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No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22

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NO RIGHT TO COUNSEL, NO ACCESS WITHOUT: THE POOR CHILD'S UNCONSTITUTIONAL CATCH-22

*Lisa V. Martin**

Abstract

In the midst of the push for universal access to counsel in civil cases and the increasing proportion of litigants who represent themselves, a critical barrier to access to justice for children has been overlooked. Federal courts have created a catch-22 for child litigants. Children cannot bring claims themselves, so parents must bring the claims on their behalf. Federal courts refuse to allow parents to pursue these claims pro se, stating that parents cannot provide adequate legal representation. Yet, there is no right to counsel in civil cases, and these same courts typically conclude the children's cases do not warrant appointment. As a result, federal courts routinely dismiss children's claims for lack of counsel in the name of protecting children's interests, leaving some of the most vulnerable patrons of the justice system without legal remedies. Thus, by enforcing a "counsel mandate," courts effectively exclude low-income children and their parents from legal relief, contravening children's fundamental constitutional rights to court access, parents' fundamental constitutional rights and responsibilities toward their children, and democratic norms. To cure this constitutionally questionable practice and protect the rights and interests of child litigants, courts should permit children's claims to proceed and liberally exercise their discretion to appoint counsel to represent them.

INTRODUCTION	832
I. THE COUNSEL MANDATE	837
A. <i>Children as Parties to Federal Civil Litigation</i>	838
B. <i>The Counsel Mandate's Legal Justifications</i>	839
1. <i>The Weak Foundation of Meeker v. Kercher</i>	840
2. Traditional Prohibitions Against Nonlawyer Representation	841
a. Common Law Doctrine	841
b. The Judiciary Act and the Right to Self-Representation	845
c. Federal Rule of Civil Procedure 17(c)	849

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3.	Protecting Children	851
4.	Unstated Concerns	853
II.	CONTRAVENING FUNDAMENTAL RIGHTS AND DEMOCRATIC NORMS	854
A.	<i>Children’s Access to Justice</i>	854
1.	Practical Implications	855
a.	The Inaccessibility of Counsel	855
b.	Detrimental Effects on Children’s Claims	858
2.	Constitutional Implications	860
B.	<i>Parents’ Rights and Responsibilities for Children</i>	865
1.	Constitutional Protections for Parental Decision-Making	866
a.	History and Purpose	866
b.	Legal Standard	869
2.	The Scope of Parental Authority Over Children’s Legal Rights	870
3.	Why Deferring to Parents on the Question of Counsel Protects Children’s Interests	872
C.	<i>Democratic Norms and Functions</i>	875
III.	PROTECTING CHILD LITIGANTS IN FEDERAL CIVIL LITIGATION	877
A.	<i>Reconceptualizing Federal Courts’ Role in Protecting Child Litigants</i>	877
B.	<i>A Path Forward</i>	885
	CONCLUSION	887

INTRODUCTION

Judges, judicial commentators, scholars, and social justice advocates have long lamented the inequity of the lack of a legal right to counsel in civil cases.¹ Yet, while the proportion of litigants representing themselves continues to increase² and the push for universal access to counsel in civil

1. For examples of this, see generally George Biram, *The Indigent’s Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967); Earl Johnson, Jr., *50 Years of Gideon, 47 Years Working Toward a “Civil Gideon,”* 47 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 47 (2013); Jonathan Lippman, *Shifting the Landscape on Access to Justice*, 38 CARDOZO L. REV. 1159 (2017).

2. See Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 749–52 (2015) (reviewing recent research); see also Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 657 (2017) (“Today, a majority of parties in [lower] courts have no legal representation in civil matters.”); Dan Gustafson et al., *Pro Se Litigation and the Costs of Access to Justice*, 39 WM. MITCHELL L. REV. 32, 33 (2012) (“Due

cases gains momentum,³ a critical barrier to access to justice for children has been overlooked. Federal courts have created a catch-22 for child litigants.⁴ Children cannot bring claims themselves, so parents must bring the claims on their behalf.⁵ Adult litigants can proceed with their own cases *pro se*,⁶ but federal courts refuse to allow parents to pursue their children's claims without counsel, arguing that parents cannot provide adequate legal representation.⁷ Yet, there is no right to counsel in civil cases, and these same courts typically conclude that children's cases do not warrant appointment.⁸ As a result, federal courts routinely dismiss children's claims for lack of counsel in the name of protecting children's interests, leaving some of the most vulnerable patrons of the justice system without legal remedies.⁹

The case of Eric Duarte and his son illustrates the catch-22 that these conflicting rules create for child litigants and their parents. In 2006, Mr. Duarte filed a civil rights action on behalf of his son, Michael, against the Santa Clara County police department.¹⁰ Mr. Duarte alleged that the police used excessive force against Michael, a child, when officers threatened Michael with a gun during a search of Mr. Duarte's home.¹¹ Mr. Duarte requested that the court exercise its discretion to appoint counsel to assist him, arguing that appointment was justified because of his inability to afford counsel, the complexity of the issues, his limited

to the high cost of legal services in litigation matters, many litigants appear *pro se*.”). These findings are consistent with prior trends. See Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 478–79 (2002).

3. See, e.g., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A, at 2 (2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lscslaid_06A112A.authcheckdam.pdf [<https://perma.cc/767W-W6P4>]; Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087, 1088–90 (2009); Tonya Brito et al., *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 224 (2016); Russell Engler, *The Twin Imperatives of Providing Access to Justice and Establishing a Civil Gideon*, 93 MASS. L. REV. 214, 214 (2010).

4. Although this Article focuses only on child litigants, this catch-22 also applies to adult litigants who lack legal capacity for other reasons, such as disability or illness.

5. See *infra* Section I.A.

6. 28 U.S.C. § 1654 (2012) (“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”).

7. See *infra* Section I.B.

8. See, e.g., *Duarte v. Figueroa*, No. C 05-1049 JF(PR), 2006 WL 708994, at *1 (N.D. Cal. Mar. 21, 2006).

9. See *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 56, 61 (2d Cir. 1990); *Duarte*, 2006 WL 708994, at *1.

10. *Duarte*, 2006 WL 708994, at *1.

11. *Id.*

legal knowledge, and the meritorious nature of the claims.¹² The court declined.¹³ Appointment of counsel was not warranted, the court held, because the claims Mr. Duarte brought on Michael's behalf were "not complex at this stage" and Mr. Duarte had "aptly presented his [own] claims" before the court.¹⁴ Without irony, the court then dismissed Michael's claims for lack of counsel, declaring: "[T]here is no apparent reason why Plaintiff is the only individual that can bring this proceeding on behalf of Michael."¹⁵ The court did not suggest where Mr. Duarte might find an individual who would stand ready to undertake litigation on behalf of and finance attorney's fees to benefit Mr. Duarte's son.

Like adults, children have legal problems. Among other things, children suffer discrimination and injuries from people and products, fail to receive proper educational support, and are wrongfully denied government benefits.¹⁶ Also like adults, children facing legal wrongs sometimes need courts to resolve their disputes. But unlike adults, children cannot independently submit their legal problems to courts. Until they reach the age of majority or become emancipated, minor children generally lack the legal capacity to pursue their own claims for civil legal relief.¹⁷ Instead, an adult, usually a parent or guardian, must initiate civil claims on a child's behalf.¹⁸ During the past few decades, parents who attempt to bring civil claims on behalf of their children in federal courts have faced an additional directive: retain counsel or face dismissal of the case.¹⁹

This practice, which this Article calls the "counsel mandate," presents lower-income child litigants and their parents with an impossible paradox. To cure their incapacity and be recognized as legitimate parties before the court, children must have an adult (usually a parent) advance

12. *Id.* at *2.

13. *Id.*

14. *Id.*

15. *Id.*

16. *See, e.g., Adams ex rel. D.J.W. v. Astrue*, 659 F.3d 1297, 1298 (10th Cir. 2011) (challenging the denial of government benefits); *Elustra v. Mineo*, 595 F.3d 699, 702 (7th Cir. 2010) (alleging false imprisonment, physical injuries stemming from the arrest, and a violation of civil rights); *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 879 (3d Cir. 1991) (asserting claims of "assault and battery, negligence, lack of informed consent, 'wrongful discharge' of confidential information and invasion of privacy"); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 60 (2d Cir. 1990) (contending racial discrimination).

17. *See infra* notes 35–36 and accompanying text.

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

19. *See Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986). *Meeker* was the first case to announce the counsel mandate. The case has been cited by nearly 300 federal court opinions applying the mandate since it was published. *See Federal Cases Citing Meeker*, WESTLAW EDGE, <https://www.westlaw.com> [<https://perma.cc/Q9MD-FWFK>] (search 782 F.2d 153; then follow the "Citing References" link; then select the "Cases" filter link; then click the "Jurisdiction" expander, and check the "Federal" filter in the expander).

their claims.²⁰ But, courts often hold that the involvement of a parent or another adult in the case places the child in a representational relationship with the adult litigant.²¹ This representational relationship triggers the mandate that counsel be retained because pro se litigants generally may represent only their own interests, and not the interests of others.²² Courts have no obligation to appoint counsel in civil matters, and they have shown a general reluctance to do so, even when the court itself mandates that counsel be retained.²³

The counsel mandate is fraught with problems. First and foremost, the counsel mandate contravenes fundamental principles of constitutional law and democratic norms. Although readily imposed by federal courts,²⁴ the mandate emerged with little supporting analysis that has been only marginally further developed. Courts have utterly failed to consider how the mandate intersects with parents' and children's constitutional rights. Moreover, the severe shortage of free and low-cost legal services in the United States means that the counsel mandate requires families to take on the substantial financial cost of attorney fees as a prerequisite to court access.²⁵ For families living in poverty and those of moderate means, the counsel mandate thus imposes an insurmountable financial barrier to civil justice.

This Article is the first to evaluate the constitutional ramifications of the counsel mandate for cases brought by parents on behalf of their children.²⁶ In brief, the counsel mandate violates children's rights under

20. See *Meeker*, 782 F.2d at 154; *infra* Section I.A.

21. See, e.g., *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 400 (4th Cir. 2005); *Cheung*, 906 F.2d at 61; *Pierson v. Allison*, No. 1:08cv208–JMR, 2009 WL 3049220, at *2 (S.D. Miss. Sept. 17, 2009).

22. See, e.g., *Berrios v. N.Y.C. Hous. Auth.*, 564 F.3d 130, 135 (2d Cir. 2009); *Cheung*, 906 F.2d at 61; see also *infra* Section I.B (discussing the counsel mandate and introducing its justifications).

23. See *infra* notes 131–32 and accompanying text.

24. See *infra* notes 42, 54, and accompanying text.

25. See ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES 13 (2018), <http://legalaidresearch.org/wp-content/uploads/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2017-5.pdf> [<https://perma.cc/UZA6-M4S9>]; see also LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 19–21 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [<https://perma.cc/73AJ-LDCR>] (noting that, in 2007, the ratio of free legal aid attorneys to the estimated number of individuals living at “125 percent of poverty or lower” results in only one attorney for 6,415 low-income individuals); *infra* Section II.A.1.a (explaining further the impact of the counsel mandate on child litigants given the inaccessibility of counsel).

26. Other scholars have discussed the counsel mandate as providing doctrinal support for other propositions. See generally, e.g., Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L. REV.* 1571 (1996) (discussing the vulnerability of children and arguing this vulnerability does not justify the courts' “paternalism interpreted at the unreined discretion of judges”). None have critiqued the development or implications of the mandate for child litigants and their parents.

multiple provisions of the Constitution and federal statutes because it excludes indigent children from federal courts and deters parents from filing meritorious claims on their children's behalf.²⁷ The breadth of this constitutional infirmity stems from courts' imposition of the counsel mandate without regard to either the nature of the child's claim,²⁸ or whether the claim will expire during the child's minority.²⁹

The counsel mandate also infringes upon the constitutional rights of parents.³⁰ Supreme Court precedent dictates that parents are presumed to act in their children's best interests, and the government must generally respect parents' choices, even when imperfect.³¹ The counsel mandate turns this deference on its head. By framing parents as would-be "attorneys," "representatives," or "advocates" for child litigants, courts justify the counsel mandate as a matter of courtroom procedure wholly

27. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996) (noting the right to court access encompasses equal protection and due process concerns); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (recognizing court access as a fundamental right); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *NAACP v. Button*, 371 U.S. 415, 429–30 (1963) (identifying expressive components of court access protected by the First Amendment). See generally Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) (identifying court access as a component of the right to petition); Gary S. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970) (characterizing the right of access to the courts as both fundamental and instrumental); Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973) (discussing due process, equal protection, and judicial access for indigents); William L. Dick, Jr., Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627 (1989) (discussing due process, fundamental fairness, and the liberty interests at stake in ensuring court access).

28. See *infra* Section II.A.

29. *Id.*

30. See *infra* Section II.B.

31. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (noting the Court's recognition of parental rights to make certain decisions); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing that parents have a "fundamental liberty interest . . . in the care, custody, and management of their child"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course . . ."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (noting that a host of Supreme Court cases "have consistently acknowledged a 'private realm of family life which the state cannot enter'" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))); *Meyer v. Nebraska*, 262 U.S. 390, 401, 403 (1923) (noting that a state prohibition of the teaching of "modern" languages unconstitutionally infringed on parents' liberty interest in controlling "the education of their own").

within their discretion and ignore its implications for protected parental authority.³² Recognizing parent litigants instead as *parents*—acting to protect the interests of their children through the courts—reframes the decision of whether to retain counsel as a parenting choice.³³

The counsel mandate ignores parents' liberty interests to the detriment of children's legal rights. By excluding their parents—the adults most likely to have the motivation and wherewithal to pursue children's legal interests—from courts, the counsel mandate leaves children without champions and without remedies.

Because it deprives children and parents of their fundamental constitutional rights, the counsel mandate must be subject to strict scrutiny. These rights, of course, are not absolute, but arguments advanced in support of the mandate are insufficient and courts have failed to conduct the searching inquiry of the mandates' aims and success in advancing them that heightened scrutiny requires.

This Article aims to compel courts to engage in that inquiry and, consequently, to open the courthouse doors to children's claims. It proceeds in three parts. Part I traces the development of the counsel mandate. It explores the mandate's primary legal justifications and its practical impact on children. Part II analyzes the contours of children's rights to court access and parents' rights and responsibilities regarding child-rearing. This Part concludes that the counsel mandate is inconsistent with fundamental guarantees of court access and protected parental decision-making as well as democratic norms of fairness and equality. Part III argues that the counsel mandate should be eliminated. Instead, the default rule should permit adult representatives to advance children's claims *pro se*, rather than consigning children's claims to the slow death of dismissal.

I. THE COUNSEL MANDATE

To elucidate the scope and underlying rationale of the counsel mandate, this Section first explores how federal courts³⁴ treat child parties

32. *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 882 (3d Cir. 1991); *see Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990).

33. *See infra* Section II.B.2.

34. State court practices regarding whether parents must retain counsel to bring claims on behalf of their children vary widely by state and by subject matter of the claim. The counsel mandate has been applied by state courts in some civil matters. *See, e.g.*, *Yulin Li ex rel. Lee v. Rizzo*, 801 N.W.2d 351, 353 (Iowa 2011) (holding that “non-attorney parents’ representation of their minor son or daughter constitutes the unauthorized practice of law”). In others, parents have been permitted to represent their children *pro se*, including in juvenile delinquency proceedings and in cases seeking restraining orders against abuse. *See, e.g.*, *Varner v. Holley*, 854 A.2d 520, 524 (Pa. 2004) (vacating conviction of minor respondent for criminal contempt because the minor appeared alone at the hearing; minor was not entitled to counsel but should have been

to civil litigation, generally. This Section next evaluates the legal justifications courts advance in support of the mandate, and, finally, explores the impact of the mandate on child litigants.

A. *Children as Parties to Federal Civil Litigation*

Although children are entitled to many of the same legal rights and protections as adults, they do not have the same ability to seek legal relief. A defining feature of minority status is the lack of legal capacity. Capacity is a party's "satisfaction of a legal qualification, such as legal age or soundness of mind, that determines one's ability to sue or be sued."³⁵ Minors generally lack the capacity to take civil legal action independently; instead, they typically must advance legal claims through an adult representative.³⁶ As incapacity is a curable defect, capacity doctrine presumes that cases involving child litigants can proceed and establishes a basic framework for protecting minor litigants' interests.³⁷

Federal Rule of Civil Procedure 17(c) governs the treatment of parties who lack legal capacity, including minors and incompetent persons, in federal courts.³⁸ The Rule authorizes general guardians, committees, and

accompanied by his parent or guardian); *Huff v. K.P.*, 302 N.W.2d 779, 783 (N.D. 1981) (finding that father of 11-year-old may waive child's right to counsel and appear for her "albeit rather ineffectively"). Complicating this analysis are statutes that explicitly confer standing on parents to bring claims on behalf of their children, and varying practices as to whether parents are permitted to proceed pro se in such cases. *Compare* *Goodwin v. Hobza*, 762 N.W.2d 623, 627 (Neb. Ct. App. 2009) (noting father was statutorily authorized to bring tort claim on behalf of child but not permitted to do so pro se), *with* *Anderson v. McGuffey ex rel. McGuffey*, 746 So.2d 1257, 1258 (Fl. App. 2001) (overturning restraining order obtained by father pro se on behalf of daughter because of failure to meet legal standard for injunction). *See generally* *Lisa V. Martin, Restraining Forced Marriage*, 18 NEV. L. J. 919, 964–65, 1000 (2018) (summarizing state laws designating the adults who qualify to seek restraining orders on behalf of minors); *Lisa V. Martin, What's Love Got to Do with It: Securing Access to Justice for Teens*, 61 CATH. U. L. REV. 457, 475–76, 484–85 (2012) (same). As a result of these myriad factors, this article evaluates the mandate only in the context of federal litigation. Nonetheless, the application of the mandate in state courts implicates equivalent concerns to those that this Article identifies.

35. *Capacity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

36. *See* 2 THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 11:13 (2018) (discussing the general rule that unemancipated minors generally lack the capacity to sue); 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 17.21[3][a] & n.16 (3d ed. 2018); *see also* Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, 27 PACE L. REV. 869, 878–79 (2007) (providing a historical overview of children's legal rights).

37. *See* *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1183–84 (S.D. Fla. 2000).

38. FED. R. CIV. P. 17(c). Interestingly, the Supreme Court has never interpreted or applied Rule 17(c). *Gaddis v. United States*, 381 F.3d 444, 452 (5th Cir. 2004). A number of states have adopted the rule verbatim. *See* Sara Jeruss, *Empty Promises? How State Procedural Rules Block LGBT Minors from Vindicating Their Substantive Rights*, 43 U.S.F. L. REV. 853, 872–73, 910–33 tbl.2 (2009) (detailing the laws and court rules addressing minors' legal capacity in the fifty states and noting that nearly all states have incorporated Rule 17(c) of the Federal Rules of Civil

conservators to sue and defend on behalf of children,³⁹ and, where children lack appointed representatives, the Rule empowers courts to appoint other adults to represent children as next friends or guardians ad litem.⁴⁰ These adult representatives stand in the shoes of minor parties and advance the child's interests in the litigation. Thus, the participation of a qualifying adult on behalf of a child in legal proceedings cures the child's incapacity and permits the case to proceed.

