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## Litigation As Parenting

Lisa Martin

*University of South Carolina - Columbia*, lvmartin@law.sc.edu

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# LITIGATION AS PARENTING

LISA V. MARTIN\*

*Children have legal rights. Yet, children typically lack the legal capacity to represent their interests in courts. When federal courts are presented with children's claims, the Federal Rules of Civil Procedure require courts to ensure that children's legal interests are adequately protected. To do so, courts decide who can speak and make decisions for the child within the litigation. Federal Rule of Civil Procedure 17(c) maps out a loose process for addressing these concerns but fails to fully account for a critical factor in protecting child litigants: the decisionmaking rights of parents.*

*Because parents have constitutionally protected authority to make important decisions for their children, litigation brought on a child's behalf presents a collision of rights and obligations between parents, children, and "the state," here, the federal courts. Court doctrine interpreting Rule 17(c) is tangled and inconsistent and fails to offer clear guidance regarding what preference, if any, parents should have to represent their children's interests in litigation. This Article proposes for the first time that constitutional doctrine establishing parents' protected decisionmaking authority should make parents the default representatives for their children in federal civil litigation. The Article presents an account of court practices and an analytical framework to guide courts' application of Rule 17(c), which implements the general constitutional rule of parent priority while upholding the courts' responsibility to protect children's interests.*

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INTRODUCTION

In 1966, fifteen-year-old John Tinker and thirteen-year-old Mary Beth Tinker wore black armbands to school to protest the government’s policies on Vietnam.<sup>1</sup> Mary Beth and John were suspended for expressing their beliefs. Their father, Leonard Tinker, filed a legal case on their behalf challenging the punishment, which ultimately resulted in one of the most impactful First Amendment opinions in Supreme Court jurisprudence and the Court’s recognition that the First Amendment’s free expression guarantees do not stop at the schoolhouse gates.<sup>2</sup> But what if the trial court had not permitted the Tinkers’ father to represent their interests in the litigation? What if the court had appointed a guardian ad litem to speak for the children instead? That court-appointed advocate could have decided that settling the case to clear the children’s discipline records better served their interests than litigating to take a stand on free speech in schools and accordingly could have agreed on the children’s behalf to resolve the case without trial.

Under current court practice, the Tinker case easily could have taken this route. In fact, federal courts claim near absolute discretion to either permit a parent to represent a child’s interests or to displace the parent as decisionmaker with another party selected by the court.<sup>3</sup> This Article argues that such unbridled discretion is misplaced as a legal and policy matter.

The law recognizes that children are not mini-adults and need special protection during childhood. Legal doctrine vests two separate authorities with the responsibility to protect children: parents and the state. Generally, the law entrusts parents to care for their children and protects parents’ role as decisionmakers on their children’s behalf.<sup>4</sup>

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<sup>1</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

<sup>2</sup> *Id.* at 506 (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

<sup>3</sup> See *infra* Part I.

<sup>4</sup> See *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

Parents' role as decisionmakers for their children is constitutionally protected<sup>5</sup> and routinely illustrated in parents' and children's daily lives.<sup>6</sup> Parents not only must enroll their children in school and consent to children's medical treatment, but also routinely must affirmatively consent to field trips, consumption of snacks,<sup>7</sup> use of sunscreen and bug spray,<sup>8</sup> participation in extracurricular activities, and the collection and use of their children's information and imagery.<sup>9</sup> Beyond consent, parents often are asked to prospectively waive claims of liability as a prerequisite to children's participation in recreational activities and forms of entertainment.<sup>10</sup> Save for certain matters affecting the broader society or evidence of parental unfitness, when the state steps in to protect children under its *parens patriae* and police powers,<sup>11</sup> parents' rights over their children are paramount and

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over minor children."); *see also* *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 . . . is now established beyond debate as an enduring American tradition."); *infra* Part II.

<sup>5</sup> *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

<sup>6</sup> *See Bellotti v. Baird*, 443 U.S. 622, 637 (1979) (plurality opinion) ("The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.").

<sup>7</sup> *See, e.g.*, Lenore Skenazy, *I Have to Sign a Permission Slip so My Middle Schooler Can Eat an Oreo*, FREE RANGE KIDS (Mar. 25, 2015), [www.freerangekids.com/i-have-to-sign-a-permission-slip-so-my-middle-schooler-can-eat-an-oreo](http://www.freerangekids.com/i-have-to-sign-a-permission-slip-so-my-middle-schooler-can-eat-an-oreo).

<sup>8</sup> *See, e.g.*, *Sunscreen and Insect Repellent - Permission*, BRIGHT HORIZONS (Oct. 2018), [https://enroll.brighthorizons.com/-/media/bh/enroll/insect-repellant\\_sunscreen\\_us.ashx](https://enroll.brighthorizons.com/-/media/bh/enroll/insect-repellant_sunscreen_us.ashx) (form published by operator of more than one thousand daycare centers across the United States).

<sup>9</sup> Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506 (2012); *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (Mar. 20, 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions>.

<sup>10</sup> *See* Paul Sullivan, *Who's at Fault? Read the Fine Print to Make Sure You're Not at Risk*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/your-money/liability-waivers.html> (describing how parents are regularly required to sign waivers for their children's use of recreational equipment like trampolines); *see also* Daniel Akst, Opinion, *Those Crazy Indemnity Forms We All Sign*, N.Y. TIMES (Dec. 8, 2012), <https://www.nytimes.com/2012/12/09/opinion/sunday/those-crazy-indemnity-forms-we-all-sign.html> (articulating that parents must choose to sign indemnification forms for entertainment activities or have their children excluded from those activities entirely).

<sup>11</sup> *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (defining the protection of morality as a fundamental part of the government's police power); *see also Santosky v. Kramer*, 455 U.S. 745, 766–68 (1982) (holding that the State's *parens patriae* interest in promoting the welfare of children justifies removing children from their parents only upon a finding of parental unfitness by clear and convincing evidence).

fundamental.<sup>12</sup>

This dual responsibility for children sometimes creates conflict between parents and the state; and, in most circumstances, the Supreme Court defers to parents.<sup>13</sup> Constitutional doctrine presumes that parents act in their children's best interests and parents' decisions must be respected, even when imperfect.<sup>14</sup> The state may intervene in parental decisionmaking only when a parent's decisions pose a significant risk of harm to a child or the broader populace.<sup>15</sup>

Counterintuitively, the opposite is true when children bring claims in federal courts. Federal procedural doctrine fails to account for the primacy of parental decisionmaking authority in the context of civil litigation. Instead, it allows courts to circumvent parents as representatives of their children's interests in civil litigation. When we envision litigants before the courts, we typically think of adults. Yet, children are persons before the law and enjoy many of the same legal rights and protections as adults do.<sup>16</sup> Because they enjoy legal rights, children often have standing to sue.<sup>17</sup> Indeed, children's civil claims in

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<sup>12</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[T]he custody, care and nurture of the child reside first in the parents . . .”).

<sup>13</sup> See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 654 (1972) (requiring that unmarried fathers, like other parents, be found unfit before the state may remove children from their custody); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (invalidating a statute compelling public school attendance for invading parents’ right to control their child’s upbringing); *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (invalidating a prohibition on teaching non-English languages to children in the eighth grade and below); see *infra* Section II.A (outlining the constitutional protection for parental decisionmaking).

<sup>14</sup> See *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (plurality opinion).

<sup>15</sup> See *Zucht v. King*, 260 U.S. 174, 176–77 (1922) (upholding vaccination requirement for school attendance against equal protection and due process challenge); see *also infra* Section II.A.

<sup>16</sup> “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.” *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); see *also Petersen v. City & County of Honolulu*, 462 P.2d 1007, 1009 (Haw. 1969) (“[I]n general, minor children are entitled to the same redress for wrongs done them as are any other persons.”); *Wilbon v. D.F. Bast Co.*, 382 N.E.2d 784, 790–91 (Ill. 1978) (“[A] minor should not be precluded from enforcing his rights unless clearly debarred from so doing by some statute or constitutional provision.” (quoting *Walgreen Co. v. Indus. Comm’n*, 153 N.E. 831, 833 (Ill. 1926))); *Sorensen v. Sorensen*, 339 N.E.2d 907, 912 (Mass. 1975) (noting that, absent a valid statute or constitutional provision to the contrary, “[c]hildren enjoy the same right to protection and legal redress for wrongs done [to] them” as adults); *Lee v. Comer*, 224 S.E.2d 721, 722–23 (W. Va. 1976) (“We perceive no reason why minor children should not enjoy the same right to legal redress for wrongs done to them as others enjoy.”).

<sup>17</sup> Standing is the “right to make a legal claim or seek judicial enforcement of a duty or right.” *Standing*, BLACK’S LAW DICTIONARY (10th ed. 2014). “A plaintiff’s age is not determinative of standing; children possess certain personal rights that are enforceable in federal court.” *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1180–81 (S.D. Fla.), *aff’d sub nom. Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

federal court run the full gamut of potential case types.<sup>18</sup> But children's status as legal "minors"<sup>19</sup> means that they lack the legal "capacity"<sup>20</sup> to represent their interests before courts and must have an adult representative act on their behalf in civil litigation.<sup>21</sup> Federal Rule of Civil Procedure 17(c) (Rule 17(c)) establishes a hierarchy of possible adult representatives for children and requires courts to ensure that the interests of unrepresented children are protected.<sup>22</sup> Despite that parents are most often the adults who bring children's claims, Rule 17(c) does not mention them, leaving it to courts to determine how parents fit within the terminology and processes established by the Rule.<sup>23</sup>

Courts have exercised this authority expansively, claiming full discretion to determine who should speak for child litigants.<sup>24</sup> In doing

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<sup>18</sup> An empirical review of federal claims brought on behalf of minors from 2015–2018 revealed a range of claims including: torts, disability rights, consumer protection, educational rights, civil rights, immigration, bankruptcy, and social security. The cases were identified by Key Citing and Shepherdizing Rule 17(c) in the Westlaw and Lexis Advance databases, reviewing relevant American Law Reports case compilations, and filtering the cases involving claims brought on behalf of minors (as opposed to adults lacking legal capacity). Lisa V. Martin, Table: Cases Brought on Behalf of Minors in Federal Courts 2015–2018 (unpublished table) (on file with author) [hereinafter Table: Cases 2015–2018] (listing eighty-seven cases); cf. Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 Fla. L. Rev. 831, 839 & n.45 (2019) [hereinafter Martin, *No Right to Counsel*] (describing research indicating that among cases involving the question of whether an adult representative could represent a child pro se, a majority of underlying claims were civil rights claims, with disability rights and tort claims making up the next two highest proportions).

