

## Political Parenthood

In February 1970, Madeline Smith, a registered foster parent, took in Eric and Danielle Gandy, who were then four and two years old.<sup>1</sup> After four years in her care, both children regarded Smith as their mother. Danielle had never seen their biological mother. Eric no longer remembered her. Unfortunately, a social worker became worried that Smith's arthritis limited her ability to supervise older children, so the foster agency removed the children to another foster home.

Smith sued New York, alleging the state deprived her of familial liberty without due process by "abruptly and summarily" removing the children from her care. Existing precedent established that parents have a constitutional right to care, custody, and control of their children. Smith argued that after four years of intimate caregiving she had forged a psychological family with Eric and Danielle that deserved similar constitutional protection.<sup>2</sup> The United States Supreme Court disagreed. Although it technically held only that the agency satisfied due process by holding an informal preremoval conference, the opinion's reasoning throws cold water on the idea of constitutional rights for foster families.<sup>3</sup>

The Justices conceded that foster and legal parents fulfill similar familial functions. The "importance of the familial relationship, to the individual and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children." In long-term foster placements, "it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family." However, constitutional parental rights protect an "interest in family privacy [that] has its source . . . not in state law, but in

<sup>1</sup> *Org. of Foster Fams. for Equal. & Reform v. Dumpson*, 418 F. Supp. 277, 280 (S.D.N.Y. 1976).

<sup>2</sup> *Id.* at 281; *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 839 (1977).

<sup>3</sup> *Smith*, 431 U.S. at 847. The Court expressly declines to hold that foster parents have no fundamental liberty interest in their relationship, but the opinion is often mistakenly read as standing for that conclusion. *E.g.*, *Removal of child from foster home*, 3 N.Y. Fam. Ct. Law & Prac. § 15:15. See Douglas Nejaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 312–13 (2020) (noting discrepancy in dicta and in lower court rulings against foster parents).

intrinsic human rights.”<sup>4</sup> In *Smith*’s foster care case, “the State seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements.”<sup>5</sup> The “emotional ties” in foster families “have their origins in an arrangement in which the State has been a partner from the outset,” which “argue[s] against any but the most limited constitutional ‘liberty’ in the foster family.”

Many people find the Court’s underlying idea – that the parent–child relationship precedes the state or law – intuitive.<sup>6</sup> Social and legal norms shape parenthood, of course, but the core of the parent–child relationship seems independent of any social or legal convention. Even many scholars who oppose the Court’s genetic vision of parenthood accept this deeper premise, disagreeing only about the relationship that grounds parenthood. Instead, adults become parents because they are gestational carriers, intentional parents, or functional caregivers. Parental rights and duties can then be justified by applying general moral principles to parent–child relationships that exist independent of political or legal authority.

Despite its intuitive appeal, this perspective is backwards. A hint of the problem appears in the reasoning of *Smith* itself. Parenthood is not only about care; it is also about socialization. Parents direct children’s lives and enforce their directions with coercion. No individual can have a personal moral right to such dominion over another person’s life. Nevertheless, every community gives some adults special authority to raise children. Social norms identify the adult who has this authority over each child and direct others not to interfere with their childrearing. This allocation of authority creates the space in which the child and their caregiver form their intimate relationship.<sup>7</sup> Therefore, the community is a partner from the outset in *all* parental relationships.

Parenthood is a relationship of political authority. Any attempt to ground parental rights or duties directly in some natural or functional relationship between the adult and child is bound to fail. This does not entail, however, that parenthood is a mere creature of positive law that states may reallocate however they wish. It is a common mistake to suppose human rights must all be moral rights that individuals could have outside of law. On the contrary, many human rights are claims to legal structures, because law is sometimes necessary to secure a person’s status as an equal member of the community. This is particularly common in two situations: when one person exercises moral authority over another and when one person is obligated to serve another’s ends. Relations like these create forms of subordination. Parenthood has both features. A parent wields authority over a child, and the parent has a duty to serve the child’s ends. Parenthood’s moral relations threaten the equal status of the child and the parent.

<sup>4</sup> *Smith*, 431 U.S. at 845.

<sup>5</sup> *Id.* at 844.

<sup>6</sup> *Hawkins v. Grese*, 809 S.E.2d 441, 443 (Va. Ct. App. 2018) (relying on *Smith* to deny that state law’s failure to recognize de facto parenthood violated the constitution).

<sup>7</sup> Frances E. Olsen, *The Myth of State Intervention in the Family*, in JUSTICE, POLITICS, AND THE FAMILY (2014).

This chapter argues that a legal structure like parenthood is necessary to reconcile childrearing authority and duties with equal respect for children and caregivers. Drawing on the political philosophy of Immanuel Kant and John Rawls, I argue that liberal-egalitarian justice requires the community to adopt parenthood as a political office. Part I explains the distinction between personal and political morality, setting the stage by noting many similarities between parenthood and paradigmatic political rights and duties. Part II provides the sustained argument that parenthood is political. The community can ensure justice for children only by giving a small number of intimate caregivers broad control over the lives of a small group of children. Every child has a political right to a parent or parents.

The next four chapters apply this political conception of parenthood to parentage law and theory. Those chapters demonstrate that parental rights and duties cannot be inferred from natural or functional kinds like genetics, causation, caregiving, or agreements. Instead, as this chapter argues, parenthood can be justified only by demands of justice. Once we recognize this separation between the justification of parenthood and the rules for assigning it, a political conception of parenthood can realign the insights of existing parentage law into an ordered, pluralistic system. To begin that jurisprudential task, we must understand the sense in which parenthood is political and why liberal-egalitarian justice demands parenthood.

## I PARENTHOOD AS A POLITICAL OFFICE

This part explains what I mean by saying parenthood is “political” rather than “personal.” I hope it can defuse some intuitive resistance to the idea of political parenthood, as well as head off the misunderstanding that I intend to revive a traditional public/private distinction.

As a general matter, I divide the class of moral duties and rights into two broad categories: personal and political.<sup>8</sup> Personal rights and duties are grounded in respect for others *as persons*. Personal morality includes negative and positive duties, such as to not lie or to help others in need. Violations of either can demonstrate a failure to respect others as persons. These personal duties are universal, but our actions and relationships lend them determinacy and directedness. For example,

<sup>8</sup> The moral universe can be divided in other ways. Rawls distinguished natural duties independent of any of our actions from obligations incurred through voluntary acts. JOHN RAWLS, *A THEORY OF JUSTICE* 97–98 (1999). Millum, a parentage theorist, distinguishes natural duties from artificial ones that depend on social conventions. JOSEPH MILLUM, *THE MORAL FOUNDATIONS OF PARENTHOOD* 87 (2018). My personal/political distinction comports with Kant’s distinction between virtue and right, although not in a strictly textual manner. Kantian philosophers use “juridical” to refer to duties of right, but I find readers outside philosophy associate that term with “jurisprudence” in the sense of focused on an area of doctrinal law, like First Amendment jurisprudence. My concern is with political morality as a subset of *moral* rights and duties. Political morality often requires creating positive law, but the moral necessity of law requires an additional argument.

some relationships generate concerns about exploitation, such as between ministers and parishioners or between charitable donors and recipients.<sup>9</sup> Other relationships may identify the people to whom we owe a special duty of benevolent assistance, such as our friends or neighbors.

Political rights and duties, in contrast, are grounded in respect for other people *as equal members of a community*.<sup>10</sup> Examples include a right to distributive justice and political representation. Because collective relations mediate these political rights and duties, they are not owed by any one person to another. For example, a society's economic institutions shape the lives of its members, which will fail to treat them with equal respect unless each member has a claim to a fair share of resources that the institutions generate. Yet no individual has a duty to ensure the justice of the market institutions sustained by our collective activities. Justice is not simply an aggregate of bilateral duties. Sections A and B will explore this example and others, which should help crystallize this distinction between personal and political morality.

This book is an extended argument that parenthood is a political office. Section A begins this process by offering reasons to suspend the widespread intuition that parental rights and duties arise from personal relationships between an adult and a child. The full proof that parenthood is political rather than personal must await the next four chapters, which argue no principles of personal morality derive parental rights or duties from the four basic parentage grounds.

Even an entire book cannot fully defend my assumption that some moral relations are irreducibly political. Nevertheless, Section B illustrates that this premise is plausible by describing three classes of political rights and duties and explaining the features that make them irreducibly political. Along the way, it points out features that each class shares with parenthood. Part II builds off those insights to present a direct argument that parenthood is political.

### A Intuitive Resistance to Political Parenthood

The idea that the contours of family are political rather than natural should be uncontroversial.<sup>11</sup> In feminist scholarship, it is nearly axiomatic. Catherine MacKinnon argues that the social norms and legal rules of family were shaped to oppress women and exploit their sexual, reproductive, caregiving, and domestic

<sup>9</sup> Barbara Herman, *Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality*, 109 J. PHIL. 391 (2012).

<sup>10</sup> I refer to community members, rather than persons or individuals, because political duties are associational duties that arise only in a community. Although "citizens" is the more common term in liberal theory, I have found readers assume that using "citizen" implies political obligations are owed only to fully participant members of a state, as opposed to noncitizen immigrants. I operate with a rough notion of community without prejudging its boundaries, because I believe only legitimate, deliberative institutions can fix the scope of political obligations.

<sup>11</sup> MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 150–51 (2004); Martha C. Nussbaum, *The Future of Feminist Liberalism*, 74 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 47, 199 (2000).

labor.<sup>12</sup> Anita Allen and Martha Fineman argue that Western nations sustain themselves by using a sexualized marital family to coerce women into providing caregiving labor necessary to meet the needs of children and the elderly.<sup>13</sup> The modern family does not reflect a prepolitical arrangement dictated by nature free of legal intervention. It is an inextricable piece of our political and economic structures.

Despite aspersions by its critics, many liberal philosophers also recognize the family as a political institution shaped by social and legal coercion. Rawls was insufficiently attuned to family life,<sup>14</sup> but earlier liberals were more attentive, and subsequent liberals corrected Rawls's omission. Harriet Taylor Mill and John Stuart Mill argued that society uses women to meet caregiving needs by inculcating gender norms in children that constrain women's life prospects.<sup>15</sup> This tradition is carried forward by liberal-egalitarian theorists of the family like Martha Nussbaum and David Archard, among many others.<sup>16</sup> Maxine Eichner articulates what I take as the current liberal-egalitarian consensus.<sup>17</sup> Any just society must ensure care for its dependent members, including children and the elderly. Most societies rely on families to provide dependent care. Accordingly, the state structures labor markets and welfare institutions around some vision of a "normal" family (in a mixed statistical and prescriptive sense).<sup>18</sup> The family is an inextricable part of "the basic structure," so justice demands the community ensure that it organizes family life in ways consistent with the equal status of children, the elderly, and their caregivers.<sup>19</sup>

<sup>12</sup> CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 76–80 (1989).

<sup>13</sup> ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988); MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

<sup>14</sup> See, e.g., FINEMAN, *supra* note 11, at 214–17, 232–37 (arguing Rawls underappreciated how "background conditions" of the social contract consist of an integrated set of workplace expectations, gendered family responsibilities, and privatization of citizen support).

<sup>15</sup> JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1869).

<sup>16</sup> DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 177 (2014).

<sup>17</sup> MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 81 (2010).

<sup>18</sup> *Id.* at 82–84.

<sup>19</sup> In later work, Rawls concedes to Okin that familial institutions are part of the basic structure but still insists that law should not regulate how family members relate to one another. JOHN RAWLS, *Idea of Public Reason Revisited*, in *POLITICAL LIBERALISM*, § 5, 468–73 (expanded ed. 2005). It should regulate entry and exit and prevent abuse and neglect; otherwise, it should allow citizens to shape their family life by comprehensive values and trust families to care for one another based on affection. Rawls's critics rightly point out that he failed to reconcile these positions. Eichner, for instance, argues that Rawls accepts a strong public/private distinction because his commitment to liberal neutrality reinforced his earlier assumption that families can fulfill a prepolitical function without state influence. EICHNER, *supra* note 17, at 24–26. Unlike some critics, I doubt Rawls's mistake has deep ties to the structure of justice as fairness. Representatives in the original position must design the basic structure knowing citizens live their entire lives within it, which means the developmental goods of family must be subject to principles of justice. Rawls is not arguing the family is immune from justice, but that justice requires not directly regulating intimate life to allow intact families to act on nonpolitical values like love. This conclusion is consistent with views, like Fineman's, that protect autonomy for caregivers. Unfortunately, because Rawls had no theory of private law, he could not explain how law

Even liberals who readily admit that marriage and family structures are political may still find it counterintuitive to treat parenthood as inherently political. Parenthood is one of our most intimate relationships. Parental duties have political ramifications, but the duties seem to arise directly from the personal relationship between a parent and child without mediation by the state. A parent would seem to have a duty to love and raise their child on the proverbial deserted island. Parental duties also seem inapt for a political relation. Parents ought to love their children, and this type of partiality seems inappropriate in political relationships.

I accept that procreators and caregivers can incur personal duties to children that do not depend on political norms. Those personal duties, however, fall far short of the full-fledged rights and duties of parenthood. Demonstrating this requires a detailed analysis of the moral principles applicable to each personal relationship between a child and an adult – genetic, causal, caregiving, and agreements. The next four chapters argue that these relationships cannot justify full parental duties or rights. In the remainder of this section, I hope to loosen the “parenthood is personal” intuition by accentuating how anomalous parental rights and duties would be among the class of personal rights and duties. Section B will present three features common to political rights and duties, each of which is shared by parenthood.

Parents claim extraordinarily broad moral authority over their children’s lives. They claim a moral power to create duties for children and a privilege to enforce them with coercion. A parent may choose their teen’s curfew and ground them for coming home late. Parents set rules for homework, chores, activities, and even friendships. Furthermore, most parents believe they have the liberty to use this power without others’ interference. If your daughter is playing at a friend’s house as her curfew approaches, her friend’s parents cannot give her permission to stay late. They lack the power to alter your daughter’s curfew; if they purport to do so, they wrongly interfere with your parenting. The state can modify these parental rights by setting rules for curfew, employment, schooling, or healthcare.<sup>20</sup> Yet, even against the state, parents assert a right to guide children’s daily lives, activities, religion, and educational priorities. Last, children cannot easily exit this relationship of parental power, if at all. If a child leaves home without parental permission, the state will return the “runaway” child. In some states, they can even charge the child with a crime.<sup>21</sup> Older youth can seek emancipation, but financial hardship makes it rarely feasible.