Although necessary to satisfy capacity doctrine, federal courts have concluded that the participation of an adult representative (usually a parent) in a child's case triggers an additional procedural hurdle that must be overcome before the case can proceed: such parents (or other adults) must retain counsel to represent the child or face dismissal of the case.⁴¹

B. *The Counsel Mandate's Legal Justifications*

Federal courts faced with pro se parents bringing civil claims on behalf of their minor children have presented a largely unified response, directing such parents to retain counsel or face dismissal of the case.⁴² Courts have applied the counsel mandate to parent-child claims across a wide spectrum of cases, including cases seeking redress under 42 U.S.C. § 1983 for civil rights violations by local government officials, cases asserting disability rights (under the Individuals with Disabilities Education Act (IDEA)⁴³ and the Americans with Disabilities Act of 1990 (ADA)),⁴⁴ and cases seeking government benefits, debt collection, products liability, bankruptcy, and tort remedies.⁴⁵

Procedure into their statutes or have a similar rule requiring that a guardian or next friend appear on behalf of minors).

39. FED. R. CIV. P. 17(c)(1).

40. FED. R. CIV. P. 17(c)(2). Because such adults make important decisions on behalf of the child in a case, their interests must not conflict with the child's. *See* M.S. v. Wermers, 557 F.2d 170, 176 (8th Cir. 1977) ("Parents should not be appointed to act as guardians ad litem in litigation challenging a grant of parental veto power.").

41. *See infra* Section I.B.

42. *See* Myers v. Loudoun Cty. Pub. Sch., 418 F.3d 395, 401 (4th Cir. 2005); Shepherd v. Wellman, 313 F.3d 963, 970 (6th Cir. 2002); Navin v. Park Ridge Sch. Dist., 270 F.3d 1147, 1149 (7th Cir. 2001); Devine v. Indian River Cty. Sch. Bd., 121 F.3d 576, 581 (11th Cir. 1997), *abrogated by* Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007); Johns v. Cty. of San Diego, 114 F.3d 874, 877 (9th Cir. 1997); Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876, 882–83 (3d Cir. 1991); Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990); Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986).

43. Pub. L. No. 101-476, 104 Stat. 1142 (1990).

44. Pub. L. No. 101-336, 104 Stat. 327 (1990).

45. A random review of 523 federal cases in which the counsel mandate was imposed revealed that the cases involved the following underlying legal claims: 64% civil rights, 15% disability rights under the IDEA and/or the ADA, 9% torts, and 4% SSI. Additional cases presented claims to enforce tax liens, fair debt collection practices, insurance, and bankruptcy. A table of 523 cases in which the counsel mandate was imposed is on file with the author.

Taken together, court opinions justify the counsel mandate as necessary to preserve the traditional prohibition against nonlawyer representation (and the underlying policies it advances) and protect child litigants' interests.⁴⁶ Although this prohibition has long been applied in other contexts,⁴⁷ its application to suits brought by parents on behalf of children has a relatively recent genesis and has proceeded without extensive legal analysis.

1. The Weak Foundation of *Meeker v. Kercher*

In what is apparently the first circuit court opinion to consider the question, the U.S. Court of Appeals for the Tenth Circuit summarily held in *Meeker v. Kercher*⁴⁸ that “a minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney.”⁴⁹ In support of its groundbreaking holding, the *Meeker* court cited only Federal Rule of Civil Procedure 17(c) and the Judiciary Act without further analysis; the court cited no prior precedent in support of the rule.⁵⁰ The court's failure to explain its derivation of the rule from these authorities is notable because neither authority directly addresses the issue. The Judiciary Act says nothing about children,⁵¹ and Federal Rule of Civil Procedure 17(c) says nothing about lawyers.⁵² Subsequent circuit court opinions have somewhat further developed the mandate's analytical foundation, but have failed to account for constitutional concerns.⁵³ Notably, despite its weak analytical foundation, federal courts have applied the counsel mandate hundreds of times since it was first announced in *Meeker*.⁵⁴

46. See, e.g., *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 284 (2d Cir. 2005) (“The rule is primarily based on protection of the legal interests of the minor and the impropriety of a person who is not a member of the bar representing another person in court proceedings.”).

47. See, e.g., *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) (per curiam) (stating that a prisoner may not bring a class action pro se to litigate the interests of other prisoners).

48. 782 F.2d 153 (10th Cir. 1986).

49. *Id.* at 154.

50. *Id.*

51. See 28 U.S.C. § 1654.

52. See FED. R. CIV. P. 17(c).

53. *Myers*, 418 F.3d at 401; *Shepherd*, 313 F.3d at 970; *Navin*, 270 F.3d at 1149; *Devine*, 121 F.3d at 581; *Johns*, 114 F.3d at 877; *Osei-Afriyie*, 937 F.2d at 882–83; *Cheung*, 906 F.2d at 61.

54. A table of 523 cases in which the counsel mandate was imposed is on file with the author. Several circuit court opinions each have been cited more than two hundred times for the proposition that parents are prohibited from advancing their children's claims pro se. *Shepherd v. Wellman*, 313 F.3d 963, 963 (6th Cir. 2002) (Westlaw's HN 15 is cited by 223 cases as of Dec. 28, 2018); *Johns v. Cty. of San Diego*, 114 F.3d 874, 874 (9th Cir. 1997) (Westlaw's HN 5 is cited by 284 cases as of Dec. 28, 2018); *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 876 (3d Cir. 1991) (Westlaw's HN 7 is cited by 210 cases as of Dec. 28, 2018); *Cheung v. Youth Orchestra*

2. Traditional Prohibitions Against Nonlawyer Representation

Courts point to the traditional prohibition against the practice of law before the courts by nonlawyers as a principal justification for the counsel mandate.⁵⁵ Courts identify three sources of legal authority for this traditional rule, but they disagree on how (and whether) each of those sources impacts the question of whether a parent may bring a civil claim *pro se* on behalf of a child.⁵⁶

a. Common Law Doctrine

Courts frequently justify the counsel mandate as an exercise of their authority to supervise the administration of justice and consistent with general prohibitions on the unauthorized practice of law.⁵⁷ Federal courts have inherent powers to control the litigants and attorneys appearing before them. These powers are not conferred or shaped by statute, but are implied by the creation of the courts themselves, and courts' resultant need to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."⁵⁸ The powers include the authority to "impose silence, respect, and decorum, in their presence, and submission to their lawful mandates,"⁵⁹ establish procedural rules in the absence of

Found. of Buffalo, Inc., 906 F.2d 59, 59 (2d Cir. 1990) (Westlaw's HN 1 is cited by 273 cases as of Dec. 28, 2018); *Meeker v. Kercher*, 782 F.2d 153, 153 (10th Cir. 1986) (Westlaw's HN 1 is cited by 210 cases as of Dec. 28, 2018).

55. See, e.g., *Elustra v. Mineo*, 595 F.3d 699, 705 (7th Cir. 2010) ("One consequence of the normal rule is that a next friend may not, without the assistance of counsel, bring suit on behalf of a minor party."); *Cavanaugh ex rel. Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756 (6th Cir. 2005) ("That a non-lawyer may not represent another person in court is a venerable common law rule based on the strong state interest in regulating the practice of law." (quoting *Heldt v. Nicholson*, No. 99-2120, 2000 WL 1176879 at *1 (6th Cir. Aug. 10, 2000))), *abrogated by Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 519 (2007).

56. See, e.g., *Beard ex rel. Ford v. Hawkins*, No. 14-13465, 2015 WL 3915877, at *1 (E.D. Mich. June 25, 2015) ("It is true that non-attorney parents may not represent the interests of their children *pro se* in federal court. But this is not a Constitutional rule. Nor, unlike subject matter jurisdiction, is it 'ironclad.' Indeed, in certain situations, the 'general rule' does not even apply. Instead, the rule is an interpretation of 28 U.S.C. § 1654, which states, 'In all courts of the United States the parties may plead and conduct their own cases personally or by counsel.' It has also been referred to as a 'venerable common law rule.' Its violation 'does not require [the court] to dismiss . . . for lack of jurisdiction.'" (citations omitted) (first quoting *Elustra*, 595 F.3d at 705; then quoting *Adams ex rel. D.J.W. v. Astrue*, 659 F.3d 1297, 1300 (10th Cir. 2011); then quoting 28 U.S.C. § 1654; and then quoting *Cavanaugh*, 409 F.3d at 756, *abrogated by Winkelman*, 550 U.S. 516)).

57. See, e.g., *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 171-72 (E.D. Va. 1994).

58. *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962).

59. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

statutory directives,⁶⁰ and “control admission to its bar and to discipline attorneys who appear before [them].”⁶¹

Court regulation of the practice of law seeks to protect the interests of litigants and the administration of justice by permitting only those who have adequate training and knowledge to represent litigants’ legal interests before the court.⁶² “Unauthorized practice of law” (UPL) doctrine generally prohibits those who are not authorized to practice law in the jurisdiction from representing another’s interests before the court.⁶³ The doctrine thus dictates that litigants represent their own interests or retain licensed counsel to do so.

Because nonlawyer parents represent their children’s interests, rather than their own, courts repeatedly have concluded that the parents engage in the unauthorized practice of law if they advance their children’s claims without counsel.⁶⁴ Courts give several reasons for applying UPL doctrine to such parents, which align with those justifying courts’ regulation of the practice of law in general. First, courts fear that permitting nonlawyer parents to act as lawyers would create a slippery slope and risk undermining the courts’ control over litigation more broadly.⁶⁵ Courts cite the need to “jealously guard[] the judiciary’s authority to govern those who practice in its courtrooms.”⁶⁶ Second, courts are concerned that permitting non-attorney parents to bring claims invites abuse of the court process and unscrupulous conduct.⁶⁷ Furthermore, courts worry that non-attorney parents’ lack of expertise will make them ineffective advocates, causing children’s otherwise viable legal claims to fail⁶⁸ and creating

60. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 1 (1825).

61. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

62. *See* *U.S. PolyCon Corp. v. United States*, 43 Fed. Cl. 11, 14 (1999); *Gallo v. United States*, 331 F. Supp. 2d 446, 447 (E.D. Va. 2004). In courts’ view, litigation advanced by nonlawyers creates “unusual burdens,” as lay-litigants may advance the proceedings in an inefficient and awkward manner, and risks unscrupulous conduct by nonlawyer representatives, who are not bound by the ethical obligations of candor and of not advancing meritless and vexatious claims. *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983); *accord* *Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829, 830 (7th Cir. 1986).

63. *See generally* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581 (1999) (examining the legal and ethical issues with using a nonlawyer for legal issues).

64. *See, e.g.*, *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990).

65. *See, e.g.*, *Elustra v. Mineo*, 595 F.3d 699, 705 (7th Cir. 2010).

66. *Id.* (quoting *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 400 (4th Cir. 2005)).

67. *See, e.g.*, *Cheung*, 906 F.2d at 61; *Rosario ex rel. Rosario v. Apfel*, No. 96CIV.1227(PKL)(SEG), 1998 WL 685173, at *1 (S.D.N.Y. 1998).

68. *See* *Devine v. Indian River Cty. Sch. Bd.*, 121 F.3d 576, 582 (11th Cir. 1997) (stating that the rule against parents bringing pro se actions on behalf of children exists “because it helps to ensure that children . . . are not deprived of their day in court by unskilled, if caring, parents”), *abrogated by* *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

significant administrative burdens for the opposing party and the court.⁶⁹ Finally, courts view the application of UPL doctrine to parent-child claims as a matter of fairness,⁷⁰ as UPL doctrine requires the retention of counsel for other litigants that require a representative litigant to advance their claims, such as estates, corporations, and partnerships.⁷¹

Because courts' inherent powers rest fully within courts' discretion, courts are empowered to make exceptions to the general rules of UPL doctrine.⁷² In practice, such exceptions are rare. In the context of parties that require a litigant representative, courts have granted exceptions to support a few objectives. First, courts have permitted nonlawyers to advance claims as litigant representatives where the interests of such representatives and parties are closely aligned.⁷³ Second, in limited circumstances, courts have permitted litigant representatives to proceed

69. *Gallo v. United States*, 331 F. Supp. 2d 446, 447 (E.D. Va. 2004); *Rosario*, 1998 WL 685173, at *1 (“Additional reasons that a non-attorney cannot pursue actions for another person are the burdens the non-attorney creates for the opposing party and the court”); *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 171–72 (E.D. Va. 1994) (“Regulation that excludes non-lawyers from representing others reflects that the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents, but also for his adversaries and the court.”).

70. *See, e.g., Osei-Afiriye v. Med. Coll. of Pa.*, 937 F.2d 876, 882–83 (3d Cir. 1991) (“[The father] is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance ever to have any of their claims heard.”); *Cheung*, 906 F.2d at 61.

71. *See, e.g., Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 830 (1824) (“A corporation . . . can appear only by attorney, while a natural person may appear for himself.”); *U.S. ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 92 (2d Cir. 2008) (ruling that private litigants may not bring False Claim Act *qui tam* actions on behalf of the United States pro se); *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002) (holding that an estate executor may not bring a claim pro se on behalf of an estate with beneficiaries other than the executor); *Iannaccone v. Law*, 142 F.3d 553, 558–60 (2d Cir. 1998) (ruling that an executor may not proceed pro se on behalf of an estate that has multiple beneficiaries); *Eagle Assocs. v. Bank of Montreal*, 926 F.2d 1305, 1310 (2d Cir. 1991) (holding that a general partner may not bring claims on behalf of a partnership pro se); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427 (7th Cir. 1985); *Capital Grp., Inc. v. Gaston & Snow*, 768 F. Supp. 264, 265 (E.D. Wis. 1991).

72. *See In re Holliday's Tax Servs., Inc.*, 417 F. Supp. 182, 184 (E.D.N.Y. 1976) (“Modifying the absolute rule of corporate representation in bankruptcy cases, rather, rests on the inherent power of a court to supervise the proper administration of justice.”), *aff'd sub nom. Holliday's Tax Servs., Inc. v. Hauptman*, 614 F.2d 1287 (2d Cir. 1979); *Turner v. Am. Bar Ass'n*, 407 F. Supp. 451, 478 (N.D. Tex. 1975) (“In appropriate circumstances, a Federal Judge may, of course, allow a defendant to proceed with a lay assistant or to orally assist his licensed counsel in the presentation of his case This is so because of the inherent power lodged in a Federal Judge to govern and control the conduct of the trial before him.”); *cf. United States v. Stockheimer*, 385 F. Supp. 979, 984 (W.D. Wis. 1974) (permitting a disbarred attorney to represent a criminal defendant at the defendant's request as an exercise of judicial discretion), *aff'd*, 534 F.2d 331 (7th Cir. 1976).

73. *See, e.g., Pension Benefit Guar. Corp. v. Viking Food Serv., Inc.*, No. 93 Civ. 6837 (LMM), 1994 WL 702042, at *1–2 (S.D.N.Y. Dec. 14, 1994) (allowing sole proprietors of insolvent former corporation to proceed pro se where the individuals were also parties to the action); *Holliday's*, 417 F. Supp. at 183 (permitting sole shareholder to advance the claims of the corporation pro se).

pro se where the party could not afford to pay attorney fees.⁷⁴ Finally, and further to this end, courts have permitted a representative to proceed pro se where requiring the retention of counsel would effectively exclude the party from the courts.⁷⁵

Each of these three rationales for creating exceptions to the counsel mandate would seem to apply frequently to parent-child claims. Yet, in the parent-child context, courts have created only one primary exception to UPL doctrine for Supplemental Security Income (SSI) appeals.⁷⁶ In these cases, parents seek federal district court review of decisions by administrative law judges regarding children's eligibility for SSI benefits or the amount of benefits they should receive.⁷⁷ Cases permitting parents to advance their children's SSI claims pro se in this context note the uniquely limited scope of SSI proceedings at the district court level, which "essentially involve the review of an administrative record."⁷⁸ Such courts further cite all of the principles that have supported the generation of other exceptions to the general rule. First, courts note that parents in SSI cases have personal interests at stake that are united with those of their children—namely, the interest in securing financial support to pay for the child's care.⁷⁹ In addition, courts note that the litigation

74. See, e.g., *Sanchez v. Marder*, No. 92CIV.6878 (PKL) (NRB), 1995 WL 702377, at *2–3 (S.D.N.Y. Nov. 28, 1995) (giving defendant corporation opportunity to prove it could not afford counsel fees and indicating willingness to permit defendant to proceed without counsel if proof provided); *Pension Benefit Guar. Corp.*, 1994 WL 702042 (LMM), at *1–2 (permitting individual defendant/third party plaintiffs to proceed pro se on behalf of their former corporation, in part, because of their "severe financial hardship"); *Holliday's*, 417 F. Supp. at 183–84; *In re MSD Woodworking Co.*, 132 B.R. 631, 632 (Bankr. D.S.D. 1991) (permitting president to advance the bankruptcy claim of closely held corporation without counsel).

75. See, e.g., *Elustra v. Mineo*, 595 F.3d 699, 706–07 (7th Cir. 2010) (permitting a motion to set aside judgment filed pro se by a parent on behalf of a child to proceed, in part, because, as time for filing had passed, dismissing the motion would deny the child the opportunity to move to set aside the judgment altogether).

76. One court formulated this exception as a broader common law rule that "if a district court, after an 'appropriate inquiry [into] the particular circumstances of the matter at hand,' determines that the non-attorney parent has a 'significant stake in the outcome of the litigation,' a parent may bring an action in federal court on behalf of their child without an attorney." *Thomas ex rel N.T. v. Astrue*, 674 F. Supp. 2d 507, 511 (S.D.N.Y. 2009) (quoting *Machadio v. Apfel*, 276 F.3d 103, 107 (2d Cir. 2002)). Some courts have further required that parents seeking to advance their children's SSI claims pro se "meet basic standards of competence." *Machadio*, 276 F.3d at 107 (2d Cir. 2002); accord *Adams ex rel. D.J.W. v. Astrue*, 659 F.3d 1297, 1301 (10th Cir. 2011).

77. *Understanding Supplemental Security Income Appeals Process—2018 Edition*, SOC. SECURITY ADMIN., <https://www.ssa.gov/ssi/text-appeals-ussi.htm> [<https://perma.cc/3NZR-3Z7Q>].

78. *Harris ex rel. Harris v. Apfel*, 209 F.3d 413, 417 (5th Cir. 2000).