<sup>19</sup> Minority is "[t]he quality, state, or condition of being under legal age." *Minority*, BLACK'S LAW DICTIONARY (10th ed. 2014). Today most states establish eighteen as the age of legal majority, with a few states retaining nineteen or twenty-one, the traditional age of majority at common law. NATIONAL SURVEY OF STATE LAWS 564–74 (Richard A. Leiter ed., 6th ed. 2008).

<sup>20</sup> 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." *Capacity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>21</sup> 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 17.21[3][a] & n.16 (3d ed. 2019).

<sup>22</sup> FED. R. CIV. P. 17(c).

<sup>23</sup> See, e.g., *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 (M.D. Fla. 2002) ("Typically, 'the next friend who sues on behalf of the minor is that minor's parent.'" (quoting *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1183 (S.D. Fla.), *aff'd sub nom. Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000)); Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1846 (1996) ("[E]xcluding cases of inherent conflict such as custody, abuse or neglect, and termination of parental rights . . . parents are expected not only to 'foot the bill [for counsel],' but also to play an active role in directing the course of the representation." (citations omitted)).

<sup>24</sup> See *infra* Part I.

so, courts utterly fail to recognize that courts' authority is limited by parents' constitutionally protected decisionmaking rights.<sup>25</sup> In short, federal courts fail to understand that by acting as representatives in these claims parent representatives are *parenting*. Thus, although the Constitution generally protects parents' rights to make decisions for their children absent some kind of parental failure, the deference normally accorded to parental decisionmaking vanishes when parents set foot in a federal courtroom to take legal action on behalf of a child.

This lack of deference to parents as representatives for their children, as a practical matter, means that parents who bring federal civil claims on behalf of their children face uncertainty as to whether courts will: permit parents to represent their children as a matter of course, require parents to advocate for and justify why parents should be granted that privilege, or supplant parents entirely in favor of an alternate representative. Although federal courts actually sideline parent representatives in only a small number of published cases, courts often avoid the question entirely by dismissing cases brought on behalf of minors on a separate basis.<sup>26</sup> Under current federal practice, courts routinely dismiss cases brought by parents *pro se* on behalf of minors for lack of counsel.<sup>27</sup> Court rhetoric in these cases suggests that courts might exercise their claimed discretion to supplant parents more frequently were more cases brought by low-income parents on behalf of minors permitted to proceed.<sup>28</sup>

Federal courts' failure to defer to parents as children's legal representatives in litigation as a default rule causes several harms. It deprives parents of their constitutional right to protect their children's interests as they see fit. It deprives children of the assurance that their interests will be represented by those who know them best. It imposes

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<sup>25</sup> See *infra* Part II. Courts' failure to recognize the family law implications of federal procedure in this context is consistent with scholars' observation that family law is often invisible within federal constitutional law and procedure. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 870–71 (2004) (describing the "exclusion of federal law from the family law canon"); Emily J. Sack, *The Burial of Family Law*, 61 SMU L. REV. 459, 473–79 (2008) (discussing how family law is largely not present in federal and constitutional law).

<sup>26</sup> In a study of federal cases brought on behalf of minors in 2015–2018, the author identified five cases in which federal courts appointed guardians ad litem to represent minor children in lieu of a parent out of seventy-eight total cases in which parents sought to serve as a child's legal representative. Table: Cases 2015–2018, *supra* note 18.

<sup>27</sup> Martin, *No Right to Counsel*, *supra* note 18, at 833.

<sup>28</sup> See, e.g., *Oliver v. Southcoast Med. Grp.*, No. CV411-115, 2011 WL 2600618, at \*1 n.5 (S.D. Ga. June 13, 2011) (dismissing claim brought by father on behalf of his daughter for lack of counsel, noting that the court has no need to assess the father's ability to serve as the child's representative because of his failure to retain counsel, and suggesting that he may not be found competent to serve, in part, because "there is some case law indicating that financial wherewithal to competently litigate is a factor").

significant financial costs where guardians ad litem are appointed. And it imposes upon litigants, counsel, and courts themselves the burden of having to relitigate the question of who should speak for a child in every case.

In what is now a developing body of law governing the relationship between the parent, child, and state, this intrusion by the federal courts on parental decisionmaking power has been overlooked.<sup>29</sup> To fill that gap and avoid these harms, this Article proposes for the first time that constitutional doctrine should govern courts' assessment of who should represent child litigants under Rule 17(c).<sup>30</sup> Specifically, courts should implement a presumption favoring parents as the appropriate representatives for their children in civil litigation and appoint a non-parent representative over a parent's objection only upon evidence that parent representation itself will cause significant harm.

The Article proceeds in three parts. Part I maps courts' treatment of parents as representatives for their children under Rule 17(c). This Part explores the doctrine surrounding the various adult representatives permitted to represent children's interests before federal courts and evaluates the disparities in courts' understandings of how parents fit into this landscape. The myriad inconsistencies in the doctrine identified by this Part illustrate the need for a unified standard. Part II proposes that standard. Drawing on constitutional principles, it presents a doctrinal justification for a default rule of court deference to parents as the adults who should generally represent their children's interests in federal litigation. It develops a novel theoretical account of parent representatives as *parenting* through representative litigation. Conceiving of litigation as a parenting choice, the Part considers the harms of courts' present failure to defer to parents and evaluates why deference serves children's interests. Part III proposes an

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<sup>29</sup> Although scholars have extensively debated parents rights vis-à-vis children's rights and those two sets of rights vis-à-vis the state, none have yet explored how the courts intrude on parents' constitutional rights when children bring civil claims in federal court. See, e.g., MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 17–50 (2005); Emily Buss, Essay, "*Parental*" Rights, 88 VA. L. REV. 635 (2002); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, MICH. L. REV. (forthcoming 2020); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255 (1979); Barbara Bennett Woodhouse, *Who Owns the Child? Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

<sup>30</sup> Cf. Martin, *No Right to Counsel*, *supra* note 18, at 872–74 (arguing that parents' choices about whether to retain counsel in cases brought to advance children's civil legal claims warrant court deference in light of parents' constitutionally protected decisionmaking authority). Of course, another factor in these cases potentially entails a child's separate right to access the courts and advance legal claims to which a parent objects. That topic is the subject of a work in progress by the author. This Article's primary focus is on cases in which parents' and children's rights and interests align, and thus touches only briefly on circumstances of parent/child conflict in Part III.



analytical framework that would enable courts to implement a presumption in favor of parents as the default representatives for children's claims while still fulfilling their responsibility to protect children's interests and respecting children's own fundamental rights.

## I

### CHILDREN'S REPRESENTATIVES UNDER RULE 17(C)

Federal courts are charged with ensuring that the interests of child litigants are adequately protected. But courts operate as though this authority gives them *total* discretion to determine who should represent a child's interests in litigation, without engaging in any analysis of the constitutional implications of this approach. In exercising this discretion, courts take widely variant approaches. Courts categorize parents as qualifying to serve in different roles and articulate different processes and standards that parents must meet to secure court approval to serve as a child's legal representative. Consequently, court doctrine interpreting Rule 17(c) is tangled and inconsistent and fails to provide clear guidance regarding how courts should proceed when presented with child litigants and how parents should be treated as prospective representatives for children. The resulting doctrinal mess is harmful for child litigants and their parents.

#### A. Courts' Authority to Protect Child Litigants

Federal courts exercise inherent powers to regulate the lawyers and parties who appear before them,<sup>31</sup> including the authority to require "submission to their lawful mandates"<sup>32</sup> and establish rules of procedure.<sup>33</sup> Further, federal courts historically have imposed upon themselves a special common law obligation to protect the interests of child litigants.<sup>34</sup> Courts typically describe their responsibility for child litigants in overly expansive terms, by, for example, referring to child

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<sup>31</sup> *Link v. Wabash R.R.*, 370 U.S. 626, 630–31 (1962).

<sup>32</sup> *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

<sup>33</sup> *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 1 (1825).

<sup>34</sup> *See Coulson v. Walton*, 34 U.S. (9 Pet.) 62, 84 (1835) ("It is the duty of the court to protect the interests of minors . . ."); *see also Bank of United States v. Ritchie*, 33 U.S. (8 Pet.) 128, 144 (1834) ("In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court."). Courts have expressed this objective in strong terms, with several declaring: "The 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." *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998) (per curiam) (quoting *Johns v. County 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).

litigants as “wards of the court”<sup>35</sup>—a phrase typically reserved for children deemed by a court to have been abused or neglected by an unfit parent—and portraying the court as the true guardian of children.<sup>36</sup> As the governmental *parens patriae* power to protect children rests exclusively with the states, federal courts’ protective role is strictly limited to the bounds of federal litigation, and it in no way approaches the relationship between guardian and ward in any literal sense.<sup>37</sup>

Rule 17(c) reflects courts’ historical responsibility and outlines the minimum steps courts must take when presented with a child litigant.<sup>38</sup> A primary concern for such courts includes ensuring that the child has an appropriate adult representative to make decisions for the child within the litigation. Rule 17(c) establishes a hierarchy among potential adult representatives according to an adult’s relationship with the child.<sup>39</sup> 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

<sup>35</sup> See, e.g., *duPont v. S. Nat’l Bank of Hous.*, 771 F.2d 874, 882 (5th Cir. 1985) (citation omitted); *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978) (“It is an ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interests.”).