When else may one person exercise such dominion over another’s life? Employment is the only remotely comparable private relation. Employers issue

can prescind from direct enforcement of equality norms inside families and still ensure that familial relations are consistent with equality.

<sup>20</sup> *Hutchins v. D.C.*, 188 F.3d 531, 545 (D.C. Cir. 1999) (parents had no constitutional right to grant children free rein to move about unaccompanied after state-imposed curfew).

<sup>21</sup> Twenty-six states require an officer to return a runaway child to their guardian, which is galling because most children run away from home to escape abuse or threats from a caregiver. Jordan Enciso, *Leaving Home: How Running Away Impacts the Lives of Juveniles and Society as a Whole*, 19 FLA. COASTAL L. REV. 143, 148–49, 158–59 (2018).

directives to employees backed by a threat of termination. Employment, however, is a limited-scope relationship premised on consent and subject to state regulation. When an employer wields authority over significant aspects of an employee's life, such as for domestic employees, their relationship becomes troubling for reasons similar to parenthood. Yet even a domestic employee can end the employer's power by quitting. The closest analogs to parental authority are relations of political authority like citizenship. Legislators have the power to impose new duties on citizens; officers enforce legal duties with coercion; and citizens may lack the legal right or practical ability to exit the polity. Given the breadth of parental authority, it is worth considering whether parenthood is also inherently political.

Parents' moral duties are also extraordinarily demanding. Many countries demand parents meet most of their child's developmental needs until the age of majority. The law may only police neglect, but a parent's responsibility is not merely to ensure their child receives a tolerable life. Parents should ensure their child flourishes. To do so, parents must reorient a large portion of their lives to serve the child's well-being. Few duties impose as extensively on individual liberty. The breadth and stringency of parental duties are rivaled only by state conscription for military or civil service – classic political obligations. The parent's duties to meet their child's needs also have a curious tie to collective obligations. A large share of what a child needs is not a function of anything their parents did. Over the last fifty years, childhood has become more protracted and expensive as children need more education for economic self-sufficiency. The community created this burden of extended childhood, yet much of that burden has fallen upon their parents – parents who did nothing different from adults in previous generations.

To be clear, I am not denying that parent–child relationships involve personal duties grounded in respect for and love of the child as an individual. They do. No relationship is more intimate than parenthood. A parent and their child share their love, lives, and dreams. The intimate parental relationship is replete with moral nuance, most of which I do not discuss in this book. Nevertheless, the uniqueness of parental authority and duties offers a good reason to suspend the intuition that the intimate relationship can justify the duties or authority. Instead, an adult can develop this intimate relationship only because they already have political rights and duties over the child. A political conception of parenthood specifies the range of liberty for families to form these intimate relationships. I defend such a political conception of parenthood in Part II.

### B *Three Classes of Political Relations*

This book cannot fully defend its second, admittedly controversial, assumption that some moral rights and duties are inherently political in the sense that they cannot be reduced to duties that we owe directly to one another as persons. Instead, I hope to motivate the idea that some moral duties are irreducibly political by describing three

types of duties and rights that make necessary reference to collective political relations. Parenthood shares features with all three. The parallels identified in this section are fleshed out in Part II of this chapter and in the next four chapters.

### 1 Parental Duties and Rights Are Demands of Distributive Justice

One class of political rights consists of rights *held by individuals as community members, with correlative duties held by the community as a collective*. Entitlements of distributive justice exemplify this category. Comparing charity and justice can help clarify this class.

Everyone has an affirmative duty of charity to help others in need. We have this duty simply because other people have intrinsic value. We owe charity to everyone, not just members of our community. No one, however, has a claim to our charity. If we had a perfect duty to help anyone in need, then once anyone chooses an end, everyone else would be obligated to assist them to achieve it. Everyone's life would become a mere means to serve others' ends. Any supposed right to charity is inconsistent with equal dignity. That does not mean that we can have no duty of charity. Instead, charity is what Kant calls an "imperfect" duty. We must make it our end to help some people in need sometimes, but we have the discretion to judge how to balance charity against our other duties and our pursuit of other valuable ends.<sup>22</sup>

Distributive justice, in contrast, is a matter of strict rights. Each community member has a claim to a fair share of resources generated by the community's collective efforts. But who holds the correlative duty to ensure they receive their just entitlement? Other individuals cannot hold it. Suppose each American is entitled to a basic income of \$12,000. An impoverished person cannot demand their basic income from any passing pedestrian. Allowing the burden to fall on such an arbitrary basis would fail to treat the pedestrian as an equal. The entire community shares this duty. Yet it is equally silly to think each impoverished American has a claim on every other American for 0.0036 cents, a 334 millionth share of a \$12,000 basic income.

The problem here is not pragmatic, as if pedestrians need to calculate a moderate donation that will reduce the injustice they encounter without undermining their own goals. Treating justice as a personal duty disrespects the obligors. Like a supposed right to charity, it turns each citizen into a means to justice for others. It also disrespects the recipients. One private citizen cannot ensure another's status as an equal, even in principle. If Jeff Bezos paid a basic income to each needy person, his massive act of charity would not create a just society. It would create a relationship of dependence that undermined equal citizenship.

Only a collective commitment to ensure distributive entitlements can satisfy the demands of justice in a way that respects the equality of all community members. No

<sup>22</sup> For a fuller discussion of imperfect duties, see Gregg Strauss, *Why the State Cannot Abolish Marriage: A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1301–02 (2015).



individual is responsible for the social, economic, and political institutions that shape all our lives. Our collective actions sustain these institutions, which is permissible only if we, as a collective, sustain political institutions that protect each member's entitlements as an equal in the community.

In Part II, I will argue that every child has a right to a parent as a matter of distributive justice. Children need intimate caregivers to meet their material and psychological needs, and they need these caregivers to have the legal power to direct their lives. The community can only meet its distributive obligations to children by ensuring each child has a parent.<sup>23</sup> The right to a parent does not rest on the child's needs *as a person*, like the duty of charity. Relying on charities to care for orphans renders them dependent on others' goodwill to meet basic needs, which fails to treat them as equal members of the community. Moreover, children's right to a parent does not correlate with a duty held by some specific person. A child who washes up on our shores in a basket has a right to a parent. The bystander who finds the child should save them, but this bystander's personal duty is limited. A state that forced the bystander to raise the child for eighteen years would treat the conscript as a means to serve the welfare of the child and the state. The community that sustains its basic economic and family structures is responsible for ensuring each child has a parent willing to fulfill this role.<sup>24</sup>

## 2 Parenthood Is a Political Office

The second class of political rights and duties concerns *offices that may be created only by a political community*. Examples include the office of voter, judge, or legislator. An office is a set of powers and duties that can be held by any number of partially fungible occupants, along with rules to identify the person who holds the office.<sup>25</sup> Many offices include the moral authority to alter others' rights and duties. Legislators, for example, claim the authority to set ends for the community as a collective. No one could have a personal claim to authority to set ends for others. Nevertheless, in a community, justice demands offices with precisely this moral authority.

Judicial offices are a paradigmatic example. When two people sincerely disagree about their rights and are unable to compromise, neither can demand the other acquiesce to their judgment. The only way to resolve the conflict while respecting

<sup>23</sup> Katharine K. Baker, *Quacking like a Duck: Functional Parenthood Doctrine and Same-Sex Parent*, 92 CHL.-KENT L. REV. 135, 129 (2017).

<sup>24</sup> HARRY BRIGHOUSE & ADAM SWIFT, FAMILY VALUES: THE ETHICS OF PARENT-CHILD RELATIONSHIPS 82–84 (2016). Brighouse and Swift conclude “adults have a duty to parent children,” but when they explicate the duty, it sounds more political than personal. Even if no adult has a duty to parent the child, the child still has a claim to a parent that is “best understood as the right that adults get together and establish an institutional mechanism for assigning the relevant (perfect) duties to” parent the child. In other words, a child's claim to a parent is a claim against the community to a system of parentage law that will help find the child a parent.

<sup>25</sup> SCOTT J. SHAPIRO, LEGALITY 75–77, 166–67 (2013).

both parties as equals is to appoint a third person to adjudicate the dispute using settled principles. Again, the problem is not simply pragmatic in that we need third parties to reduce conflict among irrational or egoistic actors. In the face of reasonable disagreement, each person has only two options: assert authority to judge for the other person or submit to the other person's judgment. They disrespect the other person or themselves. Moral equality is impossible unless the community creates adjudicative institutions.

The community must also define rules for determining who holds the judicial office. No one is personally entitled to hold this authority by virtue of their personal interests. Nevertheless, many individuals can have an interest in pursuing the office. A judgeship is an esteemed social role. Some people believe there is intrinsic value in fulfilling this function to articulate principles of justice on behalf of the community. Consequently, the office must be open to any citizen who fulfills the relevant criteria determined by the community. Once an individual satisfies all those legal criteria, the individual's interests may justify a personal claim to occupy the office. Clarity about this right to an office is crucial to understanding the relationship between parental authority and the right to be a parent.

Suppose the United States Senate refuses, for no reason, to seat a duly elected senator. This refusal is wrong because it flouts their constitutional duty, defies the will of the people, and violates the rights of the senator-elect. The senator-elect's right to the office differs from more familiar "power-rights." Each person has a right to contract, for instance, because our interest in autonomy justifies a power to change our moral relations with others. The right to a political office is different. The senators' interests do not justify their office or affect the content of their rights and duties. A legitimate state requires a representative body with legislative authority, which justifies senators' powers. The Constitution defines their precise contours. Senators must wield their authority only by making judgments about what serves the country and their constituents. Nevertheless, once a senator-elect meets the specified criteria, they can acquire a right to the office grounded in their own interests. Serving as a senator might be the crowning achievement of a person's life. Denying them this right wrongs them personally, in addition to undermining the institution.<sup>26</sup>

Parenthood is a similar kind of political office.<sup>27</sup> Part II will argue that distributive justice determines the scope of parental rights and duties. Parents have the powers

<sup>26</sup> A liberal political theory must add this nuance to the common assumption that "liberals believe that rights to control the life of another person must be justified" only by appeal to that person's consent or interests, never by "the interests of the person doing the controlling." Anca Gheaus, *The Best Available Parent*, 131 *ETHICS* 431, 435 (2021).

<sup>27</sup> Shapiro argues that parenthood is not an office for two reasons: (1) parental rights decrease over time and (2) parental turnover is not expected, whereas offices have stable rights and anticipate more than one occupant. SHAPIRO, *supra* note 25, at 210. Neither condition, however, is essential to the concept of an office. An office's powers may be contingent on facts that change over time. All offices need some "impersonality," in the sense that different individuals could serve as the officeholder, but offices can vary in the degree of fungibility and expected turnover.

and obligations necessary to ensure the child's fair share of primary goods is translated into a valuable life. The functions of parenthood include meeting the child's generic and relational needs (Part II, Section A) and directing the child's life (Part II, Section B). A parent must provide substitute judgment about what constitutes a valuable childhood and adult life. No individual could have a *personal* right to such authority over another person. Nevertheless, it is a morally necessary function, so every community must define an office of parenthood and set conditions for acquiring the office for a particular child.

What does this mean for the right to be a parent? A biological parent may be interested in raising their progeny, and a custodial caregiver may be interested in continuing their parental project. As I argue in the next four chapters, the community should protect these interests by giving genetic parents, gestational parents, caregivers, and intended parents the right to become legal parents, so long as they (like the senator-elect) meet the legal conditions for the office and fulfill its obligations. Adults' interests can shape the rules for assigning parenthood, but they cannot justify parental authority or duties, and they cannot shape their content. Parenthood is justified and defined by its political function to ensure equal respect for children.

### 3 Parenthood Is Private Authority That Requires Political Specification and Control

The final class of political rights and duties are *held between individual members because they are necessary for equal liberty*. The classic examples are property and contract rights. I have argued elsewhere that marriage falls into this category.<sup>28</sup> Private law seems "personal" insofar as it governs relations between individuals and its primary value is autonomy, but it is political in its justification, source, and content. This section explains these three political aspects, drawing heavily on recent interpretation of Kant's private law theory by Arthur Ripstein and Helga Varden.<sup>29</sup> Some of the Kantian methods for reconciling private law with equal respect become helpful in Part II.C to reconcile parental authority with equal respect.

According to Kant, private rights are necessary to ensure everyone has equal liberty to pursue their ends. The clearest example is property. We live in a shared physical world. A person may pursue their ends only if they have the moral power to acquire rights to exclude others from some objects. I have a liberty to be a potter only if I have the privilege to use clay. I must also have the power to place others under a duty not to use clay that I stockpiled; otherwise, others can use it for their ends the moment I put it down. Self-respect requires me to assume I have this privilege and

<sup>28</sup> Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1746–60 (2016).

<sup>29</sup> ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 91–106 (2010); Helga Varden, *Kant's Non-Voluntarist Conception of Political Obligations: Why Justice Is Impossible in the State of Nature*, 13 KANTIAN REV. 1 (2008).

this power to acquire property. Otherwise, I treat my liberty as subordinate to others' choices. Unfortunately, everyone else should reason similarly from their perspective. When my neighbor wants to build a brick house, how can they accept that my choice to use clay for pottery gives them a duty not to use it? That would mean their liberty to build a house is subject to my choice. None of us can pursue our ends without assuming that we can acquire rights over others concerning objects, but if anyone has such unilateral authority, no one has equal liberty.<sup>30</sup>

Private law offers a way out of this dilemma. The reconciliation proceeds in two steps, beginning with an argument for the moral necessity of legitimate law and moving to arguments for the moral necessity of private law with particular content.

