question is whether we'll use it.

C. *Legality*

Under existing law, any state could adopt parent voting—not only for state and local elections but for national elections as well. In some states, this might require an amendment to the state constitution; in others, it could be done by the state legislature or perhaps by initiative and referendum. For local elections, any municipality or school board could adopt this system so long as nothing else in state law forbids it. While we don't propose specific statutory language here, as the details would vary from state to state, the basic idea would remain the same: that any person who, but for age or incapacity, would be entitled to vote in a jurisdiction could have a ballot cast on his or her behalf by a parent or court-appointed guardian entitled to vote in that state. This system would comply with the U.S. Constitution, including those restrictions ascribed by the twentieth-century Supreme Court to the Fourteenth Amendment's Equal Protection Clause. And it'd also comply with federal statutes, enacted either to enforce those equal protection restrictions or to specify the “Manner” of elections to Congress.⁹⁸

1. Voting as a Matter of State Law

The U.S. Constitution doesn't specify who can vote or how. It “never has contained, and still does not contain, a general affirmative right to vote.”⁹⁹ It prohibits states from defining the franchise so as to discriminate on the basis of race or sex or to set the voting age above eighteen.¹⁰⁰ It bans poll taxes in federal elections¹⁰¹ and requires the

97 See *supra* text accompanying note 12.

98 U.S. CONST. art. I, § 4, cl. 1.

99 RICHARD L. HASEN, A REAL RIGHT TO VOTE: HOW A CONSTITUTIONAL AMENDMENT CAN SAFEGUARD AMERICAN DEMOCRACY 1 (2024).

100 U.S. CONST. amend. XV, § 1; *id.* amend. XIX, cl. 1; *id.* amend. XXVI, § 1.

101 *Id.* amend. XXIV, § 1.

federal government to guarantee to the states “a Republican Form of Government.”¹⁰² And to the extent a state denies the right to vote to a portion of its male citizens over the age of twenty-one, the Constitution proportionally reduces that state’s representation in the House.¹⁰³

But the Constitution’s only affirmative statements about voting assign decisions about the franchise to the states, even for federal elections. Under Article I and the Seventeenth Amendment, members of the House and Senate are to be “chosen . . . by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”¹⁰⁴ This means that whenever a state changes the franchise in its own legislative elections, the same change automatically applies in its congressional elections too. And because each state appoints members of the Electoral College “in such Manner as the Legislature thereof may direct,”¹⁰⁵ its internal definition of the franchise can also apply to its presidential elections.

The Constitution also gives states the power to decide the “Times, Places and Manner of holding Elections for Senators and Representatives,” subject to override by Congress, which may “at any time by Law make or alter such Regulations.”¹⁰⁶ But as the Supreme Court has noted, this override clause “empowers Congress to regulate *how* federal elections are held,” and “not *who* may vote in them. . . . ‘[N]othing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.’”¹⁰⁷ As Hamilton put it in *Federalist No. 60*, by restricting Congress’s regulatory power to “the *times*, the *places*, and the *manner* of elections,” the Constitution denies Congress authority to decide the “qualifications of the persons who may choose or be chosen” for office.¹⁰⁸ That decision “forms no part of the power to be conferred upon the national government.”¹⁰⁹

The result is that states for the most part retain the freedom to determine the franchise for themselves, even in federal elections. Many states let noncitizens vote in the nineteenth century—as many as twenty-two states and territories in 1875—and some jurisdictions still

102 *Id.* art. IV, § 4.

103 *Id.* amend. XIV, § 2. See generally Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279.

104 U.S. CONST. art. I, § 2, cl. 1; accord *id.* amend. XVII, cl. 1; Muller, *supra* note 1, at 1269 n.195.

105 U.S. CONST. art. II, § 1, cl. 2.

106 *Id.* art. I, § 4, cl. 1.

107 *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part)).

108 THE FEDERALIST NO. 60, at 409 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

109 *Id.*

allow it in local elections today.¹¹⁰ Likewise, some states allowed women's suffrage long before the Nineteenth Amendment: New Jersey, for example, let female property owners vote as early as 1776 before abolishing that right in 1807.¹¹¹ And those younger than eighteen can vote in certain local elections, such as school board elections in Newark, New Jersey.¹¹² If states today want to extend voting rights to sixteen-year-olds, they can; if they want to expand it to six-year-olds, they can; and if they want to adopt a system of parent voting, they can do that too. Parent voting would be a state choice, not a federal one.

A striking feature of this decentralized system of voting is that, however a state changes its voting rules, it doesn't affect that state's number of senators, representatives, or presidential electors. House seats are doled out based on each state's "whole number of persons" (children included).¹¹³ Senators, of course, are two per state.¹¹⁴ And presidential electors are assigned based on "the whole Number of Senators and Representatives to which the State may be entitled in the Congress."¹¹⁵ So a state that allowed parent proxy voting would produce more votes *in that state*, but no more votes in Congress or for the President. Expanding the franchise only affects *who picks* the state's elected representatives, not how many elected representatives that state has. Indeed, one argument for the Electoral College is that it lets the states redefine the franchise according to their own views of democracy, without thereby expanding or contracting their power over the national government.¹¹⁶

2. Equal Protection Challenges

Under current doctrine, the main limit on a state's definition of the franchise is the Fourteenth Amendment's Equal Protection Clause. While Section One of the Amendment wasn't originally understood to address the franchise,¹¹⁷ the modern Court has since identified voting

110 See Harper-Ho, *supra* note 23, at 273–85.

111 Irwin N. Gertzog, *Female Suffrage in New Jersey, 1790–1807*, in WOMEN, POLITICS AND THE CONSTITUTION 47, 48 (Naomi B. Lynn ed., 1990).

112 See Tracey Tully, *In Newark, 16-Year-Olds Win the Right to Vote for School Boards*, N.Y. TIMES, Jan. 12, 2024, at A11, <https://www.nytimes.com/2024/01/10/nyregion/newark-voting-age.html> [<https://perma.cc/2N69-C9D7>]; Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1052–62 (2017).

113 U.S. CONST. amend. XIV, § 2.

114 *Id.* amend. XVII, cl. 1.

115 *Id.* art. II, § 1, cl. 2.

116 See Muller, *supra* note 1, at 1241.

117 See CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (introducing the Fourteenth Amendment in the Senate) (“[The Equal Protection Clause]

as among the “fundamental rights” whose uneven restriction is subject to strict scrutiny.¹¹⁸ In *Kramer v. Union Free School District No. 15*, for example, the Court held that New York had violated equal protection by excluding childless and propertyless adults from voting for the school board, finding this exclusion inadequately “tailored” to further a “compelling state interest.”¹¹⁹

We can imagine at least three sorts of equal protection challenges to parent voting as a general matter. (Other challenges, based on special cases, are addressed below.) The first would be a claim of vote denial, that parent voting gives *extra* votes to some people (parents) and denies those votes to others (childless adults). The second would be a claim of vote dilution rather than denial, that counting proxy votes for children diminishes the *force* of other votes by adults. And the third would focus on the documentary requirements for registering as a proxy, arguing that those requirements burden the free exercise of the vote.

a. Denial of the Franchise

The Court in *Kramer* subjected restrictions on the franchise to strict scrutiny on the theory that a “selective basis” for the franchise might “deny[] some citizens any effective voice in the governmental affairs which substantially affect their lives.”¹²⁰ Whenever “some bona fide residents of requisite age and citizenship” have a right to vote that others lack, these “exclusions [must be] necessary to promote a compelling state interest,” so as “to determine whether each resident citizen has, as far as is possible, an equal voice in the selections.”¹²¹ Though most statutes are subject only to rational-basis review, that relaxed form of review assumes “that the institutions of state government are structured so as to represent fairly all the people”; when the electoral process itself is at issue, this assumption fails, and strict scrutiny is used instead.¹²²

protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. . . . But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society . . .”).

118 See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that poll taxes violate equal protection).

119 *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622, 633 (1969).

120 *Id.* at 627.

121 *Id.*

122 *Id.* at 628.

By giving proxy ballots only to parents, the objection might go, a state gives an extra right to vote only to some bona fide residents of requisite age and citizenship, denying the rest an equal voice in government. Being a parent of children under eighteen is an illegitimate qualification for voting; a state couldn't restrict the franchise entirely to parents, nor could it adopt ballot measures or create new offices for which only parents could vote. Neither, then, could it give parents additional votes for the measures and offices that are on the ballot already. Doing so would be akin to J.S. Mill's proposal to give "five or six" votes to university graduates based on a "reasonable presumption" of their "superior knowledge and cultivation"¹²³—a theory the Court's equal protection jurisprudence utterly rejects.

Yet this objection misfires, because parent voting doesn't give five or six extra votes to parents simply *because they're parents*. Instead, it allows parents to cast specific numbers of votes in order to represent *their specific children*—votes the parents may cast only because, and to the extent that, their children would in adulthood have the right to cast these votes themselves. The very concerns highlighted in *Kramer*, of assuring "each resident citizen . . . an equal voice" and of not "denying some citizens any effective voice in the governmental affairs which substantially affect their lives,"¹²⁴ are the precise concerns motivating the proposal: children are resident citizens too, and they deserve more effective representation than the median voter in their district can provide. Indeed, it's only because current law *doesn't* "represent fairly all the people" that the corrective of parent voting is needed in the first place.

If parent voting doesn't give parents *extra* votes—if the objection just conceptually misfires, as we argue—then there's no need even to reach the question of compelling state interests. But if a court were to reach it, ensuring that children have a more equal voice at the polls is indeed a compelling state interest. As the Court stated in *Reynolds v. Sims*, citizens have a right to "full and effective participation in the political processes of [the] State's legislative bodies," something "[m]ost citizens can achieve" only "as qualified voters" who elect "legislators to represent them."¹²⁵ Children are citizens, and everything that the Court says of adult citizens—that they have an urgent right to "effective voice in the governmental affairs which substantially affect their lives," per *Kramer*, or that they need "effective participation in the political process[]," per *Reynolds*—holds for

123 JOHN STUART MILL, THOUGHTS ON PARLIAMENTARY REFORM 26, 25 (London, John W. Parker & Son 1859).

124 *Kramer*, 395 U.S. at 627.