<sup>36</sup> 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.’” (first citation omitted) (quoting *duPont*, 771 F.2d at 882)).

<sup>37</sup> 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) (“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.”).

<sup>38</sup> See *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989) (“Rule 17(c) flows from the general duty of the court to protect the interests of infants and incompetents in cases before the court.”); see also *Adelman ex rel. Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984) (“[T]he district court’s primary concern in the instant case must be to assure, under Rule 17(c), that [the child’s] interests in vindicating his statutory and constitutional rights are properly protected.”).

<sup>39</sup> FED. R. CIV. P. 17(c).

guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.<sup>40</sup>

The Rule defers to general representatives for a child as the appropriate litigation representatives for children. General representatives exercise broad and ongoing decisionmaking responsibilities in a child's life beyond the bounds of an individual case.<sup>41</sup> The Rule permits representation by special representatives—individuals appointed to exercise decisionmaking responsibilities for a child within the bounds of a particular case<sup>42</sup>—only where a child lacks a general representative, or a general representative is unavailable, or inadequate (for example, because of a conflict of interest).<sup>43</sup> Thus, when presented with a child litigant, courts must first assess whether a child has a general representative.<sup>44</sup> Children lacking a general representative may appear by a special representative, namely, a next friend or guardian ad litem, if that representative meets the court's approval.<sup>45</sup> When a child has no adult representative, a court may appoint a guardian ad litem or take other action to protect the child's interests in a case.<sup>46</sup> Regardless of their particular designation within a case,

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<sup>40</sup> *Id.*

<sup>41</sup> *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 895–96 (7th Cir. 1997). See generally 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1570 (3d ed. 2010) (identifying individuals included in 17(c)(1) as general representatives for an infant or incompetent).

<sup>42</sup> *Brophy*, 124 F.3d at 895 (“Rule 17(c) distinguishes between a guardian or other ‘duly appointed representative,’ on the one hand—in short, a general representative—and a guardian ad litem or a next friend, on the other hand—a special representative.”); *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974) (“[A]n appointed guardian ad litem does not replace a general guardian for all purposes, but is ‘appointed as a representative of the court to act for the minor in the cause . . . .’” (quoting *Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir. 1955) (Boldt, J., concurring))). See generally 6A WRIGHT ET AL., *supra* note 41, § 1570 (noting that courts are empowered to appoint a special representative where a general representative refuses to act or has interests that conflict with those of the person represented).

<sup>43</sup> See *Garrick*, 888 F.2d at 692–93 (“[W]here the infant or incompetent is represented by a general guardian or conservator, a next friend lacks standing absent express consent or court order.” (citing *Susan R.M. v. Ne. Indep. Sch. Dist.*, 818 F.2d 455, 458 (5th Cir. 1987); *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281, 285–86 (1st Cir. 1982) (refusing next-friend standing when parent/legal guardian objected to suit))).

<sup>44</sup> See FED. R. CIV. P. 17(c); *Brophy*, 124 F.3d at 895 (“Unless . . . the court finds the child's general representative to be inadequate, it should not allow the general representative to be bypassed by appointing a special representative . . . . Rule 17(c) doesn't say this . . . but it is implicit in the usual formulations of the court's powers under the rule . . . .”).

<sup>45</sup> *Brophy*, 124 F.3d at 895. See *infra* Section I.C for discussion about how the terms “next friend” and “guardian ad litem” are understood by courts.

<sup>46</sup> *Id.*

adult representatives share the same responsibility to make disinterested decisions on behalf of child litigants.<sup>47</sup>

Courts interpreting Rule 17(c) have minimal guidance to rely upon.<sup>48</sup> “[T]he Supreme Court has never construed, interpreted, or applied [Federal Rule of Civil Procedure 17(c)] in any opinion,”<sup>49</sup> and there is virtually no published legislative history to aid in courts’ interpretation.<sup>50</sup> Moreover, as the Rule fails to clarify whether federal or state law governs determinations of who qualifies to serve as a representative for child litigants under Rule 17(c) and what procedures are required for their approval, courts vary in looking to state law, or not.<sup>51</sup> To this end, courts reach different conclusions as to whether the

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<sup>47</sup> See, e.g., *In re Moore*, 209 U.S. 490, 499 (1908) (holding that petitioning for a change of venue falls within the discretion and authority accorded to next friends acting on behalf of minors in litigation); 43 C.J.S. *Infants* § 426 (2019) (“It is the guardian ad litem’s duty to stand in the shoes of the child and to weigh the factors as the child would weigh them if his or her judgment were actually mature, and the minor was not in fact of tender years.”); Moore, *supra* note 23, at 1846 (“[I]n litigation where the parent is bringing suit on behalf of the child, the parent’s role as guardian, next friend, or guardian *ad litem* ordinarily contemplates that the parent . . . will be making decisions on the child’s behalf, even though it is the child who is the [lawyer’s] actual client . . .”).

<sup>48</sup> See Vroon v. Templin, 278 F.2d 345, 347 (4th Cir. 1960) (“It may be said that Rule 17 is lacking in complete clarity.”).

<sup>49</sup> Gaddis v. United States, 381 F.3d 444, 452 (5th Cir. 2004) (footnote omitted).

<sup>50</sup> Specifically, “[t]he only historical note in the published rules indicates that Rule 17(c) ‘is substantially former Equity Rule 70 (Suits by or Against Incompetents) with slight additions.’” *Id.* at 452–53 (quoting FED. R. CIV. P. 17 advisory committee’s note to 1937 version). The author’s review of drafters’ memos from the initial drafting and subsequent revisions of the Federal Rules of Civil Procedure uncovered no substantive discussion of the content of Rule 17(c) that would aid in its interpretation. Moreover, very little history of the development or interpretation of Equity Rule 70, Rule 17’s predecessor, exists. Indeed, a twenty-year retrospective of the Equity Rules concluded that Rule 70 “require[d] no comment.” Wallace R. Lane, *Twenty Years Under the Federal Equity Rules*, 46 HARV. L. REV. 638, 655 (1933); see also Wallace R. Lane, *Federal Equity Rules*, 35 HARV. L. REV. 276, 297 (1922) (citing no reported cases discussing Equity Rule 70 ten years after its adoption).

<sup>51</sup> Compare *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281, 285–86 (1st Cir. 1982) (interpreting Rule 17(c)(1) according to New Hampshire law), and *Bergstreser v. Mitchell*, 448 F. Supp. 10, 15 (E.D. Mo. 1977), *aff’d*, 577 F.2d 22 (8th Cir. 1978) (“Under Missouri law an infant may sue by its parent who is a natural guardian of the child without the formality of having the parent appointed as next friend.” (citation omitted)), with *Fallat v. Gouran*, 220 F.2d 325, 328 (3d Cir. 1955) (“Rule 17(c) . . . apparently gives a guardian the right to sue in the federal courts *irrespective* of his capacity under state law. From this it might be argued . . . that Rule 17(b) does not apply to guardians but that their capacity to sue in the federal courts now stands solely on the basis of federal law.”), and *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 26 F. Supp. 2d 1001, 1006 (W.D. Mich. 1998) (concluding, without reference to state law, that a parent is “a general guardian” who may sue on behalf of a minor under Rule 17(c)(1)). See generally 6A WRIGHT ET AL., *supra* note 41, § 1571 (detailing how the lack of express language in Rule 17(c) results in courts diverging in whether they interpret federal or state law when applying the rule); Moore, *supra* note 23, at 1828–29 (“Absent unusual circumstances, parents are entitled to bring lawsuits on behalf of their children. However, whether they do

question of who can represent a child under Rule 17(c) is substantive or procedural,<sup>52</sup> and whether such “representatives” acting on behalf of children are *parties* in the case whose capacity to represent a child is governed by state law pursuant to Rule 17(b).<sup>53</sup>

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so as general guardians or as next friends or guardians *ad litem* depends on the vagaries of state law.” (citations omitted)).

<sup>52</sup> See, e.g., *Travelers Indem. Co. v. Bengtson*, 231 F.2d 263, 265–66 (5th Cir. 1956) (finding the court’s determination of who qualifies to represent a child litigant is procedural and controlled by Federal Rule 17(c) and not by state law, which, in this case would permit the claim to proceed only if brought by their father since their parents divorced); *Montgomery Ward & Co. v. Callahan*, 127 F.2d 32, 36 (10th Cir. 1942) (explaining that “[h]ow appellee was required to proceed, in whose name the action must be filed, is procedural,” and thus determined by federal law). See generally *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (“[F]ederal courts are to apply state ‘substantive’ law and federal ‘procedural’ law . . . .”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”).