79. See, e.g., *Machadio*, 276 F.3d at 106; *Harris*, 209 F.3d at 416 ("As Dominisha's custodial parent, Harris is responsible for expenses associated with the minor's maintenance. Should Dominisha be found disabled within the meaning of § 1382c, Harris likely would serve as the representative payee of SSI benefits. As a representative payee, Harris could use the SSI payments for Dominisha's 'current maintenance.' Absent SSI benefits, however, Harris must pay

impacts the interests of no one other than the parent and child plaintiff.⁸⁰ Moreover, given the eligibility criteria for and nature of SSI benefits, courts recognize that the parent and child necessarily are living in poverty⁸¹ and that children's rights to the benefits "must be vindicated in a timely manner," as "child SSI benefits are intended to aid disabled children while they are children."⁸² Finally, and relatedly, courts express concern that imposing the counsel mandate in SSI appeals cases would "destroy" the child's statutory right to judicial review,⁸³ both because of the challenges of timeliness and poverty and because of the dearth of available counsel.⁸⁴ These rationales for creating an exception to the counsel mandate for parent-child SSI claims seem to apply broadly to parent-child claims, but courts refuse to apply these rationales consistently, artificially constraining the scope of the exception.

b. The Judiciary Act and the Right to Self-Representation

In addition to inherent powers, courts have cited the Judiciary and Judicial Procedure Act (Judiciary Act)⁸⁵ as a source of authority relevant to the counsel mandate.⁸⁶ The Judiciary Act guarantees to litigants the right to self-representation in federal courts.⁸⁷

for such expenses. Harris obviously has a personal financial stake in the present action." (footnotes omitted) (quoting 20 C.F.R. § 416.640 (2019)).

80. See, e.g., *Machadio*, 276 F.3d at 106 (contrasting the case with *Iannaccone v. Law*, 142 F.3d 553, 559 (2d Cir. 1998), in which an executor was prohibited from representing an estate pro se because the outcome of the litigation impacted beneficiaries and possible creditors other than the executor).

81. See *Adams*, 659 F.3d at 1300–01; *Maldonado ex rel. Maldonado v. Apfel*, 55 F. Supp. 2d 296, 303 (S.D.N.Y. 1999).

82. *Maldonado*, 55 F. Supp. 2d at 305.

83. *Id.* at 303 (noting that 42 U.S.C. § 405(g) grants the right to appeal a final decision of the Social Security Administration (SSA) by commencing a civil action within 60 days of the issuance of the decision and that a minor child "usually cannot exercise that right except through a parent or guardian"); accord *Adams*, 659 F.3d at 1301; *Harris*, 209 F.3d at 417 (stating that requiring retention of counsel by parents in SSI cases "would jeopardize seriously the child's statutory right to judicial review").

84. *Maldonado*, 55 F. Supp. 2d at 306.

85. Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified as amended at 28 U.S.C. §§ 1–5001 (2012)).

86. See, e.g., *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 202 (1993).

87. 28 U.S.C. § 1654 (2012) ("[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."). The Supreme Court held that the Sixth Amendment right to the effective assistance of counsel also encompasses the right to self-representation in the criminal context, extending its application to state court criminal proceedings. *Faretta v. California*, 422 U.S. 806, 816–20 (1975). The Court cited the longstanding recognition of the right to self-representation under English common law as well as its widespread support in the early colonies as evidence that the Framers did not intend for the right to assistance of counsel to supersede the right of a defendant to decline counsel and represent him or herself. See *id.* at 821–32.

Courts' understanding of how the Judiciary Act implicates the question of whether parents can advance their children's claims *pro se* varies widely.⁸⁸ Courts advance four distinct interpretations of the Judiciary Act that are relevant to this analysis.

First, some courts hold that the Judiciary Act's guarantee of the right to self-representation does not apply to child litigants. Such courts reason that the right to self-representation aims to respect autonomy by reserving to the individual litigant the choice of whether to present one's claims through counsel or oneself.⁸⁹ Indeed, the right emerged as a bulwark against the abuses of the English Star Chamber, in which individuals were forced to be represented by state counsel in politically motivated trials.⁹⁰ Thus, the freedom to state one's own case constitutes a defense against government oppression in state-initiated proceedings, as well as a guarantee of individual dignity and autonomy, ensuring that the individual can present her case as she sees fit.⁹¹ Courts interpreting the

88. The Supreme Court has addressed this issue in dicta but has never ruled on this question. In a case deciding a different question (whether an artificial entity could be considered a "person" and thus eligible to seek *in forma pauperis* status) the Court noted that "save in a few aberrant cases, the lower courts have uniformly held that 28 U.S.C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney." *Rowland*, 506 U.S. at 202 (footnote omitted) (quoting 28 U.S.C. § 1654). The Court opined that the holding in *In re Holliday's Tax Services, Inc.* diverged from federal precedent and had not been followed by other federal courts. *Id.* at 202 n.5. Interestingly, the *Holliday's* Court's holding that an exception could be made to the general rule that artificial entities must advance their claims through counsel in individual cases was based not on the Judiciary Act but on the inherent powers doctrine. *In re Holliday's Tax Servs., Inc.*, 417 F. Supp. 182, 184 (E.D.N.Y. 1976) ("Modifying the absolute rule of corporate representation in bankruptcy cases, rather, rests on the inherent power of a court to supervise the proper administration of justice."), *aff'd sub nom.*, *Holliday's Tax Servs., Inc. v. Hauptman*, 614 F.2d 1287 (2d Cir. 1979). The Ninth Circuit relied on this dicta to overrule a prior Ninth Circuit opinion that permitted a nonlawyer partner to represent a partnership *pro se*. *In re Am. W. Airlines*, 40 F.3d 1058, 1059 (9th Cir. 1994), *overruling in part* *United States v. Reeves*, 431 F.2d 1187, 1189 (9th Cir. 1970). Commentators have noted that this result was not necessarily required since the propriety of *pro se* representation of artificial entities was not before the Court in *Rowland*, and federal courts have relied upon their inherent powers to grant additional exceptions to the general rule since that time. See, e.g., Matthew Cormack, Note, *The Cost of Representation: An Argument for Permitting Pro Se Representation of Small Corporations in Bankruptcy*, 2011 COLUM. BUS. L. REV. 222, 238–40 (2011).

89. See, e.g., *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d. Cir. 1990).

90. RABEEA ASSY, *INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION* 2, 38 (2015).

91. *Faretta*, 422 U.S. at 833–34 ("[I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice. . . . [A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the

counsel mandate through this lens of autonomy hold the right to self-representation inapplicable to child litigants as children are incapable of making an autonomous choice to proceed without counsel that is deserving of courts' respect.⁹² Thus, when a court considers whether a nonlawyer parent can "appear as [an attorney] on behalf of" his or her child, the court must be concerned only with regulating the practice of law,⁹³ not with the self-representation guarantee.

Respect for dignity and autonomy remains an important theoretical basis for the right to self-representation, but it is not the full story. The right to self-representation also provides a critical guarantee of court access for those who cannot afford counsel. This court access foundation for the right to self-representation also has deep historical roots as a reaction against the power of the barristers, who once had exclusive authority to bring cases before the English court of common pleas.⁹⁴ The right to self-representation thus levels the playing field between indigent and well-resourced litigants, including the government, by at least ensuring access to the judiciary to all.⁹⁵

Children's legal incapacity and vulnerability provide principled bases for not extending the right of self-representation to children directly. But, as courts have recognized, the counsel mandate is "in some tension with the general notion that a person may appear in court without the benefit

individual which is the lifeblood of the law.'" (footnote omitted) (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring))).

92. *Id.* ("The choice to appear *pro se* is not a true choice for minors who under state law cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect, and solely the policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others." (citation omitted)), *quoted in* *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 285 n.5 (2d Cir. 2005); *see* *Johns v. Cty. of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997) (reasoning the same as *Cheung*); *Gallo v. United States*, 331 F. Supp. 2d 446, 447–48 (E.D. Va. 2004) ("The right to proceed *pro se* pursuant to 28 U.S.C. § 1654 reflects a policy of allowing individuals to conduct their own litigation in the manner they choose. This right, however, does not attach to children, who are unable to make an intelligent choice in this regard on their own.").

93. *Johns*, 114 F.3d at 876–77; *Cheung*, 906 F.2d at 61 (discussing the court's concern with minors receiving adequate "trained legal assistance so their rights may be fully protected").

94. *See* Robert A. Lanier, *The English Legal System: A Mirror for Us*, 19 MEM. ST. U. L. REV. 427, 437 (1989).

95. *See* Roger Michalski, *Trans-Personal Procedures*, 47 CONN. L. REV. 321, 367 (2014). This aim also provides a principled basis for excluding corporations from the general right to self-representation, which does not equally apply to children. *See id.* at 367 & n.254 (noting that exceptions must be based on probabilities and will not apply perfectly in every case, as for example, a rich individual may be permitted to proceed *pro se*, whereas a poor corporation will not be). As the Supreme Court explained: "[C]orporations can often perfectly well pay court costs and retain paid legal counsel in spite of being temporarily 'insolvent' . . . it is far from clear that corporate insolvency is appropriately analogous to individual indigency." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 206 (1993).

(or expense) of professional assistance.”⁹⁶ The goal of ensuring court access can be advanced by extending the right to parents who seek to advance their children’s claims.

Under the second interpretation of the Judiciary Act, courts have held that the Act not only applies to children, but guarantees a child litigant the “right” to seek counsel should the child wish to have representation.⁹⁷ These courts conclude that this right to have legal representation is personal to the child litigant, and a parent lacks the authority to waive the right on the child’s behalf.⁹⁸

This framing of the Judiciary Act is confusing for several reasons. First, it identifies the retention of counsel as a “right” rather than a litigation choice. As there is generally no federal right to counsel in civil matters, and the Judiciary Act makes no provision for appointment of counsel for those “entitled” to it, the “right” to counsel the courts identify cannot be understood as one to have counsel provided by the court in every case, but only to choose whether to retain counsel oneself.⁹⁹

Further, framing the Judiciary Act as conferring a “right” to counsel disrupts the typical authority conferred to adult representatives to control litigation brought on behalf of children. This framing reserves this particular litigation choice—whether to be represented by counsel—to child litigants without explanation for why this litigation choice should be set apart from all other choices routinely reserved to children’s legal representatives, such as whether, when, and where to bring suit, what claims to advance, what information to disclose, and whom to sue.¹⁰⁰ Finally, this framing reserves the choice to children only if a parent decides a certain way. That is, parents are precluded from waiving the right to retain counsel on behalf of a child, but parents are fully entitled to exercise the right to advance children’s claims through counsel, without the need for children’s input. In practice, by framing the choice

96. *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005).

97. *See, e.g., Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 883 (3d Cir. 1991). The Supreme Court has not found a constitutional right to representation by counsel in civil cases. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).

98. *See Osei-Afriyie*, 937 F.2d at 883; *McDaniel ex rel. Oltremari v. Kan. Soc. & Rehab. Serv.*, 871 F. Supp. 1331, 1332 (D. Kan. 1994).

99. *See Turner v. Rogers*, 564 U.S. 431, 444–48 (2011) (holding that the appointment of counsel is not required in every civil contempt proceeding that threatens incarceration, rather it requires a case specific determination); *Lassiter v. Dep’t. of Soc. Servs.*, 452 U.S. 18, 25 (1981) (finding that the right to appointment of counsel for indigent litigants is recognized only in cases that actually place a litigant’s physical liberty at risk); *In re Gault*, 387 U.S. 1, 41 (1967) (concluding that due process requires the appointment of counsel for indigent juveniles in delinquency proceedings that may result in a loss of physical liberty).

100. *See, e.g., In re Moore*, 209 U.S. 490, 499 (1908) (finding that next friends have the authority to select the venue of a case on behalf of a child litigant and reasoning that denying next friends this ability would deprive children of the equal protection of the law), *abrogated by Ex parte Harding*, 219 U.S. 363 (1911).

of whether to retain counsel as a right to legal representation, vesting waiver of this right exclusively in the child, and concluding that legal capacity precludes the child from executing the waiver, courts tie their hands while excluding children from the courts.

The third and fourth interpretations of the Judiciary Act relevant to this analysis point out that the Act, by its terms, only guarantees the right of self-representation to parties representing their own interests.¹⁰¹ Nonetheless, these courts also diverge on whether litigants other than individuals representing their own interests must retain counsel under the Act. Some courts conclude that the Act simply does not *guarantee* the right to self-representation to litigants who represent the interests of another.¹⁰² Thus, the decision of whether such litigants must retain counsel is reserved to court discretion.¹⁰³ By contrast, other courts hold that the Judiciary Act *restricts* the presentation of claims before courts to allow only individuals representing their own interests or attorneys to litigate claims.¹⁰⁴ Such courts construe this restriction as absolute and not subject to individualized exceptions.¹⁰⁵

c. Federal Rule of Civil Procedure 17(c)

In addition to inherent powers and the Judiciary Act, courts have evaluated the counsel mandate in conjunction with Federal Rule of Civil Procedure 17(c). As with the inherent powers doctrine and the Judiciary Act, court opinions differ widely regarding whether and how Rule 17(c) impacts whether a parent can bring a claim *pro se* on behalf of a child.

101. See *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 92 (2d Cir. 2008) (stating that the Judiciary Act limits circumstances in which civil litigants may appear without counsel to only cases in which parties “plead and conduct their *own* cases personally” (quoting 28 U.S.C. § 1654 (2012))); *Iannaccone v. Law*, 142 F.3d 553, 558 (2d Cir. 1998) (“[B]ecause *pro se* means to appear for one’s self, a person may not appear on another person’s behalf in the other’s cause. A person must be litigating an interest personal to him.”). Whether parents could be considered real parties in interest in cases they bring on behalf of their children is a complex question I will address in a forthcoming article. Because of the question’s complexity and uncertainty and because courts considering the counsel mandate uniformly assume that parents advancing their children’s claims are *not* real parties in interest, this Article does not evaluate this question.

102. See, e.g., *Fraass Survival Sys., Inc. v. Absentee Shawnee Econ. Dev. Auth.*, 817 F. Supp. 7, 9–10 (S.D.N.Y. 1993).

103. *Id.*

104. See, e.g., *Berrios v. N.Y.C. Hous. Auth.*, 564 F.3d 130, 134 (2d Cir. 2009) (“The fact that a minor or incompetent person must be represented by a next friend, guardian ad litem, or other fiduciary does not alter the principle embodied in § 1654 that a non-attorney is not allowed to represent another individual in federal court litigation without the assistance of counsel. If the representative of the minor or incompetent person is not himself an attorney, he must be represented by an attorney in order to conduct the litigation.”); *Turner v. Am. Bar Ass’n*, 407 F. Supp. 451, 477 (N.D. Tex. 1975).

105. See *Eagle Assocs. v. Bank of Montreal*, 926 F.2d 1305, 1310 (2d Cir. 1991) (stating the Judiciary Act prohibits a non-attorney from appearing without counsel “on behalf of a partnership”).

Rule 17(c) governs the appearance of minors and other persons who lack legal capacity as litigants before the federal courts. The text of Rule 17(c) does not mention attorneys. The full text of the Rule provides:

(c) Minor or Incompetent Person.

(1) *With a Representative.* The following representatives may sue or defend on behalf of a minor or an incompetent person:

- (A) a general guardian;
- (B) a committee;
- (C) a conservator; or
- (D) a like fiduciary.

(2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.¹⁰⁶

Courts have advanced three different interpretations of the implications of this text for parents seeking to advance their children's claims pro se. First, some courts have held that the text of Rule 17(c) itself affirmatively requires adults to retain counsel to advance the claims of children.¹⁰⁷ By contrast, other courts have concluded that Rule 17(c) cannot be understood to implicitly override the general restriction against nonlawyers representing the interests of others.¹⁰⁸ Finally, still other

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

107. See, e.g., *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986); *Bellamy v. Tennessee*, Nos. 3 09 1067, 3:09mc0135, 2009 WL 3734130, at *1 (M.D. Tenn. Nov. 6, 2009) (“Rule 17(c) clearly envisions representation by counsel.”).

108. See, e.g., *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 285 n.3 (2d Cir. 2005) (“The Federal Rules of Civil Procedure provide that the representative of an infant ‘may sue or defend on behalf of [him or her],’ and the Federal Rules of Appellate Procedure provide that ‘[a] pro se notice of appeal is considered filed on behalf of the signer and the signer’s spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.’ We do not read either provision to imply that a non-lawyer parent can represent a minor child in federal court proceedings.” (alteration in original) (citations omitted) (first quoting FED. R. CIV. P. 17(c); and then quoting FED. R. APP. P. 3(c)(2))); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (3d Cir. 1998) (“[U]nder Rule 17(c), a representative or guardian ‘may sue or defend on behalf of the infant.’ It is, however, well established in this Circuit that the right to proceed pro se in federal court does not give non-lawyer parents the right to represent their children in proceedings before a federal court. Other circuits follow this rule as well.” (citation omitted) (quoting FED. R. CIV. P.

courts hold that Rule 17(c) is inapposite, as it dictates only which adults can make litigation-related decisions for a child, and thus the Rule does not alter the general rule that a parent cannot advance a child's claims without counsel.¹⁰⁹

The conclusion that Rule 17(c) is inapposite to the question of whether a representative for a child must retain counsel seems the most accurate reading of the text. Yet, all three of these interpretations overlook what is perhaps the Rule's most critical contribution to this issue. Rule 17(c)'s central function is facilitating children's access to courts. The Rule bestows upon courts both the responsibility to ensure that child litigants' interests are protected and the flexibility to determine what is needed.¹¹⁰ Rather than prescribe steps that must be taken in every case involving a child, Rule 17(c) grants courts wide latitude to determine how a child's interests are best served under the child's particular circumstances.¹¹¹ Courts fail to meet their responsibilities under 17(c) through inaction—by leaving children's interests unprotected.¹¹² Thus, courts cannot simply dismiss children's claims in response to procedural deficiencies, such as the lack of an adult representative; courts have a responsibility under Rule 17(c) to ensure children's interests are protected and the litigation can proceed.¹¹³

3. Protecting Children

The second key justification courts provide for the counsel mandate is that it is necessary to carry out the courts' inherent responsibility to protect children's interests.¹¹⁴ Courts have expressed this objective in

17(c))), *abrogated by* *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

109. *See, e.g.*, *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 170 n.9 (E.D. Va. 1994) (“[L]inking the question of non-lawyer representation of others with Rule 17’s provisions confuses the issue. . . . Part (c) of [Rule 17] says that an infant can sue through a next friend. This means that the next friend is trusted to make decisions for the minor child—whether to sue, when to sue, when and on what terms to settle, and the like. But Rule 17 does not address the question whether a non-lawyer parent, when suing as next friend of the child, must be represented by legal counsel.”); *see also Berrios*, 564 F.3d at 134 (“The fact that a minor or incompetent person must be represented by a next friend, guardian ad litem, or other fiduciary does not alter the principle embodied in § 1654 that a non-attorney is not allowed to represent another individual in federal court litigation without the assistance of counsel. If the representative of the minor or incompetent person is not himself an attorney, he must be represented by an attorney in order to conduct the litigation.”).