125 *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

children too. If vindicating that right for adults is compelling, it's no less compelling for children. Since the state can only realistically vindicate that right for children through their parents, the state's interest in parent proxy voting is as compelling as anything else the state might do to assure the right to vote. If "each citizen" is to "have an equally effective voice in the election," as the Equal Protection Clause is thought to demand,¹²⁶ then children's ballots have to be cast by their *real* representatives, not left up to median voters to allocate as they see fit. Parent voting implements, rather than violates, the principle of "one person, one vote."

Parent voting is also narrowly tailored to pursuing this interest. The core problem in *Kramer* was that those excluded from the franchise weren't "substantially less interested or affected than those the statute includes."¹²⁷ But when it comes to the choice of parents as proxies, no one is more interested or affected by the use of the child's vote than *the child*, and no one has more right to act on the child's behalf in this regard than *the parents*. The Court has described "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests" it has identified.¹²⁸ Over a century ago the Court included "the right of the individual . . . to marry, establish a home and bring up children" among "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."¹²⁹ Not long thereafter, it acknowledged constitutional protection for "the liberty of parents and guardians to direct the upbringing and education of children under their control."¹³⁰ Both "[t]raditionally at common law, and still today," children "are subject, even as to their physical freedom, to the control of their parents or guardians,"¹³¹ who in turn bear some of the weightiest obligations toward others that law can impose. If representation for children is a compelling state interest, then choosing precisely those representatives who have both the legal power and the legal obligation to act for their children is narrowly tailored to this end.

By contrast, the adult challenger of parent voting undertakes no legal obligation toward the unrepresented child and has no

126 *Id.*

127 *Kramer*, 395 U.S. at 632; *cf.* *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728–29 (1973) (permitting narrowly defined groups to elect certain special-purpose agencies, such as water storage districts); *see also* *Ball v. James*, 451 U.S. 355, 370 (1981) (same, for a public power generation concern).

128 *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

129 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

130 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

131 *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

“fundamental liberty interest” in making decisions on the child’s behalf. To nonetheless insist on taking part in directing the child’s vote is like complaining that a parent, and not some unrelated voter, gets to decide on a child’s religious upbringing. Properly speaking, childless citizens aren’t excluded from the exercise of parental voting rights at all; they’re just excluded from exercising those rights *as to other people’s children*. The objection is an attempt to retain disproportionate voting power rather than prevent it. The Equal Protection Clause lends no aid to such an effort.¹³²

b. Vote Dilution

In ascribing a principle of equal apportionment to the Equal Protection Clause, *Reynolds* stated that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”¹³³ These claims often appear in apportionment disputes, in which everyone is allowed to vote but some votes count for more legislative seats than others.¹³⁴ By granting extra votes to some, the argument might go, a system of parent voting would likewise diminish the force of the votes of others.

But nonparent voters would have no grounds to complain if the voting age were, say, lowered to sixteen, though this change would also have the effect of diluting their votes. The new sixteen-year-old voters already live in the district and are already bound by its political decisions; that’s why they’re counted as residents for purposes of apportionment. Nor would the adult voters have any dilution claim if all those afflicted with mental incapacity were miraculously cured. Nor, indeed, did whites have a reasonable claim of dilution when the Fifteenth Amendment was under consideration, nor men in regard to the Nineteenth Amendment. To criticize the expansion of the franchise as “dilution,” when those to whom it is being expanded are citizens bound by the polity’s decisions, is bizarre. Questions of dilution depend on the fairness of the baseline: it’s no dilution to include those who ought always to have been included, which is why the Court’s dilution analysis looks to equality considerations only *after* “the class of voters is chosen and their qualifications specified.”¹³⁵ As

132 Similar unfairness objections might be made by someone who isn’t the guardian of any mentally disabled person; as above, to state these arguments is to refute them. *See supra* subsection II.B.3.

133 *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also* *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54 (1970).

134 *See, e.g., Hadley*, 397 U.S. at 51–52.

135 *Id.* at 59 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

the Sixth Circuit states, “Merely expanding the voter rolls is, standing alone, insufficient to make out a claim of vote dilution”; otherwise a state would violate the Fourteenth Amendment whenever it “lower[ed] the voting age” or “cut its durational residence requirement.”¹³⁶ The dilution claim overlooks the central purpose of parent voting: to correct an *existing* imbalance in representation.

In cases of geographic vote dilution, moreover—where a local government lets nonresidents vote in its elections at the residents’ expense—the standard of review typically requires only a rational basis,¹³⁷ though at least one circuit court has called for strict scrutiny.¹³⁸ As discussed above, the interest in allowing children and the incapacitated to vote by proxy should be regarded as no less compelling than the interest in voting by adults, and the choice of parents and guardians as proxies is narrowly tailored to this interest. It thus survives strict scrutiny, and certainly rational-basis review.

A different kind of dilution argument might look, not to the Equal Protection Clause of the Fourteenth Amendment’s Section One, but to the apportionment rules of Section Two. That section reduces a state’s representation in the House whenever the voting rights of any of its “male inhabitants . . . , being twenty-one years of age, and citizens of the United States,” are “in any way abridged, except for participation in rebellion, or other crime.”¹³⁹ If male adult nonparents cast only their own votes, but parents can also vote for their children, have the former’s rights to vote been “abridged”? It’s certainly true that letting children vote through their parents comparatively reduces the voting power of a male adult nonparent, whose vote now has to compete with those of others. But the same would be true if the children were allowed to vote directly. When states began lowering the voting age to eighteen, a childless twenty-one-year-old man had no reasonable claim of Section Two “abridgment,” and he’d have none if it were lowered to sixteen or even to zero. Nor would his right to vote be abridged if the voting age were lowered to zero and an infant’s votes cast by her parents on her behalf.¹⁴⁰ The complaint that *he* serves as no one’s proxy is like a complaint that he’s been denied the constitutional right to direct the upbringing of children: the exercise

136 *Duncan v. Coffee County*, 69 F.3d 88, 94–95 (6th Cir. 1995).

137 *See, e.g., id.* at 94; *see also* Amanda Mayo, Comment, *Nonresident Vote Dilution Claims: Rational Basis or Strict Scrutiny Review?*, 83 U. CHI. L. REV. 2213, 2236 (2016) (citing cases from many other circuits).

138 *See* Locklear v. N.C. State Bd. of Elections, 514 F.2d 1152, 1154 (4th Cir. 1975).

139 U.S. CONST. amend. XIV, § 2.

140 *See Duncan*, 69 F.3d at 94–95; *accord* Rutherford, *supra* note 6, at 1514–15; *see also* Morley, *supra* note 103, at 285 (arguing that Section 2 abridgment extends only to “direct disenfranchisement of certain disfavored groups of qualified voters”).

of such a right requires that he *have* children. (Indeed, he isn't actually *denied* the right at all; he just doesn't have any children for whom to exercise the right, and that isn't the state's doing.)

Actually, the abridgment argument might cut in precisely the opposite direction for mentally incapacitated citizens. Arguably the existing law disenfranchising the mentally incapacitated is the sort of abridgment that the Fourteenth Amendment should notice—and which should affect House apportionment as well. Incapacitated citizens are still citizens, who have in almost every case neither participated in any rebellion nor been convicted of any crime. Disenfranchising them might not violate any constitutional prohibition, but Section Two is specifically designed to take account of otherwise-lawful limits on the franchise. We don't know of any challenges to congressional apportionments based on the number of incapacitated citizens, but it's surely a possibility when the census numbers are close. Letting guardians cast ballots on behalf of these citizens might be the only way *not* to abridge their right to vote when they'd otherwise be unable, both legally and practically, to exercise it on their own.

c. Documentary Requirements

To register as a proxy, a parent or guardian has to establish not only her own identity, but also her legal role as parent or guardian and the identity of her child or charge. To that end she ought to produce rather more documentation than we usually require from a citizen voting on her own. Yet as in the voter ID cases, some Justices require these kinds of procedural requirements to be “justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”¹⁴¹ On this argument, “even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.”¹⁴² First “a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule,” and then it must “make the ‘hard judgment’ that our adversary system demands.”¹⁴³

The argument against parent voting might then go something like this: As with voter ID requirements, demanding that a parent or

141 *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality opinion) (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)); *see also* *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). *But see Crawford*, 553 U.S. at 204 (Scalia, J., concurring in judgment) (interpreting *Burdick* to require additional scrutiny only “for laws that severely restrict the right to vote”).

142 *Crawford*, 553 U.S. at 189 (plurality opinion).

143 *Id.* at 190.

guardian produce a birth certificate or guardianship papers imposes some burden on any parent or guardian who registers as a proxy, and it might be particularly difficult for poor, elderly, homeless, or unsophisticated parents or guardians.¹⁴⁴ In that sense, an “identification requirement [might] impose[] a special burden on their right to vote” *as proxies*.¹⁴⁵ Such a parent or guardian might then sue to avoid this burden, seeking to register as a proxy without presenting the necessary documentation.

Yet as some Justices argued in the voter ID context, “[t]he severity of that burden” depends heavily on the state’s other procedures for casting ballots when such documents are hard to find—for example, letting parents or guardians “cast provisional ballots that will ultimately be counted” if parentage or guardianship can be established within a short time after the election.¹⁴⁶ More fundamentally, those seeking to register to represent others aren’t similarly situated to those seeking merely to represent themselves. Children and mentally incapacitated citizens usually aren’t in any position to contest a fraudulent claim of representation; if the state is going to defend their legitimate (indeed, compelling) interest in accurate representation, it needs to demand sufficient documentary evidence. As a result, such demands are “unlikely” to “pose a constitutional problem unless [they are] wholly unjustified.”¹⁴⁷

Documentation of parent or guardian status is also commonly required already for a child to attend public school, as a means of preventing parents who reside and pay taxes in troubled school districts from illegally sending their children to better ones. Yet while the Court in *Plyler v. Doe* ascribed to the Equal Protection Clause an equal right to access public education,¹⁴⁸ it also explicitly permitted school districts “to apply . . . established criteria for determining residence.”¹⁴⁹ While the wisdom of these restrictions may be contested (and often is, such as by advocates for school choice), the same documentary criteria could be constitutionally applied here.