<sup>53</sup> Rule 17(b) provides that the capacity of an individual “not acting in a representative capacity” is determined “by the law of the individual’s domicile,” and that the capacity “for all other parties” is determined “by the law of the state where the court is located.” FED. R. CIV. P. 17(b) (emphasis added). Rule 17(c) makes no mention of state law and describes “representatives” who may sue or defend on behalf of a minor. It is not clear whether the “representatives” identified in Rule 17(c) are “other parties” for purposes of Rule 17(b), or whether Rule 17(b) only governs those who qualify as “real parties in interest” under Rule 17(a). FED. R. CIV. P. 17. Compare *Chrissy F. ex rel. Medley v. Miss. Dep’t of Pub. Welfare*, 883 F.2d 25, 27 (5th Cir. 1989) (applying Rule 17(b) to determination of who should represent a minor party under 17(c)), with *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 656 (2d Cir. 1999) (noting that state law regarding who may represent a child in the settlement of a child’s claim cannot restrict the federal court’s authority to appoint a representative for a child under Rule 17(c)). See generally *Vroon v. Templin*, 278 F.2d 345, 347 (4th Cir. 1960) (summarizing opposing court views of whether state law governs the determination of who can represent a child under 17(c)); 6A WRIGHT ET AL., *supra* note 41, § 1571 (describing various approaches taken by courts to reconcile Rules 17(b) and 17(c)). At least one court has held that parent guardians must bring an action in their own names as real parties in interests when bringing suit on behalf of a child, but this conclusion is uncommon. *Ciarrocchi v. Clearview Reg’l High Sch. Dist., No. 09-2433 (NLH)(AMD)*, 2010 WL 2629050, at \*2 (D.N.J. June 25, 2010) (dismissing father’s claim upon finding mother to be child’s proper guardian, and stating that even were the father the proper guardian, he would need to file the case in his name as the real party in interest and not in the name of the minor child). Most courts hold that, whatever their designated role, as representatives for their children, parents are nominal parties only and not real parties in interest. See *Morgan v. Potter*, 157 U.S. 195, 198 (1895) (“The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another.”); see also *C.M.J. ex rel. D.L.J. v. Walt Disney Parks & Resorts US, Inc.*, No. 6:14-cv-1898-Orl-22GJK, 2017 WL 3065111, at \*4 (M.D. Fla. July 19, 2017) (“The guardian ad litem or next friend mentioned in Rule 17(c)(2) has always been deemed a nominal party only, and the ward is the real party in interest.” (citation omitted)); *Caban ex rel. Crespo v. 600 E. 21st St. Co.*, 200 F.R.D. 176, 179–80 (E.D.N.Y. 2001) (“Whether suing as a natural guardian . . . , as a next friend, or as a court-appointed guardian ad litem, the representative is a nominal party only; the action must be brought in the name of the real party in interest—the infant.” (citation omitted)); J.G. WOERNER, A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND

Taken together with courts' expansive view of their discretion, these realities thwart the development of a clear, shared understanding of how Rule 17(c) applies to parents. Indeed, a survey of federal claims brought on behalf of minors between 2015–2018 confirmed that parents are the adults who most often bring cases on behalf of children, and it revealed that courts' treatment of parent representatives spanned a wide range, with courts identifying parents as “guardians” in 21% of cases, “next friends” in 26% of cases, “guardians ad litem” in 47% of cases, and failing to specify parents' role in 6% of cases.<sup>54</sup> Interestingly, court practices varied widely not only among circuits but also within circuits, although trends emerged.<sup>55</sup> For example, courts in the Ninth Circuit were far more likely than courts in other circuits to appoint parents as guardians ad litem, whereas courts in the Eleventh Circuit more often treated parents as next friends, and courts in the Third Circuit (although reflecting a smaller sample size than the Ninth or Eleventh Circuits) uniformly treated parents as guardians in all three cases identified.<sup>56</sup> As discussed in Section I.D, these disparities and the unpredictability they generate harm parents, children, and courts themselves.

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§ 58, at 188–91 (1897) (concluding that if a suit is for the sole use and benefit of the ward it should be brought in the infant's name; by contrast, if the suit involves a right belonging to the guardian as guardian or damages resulting from his possession or contract regarding the ward's property it may be brought in the guardian's name, and collecting cases holding variously that a guardian should sue in the guardian's name and that a guardian should sue in the name of the ward).

<sup>54</sup> Seventy-eight out of eighty-seven total cases brought on behalf of minors identified by the author were brought by parents. Table: Cases 2015–2018, *supra* note 18.

<sup>55</sup> *See id.*

<sup>56</sup> Treatment of parents in a given case is categorized under a specific role (e.g., next friend, guardian ad litem) if: The court found at least one parent appropriate for that role or appointed at least one parent to that role; the court was prepared to allow at least one parent to fill that role if further action was taken (e.g., the appropriate motion was filed or the parent retained counsel); or the court assessed a parent's appropriateness for that role, even if the court appointed a non-parent to that role or another. The survey of cases brought on behalf of minors in federal courts between 2015–2018 revealed the following breakdown of court classifications of parents seeking to represent their children. First Circuit: no cases identified; Second Circuit: five cases identified (guardian: 2; next friend: 2; guardian ad litem: 1); Third Circuit: three cases identified (guardian: 3); Fourth Circuit: one case identified (next friend: 1); Fifth Circuit: five cases identified (guardian: 2; next friend: 1; parent(s) not classified: 2); Sixth Circuit: three cases identified (guardian: 1; next friend: 2); Seventh Circuit: no cases identified; Eighth Circuit: two cases identified (guardian: 1; parent(s) not classified: 1—although the court in this case suggested that the parent could seek to qualify as a guardian or next friend); Ninth Circuit: forty-two cases identified (guardian: 4; next friend: 2; guardian ad litem: 35; parent(s) not classified: 1); Tenth Circuit: four cases identified (guardian: 1; next friend: 2; parent(s) not classified: 1); Eleventh Circuit: eleven cases identified (guardian: 2; next friend: 8—these eight cases had related claims, were filed in the same court, and involved the same counsel; guardian ad litem: 1); D.C. Circuit: two cases identified (next friend: 2). Table: Cases 2015–2018, *supra* note 18.

### B. Parents and General Representatives

Rule 17(c)(1) explicitly authorizes certain general representatives, including “general guardians,” “committees,” “conservators,” and other “like fiduciaries” of a minor child to sue and defend on the child’s behalf without court approval.<sup>57</sup> Thus, if a qualifying general representative appears on behalf of a child in a case, Rule 17(c)(1) presumes that the representative should be permitted to proceed and no further court action to protect a child is required (absent evidence of harm or a conflict of interests).<sup>58</sup> Courts frequently recognize that general representatives should not be sidelined in their ongoing decisionmaking role for a child through the appointment of a special representative in a particular case.<sup>59</sup>

A critical question left unanswered by Rule 17(c) is whether parents qualify as such general representatives.<sup>60</sup> Although parents and other legal custodians have decisionmaking authority in children’s daily lives,<sup>61</sup> parents are not expressly listed in Rule 17(c)(1), and courts disagree as to whether parents fit within one of the qualifying

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<sup>57</sup> FED. R. CIV. P. 17(c)(1). The full text reads: “(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.”

<sup>58</sup> T.W. *ex rel.* Enk v. Brophy, 124 F.3d 893, 895 (7th Cir. 1997) (“If the general representative has a conflict of interest (for example because he is . . . the defendant in the child’s suit), or fails without reason to sue or defend . . . , the child may with the court’s permission sue by another next friend, or the court may appoint a guardian ad litem . . . .” (citation omitted)); *see also* Ad Hoc Comm. of Concerned Teachers *ex rel.* Minor & Under-Age Students Attending Greenburgh Eleven Union Free Sch. Dist. v. Greenburgh No. 11 Union Free Sch. Dist., 873 F.2d 25, 29 (2d Cir. 1989) (“Rule 17(c) has always been viewed as permissive and not mandatory. It gives a federal court power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent person where that representative is unable, unwilling or refuses to act or has [conflicting] interests . . . .”); Garrick v. Weaver, 888 F.2d 687, 693 (10th Cir. 1989) (“When the court determines that the interests of the infant and the infant’s legal representative diverge, appointment of a guardian ad litem is appropriate.” (citing *Noe v. True*, 507 F.2d 9, 11–12 (6th Cir. 1974))); *Chrissy F. ex rel. Medley v. Miss. Dep’t of Pub. Welfare*, 883 F.2d 25, 27 (5th Cir. 1989) (“[W]hen the complaint shows a conflict of interest between a general guardian and an infant, the court should, on its own motion, determine whether the infant’s interests are adequately protected by the general guardian’s representation.” (citation omitted)).

<sup>59</sup> *See, e.g., Brophy*, 124 F.3d at 895 (“Unless . . . the court finds the child’s general representative to be inadequate, it should not allow the general representative to be bypassed by appointing a special representative . . . . Rule 17(c) doesn’t say this . . . , but it is implicit in the usual formulations of the court’s powers under the rule.”). *But see* von Bulow *ex rel. Auersperg v. von Bulow*, 634 F. Supp. 1284, 1293 (S.D.N.Y. 1986) (“[C]ourts have repeatedly affirmed the power of the court to determine that the interests of a child or incompetent would best be represented not by a general representative, such as parent or guardian, but by a guardian ad litem or ‘next friend.’” (citation omitted)).

<sup>60</sup> *See von Bulow*, 634 F. Supp. at 1293 (identifying parents as general representatives).

<sup>61</sup> *See supra* notes 5–12 and accompanying text.

categories. Specifically, courts disagree as to whether parents qualify as “general guardian[s],” “like fiduciar[ies],” or do not qualify as *any* form of general representative at all.<sup>62</sup> Because the question of parents as general representatives remains unsettled, parents generally lack the assurance that they will be entitled to represent their children’s interests without further court scrutiny or process under Rule 17(c)(1).