110. *See id.* The full text of Rule 17(c) is set forth *supra* Section I.B.1.c.

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

112. *See Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 139–40 (3d Cir. 1989).

113. *See id.* at 140.

114. *See, e.g.*, *Gallo v. United States*, 331 F. Supp. 2d 446, 448 (E.D. Va. 2004) (“The rule against allowing pro se parents to litigate on behalf of minors is aimed at protecting the rights of children.”).

strong terms, with several declaring: “[T]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him.”¹¹⁵ Rather than making individualized determinations regarding children’s interests in this context, courts often rely on the generalized assumption that legal representation will always better protect children’s interests than will permitting children’s claims to proceed *pro se*.¹¹⁶

Courts’ specific concerns typically center on the risk that a child’s legal claims will be compromised by the choices made by the child’s representative.¹¹⁷ With limited exceptions, courts have not focused attention on the harms to children’s interests posed by the dismissal of their claims.¹¹⁸ Instead, courts tend to view dismissal without prejudice as protective, as dismissal (in theory) protects against collateral estoppel and reserves the choice of whether to advance their claims with legal

115. *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998) (per curiam) (quoting *Johns v. Cty. of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997)), *abrogated in part by* *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 883 (3d Cir. 1991) (alteration in original) (quoting *duPont v. S. Nat’l Bank of Hous.*, 771 F.2d 874, 882 (5th Cir. 1985)).

116. “It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.” *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990), *quoted in* *Mann v. Boatright*, 477 F.3d 1140, 1150 (10th Cir. 2007); *Johns*, 114 F.3d at 876–77; and *Osei-Afriyie*, 937 F.2d at 883.

117. *See* *Elustra v. Mineo*, 595 F.3d 699, 706 (7th Cir. 2010) (“[T]he point of the rule forbidding a next friend to litigate *pro se* on behalf of another person is to protect the rights of the represented party. Discussing the application of the general rule outside the child-party setting, we observed that ‘[m]any good reasons exist for the strict adherence to this rule, not the least of which is that a party may be bound, or his rights waived, by his legal representative.’ This concern is even stronger in the context of a minor or other person who is unable to speak for herself.” (second alteration in original) (citation omitted) (quoting *Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829, 830 (7th Cir. 1986))); *Gallo v. United States*, 331 F. Supp. 2d 446, 448 (E.D. Va. 2004) (“It is generally not in the interest of a child to be represented by a non-attorney, who will likely be unable to adequately protect her rights and vigorously prosecute litigation on her behalf.”).

118. *See, e.g., Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005) (“Although the rule stems largely from our desire to protect the interests of minors, we think it may, in some instances, undermine a child’s interest in having claims pursued for him or her when counsel is as a practical matter unavailable.” (citations omitted)). Some district courts have permitted parents to proceed *pro se* in individual cases. Appellate courts have upheld such exercises of discretion in cases where denying the parent the ability to proceed *pro se* would entirely deprive the children of a remedy. *See, e.g., Elustra*, 595 F.3d at 706–07 (permitting motion to set aside judgment filed *pro se* by parent on behalf of child to proceed, in part, because, as time for filing had passed, dismissing the motion would deny child the opportunity to move to set aside the judgment altogether); *Murphy*, 297 F.3d at 201 (“It is hardly in the best interest of [the child] to vacate an injunction that inures to his benefit so that he may re-litigate this issue below with licensed representation in order to re-secure a victory already obtained.”).

counsel or without for children to make once they reach adulthood.¹¹⁹ As further discussed in Section III.A, common conceptions of courts' responsibilities to protect children are at once overly broad and overly narrow in focusing primarily on children's interests in legal representation.

4. Unstated Concerns

Courts' ready use of the counsel mandate might also stem from court concerns about the viability of individual claims. Opinions in several prominent counsel mandate cases (as well as several less so) indicate that the courts had a dim view of the merits of the claims and the motivations of the parents advancing them.¹²⁰ Courts also may have biases about the likely validity of certain types of claims—viewing civil rights claims, for example, with more skepticism than contracts disputes.¹²¹ Since plaintiffs in winning civil rights cases brought under 42 U.S.C. § 1983 are entitled to have their attorneys' fees paid by defendants, courts also may expect that meritorious civil rights cases will have counsel.¹²² Any such biases about the merits of particular types of claims might be exacerbated when judges are faced with parents seeking to litigate pro se, as such parents may be more likely to have a different socioeconomic background than the judge, which could unconsciously trigger stereotypes that shape the judge's understanding of the motivations and circumstances of the parents before them.¹²³ Such biases may disproportionately impact

119. See *Smith ex rel. Smith v. Smith*, 49 F. App'x 618, 620 (7th Cir. 2002) (vacating dismissal with prejudice and remanding for entry of dismissal without prejudice as to children's claims); *Johns v. Cty. of San Diego*, 114 F.3d 874, 877–78 (9th Cir. 1997) (holding that courts' duty to protect children requires the entry of dismissal without prejudice to protect child from harm caused by parent's failure to abide by court order to retain counsel and permit the child to bring the case on his own when he reaches eighteen). *But see infra* Section II.A.2.

120. See *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 882 (3d Cir. 1991); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 62 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986). Several district court opinions identified parents' representatives as recognized repeat litigants in those and other courts. See *Loper v. Cleveland Police Headquarters*, No. 1:16CV2842, 2017 WL 2063018, at *2 (N.D. Ohio Mar. 15, 2017) (noting that plaintiff had filed several state and federal court actions relating to his claims); *Coon v. Food Lion* No. 3:14–CV–05, 2014 WL 791069, at *2 (N.D. W. Va. Feb. 26, 2014) (recognizing parent as repeatedly filing); *Bethel v. Middletown City Sch. Dist.*, No. 1:11–cv–206, 2011 WL 2038597, at *2 (S.D. Ohio Apr. 21, 2011) (recognizing that plaintiffs had filed multiple similar cases); *Mannix v. Humer*, No. 10 C 5063, 2011 WL 116888, at *1 (N.D. Ill. Jan. 11, 2011) (noting that plaintiffs had filed previous suits in the same district).

121. See *Jerry Kang et al., Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1162 (2012).

122. Barriers that prevent litigants with meritorious claims from securing counsel are explored in Section III.A.

123. Professor Michelle Benedetto Nietz argues that “[s]ince people are ‘more favorably disposed to the familiar, and fear or become frustrated with the unfamiliar,’ the wealthy positions of most judges may prevent them from fully appreciating the challenges faced by poor litigants in

members of racial and cultural minority groups, as such groups disproportionately experience poverty and educational disadvantage.¹²⁴ Conversely, courts' endorsement of the counsel mandate may stem from court tendencies to disfavor trials, generally.¹²⁵ Regardless of its motivations, the reflexive application of the counsel mandate allows courts to avoid dealing with the challenges posed by these underlying concerns and instead remove the cases from their dockets.

Taken together, the legal analysis applied by *Meeker* and its progeny in support of the counsel mandate is inadequate. Some courts have expressed serious misgivings about the rule and applied it only out of deference to precedent.¹²⁶ Other courts have declined to apply the rule in the specific context of Social Security Insurance benefits appeals.¹²⁷ The proliferation of such decisions has led recent courts to describe the rule as "not ironclad."¹²⁸ These departures suggest that the time is ripe to examine whether the counsel mandate should continue to bind the federal courts and whether a new rule is warranted.

II. CONTRAVENING FUNDAMENTAL RIGHTS AND DEMOCRATIC NORMS

Because it excludes low-income children and their parents from courts, the counsel mandate undermines children's access to civil justice, parents' rights and responsibilities toward their children, and democratic norms.

A. Children's Access to Justice

As the Second Circuit conveyed in expressing misgivings about the counsel mandate:

their courtrooms." Michelle Benedetto Nietz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 142 (2013) (quoting Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, 24 JUDGES J. 6, 53 (1985)) (stating that "[l]ike all people, judges are influenced by their economic backgrounds," and noting that federal district court judges earned \$174,000 per year in 2010, more than triple the median income in the United States at that time). See generally Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010) (discussing implicit bias in the legal system); Kang et al., *supra* note 121 (discussing judicial implicit bias).

124. See Nietz, *supra* note 123, at 148–49.

125. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (documenting the decline of civil trials in federal and state court).

126. See, e.g., *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005).

127. See, e.g., *Adams ex rel. D.J.W. v. Astrue*, 659 F.3d 1297, 1301 (10th Cir. 2011); *Machadio v. Apfel*, 276 F.3d 103, 107 (2d Cir. 2002).

128. *Adams*, 659 F.3d at 1300 (quoting *Elustra v. Mineo*, 595 F.3d 699, 705 (7th Cir. 2010)).

Although the rule stems largely from our desire to protect the interests of minors, we think it may, in some instances, undermine a child's interest in having claims pursued for him or her when counsel is as a practical matter unavailable. Indeed, although the general rule serves the salutary purpose of making competent representation of children more likely, in some cases—perhaps in the appeal before us—it may force minors out of court altogether. While the *Cheung* court noted that “[t]o allow guardians to bring *pro se* litigation also invites abuse,” not allowing guardians to do so—if they are regarded by the court as reasonably competent in this regard—may thus result, in some instances, in unredressed violations of children's rights or interests.¹²⁹

The counsel mandate deprives children of access to justice as a practical matter because low-income children and their families face monumental challenges in securing counsel and it undermines the viability of their legal claims. Further, the mandate obstructs children's access to justice as a legal matter by depriving children of their fundamental right of access to the courts.

1. Practical Implications

a. The Inaccessibility of Counsel

As a practical matter, the counsel mandate results in the exclusion from the courts of children who are indigent or of moderate financial means. Civil litigants have no constitutionally guaranteed right to the assistance of counsel.¹³⁰ Federal courts can, but rarely do, request counsel to represent litigants who cannot afford representation.¹³¹ Courts have shown no special propensity to appoint counsel for children in civil proceedings brought on their behalf.¹³² Consequently, court mandates

129. *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005) (alteration in original) (citations omitted) (quoting *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990)).

130. *See Turner v. Rogers*, 564 U.S. 431, 441 (2011) (“We must decide whether the Due Process Clause grants an indigent defendant . . . a right to state-appointed counsel This Court's precedents provide no definitive answer to that question.”); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25–27 (1981) (stating that there is generally not a right to counsel except in certain circumstances, such as the deprivation of an individual's liberty).

131. *See* 28 U.S.C. § 1915(e)(1) (2012).

132. *See, e.g., Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002) (upholding district court decision not to appoint counsel and dismiss case brought by parent on behalf of child); *Pierson v. Allison*, No. 1:08cv208–JMR, 2009 WL 3049220, at *4 (S.D. Miss. Sept. 17, 2009) (declining to appoint counsel for minor plaintiff and dismissing case without prejudice); *Dunbar v. Colasanto*, No. 305CV1234(CFD), 2006 WL 798883, at *1 (D. Conn. Mar. 24, 2006) (declining

that parents retain counsel for children are effectively mandates that parents take on the financial burden of attorneys' fees. As numerous studies and scholars have documented, this burden proves insurmountable for many in the United States.¹³³

Children represent a disproportionate number of those living in poverty in the United States. In 2015, “[c]hildren represented 23.1 percent of the total population in 2015 and 33.6 percent of the people in poverty.”¹³⁴ Although these children and their families would qualify for free legal services, they would not necessarily receive them.¹³⁵

There is a dearth of legal services available to meet the legal needs of those who cannot afford to pay. The Legal Services Corporation, created by Congress to provide public financial support for civil legal services for those living in poverty, today has a budget of less than half of what it received at its peak in the early 1980s.¹³⁶ This shortfall directly impacts the number of lawyers available to serve low-income people, as most legal aid lawyers work for Legal Services Corporation-funded organizations.¹³⁷ “Nationally, there are *well over ten times more private*

to warrant appointment of counsel requested by parent bringing claim on child’s behalf because claims “not ‘likely to be of substance’”); *Polk v. City of Corsicana*, No. 3:05-CV-0861-G(BH), 2006 WL 385127, at *5 (N.D. Tex. Jan. 24, 2006) (denying appointment of counsel requested by parent bringing case on child’s behalf); *Burr v. Chitty*, No. 3:04-CV-2562-G, 2005 WL 264943, at *1–2 (N.D. Tex. Feb. 3, 2005) (denying appointment of counsel in part because of inadequate demonstration of efforts to obtain counsel and questioning whether parent, as representative and not party in the case, even has the power to request an attorney on behalf of a child litigant). *But see Brown v. Ortho Diagnostic Sys. Inc.*, 868 F. Supp. 168, 169, 172 (E.D. Va. 1994) (appointing counsel to represent minor plaintiff in products liability case initiated by child’s parent).

133. *See infra* notes 135–47 and accompanying text.

134. BERNADETTE D. PROCTOR ET AL., U.S. CENSUS BUREAU, P60-256(RV), INCOME AND POVERTY IN THE UNITED STATES: 2015, at 14 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf> [<https://perma.cc/2XD8-ZUK8>]. More than 30 million children—over forty percent of all children in the United States—had family incomes below two hundred percent of the federal poverty level, *id.* at 17 tbl.5, meaning their families earned no more than \$48,500 per year for a family of four. Annual Update of the HHS Poverty Guidelines, 80 Fed. Reg. 3236, 3237 (Jan. 22, 2015). Nearly 19 million children (more than twenty-five percent) had family incomes below one hundred and twenty-five percent of the federal poverty level, PROCTOR ET AL., at 17 tbl.5, meaning their families earned \$30,312 per year or less for a family of four. *See* Annual Update of the HHS Poverty Guidelines, 80 Fed. Reg. at 3237.

135. The Legal Services Corporation, the largest funder of free legal services in the United States, set income eligibility guidelines for free legal services supported by its funding in 2015 at one hundred and twenty-five percent of federal poverty guidelines set forth by the Department of Health and Human Services. *See* 45 C.F.R. pt. 1611 app. A (2015). Some civil legal aid organizations are able to use different sources of funding to offer legal services to individuals with incomes up to 200% of the poverty guidelines. *See* Luz E. Herrera, *Training Lawyer-Entrepreneurs*, 89 DENV. U. L. REV. 887, 895 n.50 (2012).

136. HOUSEMAN, *supra* note 25, at 8, 88–90; Steinberg, *supra* note 2, at 770 & n.159 (“While Congressional appropriations appear static from year to year, funding has dropped forty-nine percent in inflation-adjusted dollars over the past thirty years.”).

137. LEGAL SERVS. CORP., *supra* note 25, at 19–20.

attorneys providing personal legal services to people in the general population than there are legal aid attorneys serving the poor.”¹³⁸ Consequently, legal aid organizations are only able to take on fewer than half of the legal problems that individuals who qualify for services ask them to resolve.¹³⁹ On average, “[l]ow-income Americans receive inadequate or no professional legal help for eighty-six percent of the civil legal problems they face in a given year.”¹⁴⁰

Given these realities, it is no surprise that litigants across the United States are increasingly representing themselves in federal as well as state courts. Non-prisoner pro se filings now comprise nearly ten percent of the docket of the federal district courts.¹⁴¹ Litigants’ reasons for proceeding pro se vary, but inability to pay stands out as a primary driving force.¹⁴² Importantly, it is not only those who qualify as “poor” under the federal government’s poverty measures who cannot afford counsel. Individuals and families of moderate means are ineligible for civil legal aid, yet increasingly are unable to pay private attorney’s fees as well.¹⁴³

138. *Id.* at 19 (footnote omitted). A 2009 study by the Legal Services Corporation found that whereas there was “only one legal aid lawyer” available for every “6,415 low-income people in the country,” there was one lawyer providing legal services for private individuals and families “for every 429 people in the general population.” *Id.*

139. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 13 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/Q5SY-5UHZ>]. People often fail to seek legal assistance, even for significant legal problems, because they do not recognize the problems as legal, prefer to try to resolve them on their own, do not know where to seek help, or cannot afford attorneys’ fees. *See id.*

140. *Id.* at 30.

141. JEFRI WOOD, FED. JUD. CTR., PRO SE CASE MANAGEMENT FOR NONPRISONER CIVIL LITIGATION, at vii n.2 (2016), https://www.fjc.gov/sites/default/files/2017/Pro_Se_Case_Management_for_Nonprisoner_Civil_Litigation.pdf [<https://perma.cc/GRJ3-CN5H>] (“In fiscal year 2015, 25,117 nonprisoner pro se civil cases were filed in the district courts, or 9% of the total 279,036 civil filings.”). As the proportion of pro se, non-prisoner litigation has continually increased, federal courts have had to turn their attention to how to accommodate pro se parties to ensure that they have meaningful access to advance meritorious claims. *Id.* at vii & n.3.

142. JOY MOSES, CTR. FOR AM. PROGRESS, GROUNDS FOR OBJECTION: CAUSES AND CONSEQUENCES OF AMERICA’S PRO SE CRISIS AND HOW TO SOLVE THE PROBLEM OF UNREPRESENTED LITIGANTS 4 (2011); Steinberg, *supra* note 2, at 752 (“The reasons for the spike in pro se litigation are only partially understood, but most studies that have examined the characteristics of unrepresented litigants conclude that poverty is the primary force driving individuals to represent themselves in court.”).

143. *See* MOSES, *supra* note 142, at 3–4; Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 (2001); Steinberg, *supra* note 2, at 752–53; Debra Cassens Weiss, *Middle-Class Dilemma: Can’t Afford Lawyers, Can’t Qualify for Legal Aid*, A.B.A. J. (July 22, 2010, 1:36 PM), http://www.abajournal.com/news/article/middle-class_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid/?icn=most_read [<https://perma.cc/9K88-DEG2>] (stating that lawyers are too expensive for a lot of people, including those who earn “too much money to qualify for legal aid”).

Financial barriers are not the only obstacles that prevent litigants from securing counsel. Poverty alone cannot explain the failure to retain counsel by litigants pursuing legal claims under statutes with fee-shifting provisions, such as 42 U.S.C. § 1983, and claims that could secure significant contingency fees. Research suggests that personal characteristics also play a role in an individual's access to counsel. Researchers have documented, for example, that African Americans as a group have a harder time finding lawyers who will help them,¹⁴⁴ and that lawyer advertising often fails to encourage disadvantaged groups to seek help by primarily (if not entirely) displaying images of white lawyers and clients¹⁴⁵ and by using language that is inaccessible to much of the adult population.¹⁴⁶ By contrast, litigants pursuing certain other legal remedies may face particular difficulty in securing private counsel, for example, where potential cost recoveries are limited.¹⁴⁷

For all of these reasons, the mandate that parents retain counsel to advance their children's claims cannot be met by a substantial portion of families—far more than the forty percent who could qualify for free legal aid. Thus, the counsel mandate effectively excludes children of low and moderate means from the federal courts.

b. Detrimental Effects on Children's Claims

The counsel mandate also undermines children's ability to access the courts as a practical matter because of its detrimental effects on the viability of children's claims. The practical effect of the counsel mandate for a child whose family cannot afford attorney's fees is delay—either until the family gathers sufficient funds to retain counsel, or until the child reaches majority and can bring the suit herself *pro se*. Delay is detrimental to children's civil claims for several reasons. First, statutes of

144. Ellen Berrey, Robert L. Nelson, and Laura Beth Nielsen, *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* at 109–29 (2017).