Suppose we had a set of universal rules of property acquisition and ownership. Anyone who acquired property would be exercising the same powers as anyone else. We would have formal equal liberty. But where could we get the rules? If we act on our own judgment about the correct rules, the dilemma of unilateral authority recurs at a higher level of abstraction. Suppose I endorse a Lockean principle that one can acquire property rights by performing labor on unowned resources if as much and as good remains in the commons. I conclude that I have an exclusive right to clay that I dug from nearby because there are other clay sources. My neighbor may reach a different yet equally sincere and reasonable judgment. Maybe the other clay is harder to reach or is inferior for bricks, or maybe they endorse a left-libertarian principle that we each have an equal right to common stock. If I persist in acting on my judgment, I presume that I have authority to judge which principle governs our relations and how it applies to our specific case. My neighbor cannot acquiesce in my conduct without failing to respect themselves as a person of equal moral status entitled to act on their own judgment.<sup>31</sup>

Legitimate property law is the first step to enable equal respect. If a public authority selects a system of rules for everyone in the community and empowers third parties to judge how those rules apply in particular cases, then no member of the community is subject to the unilateral choice of any other. Suppose our community adopted a capture rule. Now when I stockpile clay, I am exercising a public power that was authorized by the community on behalf of us both. We each have a right to demand the community establish such a regime of private law that will enable us to respect one another's equal liberty, as well as duty to establish and support these institutions.<sup>32</sup>

However, legitimate private law is necessary but insufficient. Private law itself threatens equal liberty unless it is subject to three kinds of restrictions to reconcile it with equal respect. First, private law doctrines must be circumscribed to avoid undermining equal liberty in their own domain. Property law, for example, must

<sup>30</sup> Varden, *supra* note 29, at 13; Kyla Ebels-Duggan, *Kant's Political Philosophy: Kant's Political Philosophy*, 7 *PHIL. COMPASS* 896, 898 (2012).

<sup>31</sup> Varden, *supra* note 29, at 14–17.

<sup>32</sup> *Id.* at 17–18, 25; RIPSTEIN, *supra* note 29, at 157.

recognize easements by necessity. If someone could acquire exclusive rights to all land surrounding their neighbor, then property law would give them authority to decide how their neighbors can access that land for their projects. Second, law must prohibit citizens from using private law to perpetuate forms of structural subordination that undermine equal liberty. Restrictive covenants are a legitimate way for private owners to promote community, but the law must prohibit racial covenants that maintain segregation. Last, the law must include public rights that prevent individually innocent claims from aggregating in ways that undermine equal liberty. For example, Christopher Essert argues that universal ownership of land undermines equal liberty without a coexisting right to housing. When individuals or the state owns all land, anyone without a home has no liberty to sleep, cook, or urinate – even to *simply be* anywhere – without another’s permission.<sup>33</sup>

These three limits are not imposed on the pristine private law, distorting its commitment to liberty in favor of public welfare. Private law and its restrictions both arise from the same commitment to equal liberty. Citizens have equal liberty to pursue their own ends only if a legitimate public authority issues and adjudicates private law in ways that comply with these limitations.

Like private law, parenthood is a form of morally necessary private authority fraught with the risk of subordination. Every child is entitled to some private caregiver with authority to direct their life, but this very authority threatens the child’s equal status.<sup>34</sup> Many of the solutions for this tension are akin to those in private law. First, no individual adult can unilaterally claim authority over a child. A public authority must specify parental rights and the grounds for acquiring them, ensuring that parenthood and parentage respect the equal dignity of the child. Second, the community must enforce limits on parental authority so that a parent does not use their legal power to compromise a child’s equal status. Finally, the community must offset the systemic effects of its parenthood regime that contribute to systemic inequality. Differences in parental resources or abilities may affect children’s life prospects, so the community must offset these effects with public caregiving support and public education. The law should also take affirmative steps to counter gendered differences in caregiving that perpetuate gender inequality.

\* \* \*

Parents and children share a deeply intimate relationship, but parenthood’s extraordinary duties and authority are irreducibly political. We have seen that to ensure justice for children (I.B.1), the community must create an office of parenthood (I. B.2) that is defined and limited by law in ways that respect the equal dignity of the

<sup>33</sup> Christopher Essert, *Property and Homelessness*, 44 PHIL. & PUB. AFF. 266 (2016). Similar arguments can justify a right to poverty relief: a state cannot allow property rights to create an economic system in which some people are dependent on others’ charity as the only way to pursue their own lives. RIPSTEIN, *supra* note 29, at 279–81.

<sup>34</sup> Anca Gheaus, *Child-Rearing with Minimal Domination: A Republican Account*, 69 POL. STUD. 748 (2021).

child and parent (I.B.3). Just as no theory of justice dictates a full property regime, it will not dictate all the contours of parenthood. Citizens can reasonably disagree about how best to reconcile children's rights and parents' powers and how to reconcile parenthood with distributive justice. Only public officials exercising legitimate authority can specify a full regime of parenthood. Nevertheless, abstract moral arguments are sufficient to justify the general rights and duties of parenthood. Part II turns to this task.

## II POLITICAL CONCEPTION OF PARENTHOOD

This part argues that parenthood is a political office essential to distributive justice. Each child is entitled to an adequate parent, just as they are entitled to adequate nutrition, shelter, and education. The community has a duty to identify parents, delegate authority to them, and support them as they satisfy the distributive rights of child citizens.

The political justification for parenthood has three parts. Section A argues that each child is entitled to an intimate caregiver, drawing on arguments from feminists like Susan Miller Okin and Martha Fineman and liberals like Harry Brighouse and Adam Swift. However, a right to a caregiver is not yet a right to a parent. A "parent" is an individual with a duty to ensure a child's generic and relational needs are met and the discretionary authority to decide how to do so. Section B argues that each child is entitled to this kind of parental *authority*. It presents an original argument that a just community must empower a small number of intimate caregivers with broad control over the lives of a small group of children. In other words, justice requires parents. Section C considers additional limitations necessary to reconcile parental authority with equal respect for children and parental duties with equal respect for adults.

### A *Distributive Right to Caregiving*

This book assumes, rather than defends, a liberal-egalitarian theory of justice. Nevertheless, it is necessary to recount some foundations of this conception of justice to see how applying it to children generates a right to a parent. This section sketches core principles of justice for children and explains how they justify a right to intimate caregiving.

#### 1 Distributive Justice

Humans cannot avoid living together in communities. We are born, live, and die in a world where our lives are molded by others' choices and the community's social, economic, and political institutions. This mutual influence is not lamentable. Without it, we would not have a distinctly human existence. Yet this influence raises moral problems. How can the community shape our lives yet still treat each of us as our own person with equal dignity?

John Rawls articulated the basic answer: A community treats its members as equals only if its basic institutions enable each person to pursue a life that they judge valuable from their perspective. Equal respect, in this sense, grounds liberal rights and distributive justice.

Liberal rights protect each person's authority to live by their own judgment. A community treats its members as equals only if it allows them to judge for themselves what ends are valuable and how to pursue them, so long as their actions are consistent with equal liberty for everyone else.<sup>35</sup> This principle justifies fundamental liberties like the right to bodily integrity and freedom of expression, as well as legal rights to private property and contract for reasons explained in 1.I.B.3. Notice that liberal rights need not be justified by the overriding value of choice or negative liberty. That is a regrettably common caricature of liberalism. Liberal rights ensure everyone has equal entitlement to live by their judgment about what constitutes a valuable life.

Distributive justice ensures that each community member has a reasonable opportunity to realize those values. Each member is entitled to a fair share of primary goods and capacities needed to pursue a valuable life in their community. Rawls called these "primary" goods because they are valuable regardless of the full conception of the good a citizen accepts. Primary goods include material resources like goods and services, but the category is much more capacious. As Martha Nussbaum and Amartya Sen argue, humans also need capacities to translate goods into valuable lives.<sup>36</sup> Moreover, it is not enough for society to meet members' basic needs. Because the fundamental social, economic, and legal institutions shape everyone's lives, each member is entitled to a fair share of the resources generated by those institutions. A community does not treat members as equals if it sustains basic institutions that systematically advantage some individuals without offsetting benefits to the least well-off.

While a community must ensure distributive justice, it must also respect adults' decisions about how to use their goods to pursue a life they judge valuable. Even if expert bureaucratic directives would on balance result in more preference satisfaction, such paternalistic interventions deny equal respect by presuming to settle our ends for us. The ultimate value of any primary good can be assessed only by unrestricted judgments about the good life.<sup>37</sup> This role for values is evident in well-defined belief systems. Spiritual groups from Hasidic Judaism to New Age counter-cultures care deeply about how their members use apparently generic goods like food or education. What is true for members of these groups is true for everyone, even people who do not identify with a defined ethical or religious tradition.<sup>38</sup> Our

<sup>35</sup> RAWLS, *supra* note 8, at 56.

<sup>36</sup> MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 70 (2001).

<sup>37</sup> JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 57 (2001).

<sup>38</sup> Rawls's emphasis on "comprehensive doctrines" unfortunately intellectualized and reified the idea, leading Rawls to shift his focus from individual judgments to consensus among idealized religious or philosophical systems. John Rawls, *Reply to Habermas*, in POLITICAL LIBERALISM, 387–89 (expanded ed. 2005).



lives reflect our judgments about what is valuable, whether that is religious virtue, family life, creative expression, intellectual achievement, athletic excellence, or aesthetic experience. The state cannot legitimately dictate how we use our primary goods, because the state cannot purport to set ends for us while still regarding us as equals.

It is also essential to note that justice is not opposed to material inequality per se, much less to any given pattern of wealth at a snapshot in time. America's wealth inequality is unjust because of its differential effect on people's ability to pursue lives that they can judge valuable. Property rights – and other liberal rights – create forms of social, economic, and legal power that must be regulated so all members may pursue their ends as equals. Focusing on one snapshot in time is also inappropriate because basic institutions structure our entire lives. As Rawls said, principles of justice govern those who live their “complete life” within an ongoing society.<sup>39</sup> A just community must consider how its institutions shape our lives from birth to death.

## 2 Distributive Justice for Children: Goods and Caregivers

What does a community owe its members who, at this moment, are children? As Martha Fineman emphasizes, all human lives begin and end in periods of dependency where we cannot meet our own needs, and any of us might have been or become subject to disabilities.<sup>40</sup> Equal respect demands the community meet the needs of all its dependent members, including children.<sup>41</sup> A just community must ensure that each child has a fair share of primary goods they need to experience a valuable childhood and to develop into an adult capable of pursuing a life they judge valuable.<sup>42</sup>

Moreover, although human development follows biological paths, childhood dependency is also not a simple natural fact caused exclusively by children's development.<sup>43</sup> Childhood is a status shaped by contingent social norms. Children are molded from birth to participate in their community. Toddlers learn the local language and are inculcated with customs of sociability. Families and

<sup>39</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 18 (2005). See also EICHNER, *supra* note 17, at 52–55.

<sup>40</sup> FINEMAN, *supra* note 11.

<sup>41</sup> Christie Hartley, *Disability and Justice*, 6 PHIL. COMPASS 120 (2011). The point is not that the state should even out the effects of luck because children, elderly persons, or persons with atypical abilities are not responsible for their situation. This kind of “luck egalitarian” arguments begin with an intuition like, “There but for the grace of god goes I.” A better intuition to start with is, “There I have been; there I will be.” In our deliberative perspective as designers of just social institutions, we are all potentially children, elderly, and at risk of not having the abilities valued in our market economy. No one could, consistent with rightful self-respect, design a system in which they may become fully dependent with inadequate means of subsistence.

<sup>42</sup> BRIGHOUSE & SWIFT, *supra* note 24, at 62–65.

<sup>43</sup> Paula S. Fass, *Is There a Story in the History of Childhood?*, in *THE ROUTLEDGE HISTORY OF CHILDHOOD IN THE WESTERN WORLD 1* (Paula S. Fass ed., 2013). See Olsen, *supra* note 7; ARCHARD, *supra* note 16, at 43–45, 48–49.



schools raise children to participate in the community by teaching them its relevant skills, whether that be caregiving, farming, weaving, reading, mathematics, or computing. Youth is the longest for affluent children in post-industrial democracies, where full participation in labor markets requires extensive education. We restrict children's market labor and mandate secondary education. Children live in a world of coerced dependency, which generates a special claim on the community to ensure their current and developmental needs.

What are children's needs? And is parenthood necessary to meet them? Recent philosophical literature divides children's primary goods into two rough categories: generic and relational goods.<sup>44</sup> Any just society must meet both types of needs, but it seems possible to do so without parents in our modern sense.

First, children need generic goods like food, clothing, shelter, play, and education. Such childhood goods are generic in two senses. They are useful regardless of one's conceptions of a good life. They can also be provided in multiple ways.<sup>45</sup> The United States relies primarily on parents to supply children with food and shelter and to ensure young children have adequate opportunities for play and education. Other nations provide more generous public subsidies directly to children. A community can provide food, housing, daycare, or preschooling to children directly without using parents as intermediaries. Historically, parents held primary responsibility for their children's education, but states turned to public schooling as market economies demanded widespread skills that few parents could teach. Just as states unbundled education from parenthood, they could unbundle other generic goods. A community could collectivize cooking and daycare, as in communes or Israeli *kibbutzim*. Collective provision of generic goods has practical drawbacks, but it also enables a community to ensure children receive the goods they deserve.

Second, children need relational goods. Feminists, care theorists, liberal egalitarians, and natural law theorists agree that children are entitled to sustained relationships with affectionate adult caregivers who meet their physical, emotional, and intellectual needs.<sup>46</sup> Children need people to care for them who care about them.<sup>47</sup>

<sup>44</sup> Elizabeth Brake, *Willing Parents: A Voluntarist Account of Parental Role Obligations*, in *PROCREATION AND PARENTHOOD: THE ETHICS OF BEARING AND REARING CHILDREN* 151 (David Archard & David Benatar eds., 2010); S. MATTHEW LIAO, *THE RIGHT TO BE LOVED* (2015); Simon Keller, *Four Theories of Filial Duty*, 56 *PHIL. Q.* 254, 266–68 (2006) (distinguishing “generic” from “special” goods that a parent or a child can receive from no one [or almost no one] else).