The variety in courts’ understanding of the term “general guardian” accords with its disparate meanings within guardianship law itself. In common parlance, the term “guardian” often refers to an adult who has been court-appointed to serve as the legal representative for a child whose parents are unable to do so, but parents are guardians as well.<sup>63</sup> Guardianship law historically has divided guardians into several categories according to the duration, scope, and content of their authority. With regard to the duration and scope of their authority, general guardians act “for all purposes and over a period of time,” whereas special guardians are appointed for a limited purpose and/or a limited time.<sup>64</sup> Moreover, some authorities recognize the term “general guardian” as a specialized term “applied, mostly, to guardians appointed by probate or testamentary courts to distinguish them” from other types of guardians.<sup>65</sup>

With regard to the content of their authority, guardians of the person have custody of a child and are responsible for the child’s education and support, and entitled to their earnings,<sup>66</sup> whereas guardians of the estate are “responsible for the care, management, protection and investment” of a child’s tangible and intangible property.<sup>67</sup> These content divisions have inauspicious roots in feudal traditions and the historic legal infantilization of women.<sup>68</sup> Court-appointed guardians

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<sup>62</sup> FED. R. CIV. P. 17(c)(1).

<sup>63</sup> Peter Mosanyi II, Comment, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. L. 253, 253–54 (2002); WOERNER, *supra* note 53, § 14, at 39 (“Guardian . . . is the generic term applied, in legal usage, to a person whose right and duty it is to protect the rights, whether of person or property, of some other person . . . incompetent to manage his affairs.”).

<sup>64</sup> 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 9.4, at 560 (practitioner’s ed., 2d ed. 1987).

<sup>65</sup> WOERNER, *supra* note 53, § 24, at 76.

<sup>66</sup> CLARK, *supra* note 64, § 9.4, at 557; WOERNER, *supra* note 53, § 8, at 21–22.

<sup>67</sup> See CLARK, *supra* note 64, § 9.4, at 558; Deirdre M. Smith, *Keeping It in the Family: Minor Guardianship as Private Child Protection*, 18 CONN. PUB. INT. L.J. 271, 280 (2019) (noting that historically, the key task of guardians of the estate was to “ensure that the minor was able to enjoy, control, and dispose of their property,” thus preserving the economic benefits of the property for the family during the child’s minority).

<sup>68</sup> Under feudal traditions, the lord in chivalry had exclusive authority over the estate; until the twentieth century, American law denied women full legal status and thereby precluded women and mothers from taking legal action on behalf of themselves and their



exercise authority only over those concerns specifically designated by the court.<sup>69</sup>

Parents occupy a singular place in guardianship law, which straddles these divides. The law refers to parents as the “natural guardians” of their children, with authority deriving from their relationship rather than court order.<sup>70</sup> Common law traditionally conferred parents, as “natural” guardians, with the custody of their children and the responsibility to provide for their children’s care, education, and support, but it did not confer parents with authority over children’s property.<sup>71</sup> Thus, common law historically treated parents as guardians of the persons of their children but not of their estates.<sup>72</sup> Within these spheres, the classification of legal claims as elements of “property manage-

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children. WILLIAM MACPHERSON, *A TREATISE ON THE LAW RELATING TO INFANTS* 52–54, 57 (1843); Smith, *supra* note 67, at 278–79 (“Minors most commonly owned property because they had inherited it from their deceased fathers, so the children most in need of an appointed guardian were also legal orphans. (A fatherless child was considered an orphan because their mother had limited standing and rights.)” (footnote omitted)); *see also* WOERNER, *supra* note 53, § 19, at 53 (explaining that a father’s right to natural guardianship “is paramount to that of the mother, unless adjudged to be unfit or incompetent, in all the States except Iowa, Kansas, and Nebraska”).

<sup>69</sup> *See* 39 AM. JUR. 2d *Guardian & Ward* § 1.

<sup>70</sup> *See* CLARK, *supra* note 64, § 9.4, at 557. Although this historic terminology stems from the relationship between biological parents and their children, adoptive parents and parents who have children using assisted reproductive technology also enjoy rights as children’s legal parents, while some biological parents such as unmarried fathers may not be legally recognized until they take legal action. *See* June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 14–15 (2017) (identifying legal parents as “those adults upon whom the law confers recognition, imposes financial obligations, and grants standing to seek visitation and custody,” and identifying several sources of legal parenthood: biology, function, and formalities (such as adoption)); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 203–05 (2015) (evaluating the legal rights of unmarried fathers); *cf.* Pavan v. Smith, 137 S. Ct. 2075, 2077–79 (2017) (holding that Arkansas must recognize the legal parentage of same-sex spouses whose children are born during their marriage (by whatever reproductive means) to the same extent as opposite-sex spouses whose children are born during their marriage, even if the same-sex spouse lacks a biological tie to the child); V.L. v. E.L., 136 S. Ct. 1017, 1019–22 (2016) (holding Alabama must give full faith and credit to a Georgia adoption decree conferring legal parenthood on the same-sex spouse of a child’s biological mother). *See generally* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017) (exploring contemporary permutations of parenthood facilitated by assisted reproductive technologies and arguing for a reorientation of parentage law to emphasize parents’ social contributions over their biological contributions).

<sup>71</sup> WOERNER, *supra* note 53, § 14, at 40 (“But the authority of parents as guardians by nature extends only to the person of their child; they have no power, as such, over property, whether real or personal.”); *id.* at 55; Annotation, *Right of Natural Guardian to Custody or Control of Infant’s Property*, 6 A.L.R. 115 (1920).

<sup>72</sup> This synergy is further reflected in doctrine providing that the guardian of an infant’s person “stands in loco parentis.” *In re Bagley’s Guardianship*, 233 N.W. 563, 565 (Wis. 1930); WOERNER, *supra* note 53, § 14, at 39 (“In respect to minors, the guardian of the person stands *in loco parentis* . . .”).

ment” or “care” creates another source of ambiguity. Some commentators and courts have concluded that the common law categorizes legal claims wholesale as property interests (whether inchoate or realized), which fall under the exclusive purview of guardians of the estate, and outside the authority of parents.<sup>73</sup> Yet, this generalization overlooks the nuance in how courts historically have treated the legal claims of minors in practice.<sup>74</sup> The management of legal claims related to a child’s sole and separate estate have been understood as within the property-management authority of guardians of the estate.<sup>75</sup> But courts historically turned to *parents* as natural guardians and children’s closest relatives to advance children’s legal claims under a wide variety of circumstances, including: where a child lacks an appointed guardian of the estate, where a child’s claims are unrelated to the child’s estate, and where claims relate to the portion of a child’s estate derived from the parent.<sup>76</sup>

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<sup>73</sup> See *Am. Mut. Liab. Ins. Co. v. Volpe*, 284 F. 75, 79–80 (3d Cir. 1922) (“The father, as the natural guardian of the person of his child, during infancy, has, by virtue of such relationship, no authority whatever to exercise any control over the estate of the minor. He cannot release or compromise a suit prosecuted on behalf of the minor.”); CLARK, *supra* note 64, § 9.4, at 557, 559 (“Where a minor is a party to a suit, it is generally required that the court appoint a guardian ad litem to represent him, unless he already has a guardian of the estate, in which case that guardian may represent him.”); *cf.* *Tulsa Prof’l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (holding that a cause of action is an intangible property interest protected by the Due Process Clause of the Fourteenth Amendment); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429–30 (1982) (analyzing underpinnings of classification of legal claims as property under the Due Process Clauses of the Constitution).

<sup>74</sup> Indeed, one late-nineteenth-century commentator asserted that historically, under common law, “infants sue and defend by guardian,—not the guardian of the person and estate, but either one admitted by the court for the particular suit, or appointed for suits in general by the king’s letters patent.” WOERNER, *supra* note 53, § 58, at 188.

<sup>75</sup> One commentator suggested that actions brought by guardians of the estate regarding property or actions taken under the guardian’s authority may be brought in the name of the guardian, but all other suits for the ward’s benefit should be in the name of the ward by the guardian or next friend. *Id.* at 188–89.

<sup>76</sup> In doing so, courts historically also varied in identifying parents as guardians, next friends, or guardians ad litem under the common law. Compare WILLIAM MACPHERSON, A TREATISE ON THE LAW RELATING TO INFANTS 363–64 (1843) (“When . . . an infant claims a right, or suffers an injury . . . his nearest relative is supposed to be the person who will . . . institute a suit to assert his rights or to vindicate his wrongs; and . . . is, therefore, termed his next friend.”) and *id.* at 396 (noting that in suits in equity against an infant, “the court appoints a guardian to conduct his defence, who is usually his nearest relative . . . . This person is called guardian *ad litem*; his duties are limited to the particular suit, and he has none of the powers or liabilities of a permanent guardian”), with WOERNER, *supra* note 53, § 19, at 55 & n.8 (citing *Rhoades v. McNulty*, 52 Mo. App. 301, 306 (1893)) (“[T]he father, as natural guardian, may sue for and recover personal property of his minor son which came to the son through himself. In such case he should describe himself as guardian.”), and *id.* at 183 (“Demand made by the natural guardian for the property of his minor child was held, in the absence of a legally appointed guardian, sufficient as a demand . . . by next

State guardianship statutes uniformly adopt the common law's tradition of recognizing parents as legal guardians of their children, with "exclusive rights to care, custody, and control along with responsibility to support the child."<sup>77</sup> States have modified the common law's classic demarcation in parental authority to varying extents, with some maintaining the traditional distinction and according parents no authority over a child's property absent court-appointment as guardian of the child's estate,<sup>78</sup> and others granting parents authority over both a child's person and a child's estate.<sup>79</sup>

Although parents typically are guardians of their children, it is unclear whether parents qualify as *general* guardians under Rule 17(c)(1). Because parental authority extends beyond the bounds of a particular case in time and scope, parents are general representatives. But as parental authority may be limited to a child's person, parents could be viewed as different than general guardians who exercise authority over both a child's person and a child's estate. Rule 17(c)(1) does not define "general guardian," and the legislative history provides no insight into what the drafters of Rule 17 thought it meant.<sup>80</sup>

Against this backdrop, federal courts vary widely as to whether parents qualify to represent their children under Rule 17(c)(1). Some courts identify parents as "general representative[s]."<sup>81</sup> Others recog-

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friend, and in an early Maryland case the natural guardian was allowed to maintain the action." (citations omitted)).