3. Federal Statutory Challenges

While much of election law is state law, there is also a range of federal statutes with which parent voting would have to comply. For

144 See *id.* at 199.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Plyler v. Doe*, 457 U.S. 202, 231 (1982).

149 *Id.* at 227 n.22; accord *Martínez v. Bynum*, 461 U.S. 321, 328 (1983).

example, even after *Shelby County v. Holder*,¹⁵⁰ jurisdictions bound by certain court orders under the Voting Rights Act might still have to preclear their new laws with the Department of Justice.¹⁵¹ Other statutes, such as the National Voter Registration Act (NVRA) or the Help America Vote Act, impose other constraints on state registration and voting procedures. As we read them, these statutes pose no insuperable barrier to a system of parent voting. Often they're ambiguous as applied to proxy votes, given that they were drafted for elections in which every voter acts for herself alone. To the extent there are any real conflicts, moreover, the state laws might take effect nonetheless. As noted above, Article I gives power over voting qualifications to the states and not to Congress.

As an example of statutory ambiguity, consider the federal criminal law that punishes “[w]hoever votes more than once in an election” with federal offices on the ballot.¹⁵² A quick reading of that statute might suggest that it bans parent voting, as the parent votes once for herself and once more as a proxy. But the term “once” in this section has to be understood by reference to the sort of votes that are *legally allowed*. For example, this statute doesn't bar a state like Maine from adopting ranked-choice voting,¹⁵³ even though each Maine voter necessarily votes for multiple candidates “for an election to the same . . . office” within the language of the statute¹⁵⁴: a first-choice candidate, a second-choice candidate, and so on. Nor would it matter if Maine had its voters fill out multiple ballots at each election, with a separate piece of paper representing each ranked choice. Indeed, if Maine counted the ballots of university graduates as more weighty than those of nongraduates, this would likely violate the Fourteenth Amendment, but it wouldn't mean that anyone had “vote[d] more than once” within the meaning of the federal ban. The prohibition on “vot[ing] more than once” is a prohibition on a voter's casting more ballots than a single person is *supposed* to cast, not on a voter's casting precisely as many ballots as she's entitled to cast by law. Applying the statute to forbid parent voting would be as much of a misreading as applying it to throw every Maine voter into federal prison.

150 *Shelby County v. Holder*, 570 U.S. 529 (2013).

151 See 52 U.S.C. § 10302(c) (2018) (codifying section 3(c) of the Voting Rights Act); *The Shelby County Decision*, U.S. DEP'T OF JUST., C.R. DIV. (Nov. 17, 2023), <https://www.justice.gov/crt/shelby-county-decision> [<https://perma.cc/W329-ED6R>].

152 52 U.S.C. § 10307(e)(1) (2018).

153 See *Ranked-Choice Voting Frequently Asked Questions*, ME. DEP'T OF THE SEC'Y OF ST., <https://www.maine.gov/sos/cec/elec/upcoming/rankedchoicefaq.html> [<https://perma.cc/P2NY-SZXX>].

154 § 10307(e)(3).

Another case of apparent ambiguity involves the NVRA. That statute requires every state to “accept and use” a particular “mail voter registration application form” for “the registration of voters in elections for Federal office.”¹⁵⁵ It also requires a state to ensure that “any eligible applicant is registered to vote . . . if the valid voter registration form of the applicant” bears a timely postmark.¹⁵⁶ That form, of course, has no fields appropriate for use in registration for proxy voting,¹⁵⁷ whether as a parent or as a child who’s represented by proxy.¹⁵⁸ If the state lets every qualified voter use the form for her *own* registration, is that enough for the state to comply with the statute? Or is it forbidden from creating any *other* kind of voting, such as proxy voting, to which the form is necessarily inapplicable?

The nonexclusive reading makes more sense. For one thing, it’d be odd for Congress and the Federal Election Commission to set up a major restriction on state voting choices by means of the blank fields on a form; that would seem to be the quintessence of “hid[ing] ‘elephants in mouseholes.’”¹⁵⁹ Also, the exclusive reading undermines other parts of the statute. For example, the statute provides that a “motor vehicle driver’s license application . . . shall serve as an application for voter registration with respect to elections for Federal office” and “shall be considered as updating any previous voter registration by the applicant”¹⁶⁰—yet a driver’s license application isn’t the *only* thing that can serve as a registration form. The national mail-in form also has to be treated as fully effective to register a voter in her own right,¹⁶¹ but it, too, isn’t the only kind of form there can be. The mail-in form doesn’t serve to register the applicant’s children for public school or for social services, and it doesn’t serve to register the applicant as their voting proxy either.

As the Supreme Court has interpreted the NVRA, “a State must accept the Federal Form as a complete and sufficient registration application,” which it is.¹⁶² That doesn’t entail accepting the form as a complete and sufficient application to represent someone else by proxy, which it isn’t. The form “is to be accepted *as sufficient* for the requirement it is meant to satisfy,”¹⁶³ not for other requirements it isn’t

155 52 U.S.C. § 20505(a)(1) (2018).

156 *Id.* § 20507(a)(1)(B).

157 *See generally* REGISTER TO VOTE IN YOUR STATE, *supra* note 56; *cf.* § 20505(a)(1).

158 *See* REGISTER TO VOTE IN YOUR STATE, *supra* note 56, at 2 (limiting use of the form to persons “18 years old on or before Election Day”).

159 *West Virginia v. EPA*, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring) (quoting *Whitman v. Am. Trucking Ass’n*s, 531 U.S. 457, 468 (2001)).

160 52 U.S.C. § 20504(a)(1)–(2) (2018).

161 *See* REGISTER TO VOTE IN YOUR STATE, *supra* note 56, at 2.

162 *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013).

163 *Id.* at 10.

meant to satisfy. Moreover, the statute lets states create their own forms so long as they also accept and use the federal one;¹⁶⁴ the methods the statute prescribes are explicitly “in addition to any other method of voter registration provided for under State law.”¹⁶⁵ Given the statute’s explicitly stated purposes—to “increase the number of eligible citizens who register to vote,” to “enhance[] the participation of eligible citizens as voters,” to “protect the integrity of the electoral process,” and to “ensure . . . accurate and current voter registration rolls”¹⁶⁶—it’d be very odd to read its permissive approach to registration as a ban on any *other* means of representing the unrepresented.

Most importantly, to the extent the NVRA or any other federal statute might conflict with parent voting, it’d exceed Congress’s power under the Constitution—which plainly specifies that states, not the federal government, determine the “Qualifications requisite for Electors.”¹⁶⁷ As noted above, Congress can decide “*how* federal elections are held, but not *who* may vote in them.”¹⁶⁸ Whether parents are qualified to vote as electors for their children is a “who” question, not a “how” question, just as a state’s choice to lower the voting age would be.¹⁶⁹ So if the NVRA *were* interpreted to forbid a state from allowing parent or guardian proxy voting—or to forbid some associated requirement, like requiring further documentation from prospective proxy voters—the state could follow the script that the Court has suggested: ask the relevant agency to amend the national form, and then bring suit to contest any refusal.¹⁷⁰

The same constitutional analysis applies to another provision of the NVRA, which purports to forbid states from removing “the name of [any] registrant . . . from the official list of eligible voters” except in the event of the registrant’s request, criminal conviction, mental incapacity, death, or change of residence.¹⁷¹ It isn’t entirely clear whether, in a system of parent voting, the “registrant” here would be the parent or the child. The former, of course, could remain on the

164 52 U.S.C. § 20505(a)(2) (2018).

165 *Id.* § 20503(a).

166 *Id.* § 20501(b).

167 See U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII, cl. 1 (same); *Inter Tribal Council*, 570 U.S. at 16–17.

168 *Inter Tribal Council*, 570 U.S. at 16.

169 Congress hasn’t always abided by these restrictions—see, for example, 18 U.S.C. § 611(a)(2)–(3) (2018) (purporting to punish any alien who votes for a federal office, even if such voting is explicitly permitted “under a State constitution or statute or a local ordinance”); 52 U.S.C. § 20302(a)(2) (2018) (purporting to grant voting rights in federal elections to former state citizens now residing abroad)—but they remain good law nonetheless.

170 See *Inter Tribal Council*, 570 U.S. at 18–20.

171 52 U.S.C. § 20507(a)(3), (4) (2018).

rolls indefinitely in her own right, as could the latter, who'd automatically begin voting on her own as soon as she comes of age. But to the extent this provision were interpreted to prevent a state from deregistering a parent as proxy either when the child turns eighteen or if parental rights are terminated, the provision would be unconstitutional as applied, because it would interfere with the state's own definition of the franchise.

III. SPECIAL CASES

The discussion above addresses the core case of proxy voting—where a member of the political community who *would* be able to vote, but for age or incapacity, has a general guardian who's a voting member of that political community and would be ready to serve as proxy. But there are also special cases where one or another of these criteria might fail. Some children or mentally incapacitated persons have no parents or guardians; they might be on their own, or they might be the wards of state institutions, private orphanages, or foster parents. Or the parent of a potential voter might be unable to vote herself: she might be a noncitizen parent of citizen children,¹⁷² a disenfranchised felon, mentally incapacitated, or a child herself (say, a teenage mother), or she simply might not live in the voting jurisdiction where her child resides. In rare cases, a parent or guardian who's a fully qualified voter might have a child or charge who's ineligible for other reasons—say, as a noncitizen or disenfranchised felon. How are all these situations to be addressed?