<sup>45</sup> Some primary goods may be specific to childhood, such as a greater ability for immersive imaginative play made possible by brain development. Colin Macleod, *Agency, Authority and the Vulnerability of Children*, in *THE NATURE OF CHILDREN'S WELL-BEING: THEORY AND PRACTICE* 53, 60–61 (Alexander Bagattini & Colin Macleod eds., 2015).

<sup>46</sup> EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY* (2d ed. 2019); Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 *CONN. L. REV.* 741, 764–66, 780–82 (2015); Brake, *supra* note 44 at 174; BRIGHOUSE & SWIFT, *supra* note 24, at 71–73, 77, 118; LIAO, *supra* note 44; NANCY E. DOWD, *REDEFINING FATHERHOOD* 157 (2000) (describing children's need for “nurturing”).

<sup>47</sup> This is not my phrase, but I cannot find its source. It is consistent with the above positions.

Psychologists believe that consistent, affectionate, and attuned caregiving aids infant development, which can have enduring effects on social and academic competence.<sup>48</sup> An affectionate and consistent adult presence may help young children learn to regulate their emotions, develop a sense of agency and responsibility, and build confidence.<sup>49</sup> Even older children still need caregivers who can help guide them as they learn to exercise their growing capacities, safeguarding their future welfare against the effects of a child's immature judgment and diminished conative control.<sup>50</sup> The community is obligated to help ensure children receive their primary goods, yet these relational goods can be supplied only by another individual within an ongoing relationship.

Such caregiving relationships are both valuable now and necessary for the child to develop their capacities. In this respect (and others), children have dual interests as citizens. They have an interest in developing their capacities for future experience and judgment, including religious, aesthetic, ethical, and political matters. Children have an interest in developing their agency, as Feinberg famously argued.<sup>51</sup> However, children are not merely incomplete adults. As Anca Gheaus notes, children's different capacities may foster distinctive experiences with intrinsic value, such as imaginative play, flexible learning, penetrating wonder, or engrossing emotions.<sup>52</sup> However we specify the list of primary goods for children, the community must ensure children receive the primary goods essential to their current and future well-being.<sup>53</sup>

But even the relational goods need not be supplied by parents.<sup>54</sup> A child's need for intimate caregiving relationships could be met within different family structures,

<sup>48</sup> K. Lee Raby et al., *The Enduring Predictive Significance of Early Maternal Sensitivity: Social and Academic Competence Through Age 32 Years*, 86 CHILD DEV. 695, 704–05 (2015).

<sup>49</sup> BRIGHOUSE & SWIFT, *supra* note 24, at 72.

<sup>50</sup> *Id.* at 63.

<sup>51</sup> Joel Feinberg, *The Child's Right to an Open Future*, in WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken & Hugh LaFollette eds., 1980).

<sup>52</sup> Fass, *supra* note 43; Macleod, *supra* note 45; Anca Gheaus, *The "Intrinsic Goods of Childhood" and the Just Society*, in THE NATURE OF CHILDREN'S WELL-BEING: THEORY AND PRACTICE 35, 41–42 (Alexander Bagattini & Colin Macleod eds., 2015).

<sup>53</sup> Eichner argues relational goods cannot be added to the list of Rawlsian primary goods. EICHNER, *supra* note 17, at 22–23. However, I see no reason why political liberalism cannot include a more expansive set of caregiving goods, in much the same way that Eichner later argues public reason can justify active support for caregiving. *Id.* at 50. For efforts to incorporate caregiving in a Rawlsian framework, see CHRISTIE HARTLEY & LORI WATSON, *EQUAL CITIZENSHIP AND PUBLIC REASON: A FEMINIST POLITICAL LIBERALISM* (2018); Amy R. Baehr, *Political Constructivism and Justice in Caregiving*, in CARING FOR LIBERALISM: DEPENDENCY AND LIBERAL POLITICAL THEORY 187 (Asha Bhandary & Amy R. Baehr eds., 2020).

<sup>54</sup> SARAH BLAFFER HRDY, *MOTHERS AND OTHERS: THE EVOLUTIONARY ORIGINS OF MUTUAL UNDERSTANDING* (2009). Family law scholars typically argue children's relational interests justify constitutional rights to family integrity. *E.g.*, Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267 (2021). However, the same interests might instead justify facilitating nonparental relationships. Gheaus argues young children have a right to nonparental care because it prevents domination by their parents and limits the risk of harm from imperfect parenting. Gheaus, *supra* note 34 at 755; Anca Gheaus, *Arguments for Nonparental Care for Children*, 37 SOC. THEORY & PRAC. 483, 499–501 (2011).

such as through kinship caregiving within extended families or by members of a communal caregiving group.

Brighouse and Swift contend, to the contrary, that only parental relationships can “reliably” meet children’s “weighty developmental interests.”<sup>55</sup> Every child needs someone who (1) demonstrates love through highly attentive provision of their needs over long periods of time, (2) serves as a central “disciplinary” model from whom the child will learn self-control and moral empathy through identification, and (3) is experienced by the child as exercising discretion based on their own judgment. A child can sustain this level of intimacy and identification only with “very few” adults. Thus, children’s interests justify a right to a parent. Communal groups can meet their children’s developmental needs only by delegating intimacy and discretion to a few adults, effectively recreating a parental relationship.<sup>56</sup>

I am unpersuaded that only parents can adequately meet children’s relational needs. Although they draw on developmental psychology, Swift and Brighouse presuppose a conception of childhood, family, and agency remarkably reminiscent of middle-class, Western European families. Not all families or societies have the resources – or feel the need – to raise children with such highly individualized caregiving. Fortunately, child development does not require it. Children enjoy happy childhoods living in the shared custody of separated parents, sometimes with stepparents. Children thrive in communities that rely on extended families or communal caregiving. Even in Western societies, daycare and preschooling are a form of compensated communal caregiving. Wealthy families may rely on live-in nannies or send older children to boarding schools. Families can meet children’s developmental needs while dividing physical and emotional care. Children have a right to an intimate caregiver, but this is not yet a right to a parent. The community could meet children’s needs adequately without giving one caregiver broad authority over the child’s generic and relational goods.

### B *Distributive Right to Parenthood*

Even if parents are not strictly necessary, parenthood might still be an efficient way to satisfy children’s generic and relational needs. Liberals often justify parenthood instrumentally in this fashion. Section 1 argues that the instrumental arguments are plausible but too speculative and contingent to be the whole story. Section 2.a argues that children have a right to private practical authority. Practical authority is itself a primary good for children, not a mere means to supply generic or relational goods. Section 2.b argues that this practical authority can be consistent with equal respect for the child only if structured like parenthood: bundled authority held by a few caregivers over a small number of children.

<sup>55</sup> BRIGHOUSE & SWIFT, *supra* note 24, at 70–75.

<sup>56</sup> *Id.* at 74–75.

## 1 Instrumental Arguments for Parenthood

The United States Supreme Court argues that the law protects parental authority because parents are most likely to have the knowledge, experience, and desire to do what is best for their child.<sup>57</sup> Similar instrumental theories are defended by law professors like Emily Buss, Elizabeth Scott, and Clare Huntington and philosophers like Brighouse, Swift, and Joseph Millum. Three types of instrumental arguments suggest that giving authority to parents facilitates child welfare.

First, bundling generic and relational goods can be efficient. The adult who lives with a child can meet their generic needs and, in the process, fulfill their relational needs.<sup>58</sup> Someone must feed the child, maintain their home, and read to them. Anyone could perform these tasks in principle, but it seems efficient if the same person who cooks and reads for a child has the authority to decide what to cook and read. Perhaps more importantly, caregiving tasks help form the emotional bonds constitutive of relational goods. Providing generic goods is a way for the adult to demonstrate they care for the child's well-being, which helps build the psychological attachments necessary for child development. A public authority that frequently intervened to monitor day-to-day decisions might undermine this bonding process.<sup>59</sup>

Second, caregivers may judge more accurately what is best for their child. Children need adequate nutrition, sleep, and enrichment, but someone must decide whether each child should eat meat, when they should go to bed, and whether they should spend time on sports or gaming. Scholars and courts argue that parents should make such choices because "[g]ood parents are likely to know their child and her particular situation better than other people."<sup>60</sup> A caregiver develops relationship-specific information about the child's preferences, state of mind, and developmental needs, which they can use to make tailored judgments. In contrast, legislators must use statistics to adopt general rules that necessarily ignore details about each child. Bureaucrats could investigate and make tailored judgments, but this process would be costly and inaccurate, and an official would have less time for each decision than a dedicated parent.

On the other hand, sometimes the state has the comparative epistemic advantage. Officials can marshal scientific expertise to collect and analyze empirical data. Institutions can leverage the epistemic advantages of multimember bodies. The state will likely reach more reliable general conclusions about matters that affect the welfare of all children similarly, such as the benefits of education or vaccination. The approach most likely to facilitate child welfare is a division of authority over children: officials determine what children need in general, while caregivers guide the child's everyday life.

<sup>57</sup> Parham v. J.R., 442 U.S. 584, 602 (1979).

<sup>58</sup> Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1415 (2019).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1416 (citing Emily Buss, among others); MILLUM, *supra* note 8 at 55.

The third instrumental argument is that parents have stronger incentives to promote their child's well-being than other decision-makers.<sup>61</sup> Interest-alignment arguments typically begin with a sociobiological just-so story. Like all animals, humans naturally favor their progeny; hence, a genetic or gestational parent will care more for their child, on average, than a stranger or public official. Social conventions can then reinforce or redirect biological caregiving instincts. As adults fulfill caregiver responsibilities, they develop attachments to the child. These attachments can be built upon biological ties but can also arise from caregiving alone. The law further cultivates and harnesses these attachments by supporting parental authority. Scott and Scott argue that parental rights serve as nonmonetary incentives.<sup>62</sup> Allowing parents to decide how to raise children increases the parents' satisfaction with the role, enhancing their identification with the child and the quality of care. The law should be wary of interventions that might disrupt these attachments. When evolutionary, cultural, and legal incentives align parents' incentives with their children's welfare, the law can reasonably trust parents to do what is best for their children.

These instrumental arguments are a promising start, but instrumental rationality cannot be the entire story. Each of the instrumental arguments has significant weaknesses.

Chapter 3 will criticize sociobiological arguments for interest alignment in detail. In short, genetic incentives are too weak to justify parenthood. Genetic parents have an evolutionary incentive to facilitate the reproductive success of their progeny, but that is not an incentive to do what is best for each child or even what is best for one's children on average. Evolution is more discerning. Furthermore, human evolution favored incentives for collective caregiving by siblings, grandmothers, relatives, and friends, which can supplement or replace parental caregiving.<sup>63</sup> The law has little reason to blindly trust biological parents' evolutionary incentives more than the incentives of other caregivers.

Second, the epistemic argument is implausible for many classes of parents. Its weaknesses are acute as a justification for the initial assignment of parenthood. Few first-time parents are skilled caregivers. Gestational parents have some special knowledge about their newborns but no unique information about what is best for the child going forward.<sup>64</sup> That kind of knowledge develops only over time as the

<sup>61</sup> Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 953–56 (1996). For a critical analysis of the sociological justification, see David J. Herring, *Evolutionary Perspectives on Child Welfare Law*, in *THE EVOLUTION OF VIOLENCE* 53 (Todd K. Shackelford & Randal D. Hansen eds., 2014).

<sup>62</sup> Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 VA. L. REV. 2401 (1995).

<sup>63</sup> HRDY, *supra* note 54.

<sup>64</sup> Jessica Feinberg, *Parent Zero*, 55 U.C. DAVIS L. REV. 2271, 2305–07 (2021) (discussing “gestating parent knows best” theory). It may be conceptually incoherent to ask which birth parent will best facilitate the child's interests, because the choice of caregiver affects what interests the child develops, raising a variant of Parfit's nonidentity problem. See, e.g., I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 437 (2011).

child grows and develops their own character, skills, and interests. A trained nurse would have immediate expertise and develop the same relationship-specific knowledge about this child. Even parents of older children are unlikely to have significant epistemic advantages when making crucial decisions affecting their welfare. As our children age, we are perpetually winging it. Few parents study child development in any detail. Few of us know more than physicians about whether veganism is healthy for children, more than psychologists about how often children should play video games, or more than teachers about what play activities build children's cognitive skills. Any epistemic argument for parenthood presumes that questions like these have correct answers, yet it entrusts these factual propositions to parents.

Last, the efficiency argument for bundling generic and relational goods with parental authority rests on empirical premises that are speculative, culturally contingent, and potentially discriminatory. Whether it is efficient for parents to supply generic goods depends on their costs, including the opportunity costs. Household labor has high opportunity costs, which is why wealthy parents often rely on paid domestic labor. The efficiency argument also leans heavily on the psychological premise that material care builds relational bonds. While it seems likely that bedtime rituals and sick care build relational attachments, the causal connection between cooking and attachment is more attenuated. And cleaning? And *paying* for food or housing? Feminist theory also gives us good reason to be skeptical about intuitions regarding the alleged connections between domestic labor and relational intimacy. Our familial institutions were shaped by social norms about "motherly love" that help sustain the gendered division of caregiving burdens – imposing the full cost of care on women.

Because these instrumental arguments take for granted existing cultural norms, they are curiously conservative for consequentialist arguments. Why not consider means to change family norms? We often have good reasons to violate family privacy norms in order to change parenting practices. Even if banning corporal punishment feels intrusive to some parents, changing child discipline norms might improve child welfare and, in the long run, feel less intrusive to parents once they have assimilated to the new norms. Similarly, state efforts to directly support children may seem intrusive only because we take a specific vision of family for granted: a nuclear family with heavily privatized dependency and extensive parental discretion. The state could nudge social norms toward the separation of care from financial responsibility, household management, and decisional authority. American states could provide direct financial assistance. They could encourage parents to share more authority with experts like teachers or doctors, improving educational or medical decision-making. Communal living might even increase efficiency through the shared provision of meals, housing, and domestic chores. Instrumentalists must consider these reforms and experiments, balancing the marginal benefit to children against the marginal reduction in parental satisfaction. The outcome of any such balance is difficult to predict with certainty.