145. Jim Hawkins and Renee Knake, *The Behavioral Economics of Lawyer Advertising: An Empirical Assessment*, 2019 *ILL. L. REV.* (forthcoming 2019) (hypothesizing that “individuals are more likely to utilize legal services if they see themselves as similar to their lawyers in personal beliefs, values, and communication,” and finding that nearly 80% of lawyer websites surveyed “had pictures of exclusively white attorneys and clients”).

146. *Id.* (finding that lawyer websites surveyed were written at an 11th grade level, whereas 50% of adults in the United States cannot read books written at an 8th grade level and 21% of adults read below a fifth grade level).

147. *Machadio v. Apfel*, 276 F.3d 103, 108 n.1 (2d Cir. 2002) (“We are aware of some of the stated impediments to the delivery of legal services in children SSI cases. For example, potential contingent fees are small and attorneys ‘cannot be assured payment because the SSA does not automatically withhold a portion of a successful claimant’s retroactive benefits for attorneys’ fees.’ Mindful of such problems, we do not believe that they should be permanent barriers to legal aid. Rather they should be a spur to take steps to improve the effective administration of justice.” (citation omitted) (quoting *Maldonado ex rel. Maldonado v. Apfel*, 55 F. Supp. 2d 296, 307 n.13 (S.D.N.Y. 1999))).

limitations do not always toll during childhood.¹⁴⁸ Thus, delaying the adjudication of a claim until a child has the legal capacity to bring the case pro se might entirely deprive a child of the ability to pursue a legal remedy.¹⁴⁹ Even if a cause of action survives until adulthood, a child is not likely to be in a better position to litigate the claim at that time than a parent would be when the claim first arises. Children whose parent(s) cannot afford counsel during the child's minority are unlikely to suddenly have the funds to retain counsel themselves once they reach adulthood. Moreover, eighteen-year-olds are unlikely to be better prepared to advance a claim pro se as compared to a parent, who, at a minimum, has significantly more life experience to draw upon. Delay also precludes parents from bringing claims to remedy present, ongoing harms to children or to seek benefits only meaningful during childhood.¹⁵⁰ Finally, no matter the character of the claim, delay undermines the strength of a case as evidence goes stale, witnesses disappear, and even party recollections dim about the operative events.

As a practical matter, the counsel mandate itself may deprive indigent children of the leverage that legal rights and the threat of litigation provide in disputes with better resourced opponents, and the opportunity for alternative methods of dispute resolution that such leverage provides. Adversaries who know that a child's family lacks the means to retain counsel and is thus unlikely to be able to proceed with a suit are unlikely to be motivated to negotiate a resolution.¹⁵¹ Thus, under the counsel

148. See, e.g., *Gallo v. United States*, 331 F. Supp. 2d 446, 448 (E.D. Va. 2004) (noting that causes of action under the Federal Torts Claims Act do not toll during infancy).

149. State constitutional precedent varies on the question of whether the expiration of statutes of limitation during minority itself violates children's state constitutional rights to access the courts. Compare *Barrio v. San Manuel Div. Hosp.*, 692 P.2d 280, 286 (Ariz. 1984) (en banc) ("The minor possesses a right guaranteed by the constitution, but cannot assert it unless someone else, over whom he has no control, learns about it, understands it, is aware of the need to take prompt action, and in fact takes such action."), and *Kordus v. Montes*, 337 P.3d 1138, 1141–42, 1148 (Wyo. 2014) (applying the two-year statute of limitations to a medical malpractice claim by juvenile patient violated her fundamental right to access the courts under the Wyoming Constitution and noting that although a next friend could bring a claim on a minor's behalf within the statutory period during the minor's period of minority, "a next friend may or may not volunteer" (quoting *Dye v. Fremont Cty. Sch. Dist.*, 820 P.2d 982, 985 (Wyo. 1991))), with *Willis v. Mullett*, 561 S.E. 2d 705, 709, 711 (Va. 2002) (finding that the expiration of a statute of limitations during minority did not unlawfully abridge minor's rights because the legislature could reasonably presume that an adult responsible for a minor's welfare would act diligently to protect the minor's interests).

150. Courts have cited this concern, among others, in carving out an exception to the counsel mandate in cases brought to appeal adverse decisions regarding Social Security Insurance benefits. See *supra* notes 76–84 and accompanying text.

151. Justice Brennan argued that the holding in *Boddie v. Connecticut* should be broadened since court enforcement may be the only effective remedy for individuals seeking to protect any legal right and the government always has the "ultimate monopoly of all judicial process[es] and attendant enforcement machinery." *Boddie v. Connecticut*, 401 U.S. 371, 387 (1971) (Brennan,

mandate, children may be at once stuck with courts as the only possible forum for dispute resolution and precluded from accessing courts. For all of these reasons, the counsel mandate undermines the viability of children's claims and may entirely deny children the opportunity to seek judicial resolution of a dispute.

2. Constitutional Implications

As a legal matter, the counsel mandate contravenes children's fundamental constitutional right of access to the courts. The Supreme Court recognizes the right of access to the courts to be fundamental,¹⁵² deriving from several constitutional guarantees.¹⁵³ The right is one of the "highest and most essential privileges of citizenship."¹⁵⁴ It not only promotes orderly government and peaceful dispute resolution, but also is essential as "the right conservative of all other rights."¹⁵⁵ Because the right to court access is a "basic" one, it "call[s] for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications."¹⁵⁶

The right of access to the courts encompasses "both equal protection and due process concerns."¹⁵⁷ Court access guarantees are central to equal protection, which was intended to ensure "that all persons . . . should have

J., concurring). Scholars likewise have noted that litigation plays a critical role as an equalizer in disputes faced by poor people, who may lack other tools (such as a refusal to deal in the future) available to litigants with greater financial means, and that the imposition of fees and costs that prevent indigent litigants from accessing courts also deprive the poor of the leverage that the credible threat of litigation offers, which encourages negotiation of disputes with opponents of greater financial means. *See, e.g.*, Goodpaster, *supra* note 27, at 234.

152. *See, e.g.*, *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

153. *Tennessee v. Lane*, 541 U.S. 509, 523 (2004).

154. *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907). *See also Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876) (stating that the right of access to the courts "lies at the foundation of all well-ordered systems of jurisprudence" and is "founded in the first principles of natural justice" (quoting *Bradstreet v. Neptune Ins.*, 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839) (No. 1793))).

155. *Chambers v. Balt. & Ohio R.R.*, *supra* 154; *see also United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 580 (1971) (applying the First Amendment right of court access to Federal Employers' Liability Act lawsuits); Goodpaster, *supra* note 27, at 253–54 ("The right of access to the courts, therefore, is both fundamental and instrumental. Or, more accurately, the right of access to the courts, like certain other rights, stretches across and protects a continuum of interests from the trivial to the most significant. Aside from its general use in the resolution of private disputes, access to courts takes its specific importance and coloration from the right or interest it is being used to protect.").

156. Goodpaster, *supra* note 27, at 529.

157. *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996); *accord Griffin v. Illinois*, 351 U.S. 12, 17 (1956). *See generally* Goodpaster, *supra* note 27 (asserting that indigent people must be afforded free access to courts because of their equal protection and due process rights). Due process and equal protection rights constrain federal government action under the Fifth Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 93–94 (1976) (per curiam); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts.”¹⁵⁸ Financial impediments to court access, such as fees and security bonds, implicate equal protection concerns by treating indigent litigants differently than those with wealth.¹⁵⁹ The Supreme Court traditionally disfavors status-based distinctions rooted in wealth and poverty,¹⁶⁰ particularly where such distinctions inhibit democratic participation.¹⁶¹ The Court also disfavors status-based distinctions between children, particularly with regard to circumstances beyond children’s control.¹⁶² Court access guarantees are likewise central to due process, which legitimizes the vestment of dispute resolution powers in courts by guaranteeing that such processes will be just.¹⁶³ Impediments to court access implicate procedural due process rights by depriving litigants of the opportunity to be heard.¹⁶⁴

The Court established the clearest due process and equal protection-based court access guarantees in criminal and quasi-criminal cases,¹⁶⁵

158. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

159. *See Griffin*, 351 U.S. at 17, 19 (concluding that the denial of free trial transcripts to indigent defendants seeking to appeal their convictions violates equal protection, as “[i]n criminal trials[,] a State can no more discriminate on account of poverty than on account of religion, race, or color”). Distinctions based on wealth are subject only to rational basis review. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17–29, 40 (1973).

160. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (striking down a poll tax as violative of equal protection rights and stating that “[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored” (citation omitted)).

161. *See, e.g., M.L.B.*, 519 U.S. at 123–24 (highlighting how the imposition of tolls for government services without accounting for differences in wealth raises constitutional concerns when such tolls inhibit participation in the political process as voters and candidates and access to judicial processes in criminal and quasi-criminal cases).

162. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 223 (1982) (striking down a ban on free public education for undocumented students and noting that the law “impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status”); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (overturning state doctrine limiting claims for loss of parental consortium to legitimate children and holding it invidious to discriminate against illegitimate children as a class when they are blameless for the wrong done to their parent); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2590, 2600 (2015) (striking down prohibitions against same sex marriage, in part because of harm caused to children of same sex parents through no fault of the children).

163. *See Boddie v. Connecticut*, 401 U.S. 371, 374–76 (1971).

164. *See id.* at 380 (“[A] cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party’s opportunity to be heard.”); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Goodpaster*, *supra* note 27, at 251–52.

165. *See M.L.B.*, 519 U.S. at 123–24 (holding that transcript fees must be waived for indigent parents appealing termination of parental rights decisions, as “access to judicial processes in cases criminal or ‘quasi criminal in nature’ [may not] turn on ability to pay” (citation omitted) (quoting *Mayer v. Chicago*, 404 U.S. 189, 196 (1971))); *Smith v. Bennett*, 365 U.S. 708, 710, 713–14 (1961) (holding that filing fees for criminal appeals must be waived for indigent defendants to ensure them the equal protection of the law, as “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has” (alteration in original) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956))); *Griffin*, 351 U.S. at 19 (concluding that transcript fees must

holding these rights require courts to waive fees for indigent defendants pursuing criminal appeals,¹⁶⁶ indigent parents appealing terminations of parental rights,¹⁶⁷ and indigent putative fathers ordered to complete paternity testing in state-initiated actions for child support.¹⁶⁸ The Court has carved out narrower guarantees for civil claims.¹⁶⁹ The Court has prohibited the imposition of fees upon indigent litigants in civil disputes such as divorce, which involve fundamental constitutional rights that can only be resolved in courts.¹⁷⁰ By contrast, court fees in civil matters not entailing fundamental rights and matters capable of resolution outside of courts must only survive rational basis review,¹⁷¹ and may do so, even if such fees would have the practical effect of preventing indigent parties from pursuing the cause of action at issue.¹⁷²

In addition to the Fifth Amendment guarantees of due process and equal protection, the right of access to the courts also stems from the First

be waived for indigent criminal defendants appealing their convictions). These protections “do[] not represent a balance between the needs of the accused and the interests of society” but rather “a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way.” *Mayer*, 404 U.S. at 196–97.

166. See *Smith*, 365 U.S. at 713–14 (holding that filing fees for criminal appeals must be waived for indigent defendants to ensure them the equal protection of the law); *Griffin*, 351 U.S. at 19 (concluding that transcript fees must be waived for indigent criminal defendants appealing their convictions).

167. See *M.L.B.*, 519 U.S. at 123–24.

168. *Little v. Streater*, 452 U.S. 1, 16 (1981).

169. See *Andrews*, *supra* note 27, at 567–71. The Supreme Court upheld several preconditions to the filing of civil suits against procedural due process challenges as reasonable requirements. See, e.g., *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 556–57 (1949) (upholding a requirement that plaintiffs post security before filing a shareholder derivative action); *Jones v. Union Guano Co.*, 264 U.S. 171, 181 (1924) (upholding a requirement that a plaintiff must obtain a chemical analysis of fertilizer before filing suit against fertilizer manufacturers).

170. Compare *Boddie v. Connecticut*, 401 U.S. 371, 376–77 (1971) (finding that filing fees in divorce cases violate the due process rights of indigent plaintiffs because marriage is a fundamental right and divorce cannot be accomplished outside of courts), with *United States v. Kras*, 409 U.S. 434, 444–46 (1973) (finding that filing fees in bankruptcy cases do not violate due process because they do not entail a fundamental right and the dispute is capable of resolution through negotiation), and *Ortwein v. Schwab*, 410 U.S. 656, 659–60 (1973) (finding that filing fees in appeals of administrative welfare claim denials do not violate due process because the disputes do not entail a fundamental right and claimants have access to the administrative process). See also Ryan M. Rappa, Note, *Getting Abused and Neglected Children into Court: A Child's Right of Access Under the Petition Clause of the First Amendment*, 2011 U. ILL. L. REV. 1419, 1444 (2011) (arguing that abuse and neglect matters, like divorces, involve fundamental rights and issues that cannot be resolved outside of courts).

171. See *M.L.B.*, 519 U.S. at 123–24.

172. See *Kras*, 409 U.S. at 444–45; *Ortwein*, 410 U.S. at 660; see also *Cohen*, 337 U.S. at 556–57 (upholding a requirement that plaintiffs post security before filing a shareholder derivative action).

Amendment right to petition the government for redress of grievances¹⁷³ and the right to free speech.¹⁷⁴ These guarantees preserve court access as a means of political participation, protecting the opportunity to seek a government-ordered remedy and hold the government and private actors accountable for legal wrongs.¹⁷⁵ These guarantees also safeguard court access as a mechanism for the expression of values and political opinions regarding the social order and the structure and operation of the government.¹⁷⁶

The Constitution generally guarantees children the same fundamental rights as adults and constrains the government from acting in particular ways towards children as well as adults.¹⁷⁷ The scope of children's

173. See *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741–43 (1983) (concluding that an NLRB injunction restraining a meritorious employer defamation suit against striking employees was an unfair labor practice that violated the employer's right of access, even if improperly motivated); see also *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 515 (1972) (concluding that antitrust rules against non-competitive practices cannot preclude corporations from filing meritorious litigation, even if the suit potentially undermines competition because the restriction infringes on the right to petition). See generally Andrews, *supra* note 27 (arguing that the right to access exists through the Petition Clause); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986) (discussing the history of the right to petition within the First Amendment); Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837 (2012) (tracing the history of the right to petition); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998) (explaining that the right to petition was historically the most efficient way to address a grievance with the government).

174. See *NAACP v. Button*, 371 U.S. 415, 429–30 (1963).

175. See *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 58 (1993); *Bill Johnson's Rests., Inc.*, 461 U.S. at 741; *Cal. Motor Transp. Co.*, 404 U.S. at 513; *Button*, 371 U.S. at 429–30 (“[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.”). Some scholars frame the right to petition narrowly, as encompassing only “a right to file claims”; from this perspective, so long as the government does not restrict the filing of a complaint, rights of court access under the petition clause are protected. Andrews, *supra* note 27, at 625 (emphasis omitted). Others argue that the right to petition is broader, encompassing not only the right to request relief but also to secure a minimally adequate remedy. See, e.g., Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1747 (2017).

176. See *Button*, 371 U.S. at 429–30 (“In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.”); see also *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) (“[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.”).

177. *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion) (“A child, merely on account of his minority, is not beyond the protection of the Constitution.”); *In re Gault*, 387 U.S. 1, 13 (1967) (“[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”); see MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 260 (2005) (explaining that the ordinary rules regarding constitutional rights are most often extended to children).

constitutional rights may be narrower than those of adults because of “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”¹⁷⁸

Nonetheless, the government cannot infringe children’s fundamental rights on the basis of broad generalizations about children’s incapacity or immaturity.¹⁷⁹ Just as with adults, infringements of children’s fundamental rights must be justified by important state interests.¹⁸⁰ Thus, Professor Martin Guggenheim posits that in determining whether government action involving children is unconstitutional, the Court must not only assess “whether the governmental conduct can be said to have violated a norm of the Constitution,” but, if so, the Court must also determine “whether there are special reasons not to apply the ordinary rule to [children].”¹⁸¹

Applying Professor Guggenheim’s analysis leads to the conclusion that the counsel mandate violates children’s right of access to the courts under the Fifth and First Amendments. First, the counsel mandate implicates constitutional norms regarding access to justice. The mandate deprives indigent children of equal protection and due process by requiring them to pay attorney fees as a prerequisite to access, and thereby denying indigent children the right to be heard based on their poverty.¹⁸² As courts have applied the mandate without regard to the nature of the underlying claim, it denies children the opportunity to be heard in the civil cases the Supreme Court has identified as deserving the greatest scrutiny, including suits involving children’s fundamental rights and disputes only resolvable by courts, as well as claims regarding lesser rights and those (at least in theory) capable of resolution by other means. Moreover, as statutes of limitations do not always toll during minority,

178. *Bellotti*, 443 U.S. at 634–35 (further noting “[t]he State is entitled to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention.’”) (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion)).

179. *See id.* at 651; *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1241 (1980) [hereinafter *The Constitution and the Family*].

180. Two Supreme Court cases provide in dicta that the state must only articulate a “significant state interest” to justify a law that infringes on a minor’s fundamental right. *See Carey v. Population Servs. Int’l*, 431 U.S. 678, 693 (1977) (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976)); *Danforth*, 428 U.S. at 74–75. Commentators criticize this reasoning and argue that states should be required to demonstrate a “compelling” interest to justify the infringement on the fundamental rights of children. *See, e.g., The Constitution and the Family*, *supra* note 179, at 1198 & n.5, 1236, 1240.

181. GUGGENHEIM, *supra* note 177, at 260.

182. Interestingly, the Supreme Court recognized that limiting the ability of next friends to make procedural choices on behalf of child litigants may deprive children of equal protection by depriving them of procedural protections (here, venue) guaranteed to adults. *In re Moore*, 209 U.S. 490, 499 (1908), *abrogated by Ex parte Harding*, 219 U.S. 363 (1911).

the mandate entirely deprives poor children of the opportunity to be heard regarding claims that will expire before the child reaches adulthood and can advance the claim him or herself.¹⁸³ The mandate likewise deprives children of the ability to petition the government for redress of grievances and of the opportunity to utilize litigation for political expression. As children are denied the right to vote, children's right to court access arguably deserves special protection as their primary means of democratic participation.