The most important thing is not to let puzzle cases loom so large as to distract from the core idea. Imagine that some early nineteenth-century reformer had proposed abolishing property qualifications for voting and the response had been: "What about people who *can't afford horses*? How will they ever get to the polls?" That's a rhetorical tactic—a way of attacking an unwanted idea by means of diversion. Special cases are interesting, and it's natural to get absorbed by them, but it's an intellectual mistake in matters of policy to treat narrow problems as a bar to broad solutions. Nearly a quarter of American citizens have no representation in government *at all*. The fact that some children and incapacitated persons might lack a voting representative even on our proposal doesn't justify denying representation to children and the incapacitated across the board.

This argument of policy also serves as an argument of law. Under the Court's equal protection jurisprudence, even rational restrictions on the voting process can become "invidious" if they effectively deny

172 See U.S. CONST. amend. XIV, § 1 (establishing birthright citizenship).

the franchise and are “irrelevant to the voter’s qualifications.”¹⁷³ But the Court has never held that all restrictions are irrelevant. Citizenship, for example, is obviously relevant: a German can’t vote in an American election. The restrictions involved in the special cases of parent voting are only those that *already* suffice to exclude someone from the franchise: citizenship, felony, age, incapacity, and residence. Requiring that a proxy be eligible to vote—and that the person represented be *otherwise* eligible to vote—isn’t irrelevant to their qualifications as voters. Nor, turning to cases of orphans or other children in institutional settings or foster homes, is it irrelevant whether the proposed proxy really is the parent or guardian, with legal power to act on behalf of her child or charge in the exercise of other legal rights no less fundamental than voting. To deny representation to all children because some lack qualified proxies is to diminish equality before the law rather than to advance it.

As a result, one could disagree with us with respect to many of the special cases below without disagreeing with our core argument or rejecting parent voting in general. We propose the responses that seem best to us, but someone else could favor a different response and still agree about the virtues of parent voting. For example, with respect to unadopted orphans, we argue below that voting by institutional actors or guardians-for-voting-only would be dangerous and unwise; indeed, we think the state has a compelling interest in rejecting it. But if you disagree about that, you should support a broader system of proxy voting, not a system that keeps children’s interests off the table altogether.

Finally, with respect to some of the special cases below, we conclude that some children or mentally incapacitated persons may have to go unrepresented for lack of a qualified proxy. In this special context, the concept of “virtual representation” becomes relevant. The idea of virtual representation is that, if *A* and *B* have substantially aligned interests and *A* can vote while *B* can’t, then *B* is virtually represented by *A*.¹⁷⁴ In most cases, we dispute that virtual representation is adequate for representing children: as we argue throughout, children and the median adult often have different interests, and while parents might cast their own votes with their

173 Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008) (plurality opinion).

174 See ELY, *supra* note 33, at 82–84. Ely discusses the concept in political theory, but a version of the concept arises in modern trust law as well, where an available adult can represent the interests of “a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable,” so long as their interests are “substantially identical” and “there is no conflict of interest between the representative and the person represented.” UNIF. TR. CODE § 304 (UNIF. L. COMM’N 2024).

children in mind, that sort of limited virtual representation leads to children being radically undercounted. But in an overall *system* of parent voting, virtual representation does support those relatively few children without voting proxies, such as orphans in institutional settings. On most policy questions (though not all), the interests of orphans and other children are aligned: both have an interest in going to good schools, for example. And as to undercounting, the number of children with qualified proxies is so large relative to those without, and children generally would enjoy such massively increased political power in a system of parent voting, that the undercounting wouldn't really be consequential. Children without parents qualified to serve as proxies really would be virtually represented, and they would benefit greatly from the system as a whole.

A. *Children Without Parents*

Start with the case of children who are orphaned, or those whose parents have lost custody and who haven't been adopted. Surely it's no fault of theirs that they're without adequate representatives. So why should they be denied the vote? If they deserve the right to vote, and if voting is a fundamental right, how can it be denied them based on an accident of parentage or adoption? Why not let them pick proxy voters on their own or have a family court appoint someone else for the purpose? The same might be asked of mentally incapacitated citizens who lack court-appointed guardians: Why not have the court appoint someone else?

One answer is that appointing guardians-for-voting-only opens the door to vote buying and political manipulation. If a substantial number of votes were at stake, it'd seem all too easy for one political party or another to appoint family-court judges on a partisan basis and to arrange for biased proxies, or to choose available guardians from a politically one-sided profession.¹⁷⁵ Letting children choose proxies for themselves would open them to recruiting by partisan agents; it'd also be inconsistent with our reasons for maintaining a voting age in the first place. (If a child were capable of choosing a proxy to vote *for* the legislature, that child would also be capable of choosing a representative to vote *in* the legislature.) A potential guardian who isn't willing to take on a child's care via adoption, but only wants to make use of the child's vote in the meantime, probably shouldn't be trusted with it. The same goes for mentally incapacitated persons: a

175 Cf. Sunny Harris Rome & Susan Hoechstetter, *Social Work and Civic Engagement: The Political Participation of Professional Social Workers*, 37 J. SOCIO. & SOC. WELFARE 107, 112 (2010) (reporting that “[s]lightly more than 70%” of surveyed social workers identified as Democrats, compared to 7.9% identifying as Republicans).

court can appoint a general guardian, but the appointment of a guardian-for-voting-only raises more questions than it answers.

But there's also a deeper and more serious concern. The point of parent voting isn't to maximize voting—to find someone, anyone, to cast an available ballot. The point is to recognize how parents' ongoing commitment and dedication to their child, and their personal and fundamental responsibility for their child, *already* make them their child's true representatives before the political system. When it comes to managing a child's property, it's enough for the law to find some responsible person or other—so that “no trust shall fail for want of a trustee”¹⁷⁶—partly because we know how to assess a trustee's performance afterwards. Or when we appoint a guardian *ad litem* in litigation, we can make some consensus judgments about the child's litigation interests and whether the guardian has rendered adequate service. But there's no way for the government to make consensus judgments about how a child's ballot ought to have been cast. Voting involves moral interests as well as material ones, and only someone with the extraordinary rights and responsibilities of parenthood—including the right to *define* the child's interests in the first place—has the right to act for the child in this way. So too for the case of mental incapacity: only a general guardian bears the sort of general responsibility to define as well as to defend the charge's interests. And it is only this kind of personal obligation that makes one person the appropriate voice for another in the voting booth.

Consider, by way of comparison, a child's religious upbringing. Parents have a legal right to direct their children's religious upbringing, and children have a right to that religious upbringing, in the sense that the state may not constitutionally interfere with a parent's choice of religious education.¹⁷⁷ But that doesn't entail a positive right to a religious upbringing, in the sense that the state is obligated to supply a religious education for an orphan who'd otherwise go without. Nor does it entail that a state *could*, let alone *must*, appoint a religious guardian in the parents' place, vested with the specific legal right to compel the child to attend religious services of the guardian's choice. That kind of power can only be properly vested in someone who bears responsibility for the child, body and soul. That person needn't be a biological parent, of course; an adoptive parent is a parent in every sense, acquiring through operation of law the right to direct a child's religious upbringing. But—and this is the point—this right is acquired *only upon entering the full panoply of authority and responsibility that legally defines parenthood*. To the extent that voting

176 *Colton v. Colton*, 127 U.S. 300, 320 (1888) (stating the traditional rule).

177 *See generally* *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

involves the full scope of moral and material concerns, the state has to require a similar degree of responsibility before giving anyone the power to cast another person's vote.

In short, our argument throughout this Article has turned on the distinctiveness of the parent-child relationship. We've also relied on the reasonably comparable, and likewise legally distinctive, relationship of a general guardian to his charge. When a child is without a parent or a mentally incapacitated person without a guardian, the absence of that distinctive relationship mandates a different result.

But what about the *child's* right, one might ask, to have his interests counted at the polls in the only way possible—through a proxy? Is that right fundamental? Is it frustrated by allowing only parents to serve as proxies, and thus allowing the votes of children who lack proxies to go uncounted?

We think this right *is* fundamental in a sense; indeed, much of this Article has turned on the deep importance of having one's interests proportionally counted at the polls. But there's also a compelling state interest in allowing only parents or general guardians to serve as proxies, an interest as compelling as the parent-child or guardian-ward relationship is distinctive.¹⁷⁸ The state has good and sufficient reasons to insist on an extraordinarily strong relationship as the basis for exercising another person's right to vote, just as it has good and sufficient reasons to insist on that strong a relationship for choosing another person's religion. By reserving to parents and guardians the power to serve as proxy, a state doesn't offend a Constitution that already recognizes and protects the rights of those parents and guardians as fundamental.¹⁷⁹ Furthermore, the potential for partisan mischief and abuse in putting bureaucratically situated professionals in charge of vulnerable people's voting is so manifest and serious that governments have compelling reason to disallow it, even at the cost of frustrating a relatively small number of people's interest in being heard at the polls.

A second factor bearing on children's right to be counted at the polls turns not on how compelling the state interest is or on how fundamental the right is but on the *kind* of right it is. Certain rights of children or of parents can be exercised only under the circumstances

178 See *Hill v. Stone*, 421 U.S. 289, 295 (1975) (stating that "restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack" (citing *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969))). This list of safe-harbor exceptions may not be exclusive. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (excluding felon disenfranchisement from strict scrutiny).