<sup>77</sup> Mosanyi, *supra* note 63, at 254.

<sup>78</sup> See CONN. GEN. STAT. ANN. § 45a-629(b) (West 1999) (stating that courts may grant parents authority over a minor's estate if no guardian of the estate exists); 20 PA. STAT. AND CONS. STAT. ANN. § 5102 (West 1972) (stating that court may authorize or direct the parent to execute transactions of personal property while acting in best interest of the minor).

<sup>79</sup> See FLA. STAT. ANN. § 744.301 (West 2015) (stating that parents are natural guardians of their children during minority and can control their children's property, so long as it does not exceed \$15,000, without appointment); KAN. STAT. ANN. § 59-3053 (West 2002) (stating that a natural guardian retains the right to exercise control over the minor's person as well as the responsibility to manage their estate, unless a guardian or conservator has been appointed); MO. ANN. STAT. § 475.025 (West 1957) (stating that parents are natural guardians of their child's person, and that when the minor's estate is derived from the parent, the natural guardian has the same powers as a conservator without needing appointment or authorization from the court); OHIO REV. CODE ANN. § 2111.08 (West 1990) (stating that parents are joint natural guardians charged with their children's care, welfare, and management of their estates); TEX. EST. CODE ANN. § 1104.051 (West 2014) (stating that parents serve as natural guardians of minor children by the marriage, with one parent entitled to be appointed guardian of the children's estate); see also *Irby v. Dowdy*, 213 S.W. 739, 740 (Ark. 1919) (noting that under Arkansas law, "the natural guardian shall have the custody and care of minor children and their estates").

<sup>80</sup> FED. R. CIV. P. 17 advisory committee's note to 1937 version.

<sup>81</sup> *von Bulow ex rel. Auersperg v. von Bulow*, 634 F. Supp. 1284, 1293 (S.D.N.Y. 1986).

nize parents as “general guardian[s].”<sup>82</sup> Other courts treat parents as next friends, guardians ad litem, or as uncategorized “other representatives,” with little analysis supporting their conclusions.<sup>83</sup> Some courts recognize parents as general representatives but appoint them as next friends anyway.<sup>84</sup> Some courts rely on state law in determining whether parents qualify as general guardians.<sup>85</sup> Others rely solely on the conclusions of other federal courts or cite no authority in support of their holding.<sup>86</sup> By contrast, at least one court found that parents qualify under Rule 17(c)(1) not as “general guardians,” but as “like fiduciaries.”<sup>87</sup> Courts also disagree whether a general representative

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<sup>82</sup> *Fonseca v. Kaiser Permanente Med. Ctr. Roseville*, 222 F. Supp. 3d 850, 860 (E.D. Cal. 2016) (“Given Ms. Fonseca’s status as Israel’s mother and general guardian, she may litigate here on his behalf.”); *Prudential Ins. Co. of Am. v. Remington*, No. 2:12-cv-02821-GEB-CMK, 2013 WL 3070629, at \*2 (E.D. Cal. June 17, 2013) (denying as moot a mother’s motion for appointment as guardian ad litem “in light of the authority [she] has under Rule 17(c)(1)(A) to represent [plaintiff] as [plaintiff’s] general guardian”); *Williams v. Monroe Cty. Bd. of Educ.*, No. 07-0561-CG-B, 2009 WL 1767658, at \*4 (S.D. Ala. June 23, 2009); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 26 F. Supp. 2d 1001, 1006 (W.D. Mich. 1998) (holding that a parent is a “general guardian” who may sue on behalf of a minor under Rule 17(c)(1)); *see also Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir. 1980) (finding a mother entitled to bring suit as legal guardian); *Smogonovich v. City of Boise*, No. 09-011-S-EJL, 2009 WL 3229371, at \*3 (D. Idaho June 23, 2009).

<sup>83</sup> *See infra* Section I.C (explaining and distinguishing courts’ use of the terms “next friend” and “guardian ad litem”).

<sup>84</sup> *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997) (“Just to add to the confusion, when the child does have a general representative, the representative will usually be designated as the child’s ‘next friend,’ despite the wording of Rule 17(c) . . . .”); *Doe v. Carnival Corp.*, 37 F. Supp. 3d 1254, 1258 (S.D. Fla. 2012) (“There is a certain fluidity in the relationship between the provisions of Rule 17(c)(1) and Rule 17(c)(2), in the sense that one who qualifies as a ‘general guardian’ may also be appointed as a ‘next friend’ under Rule 17(c)(2).”).

<sup>85</sup> *See, e.g., Gibbs ex rel. Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 129 (3d Cir. 2002) (“The first step of the Rule 17 inquiry is to look to the law of the minor’s domicile to see if the minor already has a legal representative appointed for him.”); *Bergstreser v. Mitchell*, 448 F. Supp. 10, 15 (E.D. Mo. 1977) (“Under Missouri law an infant may sue by its parent who is a natural guardian of the child without the formality of having the parent appointed as next friend.”), *aff’d*, 577 F.2d 22 (8th Cir. 1978); *see also Brophy*, 124 F.3d at 896 (stating that state law should control the determination of who qualifies as a general representative for a child “because the management of the affairs of infants, like other matters relating to domestic relations, is the primary responsibility of the states rather than of the federal government”).

<sup>86</sup> *See, e.g., Travelers Indem. Co. v. Bengtson*, 231 F.2d 263, 265–66 (5th Cir. 1956) (holding that federal procedure governs determination of adult capacity to represent a child’s interests in federal court, and declining to apply Louisiana state law); *Fonseca*, 222 F. Supp. 3d at 860 (citing Rule 17(c) and one federal case to support classification of parents as general guardians); *Cmtys. for Equity*, 26 F. Supp. 2d at 1006 (concluding without reference to state law that a parent is a “general guardian” who may sue on behalf of a minor under Rule 17(c)(1)).

<sup>87</sup> *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281, 285–86 (1st Cir. 1982).

must be court-appointed to qualify to serve under Rule 17(c)(1) in light of the Rule's reference to court appointment in 17(c)(2).<sup>88</sup>

In sum, because courts treat parents so differently, parents cannot be sure whether they will be treated as general representatives by the courts. Thus, parents cannot rest assured that they will benefit from Rule 17(c)(1)'s presumption that general representatives should represent children's interests. Instead, whether a parent qualifies as a general representative in a particular court is a case-by-case determination that is perhaps, but not necessarily, informed by the scope of authority granted to parents as guardians under the law of the forum state. Notable across these disparate court-made rules is the complete absence of constitutional law analysis of parents' protected decision-making rights.

### C. *Parents and Special Representatives*

If courts fail to recognize parents as general representatives under Rule 17(c)(1), parents must seek approval to represent their children's interests as special representatives within a particular case. Rule 17(c)(2) permits a child who has no appropriate general representative<sup>89</sup> (and, according to some courts, a child who has no such *duly appointed* general representative)<sup>90</sup> to be represented by a next friend or guardian ad litem.<sup>91</sup> Next friends and guardians ad litem are special representatives for child litigants, meaning that they represent the child's interests solely in the context of the particular litigation in

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<sup>88</sup> Compare *Carnival Corp.*, 37 F. Supp. 3d at 1257–58 (“[T]he applicable federal rule explicitly envisions a court ‘appoint[ment]’ of a guardian ad litem in Federal Rule 17(c)(2), but does not specify in Rule 17(c)(1) whether or when a ‘general guardian’ must be appointed as representative, by the court or otherwise.”), with *Developmental Disabilities Advocacy Ctr., Inc.*, 689 F.2d at 285–86 (holding a parent is a “like fiduciary” who can bring a claim on behalf of a child under Rule 17(c)(1), but since a parent is not a court-appointed representative, the court retains the power to appoint a next friend or guardian ad litem if it chooses), and *Cmtys. for Equity*, 26 F. Supp. 2d at 1006 (holding that a parent not appointed guardian by a court is a “general guardian” who may sue on behalf of a minor under Rule 17(c)(1)). Although Rule 17(c)(1) says nothing about appointment, Rule 17(c)(2) provides that “[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.” FED. R. CIV. P. 17(c) (emphasis added).

<sup>89</sup> 6A WRIGHT ET AL., *supra* note 41, § 1570, at 665 (“As a general rule, a federal court cannot appoint a guardian ad litem in an action in which the infant or incompetent already is represented by someone who is considered appropriate under the law of the forum state.”).

<sup>90</sup> See *Developmental Disabilities Advocacy Ctr., Inc.*, 689 F.2d at 285–86.

<sup>91</sup> FED. R. CIV. P. 17(c). Rather than viewing parents as general representatives, next friends, or guardians ad litem, some courts conclude that children are “otherwise represented” by their parents, and thus hold that guardian ad litem appointment is unnecessary. See *infra* Section I.C.

which they are designated.<sup>92</sup> Historically, courts described the terms “next friends” and “guardians ad litem” as essentially synonymous,<sup>93</sup> differing primarily in that next friends represented the interests of minor plaintiffs, whereas guardians ad litem represented the interests of minor defendants.<sup>94</sup> Today, in practice, although the roles played by next friends and guardians ad litem are similar, next friends typically initiate litigation on behalf of children of their own volition, whereas guardians ad litem typically are appointed by courts to represent children who lack appropriate legal representatives in an ongoing case.<sup>95</sup>

As with general representatives, courts differ widely with regard to their understanding of the processes and qualifications for special representatives, of how parents fit within them, and of whether parents should have any priority to serve. Because parents must seek court approval to proceed as special representatives, parents face the possibility that they may be rejected by courts, and supplanted by another representative preferred by the court. This possibility is amplified by courts’ consistent failure to consider parents’ constitutionally protected decisionmaking authority when evaluating whether a parent or another individual should serve as a child’s special representative within an ongoing case.