If parental authority is merely an instrumental means to facilitate child welfare, then our faith in parental authority should be shaken by the bundling, epistemic, and interest-alignment arguments. If not, part of the justification for parenthood must lie elsewhere.

## 2 Children's Right to a Parent

Parenthood is not simply a means to supply children with goods. Each child is entitled to have at least one private person with the legal obligation and authority to guide the child's life on the child's behalf, and the community is obligated to ensure each child has such a parent.<sup>65</sup> Parental authority is necessary for equal respect, despite their apparent conflict. The argument for the right to a parent proceeds in two parts. Subsection a argues that because children lack the capacity to make or act on their own judgment about how to live, a community treats its children as equals only if it appoints a practical authority to direct their lives. This subsection is indebted to Tamar Schapiro, although it translates her Kantian theory of agency into a political conception of childhood that can form the legitimate basis for a liberal legal regime.<sup>66</sup> Subsection b argues that practical authority over children must be structured like parenthood, with broad authority held by a handful of caregivers over a small group of children.

To forestall misunderstanding, I do not offer a full theory of parent-child relationships. My political justification of parenthood has implications for parent-child-state conflicts, and I gesture toward them as necessary, but I do not explore in detail the scope of parental or state authority. Instead, my goal is to explain why and how the state may *ever* empower parents with authority to shape a child's life consistent with the equal dignity of the child.

A PRIVATE PRACTICAL AUTHORITY AS A PRIMARY GOOD FOR CHILDREN. Recall from II.A that liberal rights are necessary to respect each person's authority to guide

<sup>65</sup> This section distinguishes the guidance and caregiving functions for analytical precision, but in practice most decisions that require guidance are also caregiving activities. Accordingly, I hope this analytical division need not replicate the gendered divide between maternal and paternal roles. Thanks to Jennifer Hendricks for alerting me to this apparent implication.

<sup>66</sup> Tamar Schapiro, *What Is a Child?*, 109 *ETHICS* 715 (1999). Schapiro developed a Kantian theory of childhood to reconcile adult authority with respect for children. We must treat other agents as ends in themselves out of respect for their capacity to act on the basis of the universal moral law. However, children lack this ability. Their conduct is often caused by external influences or by internal impulses. Consequently, a child's choices are not attributable to the child as a person in a way deserving of blame or respect. Adults should not blame young children for their wrongful acts because their choices do not emanate from their will; instead, we should redirect their actions and reshape their motives through education or inducements. Similarly, adults are not required to respect children's preferences. Children's choices do not yet reflect value judgments attributable to them as persons. Instead, adults should act paternalistically toward children to help them develop the capacity to form and to act upon their own moral judgments.



their life by their own judgments. A person is entitled to liberal rights so long as they have two capacities: to judge what is valuable and to act on their value judgments. Once someone has these capacities, no one else can purport to dictate what this person must do without presupposing their own moral superiority. A community that does not give determinative weight to its members' judgments about their lives denies their equality.<sup>67</sup>

The community must not treat children's choices as determinative, because children are still developing these two moral capacities.<sup>68</sup> Young children lack the cognitive ability to judge ends or means. A toddler's choices do not reflect value judgments in any meaningful sense. Older children, like preteens, have the cognitive ability to make value judgments but not the conative control to act on them reliably. A just community must not allow children's uninformed or impulsive decisions to definitively shape their lives. Suppose, for instance, a parent was obligated to allow their six-year-old child to choose whether to go hiking or play video games. Or suppose the state had to respect a ten-year-old's choice whether to continue their education. Childhood decisions can determine what goods and capacities a person realizes over the course of their life. An immature child may forgo experiences that are intrinsically valuable or essential to future development. A state that treated children's choices or preferences about such matters as determinative would fail to respect them as equal citizens entitled to a life that they can deem valuable by their own judgment.<sup>69</sup>

Instead, the community must ensure someone exercises practical authority on behalf of each child. This practical authority must make value judgments for the child and direct their life to realize those values. I do not mean to imply that adults should ignore children. One cannot make judgments on a child's behalf without considering their predispositions, experiences, preferences, and beliefs. Even if children do not yet have their own settled values, they are not fungible blank slates. Making judgments from a child's perspective requires listening to the child more, not less. Furthermore, overruling a child's choices may hinder the supposed good to

<sup>67</sup> RAWLS, *supra* note 39, at 29–35, 107–08.

<sup>68</sup> Schapiro, *supra* note 66. Archard identifies three elements comprising “rational autonomy” – rationality, maturity, and independence – although his analysis reveals each category is multifaceted, scalar, and does not draw a categorical divide between adults and children. ARCHARD, *supra* note 16, at 88–91.

<sup>69</sup> This account is similar to instrumentalist justifications for paternalism. Noggle, for example, argues that states need parents to protect the welfare of children and society because children lack stable preferences and demonstrate insufficient concern for their future selves. Robert Noggle, *Special Agents: Children's Autonomy and Parental Authority*, in *THE MORAL AND POLITICAL STATUS OF CHILDREN* 97 (David Archard & Colin Macleod eds., 2002); *See also* NORVIN RICHARDS, *THE ETHICS OF PARENTHOOD* 132 (2010); LAURA MARTHA PURDY, *IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN* (1992) (arguing parents must have authority to direct children's lives so children develop into adults who can lead worthwhile lives). However, as Archard argues, such instrumental arguments presuppose a relatively determinate answer about what traits are best for each child to develop. ARCHARD, *supra* note 16, at 72–79. That is precisely what the liberal state cannot provide. All that a liberal state can, and must, supply are primary goods and capacities necessary for children to develop into adults capable of exercising the two moral powers of citizenship.



be achieved and deny the child opportunities to develop their capacities. A practical authority must consider these current and developmental concerns.<sup>70</sup> Nevertheless, the fundamental point remains. Respect for children as equal members of the community requires appointing someone to exercise substitute judgment for each child, rather than treating children's choices as determinative.

As older children develop judgment and control of their actions, their choices become more attributable to them, which justifies greater responsibility and respect from the community. At what age must a minor's decisions about their life be treated as determinative? When can a child act on their own judgments, such that others must respect the child's decisions on where they worship, what they learn about, how they spend their leisure time, or who should hold political office? Should the state adopt a bright-line age of majority or assess competence with individualized tests?<sup>71</sup>

As I indicated above, these are natural follow-up questions, but I cannot answer them here. Sound answers require a specification of each liberal right and the capacities that it presupposes. Different capacities are needed to participate in religious practices, form contracts, consent to sex, choose an educational path, and vote in elections. Many capacities are scalar without natural thresholds. Human development follows general patterns, but capacities can develop at a different pace in different children. None magically switch on at a birthday. Caregivers for preteens and teenagers constantly face difficult judgments about what to allow their children to decide for themselves. Moreover, the community's family and educational institutions affect whether and how quickly children learn cognitive and volitional skills. Childhood is a political construction superimposed on statistical facts about human development within certain social institutions. Only a legitimate political authority can judge what capacities its members need to acquire full equal membership, including liberal autonomy rights.

For simplicity, I will assume that children do not develop their own judgment and control sufficient for self-determination rights until at least their preteen years.

<sup>70</sup> ARCHARD, *supra* note 16, at 120–22.

<sup>71</sup> Critics use similar questions to argue that capacity-based justifications of parenthood are over- or underinclusive. Some adults score lower on cognitive and volitional tests than some children. Either these adults should be subject to paternalistic intervention or children should be free of them. Samantha Godwin, *Children's Capacities and Paternalism*, 24 J. ETHICS 307 (2020); JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 150–52 (2006); James G. Dwyer, *Deflating Parental Rights*, 40 L. & PHIL. 387 (2021). Archard offers a concise response to objections of arbitrariness: society must draw some lines and good practical reasons exist for age-based categorizations rather than individualized decisions. ARCHARD, *supra* note 16, at 82–85. I agree with Archard's practical arguments but would also reject the liberationists' premise that political morality requires equal treatment of adults and children with the same capacities. This premise ignores the developmental justification of parental authority. Children are subject to parental authority so they can be equal participants over their life course. Once a citizen develops basic capacities for self-governance, no public reasons consistent with equal respect justify further control of their life (short of self-harm). When a citizen never develops the relevant capacities or loses them due to injury or illness, the community must accommodate the adult's existing capacities to facilitate their participation as equal members as much as possible.

I regard this line as conservative; others might push it earlier. During this period of childhood, every community member is entitled to have some adult exercise judgment on their behalf.

The next question is, Who should exercise practical authority over children? Should it be a legislature, judge, community, extended family, parent, teacher, or someone else?

It is tempting to insist that the state must allocate authority over children to whoever will best promote their welfare. Each child is their own person. If someone must exercise authority over a child, the state should choose whoever will best facilitate this child's current and future welfare. Ana Gheaus calls this the "best available caregiver" theory.<sup>72</sup> This approach could be ad hoc or rule-based. Mary Byrn and Jenni Ives argue that genetic parents or intended parents are most likely to be the best caregivers for a child.<sup>73</sup> According to the 2017 Uniform Parentage Act, whenever a child has competing parentage claims, judges should choose whichever adult best promotes the child's interests. Others might argue that parenthood itself can be justified only insofar as it serves children's interests. The United Nations Convention on the Rights of the Child, for example, insists that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration."<sup>74</sup>

This instrumental best-interests approach, whether ad hoc or rule-based, cannot fulfill the function of practical authority for children. The problem is easiest to see in epistemic arguments for parenthood. Some courts argue that parents have rightful authority because they know what is best for their children. How could a parent know whether their infant child will have a better life growing up in a city rather than a suburb? Or with a hypercompetitive drive rather than lighthearted contentment? Many scholars object that the best-interests approach to such questions presupposes an unrealistic amount of information. That is true, but there is a deeper problem that is not merely epistemic.

A person's interests are fixed relative to their values or ends. Because a child does not yet have their own values or ends, there is no answer about which home or character best serves this child's interests. Parents cannot claim superior information about such matters because – in a fundamental sense – there is nothing to know. Until a child follows some path long enough to develop her own values or ends, it is impossible to specify which option best facilitates their well-being.<sup>75</sup> Infants have no

<sup>72</sup> Ana Gheaus, *Children's Vulnerability and Legitimate Authority over Children*, 35 J. APPLIED PHIL. 60 (2018).

<sup>73</sup> Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child*, 62 RUTGERS L. REV. 305, 332–42 (2009).

<sup>74</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 3.1 (1989).

<sup>75</sup> Feinberg identified a similar "paradox": a parent seeks to raise a child to provide a life that is good for the child, yet what is good for the child depends on their propensities and skills, and the parent's decisions about how to raise the child shape their propensities and skills. Feinberg, *supra* note 51, at 124–53, 146–48.

settled relationships, characters, values, or ends that could determine which caregiver will provide a better life. A best-interest-of-the-child principle is nearly incoherent as a method for identifying a specific caregiver for infants, selecting a default category of caregivers, or designing a society's caregiving institutions.

Of course, every community must have a general conception of child welfare to be in a position to design institutions for children. As described above, I favor a childhood version of Rawls's primary goods supplemented by capability theory. Children need to eat healthy food, get vaccinations, experience play, build friendships, and receive education. These primary goods are not specified by reference to any particular conception of a valuable life, but instead by what all citizens need to live a life that they can judge valuable by their own standards. Yet a society that only met children's basic needs would not be just. Each child must translate primary goods into a valuable life. Should a child subsist on chicken nuggets and carrots, or should they experience a variety of foods? How much food frustration should a child endure so that the child develops taste? Such questions can only be answered by reference to intrinsic values relating to health and pleasure. Value judgments like this are a pervasive aspect of childrearing. Someone must raise the child as a complete person with virtues like courage, grace, compassion, and sociability. A child needs an authority to judge what comprehensive values should direct their lives and to help them regulate their conduct so as to realize those values.

This function generates the first limit on who may wield practical authority over children. As Justice Powell wrote, a democracy must refrain from "affirmative sponsorship of particular ethical, religious, or political beliefs," and "[t]hus, it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>76</sup> Powell moved too quickly to parental authority, and his primary concern was religious upbringing, but his general point remains accurate. Raising a child requires selecting among theories of the good life. Public officials cannot legitimately dictate how a child should translate primary goods into a flourishing life. The community can ensure justice for children only by appointing some private person to exercise practical authority over a child's life.

Feinberg purports to have found a way out, arguing the paradox relies on overstatements about the malleability of propensities. Even young children have a certain "rudimentary character consisting of temperamental proclivities and a genetically fixed potential for the acquisition of various talents and skills," and parents can build on these baseline traits to make rough judgments about what is good for the child. If a child dislikes painting or shows little propensity for it, then band camp is better for them than art camp. Unfortunately, Feinberg's "solution" understates the value problem. The conclusion of his example rests on premises about the comparative value of art and music and of perseverance over one's baseline proclivities.

<sup>76</sup> *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (J. Powell, plurality).

B FROM PRACTICAL AUTHORITY TO CAREGIVER AUTHORITY TO PARENTAL AUTHORITY. The argument so far has established the necessity of private practical authority over children, but it does not yet favor parenthood over other arrangements. Authority over children might fall to a family matriarch, a kibbutz, an orphanage director, or a teacher. It might also be divided among domain-specific experts, like caregivers, teachers, and physicians. The justification of parenthood must answer three more questions. Why should one authority make most decisions for a child? Why should one adult or small group hold this authority over only a small group of children? Why should this authority be the same person who fulfills the child's need for intimate caregiving?

**i Practical Authority Requires Bundling** Practical authority over children should remain substantially bundled because of the nature of the decisions made on their behalf. Many everyday decisions involve multiple values, and those values can cross many areas of a child's life. Whoever decides what a child eats must also judge how the child will balance the virtues of health, pleasure, and environmental concern. Whoever decides how a child spends their time must also judge how the child will balance the value of education, athletics, aesthetics, and spirituality.