179 See *supra* text accompanying notes 128–31.

of actually having a parent or a child. (Again, consider the right to a religious upbringing.) A childless adult isn't being *denied* the right to direct his children's upbringing; he merely lacks children over whom such a right can be exercised. Likewise, an unadopted minor orphan isn't being *denied* the right to vote so much as he's without the kind of proxy needed to *exercise* that right. (And, of course, the orphan *can* vote when he reaches eighteen; denying him the vote before then is explicitly consistent with the Court's voting rights jurisprudence as well as the Twenty-Sixth Amendment.¹⁸⁰)

It may yet seem that the situation of unadopted orphans, mentally incapacitated persons without guardians, and others who are similarly situated is unfair. But we here approach the limits of fairness that the state can achieve, at least without violating other principles that the state has good reason to uphold. The root unfairness is that of lacking parents, something that isn't state-imposed and can't in any direct way be state-remedied. The state has compelling reasons—reasons of principle—to insist that only biological or adoptive parents or, in the case of the mentally incapacitated, general guardians be proxies. And, finally, a system of parent voting would be better (indeed, fairer) for proxyless children than either the status quo or a system of court-appointed guardians-for-voting-only.¹⁸¹

B. In Loco Parentis: *Orphanages, Institutions, and Foster Parents*

For similar reasons, institutional actors like orphanages or long-term care facilities shouldn't serve as proxies that cast their residents' votes. For one thing, artificial persons can't vote in political elections; this is one of the crucial distinctions between political elections and, say, shareholder elections, which rely on a very different kind of self-government. Allowing orphanages and similar institutions to cast proxy votes would breach a basic concept of democracy as a community of natural persons who decide the shape of their collective life together.

180 See U.S. CONST. amend. XXVI, § 1; *Hill*, 421 U.S. at 295.

181 We could imagine, as a last-ditch severability clause to defend against equal protection challenge, an optional procedure for a court to appoint a qualified-voter “godparent” to serve as a child's proxy for voting when no qualified proxy is otherwise available. At the very least, to avoid obvious avenues of abuse, no one should be able to serve as “godparent” for more than one child at a time—and such an appointment should require the consent of the family court, the child's parents (if available), and (if not) the child herself, having already attained the age of reason (say, seven years of age). We think this system would in fact be extremely dangerous and easy to abuse, and it should never be adopted except perhaps as part of a severability clause. But we're unsure whether it mightn't be preferable to having a court strike down a system of parent voting in its entirety.

As a practical matter, moreover, such arrangements would give staggering power to management. The chief executives of orphanages and long-term care facilities, or of chains of such facilities, might cast thousands or tens of thousands of votes, which would probably reflect the bureaucratic interests of the facilities and of their managers much more than those of their residents. Indeed, it's easy to foresee conflicts of interest: long-term care facilities, for example, have a clear interest in limiting their legal obligations to people who require long-term care.

Likewise, if institutional actors voted for the children or mentally incapacitated people under their care, worries about partisan manipulation would resurface in spades. There'd be none of the decentralization that comes from there being many different parents (of many different views), and the drive for partisan advantage wouldn't be counterbalanced by the love and loyalty that's the ballast of personal relationships. Institutions, by virtue of being institutions, lack those bonds. Instead, securing the right administrative positions would become the key to controlling an election-swinging number of votes. Acting *in loco parentis* is not the same as *being a parent*—and that's emphatically true for institutions.¹⁸²

A harder question is posed by foster parents. Unlike adoptive parents, foster parents' roles are designed to be temporary. They have physical and even legal custody for many purposes, but their rights last only until the child's legal parents are capable of regaining custody or until the child is adopted or attains majority. For example, a child might be placed in foster care while her parents are hospitalized, if no other care is available; the foster parents would then have physical custody, but the rights of the legal parents would otherwise continue unaltered. Per the current draft *Restatement*, when a child is placed in foster care, "the parent remains the legal parent" and "retains the constitutional right to direct the upbringing of the child."¹⁸³ Foster parents are required to make reasonable efforts to ensure that the legal parents' religious choices control, for example.¹⁸⁴ In other cases, a

182 Compare Rutherford, *supra* note 6, at 1510 (finding it "dangerous" to let institutions cast proxy votes), with Wolf et al., *supra* note 6, at 366–67 (allowing any "legal custodian" to do so).

183 RESTATEMENT OF THE L., CHILD, & THE L. § 2.71 cmt. a (AM. L. INST., Tentative Draft No. 5, 2023); see also *id.* § 2.71 reporter's note to cmt. a (citing cases).

184 *Id.* § 2.71 cmt. f (recognizing the parent's "right to determine the child's religious affiliation and practices," to be balanced with other interests, such as "stability in the placement"); see also *id.* § 2.71 reporter's note to cmt. f (citing cases); *id.* § 18.10 cmt. e (identifying an obligation to prevent the foster family from pressuring the child); *cf.* Wilder v. Bernstein, 848 F.2d 1338, 1347 (2d Cir. 1988) (requiring "reasonable efforts" from states to meet children's "religious needs" while in their care); Lipscomb v. Simmons, 884 F.2d 1242, 1248 (9th Cir. 1989) (approving Wilder), *vacated for reh' en banc*, 907 F.2d 114 (9th Cir. 1990)

foster child's legal parents may have died or a court may have terminated their parental rights; yet even in those cases, the fostering relationship is revocable, often temporary, and without the full panoply of legal authority and responsibility that marks legal parenthood. Indeed, for many families, fostering is a step toward adoption; the *point* of demarcating the two relationships is to distinguish one who acts *in loco parentis* from a complete legal parent.

Though we can imagine others disagreeing, we see the temporary and legally incomplete nature of the foster relationship as making it an inappropriate basis for proxy voting—which looks to a child's permanent rather than temporary interests and which requires that the proxy have the authority and responsibility to define the child's interests as well as to act on them. Instead, the child's legal parents ought to be the only ones who could vote as proxies on the child's behalf. Adoption, rather than fostering, is the critical line to draw.

Some children have more informal living arrangements—say, living with a grandparent or other relative without formal adoption or foster care. A state could try to recognize those relationships for purposes of voting just as it could for anything else (custody, visitation rights, public school enrollment, consent to medical procedures, and so on).¹⁸⁵ But, again, although the case could reasonably go either way, it seems to us that a state has strong reasons to formalize the parent-child relationship before allowing an informal caretaker to vote on a child's behalf. Otherwise, like fostering, the relationship might not have the depth and permanence that justifies parental voting. Moreover, the informality risks administrative confusion and thorny legal disputes over how much time with a relative is enough to transfer the rights of parenthood from one person to another—especially if a self-appointed relative asserts the right against a legal parent's wishes. Inevitably, law's formal categories won't always map onto the nuances of real life. But states are entitled to insist on a degree of formality in according parental rights, and this is a context in which that very formality has great value.

(mem.); *Pfoltzer v. Fairfax Cnty. Dep't of Hum. Dev.*, 966 F.2d 1443, 1992 WL 137512, at *5 (4th Cir. 1992) (per curiam) (unpublished table decision) (same); *Bruker v. City of New York*, 337 F. Supp. 2d 539, 551 (S.D.N.Y. 2004) (following *Wilder*); Joseph R. Ganahl, Note, *Fostering Free Exercise*, 88 NOTRE DAME L. REV. 457, 459 (2012) (discussing “reasonable efforts” as the prevailing standard); Kelsi Brown Corkran, Comment, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325, 332 (2005) (same). See generally *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (objecting to the State's “compulsion of students to declare a belief”).

185 See, e.g., TEX. FAM. CODE ANN. § 32.001(a)(5) (West 2023) (requiring written authorization from a person with power to grant it before an adult may consent to a child's medical treatment, with exceptions for a grandparent, sibling, aunt, or uncle).

C. *Ineligible Parents*

Some children have parents who are ineligible to vote. Their parents might be noncitizens or disenfranchised felons; they might be mentally incapacitated or themselves underage. This situation presents a dilemma: either the children will be disenfranchised for the sins of the parents, or else the parents will enjoy a right to vote for others when they have no right to vote for themselves.

This dilemma is also politically charged. Readers who find the underlying exclusions unjust (particularly the laws that prevent felons or immigrants from voting) may find the children's circumstances particularly unfair—and may think that felons and immigrants ought at least to be able to serve as proxies for their innocent citizen children. This Article, again, takes no position on the proper breadth of adult suffrage. But we will claim that some of the arguments for restricting adult suffrage would apply equally to restricting service as a proxy—which might seem to require a substantive defense of felon disenfranchisement or of American immigration policy, neither of which is this Article's topic.

There's a better way of thinking about the problem, but to see it we have to take a step back. Every democracy has to define its community somehow. As we pointed out above, a German living in Germany is ineligible to vote in the United States¹⁸⁶—an ineligibility that has nothing to do with his individual merit, views, or even loyalty. Germans who treasure the American project have no claim to vote in an American election; Americans who hate their country do have such a claim. It's a question of bare *stipulative membership*, not desert. In the same way, a professor at Law School *A* couldn't demand a vote in faculty meetings at Law School *B*, no matter how esteemed or committed to School *B*'s good he might be. The exclusion doesn't reflect a negative judgment about the professor: he's just not on the faculty at School *B*, so of course he can't cast a vote there.

As the example suggests, membership is something a community *gives* to an entrant; it has a factual, stipulative character. Judgments of merit or trustworthiness might *motivate* a community to afford membership to some and deny it to others, but still the community must give it: membership can't be claimed as a mere incident of merit or trustworthiness. One can be born into political membership or gain it by naturalization, and one can renounce one's nation's citizenship and be naturalized into another's, just as someone can be born into a family, leave a family, or join one. But no one can just decide on their

186 See *supra* subsection I.A.2.

membership for themselves: the family or political community, as the case may be, gets a say too.

We can appreciate this logic of democratic self-definition without having to approve or disapprove of the particular choices about the franchise the United States makes today. As things currently stand, citizen children are considered part of the American political community.¹⁸⁷ Their interests are already thought to deserve equal consideration with those of other citizens, with only their personal inability to ascertain and express those interests keeping them from the use of the ballot. But children would have no claim to representation in other political communities of which they're not part: we wouldn't propose parent proxy voting on an academic faculty, for example (with professors voting on behalf of their kids in faculty decisions), because children aren't part of the university community. Likewise, even if their children are citizens, noncitizen parents aren't full members of the American political community. As in the case of the German Americanophile or the interfering professor, the community—for better or worse—hasn't given them the right to participate in *its* councils and cast a vote in *its* elections.