### 1. *Parents and Next Friends*

A “next friend” typically voluntarily “appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff,” without being appointed as guardian or recognized as a party.<sup>96</sup> Rule 17(c)(2) pro-

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<sup>92</sup> See *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 87 (1st Cir. 2010) (stating that the appointment of a guardian ad litem in state family court proceedings does not preclude a different next friend from initiating federal litigation); *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974) (“[A]n appointed guardian ad litem does not replace a general guardian for all purposes, but is ‘appointed as a representative of the court to act for the minor in the cause . . . .’” (quoting *Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir. 1955) (Boldt, J., concurring))).

<sup>93</sup> See, e.g., *Till v. Hartford Accident & Indem. Co.*, 124 F.2d 405, 408 (10th Cir. 1941) (“There is little distinction between a next friend and a guardian ad litem.”); *von Bulow ex rel. Auersperg v. von Bulow*, 634 F. Supp. 1284, 1293 (S.D.N.Y. 1986) (“[T]here is no substantial difference between a ‘guardian ad litem’ and a ‘next friend.’”); see also *Blackwell v. Vance Trucking Co.*, 139 F. Supp. 103, 106 (E.D.S.C. 1956).

<sup>94</sup> *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997) (“The terms are essentially interchangeable, but ‘next friend’ is normally used when the child is the plaintiff, and ‘guardian ad litem’ when the child is the defendant.”); see also *Franz v. Buder*, 38 F.2d 605 (8th Cir. 1930) (describing guardian ad litem practice under Equity Rule 70, which preceded Federal Rule of Civil Procedure 17(c)).

<sup>95</sup> See *infra* Sections I.C.1–2.

<sup>96</sup> *Next Friend*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also *Morgan v. Potter*, 157 U.S. 195, 198 (1895) (“The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another.”).

vides that children who lack a duly appointed representative *may appear* by a next friend, but neither establishes qualifications for next friends nor clarifies what, if any, steps a prospective next friend must take to participate in a particular case.<sup>97</sup> Lacking clear guidance, court practices regarding next friends vary.<sup>98</sup> Consequently, a parent seeking to serve as a child's next friend faces uncertainty in the processes and qualifications required to proceed in the role.

First, courts diverge with regard to the process for becoming a next friend. Some courts conclude that no process is required—an individual becomes a next friend simply by acting as one.<sup>99</sup> Others hold that next friends must be appointed by the federal court before whom they appear.<sup>100</sup> Still others recognize both of these paths as legitimate.<sup>101</sup> Finally, at least one court suggests that individuals must be appointed the next friend of a child by some other authority (presumably, state courts) before they can serve in the federal case.<sup>102</sup>

Regardless of whether court appointment is required as an initial matter, courts uniformly agree that courts retain the power to scrutinize the suitability of an individual to serve as a next friend.<sup>103</sup> But court practices differ significantly in determining who qualifies to serve.<sup>104</sup> The standard most often applied (where one is applied at all)

<sup>97</sup> FED. R. CIV. P. 17(c)(2).

<sup>98</sup> See *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 90 (1st Cir. 2010) (“Rule 17(c) recognizes that an individual may represent the real party in interest as a Next Friend but it offers no clear guidance regarding who may proceed as a Next Friend.”); *Brophy*, 124 F.3d at 897 (noting “the almost complete lack of authority on the question” of who may serve as a next friend).

<sup>99</sup> *Brophy*, 124 F.3d at 895 (“The court does not usually appoint a next friend; it is usually the next friend who has taken the initiative in suing on the child’s behalf . . .”).

<sup>100</sup> *Ad Hoc Comm. of Concerned Teachers ex rel. Minor & Under-Age Students Attending Greenburgh Eleven Union Free Sch. Dist. v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 30–31 (2d Cir. 1989) (stating that “a court should conduct an inquiry into the application of any adult” seeking next friend status).

<sup>101</sup> *Ingram ex rel. Ingram v. Ainsworth*, 184 F.R.D. 90, 92 (S.D. Miss. 1999) (“The district court is authorized to appoint a next friend or to allow a self-appointed individual to serve as a next friend in order to protect the interests of the incompetent party.” (citing *Adelman ex rel. Adelman v. Graves*, 747 F.2d 986 (5th Cir. 1984))).

<sup>102</sup> *Hafez v. Madison*, No. 2:08-CV-0156-RWS, 2008 WL 4181328, at \*5 (N.D. Ga. Sept. 8, 2008) (“[T]o proceed on his claims against Defendant . . . regarding the placement of his children in foster care, Plaintiff must submit documentation to the Court establishing that he is entitled to serve in this lawsuit as his minor children’s guardian or next friend and that he has retained counsel on their behalf.”).

<sup>103</sup> *Brophy*, 124 F.3d at 895 (“[A]ppointed or not, [a next friend] can be challenged as not being a suitable representative, just as a guardian ad litem can be.”).

<sup>104</sup> *Compare Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281, 285 (4th Cir. 1979) (“[N]o special appointment process for the next friend is required.”), and *In re Murray*, 199 B.R. 165, 173 (Bankr. M.D. Tenn. 1996) (noting that no “appointment or qualification procedure” is required to file a next friend petition), with *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 90 (1st Cir. 2010) (“Next Friend capacity is not lightly granted to any

provides that “[t]he burden is on the ‘next friend’ clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.”<sup>105</sup> To do so, next friends must prove: (1) the real party in interest (the child litigant) cannot represent himself or herself, (2) the next friend is “truly dedicated to the best interests” of the child,<sup>106</sup> and, in some courts, (3) the next friend has a “significant relationship” with the child.<sup>107</sup>

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individual who petitions a federal court to pursue an action on behalf of another.”), and *Rawlings v. Littleton*, 23 F.3d 408 (6th Cir. 1994) (“We note that a parent, if appointed next friend, could sue on her minor child’s behalf. . . . However, there is no indication from the record that Rawlings was appointed next friend in this case.” (citing Rule 17(c))), and *Brophy*, 124 F.3d at 895 (“Yet even if the child’s existing representative is in fact inadequate, another next friend can’t jump into the case without first obtaining a court order disqualifying the existing representative from representing the child in the suit.”), and *Hafez*, 2008 WL 4181328, at \*5 (requiring plaintiff to submit documentation to the Court to establish his entitlement to next friend status). See also 6A WRIGHT ET AL., *supra* note 41, § 1572, at 683–84 (“There are no special requirements for the person suing as next friend.”).

<sup>105</sup> *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990). The standard was initially articulated by the Supreme Court in the context of habeas corpus petitions and has been extended to cases brought on behalf of children by lower courts with some variation. See *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1184–85 (S.D. Fla.) (describing origins of the standard), *aff’d sub nom. Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000). The Supreme Court’s language in *Whitmore* suggests that application beyond the habeas context is appropriate. *Whitmore*, 495 U.S. at 164–65 (“[W]e think the scope of any federal doctrine of ‘next friend’ standing is no broader than what is permitted by the habeas corpus statute, which codified the historical practice.”).

<sup>106</sup> *Whitmore*, 495 U.S. at 163.

<sup>107</sup> See, e.g., *Brophy*, 124 F.3d at 897; *Tinsley v. Flanagan*, No. CV-15-00185-PHX-ROS, 2016 WL 8200450, at \*4 (D. Ariz. May 13, 2016). Courts disagree on whether the “significant relationship” prong was established as a separate, third requirement or just a consideration in evaluating the second prong of the test. See, e.g., *Sam M.*, 608 F.3d at 90 (holding that the “significant relationship” prong is not “a necessary prerequisite”); *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1162 (9th Cir. 2002) (holding the “significant relationship” prong is required but noting its “contours . . . do not remain static” in the habeas context); *Ford v. Haley*, 195 F.3d 603, 624 (11th Cir. 1999) (holding that a would-be next friend “must show some relationship *or other evidence* that demonstrates the next friend is truly dedicated” to the party’s interests (emphasis added)); *Brophy*, 124 F.3d at 897 (noting that *Whitmore* “suggest[s]” that a next friend must have a significant relationship with a plaintiff); *Peter L. v. Rollins*, No. 00-129-M, 2001 WL 1669253, at \*4 (D.N.H. Dec. 19, 2001) (treating the “significant relationship” prong as a third and necessary requirement). Some courts have continued to recognize the third prong post-*Whitmore* in the habeas context as well. See *Hamdi v. Rumsfeld*, 294 F.3d 598, 604 (4th Cir. 2002). Some courts appear to read further into dicta from the habeas context a requirement that next friends for child litigants must be lawyers. See *Rodgers v. Dallas Indep. Sch. Dist.*, No. 3-07-CV-0386-P, 2007 WL 1686508, at \*2 (N.D. Tex. June 1, 2007); *Martin v. Revere Smelting & Ref. Corp.*, No. 3:03-CV-2589-D, 2004 WL 852354, at \*1–2 (N.D. Tex. Apr. 16, 2004). This seems to be a misinterpretation of an admonishment by the Fifth Circuit that the next friend process should not be misused by career next friends to subvert rules against the unauthorized practice of law. *Weber ex rel. Zimmerman v. Garza*, 570 F.2d 511, 514 (5th Cir. 1978) (“[I]ndividuals not licensed to practice law by the state may not use the ‘next friend’ device as an artifice for the unauthorized practice of law.”).