The integration of values is most evident in traditions where spiritual values pervade everyday life. A new age devotee may believe that respect for life unites their commitment to veganism, yoga, environmentalism, and social justice volunteering. Few modern Americans expect their lives to be univocal to this extent, but our everyday decisions still need to be guided by relatively consistent judgments. When a caregiver tells their eleven-year-old to stop reading at 8:00 pm because the child has a basketball game the next day, this directive reflects the caregiver's judgment about the value of intellectual virtue, athleticism, and long-term health. To guide the child's life, someone needs practical authority to settle a range of value judgments related to a range of decisions.

What is the appropriate level of bundling? Pragmatic concerns place some limits on disaggregation. Even if physicians would make better dietary decisions, assigning this authority to a doctor will create conflicts with a caregiver's meal planning. Many scholars advocate giving associational rights to nonparents, but the time spent in visitation and the influence that nonparents exercise during that time are nontrivial impositions on parents' ability to guide their child's life.<sup>77</sup> Repeat conflicts might create instability in adult-child relationships, and the law has good reason to

<sup>77</sup> Gheaus advocates for nonparental associational rights to break the monopoly of parental authority. Gheaus, *supra* note 34. Other proposals for "nonexclusive parenthood" do not threaten parental exclusivity because they focus on protecting the attachments that children form during periods of nonparental custody when the univocality of parental authority is already compromised. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 944–48 (1984).

reinforce “the meaning of parenthood as an enduring commitment.”<sup>78</sup> However, the justification for bundling is not simply instrumental or expressive.

A community cannot meet its duty to its children if it splits authority between too many domain-specific authorities with limited duties. The boundaries around areas of the child’s life are too porous. Should a teacher or caregiver decide how a child allocates evenings between homework, extracurriculars, church, and relaxation? Must a Native American child remain silent during an anthem celebrating a nation that spans from “sea to shining sea” as a result of land stolen from their ancestors? The community must ensure someone is responsible for judging what serves a child’s well-being as a complete person, not merely isolated judgments about their physical, psychological, intellectual, moral, or spiritual health. All children need someone with the duty to make the substitute value judgments that give relative coherence to their lives.

I do not mean to imply that Western society, much less the United States, has identified a uniquely correct allocation of authority to guide children’s lives. The issue permits a range of reasonable answers. Nevertheless, each child needs someone with broad authority and obligation to judge how the child will use primary goods to flourish as a person.

**ii Practical Authority Requires Modest Exclusivity** Having identified the reasons for bundling authority over many decisions, we can now turn to the reasons for limiting the number of adults who can wield this authority and the number of children subject to their authority. These two numerosity limits bring us closer to the ordinary notion of parentage.

A practical authority can exercise substitute judgment only for *small groups of children at a time*. Each child needs someone to judge on their behalf how they should live. This authority can treat a child as a person with equal dignity whose life matters for the child only if they strive to make substitute value judgments from the child’s perspective as an individual.<sup>79</sup> Someone in charge of a large group of children cannot make judgments for each child as an individual.

The problem is most evident in orphanages. Even if the director is an ideally loving person, they cannot adopt the perspective of any single child to set and pursue this child’s ends for the child’s own sake. Special partiality for one child would violate the director’s duty to the rest. Such conflicts are a common trope in orphan stories. Even in a well-run orphanage, children never feel loved as individuals. A director who falls in love with one child risks betraying the rest. Instead, the director must allocate resources fairly across all the orphans based on impersonal principles. Because of these distributive obligations, orphanages cannot wield

<sup>78</sup> Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. WOMEN’S L.J. 119 (2018), at 133–35.

<sup>79</sup> This does not presuppose a unique correct answer for each child, which would conflict with a premise of my general argument for authority. Instead, the focus here is on the perspective from which the authority must make the judgment. Thanks to Megan Boone for helping me clarify this position.

authority over children's lives in a way that respects each child as an equal person entitled to their own life.<sup>80</sup>

Of course, no caregiver can avoid distributional decisions entirely. There is no bright line between an orphanage with fifty children, a foster home with ten, and a parent with four. Sometimes a parent must make decisions for one sibling that affect the rest. A parent may send their child with a disability to a private tutor, even if this expense limits resources available for the siblings' education. Even a parent with only one child must make distributional decisions, sometimes favoring their own ends over the child's welfare. A parent may choose to relocate for their career, even if the new city has marginally worse schools. Nevertheless, an adult with authority over only a few children can adopt each child's perspective to make most judgments on the child's behalf. As the number of children under their care increases, it becomes more difficult to make decisions from the perspective of one child. Most decisions become distributive ones. When an orphanage is responsible for fifty children, its director will make most decisions for a child only as an abstraction, as one member of a community.

The function of substitute judgment also constrains the number of adults who can share authority over each child.<sup>81</sup> More than two adults can raise a child, but not many more. The possibility of three or more parents is a hot topic in family law. Even advocates of alternative families admit that caregiving groups face practical problems because of the increased likelihood of conflict. Of course, decision procedures exist to alleviate the practical problems. A group could aspire to unanimity and then use settlement mechanisms to resolve disagreements. They might fall back on majority voting or select a default decision-maker. Each procedure has benefits and drawbacks, but these practical concerns are not definitive.<sup>82</sup>

The moral problems might be. Each child deserves someone to guide their life with substitute value judgments. Some group decision procedures fulfill this function poorly, if at all. As List and Petit explored in *Group Agency*, some decision procedures do not satisfy the minimal conditions on rationality and preference

<sup>80</sup> Of course, orphanages have other problems. They have a terrible history of physical abuse and neglect of children's generic needs, perhaps caused by incentives built into institutional structures. Even if orphanages could be reformed to avoid their blatant faults, they might also be incapable of supplying the relational goods of childhood. Brighthouse, Swift, and Brake argue that institutional orphanages are too impersonal to provide the kind of loving care that children need on an individual level.

<sup>81</sup> Other ethicists worry that large parental groups (more than four) may be unable to supply the relational intimacy necessary for child flourishing. Samantha Brennan & Bill Cameron, *How Many Parents Can a Child Have? Philosophical Reflections on the "Three Parent Case,"* 54 *DIALOGUE: CANADIAN PHIL. REV.* 45 (2015).

<sup>82</sup> June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 *CHL.-KENT L. REV.* 9, 46–51 (2017) (discussing arrangements for three or more parents and concluding that courts should typically assign a primary parent). Jacobs argues the law can recognize more than two parents by disaggregating parental rights, but her proposal either runs afoul of the need to bundle authority or applies the title "parent" to secondary relational rights. Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 *J.L. & FAM. STUD.* 309 (2007).

aggregation to qualify as rendering a *judgment*.<sup>83</sup> For example, a majoritarian vote may often represent overlapping conclusions based on inconsistent judgments about what is best for the child. Admittedly, no decision procedure is perfect. Two parents must often compromise, but they can at least strive to deliberate in ways that can represent a shared judgment. Even a sole caregiver will not always make rational decisions – just as individuals do not when trying to direct their own lives. The community need not supply each child with a perfect decision-making process, but it must arrange some authority *capable* of reaching judgments. This precludes allowing a large group of caregivers to share equal decisional authority over a child. Without drawing precise numbers, I would doubt that a group of five adults could be equal parents without falling into default hierarchies.<sup>84</sup>

Each child has a right to substitute judgment, but neither orphanage directors nor collective groups can provide substitute judgment on behalf of each child as an individual. The community should vest authority over each child with one adult or a small group of adults, who should have authority over only a small group of children. These numerosity limits bring us one step closer to modern parenthood, but we are still not all the way there.

**iii Practical Authority over Children Should Fall to Intimate Caregivers** Why should this authority fall to caregivers? One might argue that the ideal practical authority for children would combine a psychologist's knowledge with a judge's wisdom and a parent's love. Competitive salaries might give each child a virtuous authority figure – a Mary Poppins. This expert could adjudicate conflicts among other adult experts in a child's life, such as caregivers, teachers, and physicians. Why not delegate authority over children to paid experts? The reason authority should fall to caregivers combines the fiduciary duty of a practical authority with care theorists' account of children's relational needs.

Whoever wields authority over a child's life has a duty of loyalty to make substitute judgments on the child's behalf. Because the child does not exist for anyone else's benefit, this adult must adopt the child's perspective when making decisions for them. An intimate caregiver is most likely to maintain this perspective. Care theorists argue that each child needs a sustained relationship with one affectionate caregiver.<sup>85</sup> This caregiver already needs authority to decide daily matters, like when the child eats and sleeps. Children need to recognize that this caregiver who

<sup>83</sup> CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* chs. 3–4 (2011).

<sup>84</sup> The problems of decisional complexity created by too many parents cannot be cabined to separated parents sharing custody, which merely highlights the structural problem of distributed legal authority. *Contra* Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399 (2018).

<sup>85</sup> Kittay and Fineman ground their theories in a comprehensive theory of human nature, arguing that children require mothers. KITTAY, *supra* note 46; FINEMAN, *supra* note 13. Although I reject the gendered implications of tying relational goods to motherhood, the fundamental insight remains. *See also* Brake, *supra* note 44.



meets their daily needs also cares for them as a person. Moreover, many of the relevant decisions relate to caregiving tasks for young children, like how much time a child spends at home, in daycare, at playdates, or in church. Caregivers – who already exercise authority over their daily lives, meet their relational needs, and likely care for them as individuals – should also have the authority to direct their lives generally.

One might object that we delegate children's other relational needs to experts. For example, education is also plausibly a relational good. The community must educate each child, but quality education requires long-term relationships with teachers that children trust. The community fulfills its collective duty to educate children by hiring teachers. If paid teachers can meet children's relational needs, why not hire expert caregivers? Treating parental duties to children as identical to contractual obligations in labor markets would create tension with their fiduciary duties. The problem is not with payment *per se*. I do not want to revive the discredited notion that financial motives are incompatible with other-regarding care or activities of intrinsic worth.<sup>86</sup> Money is consistent with care. Ideal teachers care for their students, nurses for their patients, and lawyers for their clients. All occupations blend instrumental and intrinsic motivations, including genuine love. I also support public compensation for parents. Parents fulfill the community's obligations. We compensate others who hold political offices that fulfill our collective duties, such as teachers, police, soldiers, or judges. Nevertheless, there is something to the intuition that parental duties require exceptional loyalty.

Parents wield a type and degree of discretion unique in law, which requires a unique fiduciary duty. Admittedly, other people wield discretion over children. Teachers can judge the best methods to ensure their pupils learn. However, teachers have little discretion over the *ends* of education. Education is a primary good. Someone must judge what kind and degree of education children need to thrive in the community's basic institutions. That requires settling disagreements about the relative importance of physical education, fine arts, liberal arts, or science instruction. No private person may settle such disputes. Parents and teachers should have input, but only public officials with authority to act on behalf of the community may legitimately decide what education children need to become equal members of society.

In contrast, parents often exercise similar authority over a child's life. They do not merely have discretion over means; they have broad discretion over a wide range of the child's ends. To arrange the child's life, a caregiver must decide to what extent a child will pursue athletic, academic, artistic, or gaming excellence. They must decide what health means for the child: balancing physical health against pleasure, and experiences against physical risks. Many of these decisions intersect spiritual

<sup>86</sup> Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 26–27 (1996).



judgments. Teachers may choose means to a state-defined education, but caregivers may choose ends for most domains of a child's life. Caregivers wield authority over the child as a whole person. This authority is qualitatively distinct.

As I argued above, a person can rightfully exercise practical authority over a child only if they exercise substitute judgment on behalf of the child. They must adopt the child's perspective to judge how the child should pursue ends as their own person.<sup>87</sup> Because caregiving tends to foster attachment with the child, caregivers are most likely to develop and sustain concern for the child as their own person. The likelihood that caregivers will form intimate ties offers a good reason, albeit not conclusive, to bundle authority over a child's life with the caregiving role.

The state cannot legally oblige caregivers to share the child's ends. Benevolent, reciprocal love is the core of most comprehensive theories about the value of family and childrearing. However, the state cannot demand or coerce the subjective adoption of ends.<sup>88</sup> This limit on legal authority is one reason public support for parenting is consistent with parents' legal duties. Financial incentives do not prevent one from exercising substitute judgment on another's behalf. It would be difficult to reconcile devotion to another's life with *purely* financial motivations, but human motives are often overdetermined. Monetary incentives need not crowd out other-regarding incentives. Public child support payments should not be set so high as to create this risk. Given parenthood's nonfinancial burdens and opportunity costs, I suspect that only very high salaries could induce mercenary parenting, but that is admittedly an empirical question.

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We have seen that distributive justice requires the community to ensure that some private authority has the responsibility and the authority to judge how each child translates their primary goods into a flourishing life (B.2.b.i). To make substitute judgments on behalf of each child, this practical authority must be one adult or small group of adults responsible for a small number of children (B.2.b.ii). The adults most likely to sustain this duty of loyalty to a child are their intimate caregivers (B.2.b.iii). In other words, distributive justice requires a parent.

<sup>87</sup> DWYER, *supra* note 71, at 150–52. My political theory of parenthood shares the core fiduciary theory intuition that parents enjoy authority to fulfill their duty to the child, and this authority requires them to exercise substitute judgment on the child's behalf. Yet, the source of the duties may differ. Some fiduciary accounts assume parents have a right to authority to fulfill duties that the parent owes directly to the child. I reject this picture of law as enforcing preexisting personal duties. Lionel Smith offers the most extensive recent defense of a fiduciary theory, but his concern is with the structure of the relationship and says little about the source of the duties. Lionel Smith, *Parenthood Is a Fiduciary Relationship*, 70 U. TORONTO L.J. 395 (2020). Scott and Scott defend their fiduciary theory from a welfarist perspective. Scott & Scott, *supra* note 62.

<sup>88</sup> Some scholars argue that a duty to love is incoherent because love is not amenable to will. BRIGHOUSE & SWIFT, *supra* note 24, at 21. I think the problem is moral; coercion designed to force someone to adopt an end denies them equal dignity.