To a considerable extent, the obstacle to this line of thought is the view that most immigrants *should* be given citizenship and *should* be allowed to vote, whether for their citizen children or for themselves. So imagine a situation in which that isn't true—a situation in which the community has good reason not to allow particular noncitizens to vote. In the television series *The Americans*,¹⁸⁸ for example, a married couple who've lived and worked in the United States for years turn out—unknown to their citizen children—to be murderous Soviet spies. Must we allow Nadezhda and Mischa (or “Elizabeth” and “Philip,” as they're known to their neighbors), sworn enemies of America, working within America's borders on behalf of an adversary nation, to vote on behalf of their children in American elections? If you'd answer no, or if you could understand someone's answering no, it may be because at some level you perceive the legal system's intuition that membership matters—and that to take part in our councils or to cancel out someone else's vote, a proxy voter must herself be a member in good standing. We can assume that Nadezhda and Mischa would be good advocates for their children in hospital rooms or parent-teacher conferences without finding it equally appropriate for them to take part in our political decisions.

187 See *supra* subsection I.A.3.

188 See, e.g., *THE AMERICANS: Pilot* (FX television broadcast, aired Jan. 30, 2013); *THE AMERICANS: Duty and Honor* (FX television broadcast, aired Mar. 13, 2013).

Of course, the example is extreme—but the point is far-reaching. If, for example, a German citizen living in Germany has no right to vote in our elections, he doesn't acquire that right as the parent of a citizen child living in New Jersey. The same is true if he's living in the United States without citizenship: his wishes don't have to be allowed to override the wishes of citizens in voting, even if offered on a citizen child's behalf, because membership is the community's to give, and the community hasn't given it to him.

As a legal matter, a rule that noncitizens can't vote, whether for themselves or in their role as parents, neither violates Fourteenth Amendment doctrine nor is even subject to strict scrutiny, for that test is applied only to exclusions "*other* than residence, age, and citizenship."¹⁸⁹ Just as orphans find their right to vote through proxy frustrated for lack of a person to exercise it, the citizen child of noncitizen parents is in much the same position: there's someone with a parental bond to him, but that person isn't qualified to vote, and while he may have friends and relatives who are qualified to vote, none of them owe him the kinds of obligations that would make them his proper representative in the voting booth. Nor can his parents appoint someone as proxy: that would raise the same serious concerns about vote buying and manipulation discussed above. Of course, if one of the citizen child's parents is a U.S. citizen qualified to vote, the proxy relationship is intact: the citizen parent as sole proxy can cast the child's entire vote. But the general point remains: the right to vote by proxy can fail for lack of a legally suitable proxy.

A similar course of reasoning applies to felon disenfranchisement. While noncitizens have failed to *acquire* membership in the American political community, on some accounts disenfranchised felons have partly *forfeited* this membership. The community has judged that what they did was bad enough, akin to a mini-treason, to justify depriving them of the voting rights that full membership would entail.¹⁹⁰ On this theory one who's engaged in sufficiently serious lawbreaking has so rejected the authority of government as to lose the right to impose that same authority on others. We take no view here of the strength of this rationale, but we note that if it suffices to bar felons from voting on their own account, it'd also suffice to bar them from voting on others' behalf. A rule that bars disenfranchised felons from acting as proxies

189 Hill v. Stone, 421 U.S. 289, 295 (1975) (emphasis added).

190 See, e.g., Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 965–67 (2016) (developing a theory of felon disenfranchisement as a kind of ostracism or banishment, in which felons are regarded “as having forfeited the privileges of membership,” *id.* at 967); see also *id.* at 941 (noting that punishment in general can be “an instrument of communal self-definition and social exclusion,” rather than merely one of retributive “hard treatment” or utilitarian “control”).

isn't the moral or legal equivalent of a rule that no one with felon parents may vote; the child would lose out on representation for lack of a qualified proxy, not for having a parent with a record. (Again, if only one of two parents is a disenfranchised felon, the other can cast the child's whole vote.) Given that felon disenfranchisement has been categorically exempted from Fourteenth Amendment voting-rights scrutiny,¹⁹¹ there's little reason to suspect that a similar exclusion from serving as a proxy would offend that Amendment either.

Finally, if a child's parents are themselves teenagers below voting age or are themselves lacking in mental capacity, the electoral system would regard the child as being in something resembling the position of an orphan: there may be others to care for him, but no one who's qualified to take part in voting and who holds the rights or bears the responsibilities of a legal parent. Even if, say, the child's grandparents already cast his mother's vote, if they lack legal custody over him then they aren't *his* parents; they don't owe him a parent's duties or have a parent's powers to control him or to act in his name. They can't decide his religion, and they also shouldn't decide how his vote will be cast.¹⁹²

In our view, the principle governing all these questions should be this: whatever reasons are sufficiently compelling, morally and legally, to exclude a person from the franchise on his own account are also sufficiently compelling to prevent that person from casting proxy votes for others. The triangle of relationships we mentioned earlier—between parent and child, polity and child, and polity and parent—must all be intact for parent proxy voting to make sense, and likewise for the mentally incapacitated and their guardians. Given this structure, it will sometimes happen that a child or incapacitated citizen will have a legal parent or guardian who isn't eligible to vote in her own right and who therefore can't vote as a proxy either.

That isn't ideal, and we think one might disagree with our account of these cases without thereby turning against parent voting in general. But remember how these exclusions from parent voting would compare to the current system. Many people assume that children are adequately represented today because their parents are already voting and already consider their interests. But if, right now, we depend on parents to represent their children, then disenfranchising noncitizens or felons *already* deprives their innocent citizen children of a political voice. While people do often argue for felon or noncitizen voting, they rarely make such arguments on behalf of the voter's children. Instead,

191 See *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

192 We could imagine a state choosing to adopt such "grandparent voting" in the case of minor parents; in our view this would be defensible only if accompanied by the other deep rights and obligations that parents have traditionally held.

it's thought to go without saying that (for example) when you commit a felony and lose the right to vote, you lose the right to advocate for your children through the vote. Or if you immigrate to a new country and haven't yet obtained citizenship, you haven't yet gained the ability to represent your newborn citizen children in the political sphere. To lack or to forfeit the right to vote yourself also results in lacking or forfeiting the right to represent your children's interests. If one objects to the parents' disenfranchisement, then one should object to that disenfranchisement directly—not by arguing that the parents, though they can't vote themselves, should be able to vote for another.

D. Ineligible Children

Some children and mentally incapacitated persons are ineligible to vote for other reasons, even if they have parents or guardians who are eligible. Some children might be felons, for example (say, tried as adults at seventeen), and in unusual cases children of citizens might not be citizens themselves.¹⁹³ Likewise, someone might be both mentally incapacitated and a disenfranchised felon (perhaps having committed the felony before the incapacity), or both mentally incapacitated and a noncitizen. Yet such children and mentally incapacitated persons might be residents of the United States, counted for purposes of apportionment, with legitimate interests in the operation of our political system, and with adequate proxies available. Should their proxies be entitled to vote on their behalf? Here too we seem to find a dilemma: either their interests go unrepresented, or they're represented by proxy even when they'd have no right to represent themselves.

But the dilemma is more apparent than real. Why should people with no underlying right to be heard at the polls acquire that right simply because they are mentally incapacitated or underage? Proxy voting deals with a situation in which people with full political rights can't exercise them for reasons of *competence*. Children and the mentally incapacitated may be barred from voting by law, but their actual inability to defend their interests through voting can't be relieved just by changing the laws. Given the real-world limits on their personal abilities, they need someone else to vote for them if their interests are to be adequately represented. Letting parents vote for children and guardians vote for the mentally incapacitated deals with *that* problem, not with a noncitizen's lack of membership in the political community or a convict's forfeiture of political rights.

193 See 8 U.S.C. § 1401(c) (2018) (denying birthright citizenship to those born abroad to citizen parents who were themselves born abroad and hadn't previously lived in the United States).

If the only reason to exclude felons or noncitizens from voting were that they're likely to be *unwise* voters, then having ballots cast for them by their innocent citizen parents or guardians might seem like a good way to solve the problem. But if there are other reasons why the political system would properly exclude their participation—say, because they never acquired or have forfeited the necessary rights in this political community—then those reasons would justify excluding them from proxy representation as well. Nor do we see any legal concerns here, given that citizenship and felony are already grounds for restricting the franchise: a noncitizen child has no more constitutional claim to a ballot, even one cast by someone else, than a noncitizen adult does. (And letting felons and noncitizens be represented by proxy at the polls, but only if they're *also* mentally incapacitated or under eighteen, might create more Fourteenth Amendment problems than it solves.)

E. Problems of Residence

Sometimes parents and their children live apart. A child might attend boarding school in another state, or she might spend a year with her aunt in Colorado. And some parents and children are homeless, with no fixed place of residence at all. Yet voting depends heavily on residence: people who live on opposite sides of the street might be in different towns, school districts, congressional districts, and so on. In these cases, *who* has a right to cast the child's vote, and *where* do they have a right to cast it?

Start with the case of children. Voting depends on citizenship, and under the Fourteenth Amendment, state citizenship depends on residence.¹⁹⁴ The common law rule is that a minor necessarily shares her parents' domicile (and thus their citizenship).¹⁹⁵ For example, a child at boarding school is a citizen of the state in which her parents now live, even if they've sold the childhood home and moved to another state. The child's legal residence is the parents' residence; that's where she'd be counted for purposes of legislative apportionment,¹⁹⁶ and that's where she's a citizen too. So the parents should cast a proxy vote for her at home, for all the offices and ballot questions appropriate to their district.

194 See U.S. CONST. amend. XIV, § 1 (providing that U.S. citizens are also citizens "of the State wherein they reside").

195 See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989); *Rodriguez Diaz v. Sierra Martinez*, 665 F. Supp. 96, 98 (D.P.R. 1987), *rev'd on other grounds*, 853 F.2d 1027, 1030 (1st Cir. 1988) (declining to apply this common law rule).