Applying the second prong of Guggenheim's analysis, although children's vulnerability and legal incapacity justify extending them additional procedural protections in litigation, protectionist instincts do not justify entirely depriving children of their fundamental right of access to the courts. A categorical counsel mandate disservices the interests of low and moderate income children, as described in Section II.A.1, because its practical result is the dismissal of their claims. Courts would not tolerate this outcome for adults. Important state interests support permitting children's claims to proceed,¹⁸⁴ and dismissal is far from the least restrictive alternative available to courts seeking to protect children's interests in litigation.¹⁸⁵

B. *Parents' Rights and Responsibilities for Children*

The counsel mandate also undermines the constitutional protections accorded to parental decision-making. Courts addressing the counsel mandate tend not to view parents advancing children's claims as parents at all. Instead, courts describe parents as acting as an attorney for their children.¹⁸⁶ Placing parents in the box of "wanna-be attorney" for child litigants allows courts to frame the counsel mandate as simply a matter of courtroom procedure and ignore its implications upon parental authority. Viewing parent litigants instead as acting as *parents* protecting the interests of their children through the courts reframes the decision of whether to retain counsel as a parenting choice. This perspective, in turn, invites consideration of the extent to which constitutional protections

183. The existence of exceptions to statutes of limitations that might toll claims during minority does not avoid the problem of children's claims expiring because exceptions do not always apply and, even if applicable, are not always granted. *See Gallo v. United States*, 331 F. Supp. 2d 446, 448 (E.D. Va. 2004) ("Dismissal would be a particularly harsh result in this case because any subsequent claim filed by M.G. after dismissal of this action would be effectively barred by the statute of limitations. Infancy does not toll the statute of limitations under the Federal Tort Claims Act. Therefore, M.G. would not be able to litigate her claim on her own behalf when she reaches adulthood." (citation omitted)).

184. *See infra* Section II.C.

185. *See infra* Part III.

186. *See, e.g., Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 60–61 (2d Cir. 1990); *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 877, 879 (3d Cir. 1991).

shielding child-rearing from government interference extend to litigation choices made by parents on behalf of children, including the choice of whether to retain counsel. Arguably, parents facilitate children's legal rights through the exercise of their parenting authority.

1. Constitutional Protections for Parental Decision-Making

Parents have protected liberty interests in the care, custody, and control of their children, which includes responsibility for decision-making about children's well-being.¹⁸⁷ This Part considers how the Constitution's protections for parenting impact the counsel mandate—a doctrinal limitation that courts have so far ignored.

a. History and Purpose

Although the Constitution nowhere mentions parents or children, parents' freedom to raise their children has become regarded "as among the most protected and cherished of all constitutional rights."¹⁸⁸ The Due Process Clause creates a sphere of family privacy, which protects spouses, parents and children, and close family members from government interference in their relationships with one another.¹⁸⁹ This guarantee of privacy conveys to parents the fundamental liberty interest in the "care, custody, and control of their children."¹⁹⁰ The Supreme Court identified this liberty interest as "perhaps the oldest of the

187. See *infra* Section II.B.1.a.

188. GUGGENHEIM, *supra* note 177, at 23.

189. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) ("A host of [Supreme Court] cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.'" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))); see also *The Constitution and the Family*, *supra* note 179, at 1213–16 (discussing that the state cannot generally intervene in a parent's childbearing and child-rearing decisions).

190. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting that there is a "fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course . . ."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949))).

fundamental liberty interests recognized by this Court.”¹⁹¹ Although cases addressing parental rights typically address state government action under the Fourteenth Amendment, these protections also constrain the federal government under the Fifth Amendment.¹⁹²

Parental caretaking rights are deeply rooted in tradition¹⁹³ and support several important interests. First, according parents the liberty to raise their children as they see fit serves children’s interests in having those who care most about them and know them best make important decisions on their behalf.¹⁹⁴ Parents are presumed to possess the “maturity, experience, and capacity for judgment” that children often lack, which is necessary to make “life’s difficult decisions.”¹⁹⁵ Parents also are presumed to be motivated to act in their children’s best interests because of the “natural bonds of affection” they share.¹⁹⁶ As compared to other adults or the state, parents are in the best position to make good choices for their children because parents have intimate knowledge of their children’s personalities, needs, and wishes.¹⁹⁷

Second, protecting parental freedom in child-rearing serves parents’ interests in “achieving fulfillment through childrearing.”¹⁹⁸ This interest includes “[i]mparting values and beliefs to one’s children, responding to their constantly changing demands, [and] ensuring that they will realize their full potential as they grow into adulthood.”¹⁹⁹

Finally, parental liberty interests advance society’s interest in maintaining a diverse and pluralistic community.²⁰⁰ As government exists in service of the people, rather than the people existing in service of the

191. *Troxel*, 530 U.S. at 65.

192. See *The Constitution and the Family*, *supra* note 179, at 1187.

193. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406–08 (1995) (tracing the history of respect for parental authority throughout U.S. history).

194. GUGGENHEIM, *supra* note 177, at 46 (“[T]he core of the parental rights doctrine guarantees children at least that the important decisions in their lives will be made by those who are most likely to know them best and to care the most for them.”); *The Constitution and the Family*, *supra* note 179, at 1350, 1353–54; E. Gary Spitko, *Reclaiming the “Creatures of the State”: Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1206–09 (2000).

195. *Parham*, 442 U.S. at 602 (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.”).

196. *Id.* Professor Martin Guggenheim points out that this conclusion has not been subjected to rigorous empirical study. GUGGENHEIM, *supra* note 177, at 35.

197. See Spitko, *supra* note 194; *The Constitution and the Family*, *supra* note 179, at 1350, 1353–54.

198. *The Constitution and the Family*, *supra* note 179, at 1353.

199. *Id.*

200. See *id.*; see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

government, parents have “[t]he duty to prepare the child for ‘additional obligations,’” including “the inculcation of moral standards, religious beliefs, and elements of good citizenship.”²⁰¹ Because of the diversity in their own morals and values, parents impart diverse morals and values to their children in the course of child-rearing. Vesting the obligation to prepare children for adulthood and full participation in political life with parents prevents children from becoming “mere creature[s] of the [s]tate,” indoctrinated with state-determined values and uniformity of thought.²⁰²

The constitutional doctrine protecting parental liberty interests thus creates a sphere of decision-making that reserves to parents the authority to raise their children in accordance with their own morals and values.²⁰³ The doctrine establishes “why parents, as opposed to others, have rights in and to their children,” and develops the contours of parents’ rights.²⁰⁴ The Supreme Court has recognized parents’ rights to “establish a home and bring up children,”²⁰⁵ retain physical custody of their children,²⁰⁶ and make decisions about children’s visitation with non-parents,²⁰⁷ religious upbringing,²⁰⁸ education,²⁰⁹ and health.²¹⁰

Nonetheless, parental authority is not absolute.²¹¹ It is constrained by powers reserved to the government, including the police power, which

201. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (quoting *Pierce*, 268 U.S. at 535).

202. *Pierce*, 268 U.S. at 535; see also GUGGENHEIM, *supra* note 177, at 27 (“Our future as a democracy depends on nurturing diversity of minds. The legal system’s insistence on private ordering of familial life ultimately guards against state control of its citizens. Accordingly, government must allow parents wide latitude to raise children as the parents wish to raise them.” (footnote omitted)).

203. See GUGGENHEIM, *supra* note 177, at 38 (“Any alternative to the parental rights doctrine empowers state officials to meddle in family affairs and base their decisions on their own values.”).

204. *Id.* at 18.

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

206. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

207. *Troxel v. Granville*, 530 U.S. 57, 65, 67 (2000).

208. *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972).

209. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (finding parental liberty to direct upbringing and education of children encompasses the choice to send child to private school and precludes the state from outlawing non-public schools); *Meyer*, 262 U.S. at 401 (finding that the restriction of school curricula to prohibit the teaching of “modern” languages other than English before the eighth grade unconstitutionally infringed on parents’ liberty interest in controlling “the education of their own”).

210. *Parham v. J. R.*, 442 U.S. 584, 588 & n.3, 604, 620–21 (1979) (upholding Georgia’s mental hospital commitment statute, which permitted parents or guardians to request that their child be committed if there was evidence of mental illness, because parental decisions regarding a child’s medical care should receive great deference).

211. See *The Constitution and the Family*, *supra* note 179, at 1350, 1354 (“Although the interests of parents themselves support parental control in all contexts, the interests of the child and of society at large in parental control vary significantly. Parental rights therefore deserve different degrees of constitutional protection in different circumstances.”).

authorizes the state to regulate conduct that could harm all citizens,²¹² and the *parens patriae* power, which authorizes the state to protect children and vulnerable adults who are unable to look out for themselves.²¹³ Finally, parental authority is limited by the constitutional rights of children themselves.²¹⁴

b. Legal Standard

Substantive due process analysis involves a “flexible balancing” approach, in which courts weigh the nature of a government infringement upon a fundamental right against the impact of the infringement upon the right involved.²¹⁵ The more intrusive the infringement, the more substantial government interests must be to justify it, and the closer the fit between those interests and the means used to advance them.²¹⁶

The Court has articulated different formulations of this balancing when evaluating government intrusions upon family life. Taken together, Supreme Court doctrine suggests that courts should apply some form of heightened scrutiny to government intrusions that directly interfere with child-rearing decisions made by fit parents.²¹⁷ In doing so, courts must presume that fit parents’ choices serve children’s interests.²¹⁸ “The Due Process Clause does not permit a State to infringe on the fundamental

212. See *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 569 (1991). See generally Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007) (tracing the history of police power to find it is defined by public safety).

213. See *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). See generally Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children’s Welfare*, 6 MICH. J. GENDER & L. 381 (2000) (detailing the history of state as guardian to children without private caretakers).

214. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”); *The Constitution and the Family*, *supra* note 179, at 1350, 1377–83. See generally Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1 (exploring what rights the Constitution, and more specifically the Bill of Rights, grants to minors).

215. *The Constitution and the Family*, *supra* note 179, at 1193–96.

216. *Id.*

217. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (holding that when reviewing laws intruding on family living arrangements, “this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation”); *Troxel*, 530 U.S. at 69 (plurality opinion) (applying heightened scrutiny and holding courts must accord “special weight” to a parent’s decision regarding visitation of children with third parties, but neither specifying the standard nor clarifying whether the framework extended to other contexts).

218. *Troxel*, *supra* note 217, at 68. Thus, “so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” *Id.* at 68–69.

right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”²¹⁹ Interventions that override those choices should be sustained only if the parental decisions at issue significantly harm a child and the intervention would actually benefit the child.²²⁰

2. The Scope of Parental Authority Over Children’s Legal Rights

Although parents’ rights to the care, custody, and control of children are strongly rooted in constitutional and common law doctrine, parents’ authority with regard to children’s legal rights is evolving. Common law doctrine historically limited the rights of parents as natural guardians to those of care, custody, and control.²²¹ Authority over children’s property historically was reserved to court-appointed “guardians of the estate.”²²² As legal claims are a type of property interest, parents likewise traditionally lacked the authority to waive or release legal claims on behalf of their children without court authorization.²²³ Today, state laws vary with regard to whether and under what circumstances parents have authority over the property of a child.²²⁴ In some states, parents have no authority over a child’s property unless they are court-appointed to serve as guardians of the child’s estate.²²⁵ Others grant parents authority over a child’s estate or a child’s legal claims.²²⁶ Similarly, courts vary widely in their understanding of how parents fit into the representatives authorized

219. *Id.* at 72–73.

220. *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (rejecting the argument that the *parens patriae* power permitted the state to override the religious beliefs of Amish parents and force Amish children to attend school beyond eighth grade because the case was “not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred” and noting “[t]he record is to the contrary, and any reliance on that theory would find no support in the evidence” (footnote omitted)); see *The Constitution and the Family*, *supra* note 179, at 1236–37.

221. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 9.4 at 331 & n.6 (2d ed. 1988) (citing *John Hancock Mut. Life Ins. Co. v. Dower*, 271 N.W. 193 (1937) (stating that a parent as such has no right to sell or encumber the child’s property)).

222. *Id.* at 310. This divergence between parents’ rights to care and custody and rights to children’s property stems from feudal traditions and the early exercise of the king’s *parens patriae* authority in England, which was undertaken primarily as a source of revenue for the crown. See *infra* notes 260–61.

223. See *Johnson v. Ford Motor Co.*, 707 F.2d 189, 194–95 (5th Cir. 1983).

224. *Id.* at 310. This divergence between parents’ rights to care and custody and rights to children’s property stems from feudal traditions and the early exercise of the king’s *parens patriae* authority in England, which was undertaken primarily as a source of revenue for the crown. See *infra* notes 260–61.

225. See CLARK, *supra* note 221, at 557 n.11.

226. See, e.g., *Irby v. Dowdy*, 213 S.W. 739 (Ark. 1919) (noting that under Arkansas law, “the natural guardian shall have the custody and care of minor children and their estates”); N.Y. C.P.L.R. § 1201 (an infant without a court appointed guardian of his property shall appear (in court) by a parent with legal custody).

to bring children's claims under Rule 17(c), with some recognizing parents as general guardians, and others as next friends or guardians ad litem.²²⁷

Although parents may lack exclusive legal province over the litigation and resolution of children's civil claims, as a practical matter, they are the adults most likely to advance them.²²⁸ Given their familiarity with and proximity to their children, parents are best situated to recognize that their children have suffered wrongs and most likely to be motivated to pursue legal action on their behalf.²²⁹ Children with living parents are unlikely to have appointed guardians or conservators. And courts often look to parents as the adult best suited for appointment as next friend or guardian ad litem.²³⁰

Court preference for parents as next friends is consistent with court deference to parents in other important decision-making spheres, as the choice to initiate litigation for a child has a caretaking component.²³¹

227. A full exploration of the questions of how parents fit under Rule 17(c) and whether parents should be accorded priority in representing their children's litigation interests is beyond the scope of this Article. I explore these questions in a forthcoming article. *Compare* *Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir. 1980) (mother entitled to bring suit as legal guardian); *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 26 F. Supp. 2d 1001, 1006 (W.D. Mich. 1998) ("A parent is a guardian who may so sue" as a general guardian under Federal Rule 17(c)) *with* *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1185 (S.D. Fla.), *aff'd sub nom. Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) ("Typically, the next friend who sues on behalf of a minor is that minor's parent."); C.M.J. by & through D.L.J. v. Walt Disney Parks & Resorts US, Inc., No. 614CV1898ORL22GJK, 2017 WL 3065111, at *5 (M.D. Fla. July 19, 2017) ("A parent bringing a personal injury claim as next friend on behalf of a child acts as a *de facto* guardian ad litem, and is not the real party in interest insofar as the child's claims; the child is the real party in interest.").

228. *See* *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977) ("[C]hildren usually lack the capacity to make [decisions about their interests;] . . . their interest is ordinarily represented in litigation by parents or guardians.").

229. *See* *Maldonado ex rel. Maldonado v. Apfel*, 55 F. Supp. 2d 296, 303 (S.D.N.Y. 1999) ("[A] minor child living in a low-income family usually cannot exercise that right [to judicial review of final decisions of the SSA] except through a parent or guardian.").

230. *See* *Bank of U.S. v. Ritchie*, 33 U.S. (8 Pet.) 128, 144 (1834) ("[Infants] defend by guardian to be appointed by the court, who is usually the nearest relation not concerned, in point of interest, in the matter in question."); *see also* *Johnson v. Collins*, 5 F. App'x 479, 485 (7th Cir. 2001) ("To maintain a suit in a federal court, a child or mental incompetent must be represented by a competent adult, ordinarily a parent or relative."); *Gonzalez-Jimenez de Ruiz v. United States*, 231 F. Supp. 2d 1187, 1196–97 (M.D. Fla. 2002) ("When a parent 'brings an action on behalf of a child, and it is evident that the interests of each are the same, no need exists for someone other than the parent to represent the child's interests . . .'" (quoting *Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1183 (S.D. Fla.), *aff'd*, 212 F.3d 1338 (11th Cir. 2000))).

231. A full exploration of the extent to which courts can interfere with parental authority by appointing guardians ad litem or other representatives to make decisions for children in litigation over parental objection where the interests of parents and children align is beyond the scope of this Article, and is the subject of a forthcoming project. Interestingly, at least one court has held that the retention of counsel by a parent, and the resulting obligation to pay legal fees, created a conflict of interest that disqualified the parent from continuing to serve as a child's representative

Litigation has the potential to deplete multiple family resources, including time, emotional energy, and money, which could otherwise be used to meet a child's other needs. Parents, like other potential litigants, are likely to see courts as fora of last resort for resolving their children's disputes.²³² A parent's choice to initiate a child's case can be understood as a decision that filing suit is the best option to protect the child's interests.

Finally, the advancement of children's legal claims by parents serves an expressive function that conveys messages about values and citizenship. When parents initiate lawsuits to vindicate their children's legal interests, they impart values to children about addressing disputes, standing up for one's self, using democratic institutions, and, potentially, making the world a better place. Bringing suit can thereby be understood as a statement of a parent's values, as well as a signal that a parent understands a child to have been wronged and a demonstration that a parent is standing up for a child. A parent's initiation of a lawsuit also has an educational function, as it teaches children about the democratic process, the rule of law, and resolving disputes through courts rather than force.

In sum, although children enjoy independent legal rights and parents do not have absolute legal authority over the exercise of those rights, it is generally parents who facilitate those rights and thus give them force and effect as a practical matter. These realities suggest that there is value in the context of parent-child claims to understanding the choice to retain counsel (or proceed pro se) not only as a litigation decision, but also as a parenting choice—a calculation made by parents of how (or whether) to allocate limited family resources to vindicate children's legal interests. Parents' authority over children's civil claims extends no further than that of other civil litigants over their own cases. That is, parents are not exempt from compliance with general procedural and evidentiary rules just because they are acting on behalf of their children. The choice to retain counsel stands apart from other litigation decisions because of its implications for children's ability to access the courts, children's non-legal needs, and parents' transmittal of morals and values to children.

3. Why Deferring to Parents on the Question of Counsel Protects Children's Interests

Deferring to parents on the question of whether to retain counsel to advance a child's claim protects children's interests. In extending the counsel mandate to children's claims, courts have generally concluded that children should be treated like other parties unable to speak for

during settlement negotiations and required the appointment of a disinterested guardian ad litem. See *Scott v. District of Columbia*, 197 F.R.D. 10 (D.D.C. 2000).

232. See *infra* notes 277–79 and accompanying text.

themselves in litigation—largely, artificial entities such as corporations and estates. The U.S. Court of Appeals for the Second Circuit went so far as to state that “[t]here is nothing in the guardian-minor relationship that suggests that the minor’s interests would be furthered by representation by the non-attorney guardian.”²³³ This may result from adherence to what one commentator has dubbed the norm of “trans-personality”—the principle that procedural rules should apply equally to all litigants, without regard to the artificial entity type or personhood of the parties.²³⁴ But, where real differences exist, as between children and artificial entities, the failure to account for those differences creates its own species of unfairness.²³⁵ Several distinguishing features of the parent-child relationship warrant treating parents and children differently than other representational relationships in which the counsel mandate is applied, such as corporate or testamentary cases.