## C Reconciling Parenthood with Equal Dignity for the Child and Adult

Children's right to a parent goes a long way toward reconciling parenthood with equal dignity for children, but the reconciliation is incomplete. Even if the institution of parenthood is generally justified, parental authority and duties contain the seeds of subordination. For reasons similar to those discussed regarding private law in I.B.3, the law must impose internal and external limits on the parental office to ensure that it remains consistent with equal dignity for the child and the parent. Communities have many reasonable ways to specify parenthood, just as they have many reasonable ways to specify property law. Abstract moral theory cannot specify a unique regime of parental rights and duties, but it can yield general limits on parenthood's substantive content. It also imposes limits on the rules for acquiring parenthood. This section sketches some broad implications for parenthood, focusing on elements that mirror constraints on parentage in subsequent chapters.

## 1 Internal Limits on Parental Rights

The first limit is a corollary of the child's right to a parent: the parent must be willing and able to fulfill the parental office adequately. Children have a claim *against* being raised by inadequate parents. Parents' constitutional rights are, as the United States Supreme Court has explained repeatedly, always coupled with their duties.<sup>89</sup> A community may not allow anyone to exercise authority over a child if the person is unwilling or unable to guide the child's life with reasonable judgments.<sup>90</sup> Since the child cannot assert their entitlements, officials must have the authority to ensure that each child has a "fit" parent who supplies their material and relational primary goods.

The appropriate method to ensure parental adequacy is up for debate. In the United States, the official default rule leaves biological parents to raise their children on their own, unless someone reports suspicions of neglect or abuse, in which case social workers initiate investigations and potential removal to a foster family. Some philosophers believe such *inter se* supervision is insufficient to protect children's welfare. Hugh LaFollette famously argued that no one should be allowed to take custody of a child without affirmatively demonstrating their parental abilities.<sup>91</sup> Recent progressive scholarship is highly critical of the American child protection system, arguing that it punishes impoverished families

<sup>89</sup> JEFFREY SHULMAN, *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD* 79–84 (2014).

<sup>90</sup> *In re J.B.S.*, 237 A.3d 131, 144 (D.C. 2020) (a court should not afford "any special weight or deference to an unfit parent's preference in choosing between competing adoption petitioners"). ARCHARD, *supra* note 16, at 178–81.

<sup>91</sup> Hugh LaFollette, *Licensing Parents Revisited*, 27 J. APPLIED PHIL. 327 (2010); Hugh LaFollette, *Licensing Parents*, 9 PHIL. & PUB. AFF. 182 (1980). In 2.III.B.3, I argue that *ex ante* licensing is not necessary to respect children.

by using removal as a substitute for public welfare and relies on methods of reporting and investigation that are systemically racist.<sup>92</sup> Rather than policing and blaming families, it insists the law should promote quality parenting by offering families affirmative support on a systemic basis.<sup>93</sup>

Nevertheless, the community has a duty to ensure parental adequacy, which it can fulfill only if it has authority to define and enforce limits on parental conduct. Rules defining the boundaries of reasonable parenting are akin to the internal doctrines of private law (like easements by necessity) that prevent morally necessary forms of legal authority from undermining their function. The community can determine that some conduct, like corporal punishment, is not justified by any plausible child welfare arguments given available scientific evidence.<sup>94</sup> Other conduct might be motivated, in a sense, by concern for the child but still inconsistent with the parent's fiduciary function. For example, the law may not allow a parent to withhold necessary medical treatments from a child, even if the parent honestly believes it is necessary for salvation.<sup>95</sup> This parent has chosen to foreclose most conceptions of a valuable life for the child in service of a single value. No one can purport to make such a judgment on behalf of the child. The parent cannot assert that their daughter shares these religious values because the child lacks their own values – that is the only reason *anyone* can decide for the child. The parent's purported trade-off treats the child as someone who exists to serve the parent's values rather than as a distinct person with equal dignity entitled to live a full life according to their own values.

Many problematic cases involve conflicts between primary goods and religious values, but the potential conflicts include secular values. For example, a parent must judge whether the benefits of a sport justify some physical risks, but the law must set age limits for dangerous activities like motocross and skydiving. Adults have the right to decide whether a thrill is worth risking their health or their lives, but the state cannot allow parents to make similar judgments about the risk to their child's future. A community that did not limit dangerous activities for children would not ensure that each child has a fair opportunity over the course of their life to pursue their own ends rather than their parent's chosen ends.

For similar reasons, the community must require education. An adult may decide for themselves whether to forgo college for an acting career, because the state must respect their authority to pursue their own life. Parents cannot make similar judgments on behalf of their high school children. In this respect, the US Supreme

<sup>92</sup> DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES – AND HOW ABOLITION CAN BUILD A SAFER WORLD* 66–82 (2022).

<sup>93</sup> EICHNER, *supra* note 17; Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 156–60 (2013).

<sup>94</sup> Cynthia Godsoe, *Redefining Parental Rights: The Case of Corporal Punishment*, 32 CONST. COMMENT. 281, 299–304 (2017).

<sup>95</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015); *Matter of McCauley*, 565 N.E.2d 411, 414 (Mass. 1991).

Court's decision in *Wisconsin v. Yoder* is mistaken.<sup>96</sup> The Court held that Amish parents had a right to deny their children a high school education because the parents believed that only vocational skills were needed to flourish in their traditional farming community. Limiting the children's education reduced the likelihood that they would challenge their parents' Amish values and, if they did, increased the difficulty of transitioning into secular American life. These Amish parents used their children to sustain their agrarian way of life. No individual can have the authority to limit another person's life in this way. Only a political community can legitimately decide what capabilities members need to participate as equals in its social, economic, and political life. Wisconsin's citizens, acting through their legislature, expressed their collective judgment that all children needed a high school education. *Yoder* wrongly reallocated this authority to the Amish parents as private persons.<sup>97</sup>

The Court's famous paean to the Amish was irrelevant. These parents did not represent the Amish community and, regardless, the Amish are not a political unit entitled to political authority over their members. Any political theory must decide which community has legitimate authority to define and protect political equality. Is a child's political status defined by membership in the Amish community or as a citizen of the United States? Similar questions arise concerning Native American children and the Indian Child Welfare Act.<sup>98</sup> I cannot defend a particular theory of the bounds of political community here. Instead, I assume children have political rights as citizens of the United States and their state of residency, not their religious communities. That does not mean the Amish community is a "voluntary association." Members of the Amish community may conclude that their religious obligations bind them without consent. Nevertheless, the Amish community has no authority to coercively control the lives of adults who reach a contrary judgment – or prospectively prevent children from judging these matters for themselves.

One might worry that this liberal objection generalizes. If parents cannot constrain their children's lives in service of religious values, then parents should not use any comprehensive values to guide their children's lives. Michael Clayton, a Rawlsian political liberal, argues that parents may not legitimately "enroll" their children in the parents' comprehensive doctrines, which precludes even encouraging the child to accept their ethical or religious beliefs or participate in their practices.<sup>99</sup> He grounds this conclusion in an argument from Rawls's original position. A representative must design institutions to govern their life as a whole. They would not authorize parents to inculcate a comprehensive value system into a child, knowing that the child might later, as an adult, judge those values to be fundamentally mistaken. Even if they do not fully reject the parent's values and

<sup>96</sup> 406 U.S. 205 (1972).

<sup>97</sup> SHULMAN, *supra* note 89, at 115–17.

<sup>98</sup> Emily Stolzenberg, *Tribes, States, and Sovereigns' Interest in Children*, 102 N.C. L. REV. 1093 (2024).

<sup>99</sup> MATTHEW CLAYTON, *JUSTICE AND LEGITIMACY IN UPBRINGING* ch. 3 (2006).

beliefs, they might still come to “resent the fact that [their] life will always have a particular history marked by [] interests and abilities [that] have been to some extent chosen by [their] parents.”<sup>100</sup> Once we recognize that parenthood is a public office of coercive authority, parents should be subject to the liberal principle of legitimacy and the ideal of public reason. A parent may use comprehensive values only if instrumentally necessary to develop the child’s capacities for a sense of justice and the good.

Clayton’s theory comes close to the “caricature of ideal liberal parents . . . striving to avoid the creation of any particular personality in their children.”<sup>101</sup> The problem, as a theoretical matter, begins because his notion of retrospective regret distorts reasoning from the original position. Behind the veil of ignorance, representatives must not know their own conception of the good, but they must know the psychological and social conditions for realizing the two moral capacities to develop and follow a conception of the good. Everyone’s interests and abilities are shaped by their parents, peers, teachers, and culture in ways they do not choose. No one has a life free of “particular history.” Our life influences increase the difficulty of revising our values, but without some such influences we would never become a person at all.<sup>102</sup> A child cannot develop moral agency by studying values at a safely detached distance, the way a professor studies Greek and Christian theories of virtue. A child develops the capacity to pursue a conception of the good only by pursuing a conception of the good under the guidance of parents, friends, and teachers. And these adults cannot guide the child’s life only by public reasons. The child is unlikely to ever value athleticism or camaraderie if adults can encourage them to play sports only insofar as necessary to cultivate a sense of fair play. Moreover, as Bou-Habib and Olsaretti argue, parents dedicated to ignoring comprehensive values might under-supply intrinsically valuable childhood goods like play or prevent the child from developing intrinsically valuable nonpolitical character traits like humor.<sup>103</sup> A child needs their life to be guided by some adult’s comprehensive values. This guidance will shape the child’s interests and values, but that influence is not a regrettable side effect that a liberal society should seek to minimize. On the contrary, every child has a political right to comprehensive moral guidance.

Viewing their lives as a whole, representatives in the original position should recognize that, as children, they are entitled to a caregiver who will use comprehensive value judgments to provide them with a flourishing childhood and help develop their capacity to form their own conception of the good. A parent does not disrespect their child by encouraging them to participate in the parent’s comprehensive

<sup>100</sup> *Id.* at 99, 105.

<sup>101</sup> ARCHARD, *supra* note 16, at 77.

<sup>102</sup> Robert Noggle, *A Chip off the Old Block: The Ethics of Shaping Children to Be Like Their Parents*, in PROCREATION, PARENTHOOD, AND EDUCATIONAL RIGHTS 94 (Jaime Ahlberg & Michael Cholbi eds., 2017).

<sup>103</sup> Paul Bou-Habib & Serena Olsaretti, *Autonomy and Children’s Well-Being*, in THE NATURE OF CHILDREN’S WELL-BEING 25 (Alexander Bagattini & Colin Macleod eds., 2014).

traditions, whether grounded in religion, philosophy, or pop culture. The law must ensure that every child has an adequate parent who will guide the child's life by their conception of the good, yet always with a recognition that the child is their own person who eventually will come to make their own judgments.<sup>104</sup>

## 2 External Limits to Redress Parenthood's Distributional Effects on Children

The legal limits discussed so far – parental adequacy and state definition and protection of primary goods – reconcile the equality of individual children with the authority of their parents. The law must also reconcile equal citizenship with the systemic consequences of private parental authority. Even when a child has adequate parents, the child may still object if a parentage regime creates or perpetuates distributive injustice. The law regarding parents needs analogs for redistributive taxation and the ban on racial covenants (see I.B.3).

Parenthood has distributional effects. The assignment of parents can alter a child's lifetime well-being.<sup>105</sup> Inequalities in parental education, economic resources, social status, or parenting abilities can affect children's life prospects. The distribution of parents is as much a matter of luck as is the distribution of scarce talents with market value. Accordingly, the community does not treat its members as equals if the parentage lottery determines the child's share of the collective resources. The community must offset distributive inequalities created by parenthood. Current American law falls far short of any plausible liberal-egalitarian ideal. Redressing the parentage lottery requires, I would surmise, universal preschooling and public subsidies for caregivers along the lines suggested by advocates of the supportive state like Fineman or Eichner.<sup>106</sup>

In addition, parenthood can generate additional injustices through unjust legal rules or questionable conduct by social actors. Because parenthood is a role that carries social esteem, the law must ensure its parentage rules do not become a means to create and sustain social hierarchy. The United States long violated this principle by using marriage, legitimacy, and biological parentage to maintain racial apartheid. As recently as twenty years ago, same-sex couples in most states could not become joint parents – and the goal of many opponents of marriage equality was to withhold public validation from same-sex families. I argue in Chapter 6 that equality for

<sup>104</sup> Reasonable disagreement will exist about the line between legitimate parental guidance and education for political autonomy, but that does not mean it is impossible for the community to draw reasonable lines. *Contra* SHULMAN, *supra* note 89, at 145–54.

<sup>105</sup> CLAYTON, *supra* note 99, at 61; BRIGHOUSE & SWIFT, *supra* note 24, at 31.

<sup>106</sup> EICHNER, *supra* note 17, at 61–69, 81–84. The collective duty to ensure each child receives adequate care is sufficient to justify public subsidies for caregivers. Subsidies might also be justified because perpetuating a community across generations is a public good in the economic sense of being nonexcludable and nonrivalrous, such that without subsidies we would have too little procreation and child-rearing. Serena Olsaretti, *Children as Public Goods?*, 41 PHIL. & PUB. AFF. 226 (2013).

lesbian and gay couples requires states to adopt parentage rules that empower intentional parents to establish parenthood before the birth of a child.

Other laws use parentage more subtly to reinforce inequalities around race, class, or disability. Although the US Constitution bans hereditary titles, many institutions maintain hereditary privileges that perpetuate racial and economic subordination, such as legacy admissions to elite universities.<sup>107</sup> Dorothy Roberts has argued that America's *laissez-faire* approach to assisted reproductive technology (ART) allows the fertility industry to profit by reinforcing essentialist notions of race and disability.<sup>108</sup> A liberal-egalitarian state should regulate sources of persistent inequality tied to its parenthood law. Like the ban on racial covenants that I discussed in I.B.3, such regulations are better seen not as public policy intrusions into the family but instead as emerging from the same commitment to equal respect for children that requires parenthood in the first place.

Even if regulations prevent blatant discrimination and distributive injustice, some parental choices that seem neutral or admirable still have distributional effects. A person's lifetime economic success often depends on traits or preferences developed under parental guidance, such as resilience or a love of science. Can a community committed to equal respect allow the parentage lottery to shape our lives in this manner? This question might be developed into a full-fledged objection from either the perspective of the child or the parent.