196 See Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5531 (Feb. 8, 2018) (to be codified at 15 C.F.R. ch. I).

When a child has been sent to live elsewhere on a permanent basis, rather than just for the school year, the answer should again track the answer for citizenship. Some courts in diversity jurisdiction cases have suggested that a child living with a relative in another state is a citizen of that state and not of the state where her parents live.¹⁹⁷ Others have adhered to the common law rule.¹⁹⁸ We take no view on that question—though we note that courts ruling on the issue sometimes err by emphasizing the policies behind diversity jurisdiction in particular, without realizing how many *other* legal questions hinge on citizenship too.¹⁹⁹ Either way, so long as a child legally shares her parents' domicile and citizenship, her parents should be able to cast a vote for her at home.²⁰⁰

Turning to mental incapacity, the situation is more complex. Unlike with minors, there's no presumption that a mentally incapacitated person and a guardian share domicile. In general, one "adjudged insane or otherwise incompetent" is "presumed to be incapable of forming the intention necessary to change domicile,"²⁰¹ meaning that her "last-acquired domicile" remains in place—either until her capacities are regained or until her legal representatives update her domicile to her present residence.²⁰² While the standard for mental capacity for voting isn't always the same as that for other civil rights, it seems likely that many persons denied the vote for mental incapacity could reside in different jurisdictions from their guardians, especially once one considers local elections as well as state ones.

But when proxies and charges live in different places, the difference between state and local elections may be decisive. When it

197 See ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* (WRIGHT & MILLER) § 3615 & n.5.1 (3d ed. 2025) (citing cases).

198 See *id.*; see also *Dunlap v. Buchanan*, 741 F.2d 165, 168 (8th Cir. 1984) (refusing "to make an exception to the general rule" so long as the child's parents "continued in their parental roles").

199 See, e.g., *Ziady v. Curley*, 396 F.2d 873, 875 (4th Cir. 1968).

200 This includes the case when a child and her parents are homeless. States sometimes allow the use of shelter addresses for registration, see *Step-by-Step Voting Guide for People Experiencing Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Dec. 31, 2021), <https://www.usich.gov/guidance-reports-data/federal-guidance-resources/step-step-voting-guide-people-experiencing> [<https://perma.cc/45ZV-CVF3>], and the federal government provides assistance for public school enrollment of children "who lack a fixed, regular, and adequate nighttime residence," 42 U.S.C. § 11434a(2)(A) (2018).

201 MILLER, *supra* note 197, § 3616.

202 *Id.*; see also *id.* § 3616 n.8 (first citing *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.3d 444 (5th Cir. 2003); and then citing *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 12 F.3d 171 (10th Cir. 1993)); accord *Dakuras v. Edwards*, 312 F.3d 256, 258 (7th Cir. 2002); RESTATEMENT (SECOND) OF CONFLICT OF L. § 23 cmt. f (AM. L. INST. 1988). But see *Long v. Sasser*, 91 F.3d 645, 647 (4th Cir. 1996) (holding domicile to be immutable while individual is without capacity).

comes to municipalities, water districts, or other political subdivisions, the legal boundaries separating local governments can be more porous than state borders are. States can and sometimes do allow for voting across district lines: for example, letting people vote in school board elections for another district if their taxes are being used to support its schools.²⁰³ While separate states are distinct political communities, with borders that are immutable without their own consent,²⁰⁴ towns and counties are mere creatures of the state, with both the location and significance of their borders a matter of shifting state law. So if a state wants to let a guardian in one town vote for her charge in another, it can.

This legal difference also makes political sense. A citizen and resident of a distant state is part of a distinct political community, with no right to tell the locals how they should govern themselves. Nor does the distant citizen likely have much to tell them: someone who lives three states away probably knows even less than the median voter about the downballot candidates for agricultural commissioner. State lines provide both a definition of a political community and a rough-but-evenhanded test of knowledge and commitment, in much the same way that an age of majority provides a rough-but-evenhanded test for mature judgment. So, in general, someone who resides in a faraway state should have no right to vote in this state's local elections, but someone who resides in a different town in the same state might, depending on how the state has chosen to arrange things.

For reasons of both political theory and practicality, then, proxies who live and vote in the same state as their charge ought to be able to cast ballots on the charge's behalf—even when the charge has a different voting address and even when different local offices would appear on the latter's ballot. (If the proxies won't be in the charge's jurisdiction on Election Day, they can always vote absentee, just as other people in that situation do.) In addition to its theoretical simplicity, this approach also has the practical advantage that a state legislature typically can control the franchise in local elections or override local rules, giving it the power to draft voting qualifications as it likes and to permit interdistrict voting as needed. And the majority of circuits uphold such interdistrict voting whenever the state has a rational basis for allowing it, something that's surely present here.²⁰⁵

203 See, e.g., *Duncan v. Coffee County*, 69 F.3d 88, 96–97 (6th Cir. 1995); *supra* notes 136–38 and accompanying text.

204 See U.S. CONST. art. IV, § 3, cl. 1.

205 See *supra* notes 136–38 and accompanying text. With respect to congressional elections, there's a statutory wrinkle. The federal statute on single-member districts requires states to “establish[] by law a number of districts equal to [their] number of Representatives,” and it provides that “Representatives shall be elected only from districts so

By contrast, when a charge's voting address is in another state, of which the proxies *aren't* residents and citizens, those proxies typically shouldn't be able to cast ballots on the charge's behalf. True, the charge's interest might then go unrepresented. But this is a direct result of the proxies' lack of *state* citizenship and residence, just as their lack of *U.S.* citizenship and residence would be a ground for denying a proxy ballot too. As noted above, resident noncitizens can vote in some states' local elections, and federal law purports to let certain citizen nonresidents vote as well (that is, citizens who last resided in a state and have since made a new home abroad).²⁰⁶ But as far as we're aware, no state lets *noncitizen nonresidents* vote in its elections. Rather, the Court's equal protection caselaw has "uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders";²⁰⁷ a state "has unquestioned power to impose reasonable residence restrictions on the availability of the ballot."²⁰⁸ That kind of restriction is both sensible and legally permissible here. To the extent that the government of a state should be chosen by and on behalf of its citizens, if either the proxy or the beneficiary isn't a citizen of that state, then the former shouldn't cast a ballot for the latter there.

F. *Noncustodial Parents*

So far we've assumed that a child lives with both of her parents or neither of them. But what if a child lives primarily with one parent or commutes back and forth between them? What kind of custody, physical or legal, does a proxy voter need? And when two parents or guardians live in different places, where should they vote by proxy?

established, no district to elect more than one Representative." 2 U.S.C. § 2c (2018). If a guardian resides separately from her mentally incapacitated charge, can she cast a proxy ballot in the charge's congressional district? Because the ballot is cast on the charge's behalf and the charge really does live there, the chosen representative plausibly would be "elected . . . from" the "district[] so established," even if the guardian with the right to cast that ballot lives elsewhere. This arrangement is also consistent with the goal of "equal representation for equal numbers of people," as expressed in *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). But if the statute can't be read to permit this, it'd again raise as-applied constitutional issues, as Congress's power over the "Manner" of House elections doesn't extend to defining the franchise. See *supra* notes 167–71 and accompanying text.

206 See 52 U.S.C. §§ 20302(a)(1), 20310(5)(C) (2018). To the extent these statutes claim to impose different qualifications for federal elections than for state legislative elections, their constitutionality is doubtful under Article I, see U.S. CONST. art. I, § 2, cl. 1, as well as under *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013). See *supra* text accompanying notes 167–68.

207 *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (1978).

208 *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

Unlike some supporters of parent voting,²⁰⁹ we think legal custody, rather than physical custody, is the appropriate dividing line. It's true that a parent with "primary residential responsibility" for a child is "more accessible" to that child and "ha[s] a greater shared stake in the child's financial welfare."²¹⁰ But depending on state law, a parent may lack such physical custody but nonetheless retain *legal* custody: that is, the "authority to make significant decisions on a child's behalf, including decisions about education, religious training, and healthcare."²¹¹ Such a parent still bears an extraordinary responsibility for the child and owes extraordinary obligations to the child. To the extent that such a parent has a legal right to participate in decisions on a child's health, safety, or religious upbringing, this parent should also have the right to participate, through casting a fractional ballot, in deciding how the child's political influence should be used.

In other words, a system of parent voting would look to the state's existing family law apparatus to decide which people are parents and what rights they have. States could assign or divide voting rights the same way they assign or divide other parental rights. For example, if absent parents abandon their children but register to vote as proxies anyway, their legal right to do so would depend on whether their parental authority terminated automatically under state law or had to be terminated formally, such as by the judgment of a court.²¹² And because parental rights are fundamental rights under the Constitution, whatever grounds are enough to restrict one's legal custody would also be enough to restrict one's right to vote by proxy.

When one parent has physical custody and the other lives in a separate jurisdiction, the approach would be the same as in the previous section. Only a parent who shares citizenship with the child, residing in the child's state of legal domicile, should have the right to cast a ballot on the child's behalf. So if a noncustodial parent lives in another state, she can't be a proxy; if she lives in another jurisdiction in the same state, she might.²¹³ And if only one parent qualifies as a proxy, that parent would cast a full vote rather than a fractional one.

But when parents live apart, determining a child's legal domicile can also be more complicated. Here the only solution is again to follow preexisting law, which finds some means of choosing one address over

209 See, e.g., Rutherford, *supra* note 6, at 1506.

210 *Id.*

211 *Custody*, BLACK'S LAW DICTIONARY (12th ed. 2024).

212 A state might also notify existing proxies whenever another proxy registers for the same child, enabling challenges and provisional ballots as appropriate.

213 See *supra* text accompanying notes 207–08. The noncustodial parent would have no legal grounds to object, as nonresidence in a state is a perfectly adequate ground for denying the franchise.

another.²¹⁴ For example, even when a child alternates equally between two houses, it might be that the state already recognizes one parent's address as the basis for public school enrollment or other social services. Or if things are truly in equipoise, the state might let each parent cast a fractional ballot in his or her own jurisdiction; as above, this would easily satisfy a rational-basis test for voting across geographic lines.²¹⁵ In any case, both the child's interest in representation and the parent's interest in directing their proxy votes would be served.