The first and most important distinguishing feature of parent-child relationship is humanity. Unlike other representational relationships to which courts have applied the counsel mandate, the represented party in the parent-child relationship (the child) is a human being. The particular emotional attachments between parents and children represent a second distinguishing feature of the relationship. Strong bonds of love and affection, as well as a sense of moral obligation, motivate parents to do right by their children.²³⁶ Finally, the interests of parents and children are thoroughly intertwined.²³⁷ Because many decisions that parents make for children also affect parents’ lives, parents are extra motivated to advance their children’s interests.²³⁸

Furthermore, many concerns underlying the traditional rule against representation by nonlawyers are inapplicable to parent-child claims.²³⁹ Court goals to protect the public and the administration of justice against

233. *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990).

234. Michalski, *supra* note 95, at 325.

235. Professor Roger Michalski argues that courts should depart from strict adherence to trans-personality when doing so advances procedural values, including equalizing access or litigation opportunities. *Id.* at 355–57 (“Strict formalism . . . conflicts with intuitions that there might be good reasons to extend special protections to vulnerable persons and entities.”). For further discussion of important differences between the child/parent relationship and other representational relationships, see *supra* Section II.B.3.

236. See *supra* notes 193–97.

237. Courts have cited the blending of parents and children’s interests as one factor supporting the exemption of SSI cases from the counsel mandate. See, e.g., *Machadio v. Apfel*, 276 F.3d 103, 107 (2d Cir. 2002).

238. See *Scott & Scott*, *supra* note 193, at 2437.

239. See *supra* Section I.B.1.a. See generally *Denckla*, *supra* note 63, at 2593–99 (discussing the rationale behind the unauthorized practice of law doctrine).

unscrupulous conduct,²⁴⁰ for example, are not undermined by permitting individual parents to advance individual claims on behalf of their own children. Such parents do not seek to serve the public as a whole, and the strong bonds and intertwined interests that parents share with their children differentiate parents from nonlawyers seeking to represent litigants for financial gain. Moreover, courts' inherent powers authorize courts to sanction nonlawyers and lawyers alike "for unethical tactics or lack of candor."²⁴¹ Finally, although concerns about the competence of nonlawyer parents to advance a child's claims have merit, they disregard the reality faced by low-income families. Where parents lack sufficient financial resources to retain counsel on behalf of their children, such children are unlikely to be able to afford to retain counsel themselves once they reach adulthood.²⁴² Thus, when courts evaluate the risk that a nonlawyer parent's incompetence might harm the child's legal claim, courts should not assess the parent against a lawyer, but rather against the relative competence the child is likely to have as an eighteen-year-old nonlawyer to advance the claim him or herself. If nothing else, parents' increased life experiences are likely to make them more competent to represent their children's interests than the children themselves would be at the cusp of adulthood.

Finally, reserving to parents the question of whether to retain counsel serves the broader societal interests in cultivating diversity and pluralistic thought that underlie constitutional protections for parental authority generally. Eliminating the counsel mandate will enable far more parents, with a far broader range of financial resources, to bring civil suits on behalf of their children. As filing suit is about expression as well as remedy, enabling families to make use of courts according to their values and priorities, rather than according to their financial resources, facilitates the public exchange of a broader range of ideas. Likewise, ensuring that parents from all income levels are able to advance their children's claims guarantees that laws will be enforced and challenged to advance a broader range of values and perspectives, and that courts will have an opportunity to interpret and enforce laws in a broader array of contexts, not just those of families with significant financial resources.

240. See Denckla, *supra* note 63, at 2594 ("[L]awyers are more likely to protect client interests than nonlawyers . . . [This] assumption is backed by the belief that lawyers are both more competent and more scrupulous than nonlawyers would be in handling legal matters.").

241. *Id.* at 2597.

242. See Jason DeParle, *Harder for Americans to Rise from Lower Rungs*, N.Y. TIMES (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html?sq=mobility&st=cse&scp=1&pagewanted=all> [<https://perma.cc/5L4C-UMWY>].

C. *Democratic Norms and Functions*

The counsel mandate not only runs counter to established legal doctrine, but also to fundamental norms and functions of democratic government. Democracies are characterized not just by their formal governing structures, but also by the informal norms or values that those structures advance.²⁴³ Government actions that contravene fundamental democratic values undermine the public trust and call into question the legitimacy of the government itself.²⁴⁴ Democracies must be perceived as legitimate to function because they operate by and for the people, and thus depend on the consent of the people to govern.²⁴⁵

Fairness is a core democratic value that directly implicates public acceptance of the government.²⁴⁶ People expect that the government will treat them fairly both under the rule of law and also in its implementation.²⁴⁷ Equality is a central component of the fairness people expect from democracy.²⁴⁸ Political theorist Sidney Verba argues that an important facet of this equality is having an equal political voice.²⁴⁹ “Perceived inequalities of voice challenge the legitimacy of the government, reducing consent and requiring, perhaps, a more coercive government.”²⁵⁰ Citizens exercise political voice through all forms of political expression, including petitioning, and efforts to shape the law.²⁵¹

The counsel mandate undermines these values by depriving poor children of an equal political voice. The mandate silences the multiple forms of political expression facilitated by litigation, including communication to the government, the opposing party, and the broader populace that a child has been wronged. The mandate also deprives poor children of the opportunity to shape the law through the expression of

243. See Julia Azari, *Forget Norms. Our Democracy Depends on Values*, FIVE THIRTY EIGHT (May 24, 2018, 6:01 AM), <https://fivethirtyeight.com/features/forget-norms-our-democracy-depends-on-values/> [<https://perma.cc/G82Q-764S>]. Professor Robert Post argues that democracy is best understood as “a normative idea that refers to substantive political values.” Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. SOC. SCI. 24, 25 (2006).

244. See Azari, *supra* note 243 (discussing the role of norms in maintaining legitimacy in the executive branch).

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

246. See *id.*

247. See *id.* at 504–05.

248. See *id.*

249. *Id.*; see also SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 1 (1995) (“Voice and equality are central to democratic participation. . . . Since Democracy implies not only governmental responsiveness to citizen interests but also equal consideration of the interests of each citizen, democratic participation must also be equal.”).

250. Verba, *supra* note 245, at 505.

251. *Id.* at 507.

their perspective and needs.²⁵² Court imposition of the mandate has the potential not only to corrode the faith in government held by the children and parents at issue, but also that of the broader populace. At a time when the American public increasingly believes that courts favor the wealthy,²⁵³ the wholesale exclusion of indigent children from federal courts based on their poverty can only exacerbate that impression.

The counsel mandate not only undermines democratic norms, but also the effective functions of democratic government. The exclusion of indigent children's claims limits courts' ability to fully exercise the judicial function, as courts deprive themselves of the opportunity to interpret the law in the context of poor children's concerns.²⁵⁴ This deprivation may cause the law to bend toward the needs and interests of adults and children from wealthier families and reduce the enforcement level of regulatory regimes of particular utility for low-income children.²⁵⁵

Moreover, foreclosing litigation on behalf of indigent children prevents government accountability for harms done to this vulnerable group, which is unable to express its discontent at the ballot box. The exclusion of poor children's claims further deprives the government and the public of awareness of harms wrought by private actors, and may leave children and their families with no tool but force to resolve disputes.

The perceived unfairness of children's exclusion from federal civil litigation may be further amplified by its disconnect with state policies. Some states, for example, permit parents to represent their children pro se and waive children's constitutional right to appointed counsel in

252. See *id.* at 505–06 (“Democracy is a system by which citizens, ultimately, control governmental decisions. It is also a system whose basic principle includes equal consideration of the needs and preferences of all citizens. Equal political voice is the key to equal consideration. It is through political activity that citizens convey to the government their needs and their preferences. And equal political activity—equal voice in the processes of politics—makes it more likely that government policies will provide equally beneficial output to citizens.”); see also Goodpaster, *supra* note 27, at 233 (“The legal system, therefore, is not providing the review of lower court proceedings which is essential for the development of justice and uniformity in the law. Consequently, in addition to the possibility of injustice in the particular case, the lack of corrective devices for a large number of cases involving the poor again shows the poor being treated unequally as a class.”).

253. See Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 900 (2007) (“62% of the public say that courts favor the wealthy or those with political influence . . .”).

254. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (“Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy.”).

255. Courts have cited this concern as further support for excepting SSI cases from the counsel mandate. See *supra* notes 76–84 and accompanying text.

juvenile proceedings that place their physical liberty at stake.²⁵⁶ The disconnect between these doctrines gives rise to suspicion that the common thread is not protecting children's interests in court proceedings, but costs.

III. PROTECTING CHILD LITIGANTS IN FEDERAL CIVIL LITIGATION

A. *Reconceptualizing Federal Courts' Role in Protecting Child Litigants*

Federal courts are charged with protecting child litigants, and courts have broad discretion to determine what is required to protect a child within the circumstances of a case.²⁵⁷ But the scope of courts' protective role often is overstated and court instincts are often overly interventionist.

Federal courts historically have declared themselves vested with a duty to protect the interests of child litigants in the matters before them.²⁵⁸ As the Supreme Court noted in 1834, "[I]n all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court."²⁵⁹ This duty to protect children likely derives from the common law doctrine of *parens patriae*, traditionally, "the King's power as guardian of persons under legal disabilities to act for themselves."²⁶⁰ Federal courts continue to describe this duty in strong terms, sometimes referring to children as the "wards" of courts before whom their legal rights are presented,²⁶¹ and

256. See, e.g., *Huff v. K.P.*, 302 N.W.2d 779, 779, 783 (N.D. 1981) (finding that a father of an eleven-year-old may waive child's right to counsel and appear for her "albeit rather ineffectively").

257. See *Adelman ex rel. Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984) ("We hold only that the district court's primary concern in the instant case must be to assure, under Rule 17(c), that Daniel's interests in vindicating his statutory and constitutional rights are properly protected.").

258. See, e.g., *Coulson v. Walton*, 34 U.S. (9 Pet.) 62, 84 (1835) ("It is the duty of the court to protect the interests of minors . . .").

259. *Bank of U.S. v. Ritchie*, 33 U.S. (8 Pet.) 128, 144 (1834).

260. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) ("The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the 'royal prerogative.' . . . Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as 'the general guardian of all infants, idiots, and lunatics' . . ." (footnote omitted) (first quoting Michael Malina & Michael D. Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U. L. REV. 193, 197 (1970); and then quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *47)); see also *Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves . . .").

261. See, e.g., *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998) (per curiam) ("The court has a duty to enforce the *Cheung* rule *sua sponte*, for '[t]he infant is always

with some portraying the court as the “true” guardian of children.²⁶² Further to this end, federal courts continue to assert the traditional prerogative to review and approve (or reject) proposed settlements of children’s claims.²⁶³

Despite the sweeping rhetoric, federal courts’ protective role towards children is limited by several doctrines. First, it is limited by federalism. The *parens patriae* doctrine in the United States derives from the powers of the English Court of Chancery.²⁶⁴ All of the Court of Chancery’s powers, including the *parens patriae* power, devolved to the states and not to the federal government.²⁶⁵ Reflecting this evolution, the domestic

the ward of every court wherein his right or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him.” (alteration in original) (quoting *Johns v. Cty. of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997))), *abrogated in part by Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *duPont v. S. Nat’l Bank of Hous.*, 771 F.2d 874, 882 (5th Cir. 1985) (“[T]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him.” (quoting *Richardson v. Tyson*, 86 N.W. 250, 251 (Wis. 1901))). The description of children as “wards” of the court may stem from the feudal tenurial system of England, under which the lord or the crown assumed wardship of the children of a knight tenant if the tenant died before the children reached adulthood. *See* Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 195–96 (1978). With the demise of the feudal system, wardship became understood within English common law as a facet of the king’s power as *parens patriae* (parent of the country) to protect persons unable to protect themselves, including children. *Id.* at 201–02. At the outset, the English Court of Chancery exercised the king’s *parens patriae* authority over the property of minor heirs as a source of revenue for the crown; the authority later expanded to include humanitarian concerns. *Id.* at 199, 202; *see also In re S.G.*, 677 N.E.2d 920, 928 (Ill. 1997) (discussing that the *parens patriae* doctrine’s history is derived from English courts); *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 117–18 (W. Va. 1974) (discussing that the early development of the doctrine of *parens patriae* is derived from English law as a state fiscal policy).

262. *See, e.g., Anderson v. SAM Airlines*, No. 94 Civ.1935(ERK), 1997 WL 1179955, at *8 (E.D.N.Y. Apr. 25, 1997) (“Indeed, it is the judge who truly stands in a guardian/ward relationship with the infant. ‘The guardian ad litem is appointed merely to aid and to enable the court to perform that duty of protection.’” (citation omitted) (quoting *duPont*, 771 F.2d at 882)).

263. *See, e.g., Johnson v. Ford Motor Co.*, 707 F.2d 189, 195 (5th Cir. 1983) (“Against this background it is apparent that a minor’s rights may not be relinquished except pursuant to a specific authorization from a court of competent jurisdiction. It is incumbent upon the court from which the authority to compromise a minor’s claim is sought, and any court called upon to give effect to that compromise, to take pains to assure that the minor’s interest is well served.”); *Mock v. Grady-White Boats, Inc.*, Nos. 11-2057, 11-2653, 2013 WL 1879683, at *1 (E.D. La. Apr. 17, 2013) (“Under federal law, it is well established that ‘[t]he court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming . . . to represent him.’” (alteration in original) (citations omitted) (quoting *Torres v. Trinity Indus. Inc.*, 229 F. Supp. 2d 598, 613 (N.D. Tex. 2002))), *adopted by* Nos. CIV.A. 11-2057, 11-2653, 2013 WL 1879681 (E.D. La. May 3, 2013).

264. *See* Sharon Elizabeth Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 14–15, 14 nn.63–64 (1984).

265. *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) (“In the United States, the ‘royal prerogative’ and the ‘parens patriae’ function of the King passed to the States.”); *Fontain v. Ravenel*, 58 U.S. (1 How.) 369, 384 (1855) (“[W]hen this country achieved its

relations exception to federal jurisdiction reserves most questions of children's welfare to the states.²⁶⁶ And even the states' *parens patriae* authority is limited by the constitutional rights of parents to the care, custody, and control of their children, and by children's constitutional rights.²⁶⁷

In light of these constraints on federal power, federal courts' duty to protect children can be understood to concern child litigants' interests in the litigation. The Federal Rules of Civil Procedure provide insight into the scope of federal courts' protective role. Rule 17(c) requires courts to "appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action."²⁶⁸ Likewise, Rule 55(b) requires the court, rather than the court clerk, to review a request for entry of default against a child party and precludes the court from entering a default judgment against a child litigant who lacks an adult representative in the case.²⁶⁹ Both of these rules obligate courts to ensure that child litigants have appropriate legal representatives, or that children's interests are adequately protected without an adult representative. These rules give courts significant flexibility in exercising their responsibilities to child litigants. Courts must affirmatively assess whether children's interests are protected, but they retain discretion to determine what, if anything, is needed to protect

independence, the prerogatives of the crown devolved upon the people of the States. . . . The State, as a sovereign, is the *parens patriae*. . . . Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriae*, are not possessed by the circuit courts."); *see also id.* at 393 (Taney, C.J., concurring) ("The 2d section of the 3d article of the [C]onstitution . . . obviously confer[s] judicial power, and nothing more; and cannot, upon any fair construction, be held to embrace the prerogative powers, which the king, as *parens patriae*, in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the [C]onstitution, extends only to cases over which the court of chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants . . . has not been conferred. These prerogative powers . . . remain with the States."); Rush, *supra* note 264, at 14–15, 14 n.64 ("It has been argued that the nonjudicial prerogatives of the crown, such as the *parens patriae* doctrine, devolved upon the sovereign states and not upon the federal government.").

266. *See* Ankenbrandt *ex rel.* L.R. v. Richards, 504 U.S. 689, 703 (1992); *In re Burrus*, 136 U.S. 586, 593–94 (1890).

267. *See* Troxel v. Granville, 530 U.S. 57, 58 (2000) (finding that the state cannot exercise its *parens patriae* authority to override the judgment of fit parents regarding their children's visitation with non-parents); *In re Gault*, 387 U.S. 1, 30 (1967) (concluding that the state acting as *parens patriae* in juvenile delinquency proceedings does not entitle it to deprive juveniles of constitutional rights, including the due process right to notice and an opportunity to respond to charges, the right to counsel, and the privilege against self-incrimination, among others).

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

269. *Id.* at 55(b)(1), (2); 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1570 (3d ed. 2018).

a particular child in a particular case.²⁷⁰ The flexibility accorded by the Rules contrasts strikingly with courts' rigid formulation and application of the counsel mandate.

Second, courts' role in overseeing children's litigation interests is limited by parents' and children's constitutional rights.²⁷¹ To date, courts have ignored them. Courts have not considered the extent to which child litigants' constitutional rights or fit parents' constitutionally protected sphere of decision-making constrain the courts' discretion to require parents to retain counsel.²⁷² Nor have courts made individualized determinations about the impact of a parent proceeding pro se on the interests of a particular child. Instead, courts' analyses rely on the assumption that legal representation best serves the interests of every child. For several reasons, this unsupported assumption cannot continue to justify the counsel mandate under heightened scrutiny.

First, the mandate does not result in poor children securing counsel. Absent further court action, the mandate may simply result in the dismissal of children's claims.²⁷³ Indeed, even should a court want to obtain counsel for a child litigant, it lacks the power definitively to do so. Under federal law, courts only have the authority to *request* counsel to represent indigent litigants in civil matters; courts have neither the power to *require* counsel to do so, nor funds with which to pay attorneys who agree to serve.²⁷⁴ Lacking both carrot and stick, these requests may go unmet.²⁷⁵

Second, courts exceed the proper bounds of their authority by so readily substituting their own judgments for those of parents without giving parental decisions any consideration or weight. "Simply because the decision of a parent is not agreeable to a child, or because it involves risks, does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."²⁷⁶ Courts' special

270. See *M.S. v. Wermers*, 557 F.2d 170, 174 (8th Cir. 1977).

271. See *United States v. Maryans*, 803 F. Supp. 1378, 1379 (N.D. Ind. 1992) ("[T]he court's authority under Rule 17(c) extends only as far as necessary to protect the incompetent's interest.").

272. Similar concerns have been raised about courts overriding parents' and children's constitutional rights while ostensibly exercising their powers to protect children's best interests, for example, regarding the exercise of *parens patriae* authority to preclude parents from resolving custody disputes through arbitration. See, e.g., *Spitko*, *supra* note 194, at 1154.

273. See, e.g., *Stanford v. Brantley*, 2008 U.S. Dist. LEXIS 70200, at *1–2 (M.D. Ala. 2008) (dismissal for failure to appear by counsel).

274. 28 U.S.C. § 1915(e) (2012).