First, one might argue that it is *unfair to a child* if other kids' parents have greater parenting skills or inculcate traits more likely to facilitate success. It is tempting to say these inequalities are consistent with equal respect for the "disadvantaged" child only if this child received the best parent willing to take on the role.<sup>109</sup> In ethics, this is now known as the "best-available parent" principle. Anca Gheaus argues that any authority over another person must be founded on their consent or justified exclusively by their interests, which entails that children are entitled to the parent most likely to facilitate their interests.<sup>110</sup> Writing in children's law, James Dwyer argues that neglect law gives parents too much protection, often sacrificing the child's welfare to protect the parent's desire to raise them. Generalizing this objection, he argues that any time the state considers adult interests when designing rules for children, it treats children as mere means to serve adults' ends.<sup>111</sup> Consequently, Dwyer rejects any right to be a parent and is skeptical of reforms to neglect or foster law designed primarily to promote adult equality.<sup>112</sup> The mantra for this perspective is that children's law must focus exclusively on children's interests.

<sup>107</sup> MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* (2020).

<sup>108</sup> E.g., Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 SIGNS 783, 789–96 (2009).

<sup>109</sup> Peter Vallentyne, *Rights and Duties of Childbearing*, 11 WM. & MARY BILL RTS. J. 991 (2002).

<sup>110</sup> Gheaus, *supra* note 26, at 435, 444–45.

<sup>111</sup> DWYER, *supra* note 71, at 151.

<sup>112</sup> *Id.* at 192–95; Dwyer, *supra* note 71 at 393.



This perspective rests on an inflated sense of children's entitlements. Although the law often wrongfully disregards children's interests, we should avoid swinging too far in the other direction. Children are *only* equal members of society. Like all citizens, children are entitled only to a fair share of primary goods over the course of their lives. A state cannot justly give children's interests lexical priority.<sup>113</sup> The state must consider adult interests even for laws that affect children's lives. For example, public schools had to consider teachers' welfare when deciding how to reopen during the COVID-19 pandemic. States must look for ways to prevent neglect without blaming indigent parents for their poverty in ways that sustain systemic racism. When designing the basic structure, a community must make trade-offs in ways that treat all citizens as equals.

Each child is entitled to a parent, but they are not entitled to an ideal parent or even the best available parent – notwithstanding the guilt cultivated by modern parenting culture. As with other primary goods, children are entitled to an adequate or good enough parent. A community treats its children with equal respect so long as it ensures parents provide sufficient care and guidance for the child to have a childhood with valuable experiences and develop into an adult who can flourish on their own terms.<sup>114</sup> Standards of “good enough” parenting must be fixed by collective judgments about children's distributive rights as part of a comprehensive scheme of justice that considers the interests of all citizens – including parents.

Law can even protect parental rights for reasons grounded in respect for adults, just as it can with other political offices (1.I.B.2). The law may respect an adult's project to raise their genetic child (2.II.A), a child they gestated (4.III.C), a child they helped create through ART (5.III.D), or a child for whom they have long served as a custodial caregiver (4.III.B). These are parental rights in the sense that these adults have a liberty to raise a child because it is necessary to respect the adults' familial projects. Nevertheless, the liberty right to raise a child does not treat the child as if

<sup>113</sup> Gheaus argues parentage principles cannot consider adult interests because any authority relationship is justified only if the subordinate consents or the relationship serves their interests. Gheaus, *supra* note 26, at 435. By beginning her analysis with individual interests and interpersonal moral relationships, Gheaus slips too easily into a duty to maximize children's interests that paints as disrespectful trade-offs that are inevitable features of distributive justice. See *id.* at 446–49. The mistake becomes evident when Gheaus argues that denying a child the best parent so that an adequate parent can have the opportunity to raise a child is disrespectful in the same way that it is disrespectful to deprive a patient of the best surgeon so that an adequate surgeon can have the opportunity to practice medicine. I accept the situations are morally equivalent but regard the latter as an inevitable result of a just health care system with equal opportunity in employment.

<sup>114</sup> Clayton rejects a similar argument for exclusively “child-centered” theories of parenthood. CLAYTON, *supra* note 99, at 54–66. Brighouse and Swift also conclude children have a right only to “good enough” parents, but the conclusion seems ad hoc given their interest-based theory of children's rights, according to which parents “have just those rights . . . that it is in their children's interests for them to have.” BRIGHOUSE & SWIFT, *supra* note 24, at 94–95, 121. With this picture, it is difficult to avoid Gheaus's inference that a legal system violates children's rights if it allows a merely competent parent to raise a child when a better parent was available – or at least unless the parentage rules are designed on average to identify the best available parent.



they existed for the adult's benefit, insofar as the adult's liberty to parent is conditional on supplying the child's primary goods of adequate care and guidance.<sup>115</sup> The adult's claim is to fulfill the child's right to a parent.

The second distributive objection to parenthood starts instead *from the parent's moral duties*. Brighouse and Swift worry that parenting contributes to intergenerational inequality. Ordinary aspects of good parenting, like reading bedtime stories or sending a child to summer camp, confer comparative advantages on the children who receive them.<sup>116</sup> May a parent confer advantages on their child when they know it contributes to the persistence of inequality? Although Brighouse and Swift worry that parental partiality violates the parent's duty of justice, they ultimately conclude that parents must be allowed to benefit their children insofar as necessary to enable the child's goods crucial to human flourishing. Parents have a right to benefit their children in ways necessary to promote relational goods, such as reading bedtime stories, but no general permission to benefit their children in ways that might disrupt equality, such as by giving them bequests or sending them to expensive private schools.

I believe the parental partiality worry is overstated. A just state must allow all citizens to pursue their own ends. No citizen – adult or child – has a strict duty to sacrifice their well-being to facilitate distributive justice. Securing justice is the responsibility of the community as a collective. It does this by passing general laws that enable private and public rights. As individuals, we have an individual duty to help establish and maintain just institutions, but this duty must be imperfect for the same reasons as the personal duty of charity (1.I.B.1). If it were wrong to engage in any act that increased inequality, no one would have liberty to pursue their own ends. An adult does not violate their duty of justice by taking college classes, even if their new skills give them a competitive advantage. Similarly, a parent does not violate their duty of justice by sending their child to a private school, even if the child receives an educational advantage. On the contrary, parents *must* be partial. A parent's obligation is to adopt *the child's perspective* to judge how the child will flourish now and in the future. Partiality for one's child is no more problematic than partiality for one's own ends.

That does not mean parents may ignore reasons of justice when deciding how to raise their children – any more than each person can ignore reasons of justice in their own life. Parents must consider their child's imperfect duty of justice when deciding how to pursue the child's own ends. This is a difficult judgment to make, whether done for oneself or on behalf of one's child. Whatever one concludes as

<sup>115</sup> Austin argues parents have a fundamental interest in making discretionary judgments about how to fulfill their duty to the child. MICHAEL W. AUSTIN, CONCEPTIONS OF PARENTHOOD: ETHICS AND THE FAMILY 74, 81–83 (2016). A parent's discretion enables them to make “a unique and personal contribution” by guiding how the child will “experience meaning and satisfaction in life, psychological well-being, and relational intimacy,” which is in turn a source of meaning and satisfaction for the parent.

<sup>116</sup> BRIGHOUSE & SWIFT, *supra* note 24, at 31–33, 127–30.

a personal matter, none of this means that the community cannot promote distributive justice by limiting private schools or parental bequests. These are classic problems of distributive justice, not questions about the private obligations of individual parents, and they pose no special challenge to the justice of the institution of parenthood.

### 3 Limits on Parental Duties

In addition to reconciling parenthood with equal respect for children, the community must ensure its regime of parenthood respects parents as well. Parenthood substantially limits a parent's liberty. The threat to adult liberty is apparent if we imagine a state assigning parenthood arbitrarily. Imagine that someone found a baby in a basket washed up on shore, and the community decides that this bystander alone must bear the cost of raising the child. This community uses the bystander to meet its collective duty to the child. Men who contest child support by arguing their sperm was stolen allege a similar unfairness. Equal respect for adults requires a fair basis for assigning parenthood.

The difficulty is not limited to involuntary parenthood. Parental duties themselves can become troubling, even when the adult expressly chooses to be a parent. Parents incur a duty to reorient their lives to serve their children's ends, and such an open-ended duty threatens the parents' equal liberty. Their liberty is now subject to the vagaries of the child's future development and choices. Suppose a teenager crashes their car, resulting in a severe disability. Does the adult's initial choice to become a parent really justify the added burdens created by a state that fails to provide adequate medical and disability support? Furthermore, adults cannot choose the content of their parental duties. The community fixes parental duties to ensure children will become equals within institutions chosen by the community. As mentioned above, parental duties have expanded considerably in the last hundred years.

If the community defines parental duties and imposes them on parents, how can parenthood be reconciled with the status of *the adult* as an equal member of society? The next four chapters will identify principles for acquiring parenthood that help reconcile parental duties with parents' equal status. For example, Chapter 2 argues that imposing parental duties solely based on genetic ties violates equal respect; however, Chapter 3 concludes that the state may impose some financial support obligations on anyone whose voluntary conduct caused a child to exist.

Just parentage principles are necessary but insufficient to reconcile parenthood with parental equality. This section concludes this chapter by identifying ways that the law structures parenthood itself to reduce the tension between parental duties and parental equality.

Children are entitled to parents who act on their behalf, making practical judgments about what will be a valuable life for them. While parental duties involve

burdensome self-sacrifice, we should not overstate parents' fiduciary duties. In particular, we should be wary of the analogy to other legal fiduciary duties. Law often states the fiduciary duty of loyalty in categorical terms. A trust fiduciary, for example, has an "absolute" duty of loyalty to make decisions considering only the beneficiary's interests.<sup>117</sup> Applying such doctrines directly to parents would be a mistake.

Parents cannot, and must not, make decisions with a monomaniacal focus on a child's interests. No child is entitled to that level of care. As a matter of justice, each person's rights must be consistent with equal rights for others. No child has a right to demand that a parent focus *entirely* on the child's ends, irrespective of the parent's ends. Such a parental duty would subordinate the parent to the child. Children have no more right to claim the lives of adults than vice versa. Children have a right to have someone to guide their lives, not a right to a servant. Similarly, the state cannot demand that parents accept self-sacrifice as a condition for raising a child. Parents may consider their own well-being when making decisions that affect their family.

A nuanced description of parental obligations will limit the conflicts between the interests of a parent and their child. The parental function is to make value judgments on the child's behalf, and every reasonable conception of the good includes other-regarding values. A parent should not adopt an unreasonably egoistic theory of value when acting on their child's behalf. They must consider how promoting their child's ends will affect them, siblings, friends, neighbors, and communities.<sup>118</sup> They must forgo pursuing their child's ends to respect others' rights. They may forgo a measure of welfare for their child to advance the welfare of others or society. Such decisions do not treat the child as a mere means to serve others if they reflect a reasonable judgment about the good from the child's perspective.

Internal limits on parental duties can reduce but not eliminate conflicts between parenthood and equal liberty. Parental responsibilities remain a substantive burden. As Alstott argues, society demands adults enter a long-term commitment to give priority to their child's interests.<sup>119</sup> The financial and opportunity costs may relegate parents to a subordinate role in society. Against our background of gender injustice in the workplace and in caregiving norms, this subordination falls mostly on women. A liberal-egalitarian state must offer families public support to protect parents' equal status and take active steps to encourage gender equality in parenting, including revised workplace policies and legal support for coparenting.<sup>120</sup>

<sup>117</sup> RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. b (2007).

<sup>118</sup> The congruence argument (a child flourishes whenever their parents, siblings, neighbors, or community flourish) is generally implausible and capable of being assessed only within a full theory of the good life for children, families, and communities.

<sup>119</sup> ANNE ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 50 (2004); CLAYTON, *supra* note 99, at 61.

<sup>120</sup> DOWD, *supra* note 46, at 220–27. However, I believe Dowd's insistence on gender-specific interventions will reinforce, rather than combat, those norms. *Id.* at 229–31.

## CONCLUSION

Parental responsibilities arise from demands of justice. A community treats its members as equals only if it ensures that each child has a caregiver with the authority to judge how the child should use primary goods to flourish as a child and become a thriving adult. The child's right to a parent is not contingent on what some adults did to create the child or to prepare to raise them. It rests on the child's status as an equal community member, and the public holds the correlative duty to ensure that all children have parents. A legitimate public authority must also define and constrain parental rights and duties in order to ensure these relations remain consistent with equal respect for the child and the adult. In other words, parenthood is a political office.<sup>121</sup>

What distinguishes parenthood from Madeline Smith's relationship with Eric and Danielle Grady is not that this foster family originated in state power. All parental rights and duties are inescapably entwined with political authority. The question, then, is how the parental office is acquired for a specific child. Smith alleged that she acquired parental rights by caring for Eric and Danielle and forming emotional bonds. If caregiving is sufficient, many stepparents and relative caregivers also acquire parental rights. Other citizens may insist that parenthood arises instead from genetics, causation, or intentions. The next four chapters demonstrate that no existing moral theories justify inferring parental rights and duties directly from any of these grounds.

Nevertheless, this failure should not cast doubt on the legitimacy of parental authority. Once we recognize parenthood as a political office, we can abandon the quest to find some natural or social relation between a child and an adult that justifies parental rights and duties. The rights and duties of parents are determined by the child's needs as an equal citizen. The law simply needs principles for acquiring this parental office that ensure equal respect for the child, the parent, and other adults. As I also show in the next four chapters, each of the four classic grounds can still play a specific role in this liberal parentage regime.

<sup>121</sup> Because any liberal-egalitarian political community must identify which family forms are capable of fulfilling the functions necessary to ensure justice for children, I believe Ristroph and Murray are mistaken to adopt a presumption in favor of "disestablishing the family," but I agree with their conclusions that the Supreme Court has allowed states to misuse this authority to squelch reasonable disagreement about family life based on nonpublic, ideological values. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1260–63, 1267–71 (2009).