G. *Emancipated Minors*

One further wrinkle concerns emancipated minors. Depending on state law, an emancipated minor can be generally independent of his or her parents, with many of the rights and powers ordinarily reserved for adults—to marry, to contract, to sue and be sued, to hold and convey property, and so on.²¹⁶ If the parents were previously casting a ballot on the child's behalf, should they keep doing so after emancipation? Or should emancipated minors have the right to cast their ballots themselves?

Just as we take no view on the proper voting age, we also take no view on whether emancipated minors should have an individual right to vote. On the one hand, it may seem odd to treat a seventeen-year-old as sufficiently responsible to live alone, get married, open a bank account, take out a loan, form a corporation, buy cars and real property, and so on, and yet refuse to let them vote. On the other hand, drawing a firm line at eighteen may be the only way to keep things fair. However a state answers this question, we think it should apply the same answer to parent voting. If emancipated minors are given the right to vote under state law, then they don't need their parents to vote for them. If they don't have the right to vote, but their parents are still general guardians with powers to act on behalf of their children, then those guardians should be able to cast proxy votes too. And if the minors don't have the right to vote, but their emancipation had the state law consequence of terminating all parental rights over them,²¹⁷ then their parents are no longer their general guardians and shouldn't be able to vote in their names. Only if emancipation under

214 Compare *Yarborough v. Yarborough*, 290 U.S. 202, 211 (1933) (using the father's domicile for a child born in wedlock), with *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48–49 (1989) (using the mother's domicile for children born out of wedlock). See generally RESTATEMENT (SECOND) OF CONFLICT OF L. § 22 cmt. d (AM. L. INST. 1971) (addressing the case of separated parents).

215 See *supra* text accompanying notes 136–38 (discussing vote dilution).

216 See, e.g., N.C. GEN. STAT. §§ 7B-3504(3), -3507(1) (2024).

217 See, e.g., § 7B-3507(2) (eliminating parental duties and rights upon emancipation).

state law empowers the minor without *disempowering* the parents would those parents retain the power to cast proxy ballots. In any case, it'd all depend on the details of state law.

CONCLUSION

The arguments we've presented for parent voting are all about process, not outcomes. In our view, the democratic case for representing children by proxy should be based on whether they deserve representation, not on predictions about which party or policy would thereby come out ahead. Judging this proposal by whether it helps or hinders a partisan cause would miss the point. That said, however, it's certainly *natural* to wonder what the consequences of parent voting would be, and we turn to that question here at the close.

But while those consequences might well be large, they're also harder to predict than one might think. Certain policies in which children have a stake, such as the national debt, sound on the Republican side. Others, like climate change, sound on the Democratic side. Some studies suggest that motherhood has "liberalizing effects on issues connected to social welfare"; others find "conservative effects on issues connected to morality."²¹⁸ Even the presumably conservative force of middle age might be countered by other forces presumably pushing in a liberal direction, such as automatic registration of children when they turn eighteen.

As to immediate party effects, the 2022 House elections showed a slight Republican advantage among voters who were parents of children under eighteen,²¹⁹ while the 2024 presidential elections showed a somewhat larger one.²²⁰ Mothers do seem to vote Republican to a greater extent than adult women without children. But parents in general seem to be more *centrist* than childless adults: In 2022's House elections, for example, the Republican advantage was four percentage points smaller among fathers than among childless men, and the Democratic advantage was seven percentage points smaller among mothers than among childless women.²²¹ In 2024's presidential

218 JILL S. GREENLEE, *THE POLITICAL CONSEQUENCES OF MOTHERHOOD* 10 (2014).

219 See *2022 Exit Polls*, CNN (Jan. 10, 2023, 10:02 AM ET), <https://www.cnn.com/election/2022/exit-polls/national-results/house> [<https://perma.cc/6ZKP-GT9Y>] ("Have any children under 18?") (showing a two point increase in the Republican advantage as between nonparents and parents of children under eighteen).

220 See *Election 2024: Exit Polls*, CNN (Dec. 13, 2024, 5:07 PM ET), <https://www.cnn.com/election/2024/exit-polls/national-results/general/president/0> [<https://perma.cc/VY8A-9JV6>] ("Have any children under 18?") (showing a nine point increase in the Republican advantage as between nonparents and parents of children under eighteen).

221 See *2022 Exit Polls*, *supra* note 219 ("Parents") (showing a sixteen point Republican advantage among childless men but a twelve point advantage among fathers, and an eleven

election, by contrast, while mothers still favored the Democratic candidate and fathers the Republican one, fathers shifted Republican relative to 2022, and mothers voted Democrat at the same rate they did in 2022.²²²

Yet the parties aren't static, and the most significant impact of parent voting might be on the parties themselves. As Ross Douthat suggests, parent voting "might change the balance of power *within* each coalition rather than benefiting either party overall," giving more influence to "low-income families" among Democrats and "the minivan-driving middle-aged" among Republicans.²²³ The main force of the change might lie in changing the *mix* of policies those parties support: it might affect primaries more than general elections, and it might alter candidates' calculations long before an election year arrives. (And perhaps the greatest impact would be on local elections, such as for school boards or city councils, which often lack partisan affiliations.)

As to policy, while both parties will surely assemble new coalitions around issues of interest to parents, it's hard to know what those issues will be. If we had to guess, we'd put our money on more child tax credits, more focus on school quality, more emphasis on public safety, more environmental protection, and more concern with long-term financial risk—but we might be proven wrong. The most likely outcome is that parent voting would start a process of parties and politicians trying to figure out what parents want for their children: polling parents intensively, trying out policies they think will resonate, and so on.

Parent voting's effect on politics might also be subtler than support of specific parties or policies. Judging from our own experience, we'd expect parents—in the aggregate, on average, and by comparison to the median voter—to have something of a different relationship than nonparents to tradition, to collective goods, and to the essential fragility of culture and institutions. The tendency in parenthood is to think of society as a big connected web of interdependence, with everyone affecting each other and shaping a common culture that shapes children in turn. Parents may be more prone to see the social contract as Burke did, as a partnership "between those

point Democratic advantage among childless women but a four point advantage among mothers).

222 See *Election 2024: Exit Polls*, *supra* note 220 ("Children under 18?") (showing a ten point Republican advantage among childless men but a twenty-one point advantage among fathers, and the same eleven point Democratic advantage among childless women and four point advantage among mothers).

223 Douthat, *supra* note 3.

who are living, those who are dead, and those who are to be born.”²²⁴ Yet it isn’t obvious what broad habits of thought such as “fragility” and “interdependence” might mean for concrete issues. There *are* differences in sensibility between parents and nonparents, but what the differences mean for party and policy aren’t fully predictable.

The differences in political perspective between parents and nonparents have become more salient as the demographics of Western societies have changed. One of the singular, world-historic developments of our time is the large and growing number of adults without children at home.²²⁵ This development means that the different sensibilities of parents and nonparents are competing in American political life. Each has an equal right to make its influence felt at the polls. But these influences should be felt in proportion to their true numbers in the population, and that means counting children.

However the consequences shake out, parent voting shouldn’t stand or fall by the specific policy changes it brings about. The arguments for adopting it are about process, not outcomes, and certainly not about the particular people who may or may not cast additional ballots as a result. Compared to the present day, which hands children’s voting power to the median voter, a system that’s better at representing children might empower communities with many children in them, including religious or traditional communities like Mormons in Utah or Hasidic Jews in Kiryas Joel, New York. Some people will no doubt oppose our proposal on the ground—whether expressed out loud or *sotto voce*—that they don’t wish those communities to have any more electoral influence than they do. Or they might oppose it on the ground—again, expressed out loud or only *sotto voce*—that they don’t wish to reward people with children, or don’t wish to encourage people (especially not “*those people*”) to have any more children than they do.²²⁶

224 BURKE, *supra* note 52, at 96.

225 See, e.g., JONATHAN V. LAST, WHAT TO EXPECT WHEN NO ONE’S EXPECTING: AMERICA’S COMING DEMOGRAPHIC DISASTER (2013); Emily Schondelmyer, *No Kids in the House: A Historical Look at Adults Living Without Children*, U.S. CENSUS BUREAU (Oct. 8, 2021), https://www.census.gov/newsroom/blogs/random-samplings/2016/12/no_kids_in_the_house.html [<https://perma.cc/4LA6-2KN9>] (reporting that, in a fifty-year period, the percentage of U.S. adults living without children had risen from 52.5% to 71.3%); accord Lyman Stone, *The Rise of Childless America*, INST. FOR FAM. STUD. (June 4, 2020), <https://ifstudies.org/blog/the-rise-of-childless-america> [<https://perma.cc/VVS6-VY4Z>].

226 We find it exceedingly unlikely that the incentive of casting an extra half ballot now and then would lead any significant number of parents to have additional children: the reward is too minuscule, the cost too great, and the efforts of other countries to encourage parenthood with far greater incentives too unsuccessful. Perhaps if parents cast their proxy

We find such arguments both offensive and inapt. The children of these families are fellow citizens, and we don't get to pick and choose our fellow citizens, especially in deciding whether they get to vote. (Otherwise we might find it simpler, as in Brecht's quip, "[t]o dissolve the people / [a]nd elect another."²²⁷) Departures from "one person, one vote" should never be a policy instrument. The reason to represent children by proxy is that, as citizens, they deserve adequate representation; the mentally incapacitated do too. And if they're to be adequately represented at the polls, we should give their parents and guardians the vote.

ballots for family-friendly policies, and those policies actually made it easier to have more children, more people would. Americans today are having fewer children than they tell pollsters that they *want* to have, and bad government policies may be among the reasons why. See Clara E. Piano & Lyman R. Stone, *The Fertility Gap and Economic Freedom*, 43 CONTEMP. ECON. POL'Y (forthcoming 2025) (manuscript at 2). Regardless, we see our arguments as sounding in fairness, not fertility rates.

227 BERTOLT BRECHT, *Die Lösung* [*The Solution*], in POETRY AND PROSE 119, 119 (Reinhold Grimm ed., 2003).