275. See *Mallard v. District Court*, 490 U.S. 296 (1989) (court authority under 28 U.S.C. 1915 is limited to "requesting" uncompensated attorney service, not compelling it, but attorneys' ethical obligations should weigh in favor of accepting court requests). The Supreme Court left undecided in *Mallard* the question of whether courts had the inherent authority to compel attorneys to serve without compensation.

276. *Parham*, *supra* note 31, at 602–03 (indeed, "[t]hat some parents 'may at times be acting against the interests of their children,' . . . creates a basis for caution, but is hardly a reason to

insight into litigation and how it is best pursued not only gives children's litigation interests outsized importance to courts, but also may feed the perception that courts are in the best position to assess children's interests as litigants. Likewise, courts' confidence in their perception of what is best for children as litigants may cause courts to broadly conclude that parents who take the risk of proceeding *pro se* have judged unwisely.

Yet, by focusing exclusively on the generalized litigation interests of child litigants, courts overlook the many other interests significant to an individual child, which may legitimately impact a parents' decision to retain counsel (or not). In deciding whether to bring a legal claim on a child's behalf, a parent necessarily will consider a child's interests in advancing the claim and how much the family can invest in the claim within the context of other pressing interests in the child's life, because for parents, children's legal and non-legal interests are inextricably related by a shared pot of resources. Rather than conclude that parents who bring children's claims *pro se* have wantonly disregarded the benefits of counsel, it is more reasonable to assume that the average parent understands that a claim would be better presented with counsel but has determined that the investment of the family's financial resources in legal fees is not the best choice overall for the child.

For some families, this investment may be simply impossible.²⁷⁷ Parents living in poverty cannot be said to have a meaningful "choice" to retain counsel for their children when doing so would require sacrificing food, medical care, transportation, or putting the family's housing at risk. Additionally, parents may face structural barriers that impede their ability to secure representation even in cases where fee-shifting provisions provide a potential external source of attorney fee payment.²⁷⁸ As with parental decision-making in other contexts, judges are not well situated to identify and evaluate the factors that parents consider as they weigh whether they can and should invest family resources in the retention of counsel.²⁷⁹

discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests") (internal citations omitted).

277. *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting) ("[N]o one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and, by eliminating a sense of security, may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase, but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have . . .").

278. *See supra* notes 144–47.

279. *See Spitko, supra* note 194, at 1198 ("Parental autonomy is grounded also in the view that the state generally functions poorly as a parent and, in most cases, would function less ably than would a child's biological or adoptive parents. Most parents know their child better and

Third, generalized assumptions about the value of counsel cannot justify the mandate because this perceived value is partly about the functioning of courts themselves.²⁸⁰ Federal courts continue to operate under a purely adversarial model, which functions as intended only when all parties have legal representation.²⁸¹ Without guaranteed government-funded legal assistance in civil as well as criminal matters, low-income litigants will never achieve meaningful equal access rights, and some might argue, based on how the right to counsel has been realized in practice in the criminal justice system, not even then.²⁸² The counsel mandate places the responsibility to remedy this structural disconnect for poor children upon poor children and their parents. But this delegation does nothing to rectify the disconnect in fact because indigent litigants cannot do what the mandate directs. It is incumbent upon the courts to remedy structural choices that prevent individuals living in poverty from fully realizing their rights in courts.

Finally, the mandate is based on assumptions regarding the value of legal representation, which are not supported by empirical evidence. As a result of an enduring reticence to study the efficacy of legal assistance, today we are entirely without an empirical understanding of how and under what circumstances legal assistance benefits litigants who otherwise would proceed pro se.²⁸³ Courts also have not fully articulated *which* interests of children legal representation is needed to protect. These gaps are critical, because absent this information, courts cannot identify the particular litigants, claims, or stages in litigation that would meaningfully benefit from legal representation.²⁸⁴ Likewise, especially in

understand her particular needs and wishes better than the state is capable of doing. Moreover, parents generally are better able than is the state to apply this knowledge for the benefit of their child.”).

280. Rebecca Sandefur, *Access to What?*, 148 *DAEDELUS* 49, 52 (2019) (arguing that lawyers are not always the solution to access to justice problems, sometimes systemic reform is the better approach).

281. See Fern A. Fisher, *Why Judges Support Civil Legal Aid*, 148 *DAEDELUS* 171, 171 (2019).

282. See Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 *U. PA. L. REV.* 967, 972 (2012).

283. See generally Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 *S.C. L. REV.* 295 (2017); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 *YALE L.J.* 2118 (2012) (concluding that all but seven of over one hundred identified studies regarding the impact of counsel are unreliable because they compare case outcomes without randomized controls).

284. D. James Greiner, *The New Legal Empiricism & Its Application to Access-to-Justice Inquiries*, 148 *DAEDELUS* 64, 65 (2019) (“There is little evidence about how to identify cases in which full representation makes a difference.”); Sandefur, *supra* note 280 (“Lawyers and social scientists have a limited understanding of how to determine which justice problems of the public need lawyers’ services and which do not.”).

light of this gap, courts can neither categorically conclude that dismissal better serves children's interests than pro se litigation,²⁸⁵ nor predict what level of legal assistance—full representation throughout the litigation, or something less—would suffice.²⁸⁶ The benefits of counsel may be particularly overvalued in the context of the claims of low-income children, whose parents may simply abandon the claim entirely if ordered to retain counsel, and in the context of practice areas in which there is a dearth of counsel competent and willing to assist.²⁸⁷ And, despite the many challenges faced by pro se litigants, parents have secured successful outcomes for their children pro se.²⁸⁸

This discussion is not intended to disregard courts' experience-based appreciation for the value of legal assistance to litigants, generally, nor the ideal that those living in poverty ought to enjoy equal access to legal services. Judges are uniquely situated to appreciate the positive impact of legal representation on litigation and the significant challenges faced by pro se parties. Pro se litigants obtain far fewer favorable case outcomes than do represented parties.²⁸⁹ Judges report that pro se litigants regularly

285. Some empirical studies suggest that in some settings, some litigants can successfully represent themselves. More research is needed to understand *why* such litigants were successful in those settings (characteristics of litigants, types of claims, characteristics of court). Jeffrey Selbin, Jeanne Charn, Anthony Alfieri, & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Griener and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 55, 59 (2012) (citing Greiner and Pattanayak, as well as Ralph C. Cavanaugh & Deborah L. Rhode, Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976)).

286. Jeffrey Selbin, Jeanne Charn, Anthony Alfieri, & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Griener and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 55 (2012) (“without well-designed research to provide objective and credible evaluation of our efforts, we have no basis to compare different full-representation models with each other or with less-than-full representation or nonrepresentation alternatives”).

287. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545–46 (2001) (stating that speech restrictions imposed by Congress on Legal Services Corporation attorneys, which required withdrawal if case raised constitutional questions, were especially problematic because indigent clients pursuing welfare benefits appeals were “unlikely to find other counsel”); Maldonado *ex rel.* Maldonado v. Apfel, 55 F. Supp. 2d 296, 307 (S.D.N.Y. 1999) (recognizing the challenge posed by dearth of counsel for SSI appeals).

288. *See, e.g.,* Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 201 (2d Cir. 2002) (declining to overturn district court verdict for plaintiff on basis that plaintiff's claim was pursued by nonlawyer parent pro se and holding that a trial court's failure to require an adult representative to obtain counsel at trial is not reversible error).

289. *See* Carpenter, *supra* note 2, at 658 & n.33; David A. Hyman et al., *Medical Malpractice Litigation and the Market for Plaintiff-Side Representation: Evidence from Illinois*, 13 J. EMPIRICAL LEGAL STUD. 603, 608, 610 (2016); Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOC. REV. 909, 910 (2015); Steinberg, *supra* note 2, at 756–57. In one study of filings in the Southern District of New York, no pro se litigants who went to trial on their claims won a judgment on the merits. Jonathon D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*,

fail to present critical evidence, make significant procedural errors, ineffectively question witnesses, and fail to object to opponents' improprieties.²⁹⁰ And parents' errors do harm children's legal claims.²⁹¹ All of this lends further contextualized support to the growing call for empirical research to inform critical questions of legal "service delivery, resource allocation, and access to justice."²⁹²

For all of these reasons, courts' role in protecting children's interests should be understood as primarily about ensuring that children have appropriate adult representatives actively participating in the case. When parents represent children's interests in litigation, constitutional principles suggest that courts should give parents' decisions special weight and not intervene just because courts believe a "better" decision could be made. Especially in the context of the choice to retain counsel, which impacts the availability of financial resources to meet children's other needs, courts should presume that parents act in children's best interests and defer to their judgment about whether counsel should be retained. It is important that courts understand their protective role as an exercise of discretion rather than one bound by absolutes. By applying the counsel mandate as an absolute bar to the advancement of children's claims, courts do more harm than good, particularly for children living in poverty.

30 FORDHAM URB. L.J. 305, 340 (2002). Likewise, a study of the Northern District of California found that "[m]ore than half of the claims involving a pro se litigant were dismissed under a preliminary motion such as a motion to dismiss for a failure to state a claim." Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 823 (1997).

290. See LINDA KLEIN, ABA COAL. FOR JUST., REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 12 & tbl. 4 (2010), https://www.americanbar.org/content/dam/aba/publishing/abanews/1279030087coalition_for_justice_report_on_survey.authcheckdam.pdf [<https://perma.cc/8ZH7-KZJP>]; DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 23 (2011), <https://www.fjc.gov/sites/default/files/2012/ProSeUSDC.pdf> [<https://perma.cc/J2V6-6PT5>].

291. See, e.g., *Osei-Afriyie*, 937 F.2d at 886 (jury relied upon a faulty instruction and denied children relief because their claims had expired, after father failed to timely object to faulty instruction). A study of cases brought by parents to enforce children's rights under the Individuals with Disabilities in Education Act (IDEA)—a context in which parents have independent standing and thus are permitted to proceed pro se—found that parents seeking relief fare significantly worse when they litigate their claims pro se. Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Educational Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 113–14 (2011).

292. Jeffrey Selbin, Jeanne Charn, Anthony Alfieri, & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Griener and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 46 (2012).

B. *A Path Forward*

Given the present reality of scarce resources and scarce empirical data, how should courts proceed when presented with civil claims brought by parents on behalf of children? First, courts should discard the counsel mandate and exempt claims brought by parents on behalf of their children from the general application of the rule that a nonlawyer cannot represent the interests of another in litigation. Courts have the authority to discard the rule not only because it contravenes constitutional rights, but also because the choice to apply the rule (or not) is a matter wholly within courts' inherent discretion. Some courts already recognize that the counsel mandate is not ironclad, warrants a contextual determination,²⁹³ and should not apply where clear injustice results.²⁹⁴ Courts are right to recognize the harms the rule inflicts in these contexts, but injustice occurs whenever poor children are categorically prevented from advancing their claims.

Rather than dismissing children's claims as a matter of course, courts should permit claims brought by parents pro se on behalf of children to proceed and fulfill their responsibility to assess whether additional supports are needed to protect children's interests. In doing so, courts should consider whether efforts to secure counsel are warranted. Rule 17(c) gives courts broad discretion to take "any other actions necessary to protect the interests" of litigants who lack legal capacity.²⁹⁵ This authority arguably permits courts to appoint counsel whenever necessary to protect a child litigant's interests. The exercise of courts' discretion under Rule 17(c) may (but need not) be informed by court practice under 28 U.S.C. § 1915(e), which authorizes courts to request counsel to represent indigent civil litigants of any age and capacity.²⁹⁶ Courts have developed a set of specific criteria for evaluating litigant requests for appointment of counsel under § 1915(e), including that: the litigant lacks adequate financial resources, the case is likely "of substance," the litigant diligently has attempted to secure counsel, the complexity of legal issues, the litigant's ability to litigate the case, and any "special factors" that make appointment of counsel more likely to result in a just determination.²⁹⁷ Section 1915(e) authorizes courts to dismiss

293. *Tindall*, 414 F.3d at 285–86 (providing, "We pause to note, however, that the rule is not quite as absolute as it may seem," and "[i]n our view, the rule that a parent may not represent her child should be applied gingerly.").

294. *See, e.g., Machadio v. Apfel*, 276 F.3d 103 (2d Cir. 2002).

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

296. *See Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 172 (E.D. Va. 1994) (appointing counsel for a severely disabled infant under § 1915).

297. Professor Catherine Ross argues that these factors support the routine appointment of counsel in civil litigation implicating children's interests, an argument that applies with greater force where children are parties to the litigation. Ross, *supra* note 26, at 1596–98. Some courts

proceedings *in forma pauperis* if the court determines the case to be frivolous, malicious, or fails to state a claim upon which relief can be granted.

Thus, like in any proceeding brought *in forma pauperis*, courts should first assess whether the case is frivolous, malicious, or fails to state a claim.²⁹⁸ Next, courts should evaluate the complexity of the case.²⁹⁹ Cases requiring fact development and the presentation of evidence at trial may be more likely to benefit from the assistance of counsel than those in which courts need only review a factual record developed at the agency level.³⁰⁰ Likewise, cases raising novel issues of law or involving ambiguous processes might signal a greater need for legal representation.³⁰¹ Courts might also prioritize cases involving fundamental rights, disputes incapable of resolution outside of courts, and claims expiring during a child's minority.

To increase the likelihood that requests for attorney service will result in representation, courts could partner with the private bar and legal services organizations to recruit a cadre of lawyers ready to accept court

have expressed similar sentiments. *See, e.g., Machadio v. Apfel*, 276 F.3d 103, 108 (2d. Cir. 2002) (“Certainly, where the district court harbors any doubt about the abilities of the non-attorney parent in a matter involving a substantial claim, counsel should be appointed. Under the law, children – society’s future – deserve no less.”).

298. Two former federal court pro se clerks note the challenges posed to screening pro se civil complaints, including that they must be screened “solely on the basis of a single poorly-drawn set of allegations (unlike collateral attacks on conviction or interim rulings in criminal cases, which are reviewed on the basis of records of judicial factfinding proceedings), and, “in civil rights cases, the law is changing constantly.” As a result, they recommend that screening be flexible, and summary dismissal reserved for cases in which the complaint clearly fails to establish federal jurisdiction,” “contains some other incurable defect,” or the allegations are incomprehensible. Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 211 (1972). *See also* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed Counsel Funding and Pro Se Access to Justice*, 160 PENN. L. REV. 967 (2012) (appointment of counsel should be reserved for meritorious claims). Courts should not use the frivolity test as a mechanism for dismissing all pro se claims brought on behalf of minors. *Epps v. Russell Cty. Dep’t of Human Res.*, No. 3:15CV25-MHT, 2015 WL 1387950, at *4 (M.D. Ala. Mar. 25, 2015) (“Because it is futile for the Plaintiffs to attempt to pursue claims *pro se* on their children’s behalf, all claims they purport to assert on behalf of their children are frivolous and are due to be dismissed pursuant to 28 U.S.C.A. § 1915(e)(2)(B)(i).”).

299. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed Counsel Funding and Pro Se Access to Justice*, 160 PENN. L. REV. 967 (2012); Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 206 (1972). Until more empirical research is completed, court judgments about the types of “complexity” that most warrant legal assistance will have to continue to be based on intuition and individual experience.

300. *See supra* note 78.

301. Jeffrey Selbin, Jeanne Charn, Anthony Alfieri, & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Grievance and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 52 (2012).

requests to represent child litigants.³⁰² Fee shifting under federal civil rights statutes and courts' Rule 17(c) authority could help persuade lawyers to accept appointments.³⁰³

Separately, courts should evaluate what structural reforms are needed to make judicial processes more accessible to and functional for pro se parties, generally, as such measures could potentially enable nonlawyer parents to better advance their children's claims.³⁰⁴ Courts might rely on magistrate judges to oversee fact-finding,³⁰⁵ establish pro se legal clinics on site to offer limited legal advice and assistance with preparing court forms and procedural questions, create standardized forms and procedural manuals for pro se parties, and publish information about court and judicial practices.³⁰⁶ Finally, courts should seek out and support empirical research on the impact of structural changes on the accessibility of courts for unrepresented parties, as many courts already do for adult pro se litigants.

CONCLUSION

Court efforts to protect the interests of child litigants must account for children's and parents' fundamental rights. The counsel mandate ignores children's right of access to the courts, and its blanket application unjustifiably substitutes courts' decisions for parents' decisions about

302. See *Machadio v. Apfel*, 276 F.3d 103, 108 n.1 (2d Cir. 2002) ("The provision of legal counsel will depend on the continuing efforts, among others, of members of the relevant bar, legal services organizations, law firm *pro bono* services, and the court. We are aware of some of the stated impediments to the delivery of legal services in children's SSI cases. . . . Mindful of such problems, we do not believe that they should be permanent barriers to legal aid. Rather they should be a spur to take steps to improve the effective administration of justice."). The court identified impediments to the availability of legal services in children's SSI cases, noting that "potential contingent fees are small and attorneys 'cannot be assured payment because the SSA does not automatically withhold a portion of a successful claimant's retroactive benefits for attorney's fees.'" *Id.*

303. See 42 U.S.C. § 1988(b) (2012). Courts have assessed costs under Rule 17(c) to compensate court-appointed guardians ad litem for their role in representing children's interests before the court. *Gaddis v. United States*, 381 F.3d 444 (5th Cir. 2004) (en banc). The fees of attorneys appointed by courts to protect children's interests should likewise be eligible for compensation.

304. See *Turner v. Rogers*, 564 U.S. 431, 448 (2011).

305. Fern A. Fisher, *Why Judges Support Civil Legal Aid*, 148 *DAEDELUS* 171, 172 (2019) (suggesting referral of cases to magistrates for fact finding as an alternative to demanding a fully adversarial process to equalize access to justice in the absence of counsel for all); Donald H. Zeigler and Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 *N.Y.U. L. REV.* 157, 211–12 (1972) (arguing that appointment of counsel is the only way to assure pro se civil litigants "substantial justice," except for "establishing special courts staffed by 'investigator-judges'" and developing and implementing radically revised court procedures).

306. See generally the measures taken by the Eastern District of New York. <https://www.nyed.uscourts.gov/self-representation> [<https://perma.cc/G6GN-MAKH>]. See also the measures taken by the Southern District of New York. <http://www.nysd.uscourts.gov/prose> [<https://perma.cc/4VVV-64QH>].

what best serves children's interests. The mandate's resulting exclusion of indigent children from federal courts violates not only the rights of the parents and children involved, but also the democratic norms of fairness and equality, and thereby breeds distrust for our system of justice. To reconcile courts' obligations to protect children with these competing guarantees, courts should discard the counsel mandate. Instead, courts should permit cases brought by unrepresented parents on behalf of children to proceed, and liberally exercise their discretion to appoint counsel to ensure children's interests are protected. To fulfill their obligation to protect children's interests in such cases, courts should consider appointment of counsel and institute reforms to make judicial processes more accessible to all pro se litigants, including parents. Taking steps to protect children's interests as litigants, rather than dismissing their claims, is a better, less constitutionally precarious way to protect children's interests, respect parents' choices, and ensure children's access to justice.