The first requirement is easily satisfied in the case of child litigants because of their legal incapacity.<sup>108</sup> In determining whether a next friend is “truly dedicated” to the child’s best interests, courts have considered a variety of factors depending on the circumstances of the case, including: “the individual’s familiarity with the litigation, the reasons that move her to pursue the litigation, and her ability to pursue the case on the child’s behalf,”<sup>109</sup> that the individual “has embraced the responsibility of prosecuting the instant case,” and that the individual “has cared for [the child] in his own home.”<sup>110</sup>

Courts that recognize the third requirement vary as to what constitutes a sufficiently “significant relationship” to qualify for service as a next friend. Several circuits conclude that the determination depends on the circumstances of the child and should be interpreted flexibly to ensure that children can access the courts.<sup>111</sup> Under this reasoning, if a child has a “significant relationship” with one or more adults, the next friend should be one of those adults, such as a close relative, a personal friend of the child or the child’s family, or “a professional who has worked with the child.”<sup>112</sup> If a child lacks a “significant relationship” with any adult, as, for example, many foster children do, then an individual with only *some* or even little to no relationship with a child may be permitted to serve.<sup>113</sup> In such cases, courts may require the putative next friend to demonstrate that he or she has a good faith interest in pursuing the claim,<sup>114</sup> is motivated “by a sincere desire to seek justice on the infant’s behalf,”<sup>115</sup> or has some relationship “conveying some modicum of authority or consent, ‘sig-

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Indeed, the persistence of the common law mandate that next friends advancing children’s claims must retain counsel and cannot proceed *pro se* contradicts the idea that a law license is required for service as a next friend. *See generally* Martin, *No Right to Counsel*, *supra* note 18 (evaluating federal doctrine requiring that children’s civil claims be advanced by adult representatives and counsel).

<sup>108</sup> *Tinsley*, 2016 WL 8200450, at \*4.

<sup>109</sup> *Sam M.*, 608 F.3d at 92.

<sup>110</sup> *Gonzalez*, 86 F. Supp. 2d at 1186.

<sup>111</sup> *Sam M.*, 608 F.3d at 90–91 (evaluating cases).

<sup>112</sup> *Brophy*, 124 F.3d at 897.

<sup>113</sup> *See Sam M.*, 608 F.3d at 91 (“In evaluating an individual’s capacity to serve as Next Friend for minors who lack ties with their parents and family members, federal courts have rejected a rigid application of the significant relationship requirement . . . .”); *Brophy*, 124 F.3d at 897 (holding that “in desperate circumstances,” a court could appoint “a stranger whom the court finds to be especially suitable to represent the child’s interests in the litigation” as next friend); *see also* *Hamdi v. Rumsfeld*, 294 F.3d 598, 604 n.3 (4th Cir. 2002) (noting in the habeas context that a significant relationship may not be required if a detainee has no significant relationships).

<sup>114</sup> *Sam M.*, 608 F.3d at 91–92.

<sup>115</sup> *Ad Hoc Comm. of Concerned Teachers ex rel. Minor & Under-Age Students Attending Greenburgh Eleven Union Free Sch. Dist. v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 30–31 (2d Cir. 1989).

nificant' in comparison to the detainee's other relationships."<sup>116</sup> Together, these limitations are intended to prevent "intruders or uninvited meddlers"<sup>117</sup> and individuals motivated by personal political ideology alone from advancing litigation ostensibly on behalf of others as next friends.<sup>118</sup> Courts not applying this three-pronged test assess prospective next friends based on similar factors, including: the existence of an actual or potential conflict of interests,<sup>119</sup> whether the individual is acting in good faith and interested in the child's welfare,<sup>120</sup> and whether the individual can adequately represent the child<sup>121</sup> and prosecute the case.<sup>122</sup>

Many courts treat parents seeking to represent their children in litigation as next friends.<sup>123</sup> Although the common factors applied by courts in assessing the propriety of next friends favor parents, courts vary as to whether parents should be prioritized for this role.<sup>124</sup> In considering parents as prospective next friends, courts uniformly fail to account for parents' protected decisionmaking authority. Instead,

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<sup>116</sup> See *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1162 (9th Cir. 2002) (holding that a coalition of professionals who had "not demonstrated any relationship with the detainees" lacked standing as next friends in a habeas case); see also *Sam M.*, 608 F.3d at 92–94 (permitting a former foster parent, a school psychologist, and a sociology professor who focused on child maltreatment to serve as next friends for foster children).

<sup>117</sup> *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921).

<sup>118</sup> See *Brophy*, 124 F.3d at 897 ("[N]ot just anyone who expresses an interest in the subject matter of a suit is eligible to be the plaintiff's next friend . . ."); see also *Tinsley v. Flanagan*, No. CV-15-00185-PHX-ROS, 2016 WL 8200450, at \*4 (D. Ariz. May 13, 2016) (noting the difficulty of identifying those next friends motivated by purely ideological interests).

<sup>119</sup> See *Ballard v. Johnson*, No. 15-11039, 2017 WL 1151166, at \*5–6 (E.D. Mich. Mar. 28, 2017) (declining to appoint former foster mother as next friend because she was an interested party in the litigation and sought monetary damages for herself and the children).

<sup>120</sup> See *Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d at 30–31.

<sup>121</sup> See *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 92 (1st Cir. 2010).

<sup>122</sup> See *Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d at 31.

<sup>123</sup> See *Rawlings v. Littleton*, 23 F.3d 408 (6th Cir. 1994) (citing Rule 17(c) in noting that parents can be appointed next friends); *In re Murray*, 199 B.R. 165, 173 (Bankr. M.D. Tenn. 1996) ("There is no evidence that this infant's best interests are not being protected by her mother. . . . [T]he debtor's mother may act as the debtor's next friend."). Indeed, some courts refer to parents as next friends despite recognizing them to be general representatives. *Brophy*, 124 F.3d at 895; *Doe v. Carnival Corp.*, 37 F. Supp. 3d 1254, 1258 (S.D. Fla. 2012).

<sup>124</sup> Compare *Brophy*, 124 F.3d at 897 ("[O]rdinarily the eligibles will be confined to the plaintiff's parents, older siblings (if there are no parents), or a conservator or other guardian, akin to a trustee . . ."), with *Ingram ex rel. Ingram v. Ainsworth*, 184 F.R.D. 90, 92 (S.D. Miss. 1999) ("There are no special requirements for serving as a next friend. At its discretion, the court may consider whether there is a significant relationship between the next friend and the incompetent party and whether there is a legitimate reason why the actual party cannot bring suit.").

courts that express a preference for parents serving as next friends describe this preference as a common-sense measure, rather than a result dictated or supported by parents' constitutional rights.<sup>125</sup>

## 2. *Parents and Guardians ad Litem*

Like next friends, guardians ad litem act on behalf of and make decisions for child litigants within a particular case.<sup>126</sup> Historically, guardians ad litem represented defendants; today, courts appoint guardians ad litem to represent both parties.<sup>127</sup> At least some courts require parents to affirmatively seek court appointment as guardians ad litem before they can represent their children.<sup>128</sup>

A more prominent concern for parents regarding guardian ad litem appointment entails whether a court will appoint a guardian ad litem to serve as a child's representative *in lieu of* or *in addition to* a parent. Courts that appoint guardians ad litem in cases brought by parents typically do so because they identify an actual, or in some cases, a potential conflict of interest in the case between the parent and the child.<sup>129</sup> Interestingly, courts' imposition of what I call the counsel mandate appears to allow courts to avoid making determina-

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<sup>125</sup> See, e.g., *Brophy*, 124 F.3d at 897.

<sup>126</sup> See *United States v. 30.64 Acres of Land*, 795 F.2d 796, 805 (9th Cir. 1986) ("A guardian ad litem is authorized to act on behalf of his ward and may make all appropriate decisions in the course of specific litigation."); *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974) (stating that a guardian ad litem is "appointed as a representative of the court to act for the minor in the cause, with authority to engage counsel, file suit, and to prosecute, control and direct the litigation" (quoting *Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir. 1955) (Boldt, J., concurring))).

<sup>127</sup> See *Till v. Hartford Accident & Indem. Co.*, 124 F.2d 405, 408 (10th Cir. 1941) (upholding verdict entered against minor defendants, concluding they were adequately represented by voluntarily serving next friends, rather than court appointed guardians ad litem, and noting that "[a] guardian ad litem is a special guardian, appointed by the court to defend in behalf of an infant party. A next friend is one who, without being regularly appointed guardian, represents an infant plaintiff").

<sup>128</sup> See, e.g., *Mayall v. USA Water Polo, Inc.*, No. SACV 15-171-AG (RNBx), 2015 WL 12907832, at \*3 (C.D. Cal. June 8, 2015) (dismissing case upon defendant's motion for failure of mother to seek appointment as guardian ad litem for child plaintiff and finding that guardian ad litem appointment is a prerequisite to a parent bringing a case on behalf of a child); *In re Murray*, 199 B.R. at 173.

<sup>129</sup> See, e.g., *In re G & R Feed & Grain Co.*, No. 13-00001-als7, 2014 WL 8662773, at \*1-2 (S.D. Iowa July 3, 2014) (denying parents' request to serve as guardians ad litem for their children because the parents and children both are defendants in the suit and the parents may be witnesses to the claims against the children); *Horacek v. Exon*, 357 F. Supp. 71, 74 (D. Neb. 1973) (appointing a guardian ad litem to serve in addition to parent representatives, since the guardian ad litem could "recognize potential and actual differences in positions by the parents and positions that need to be asserted on behalf of the plaintiffs").

tions that parents are unfit to represent their children's interests.<sup>130</sup> Despite that the appointment of a guardian ad litem effectively deprives a parent of decisionmaking authority over a child within a particular case, courts consistently fail to analyze parents' constitutionally protected decisionmaking rights when considering whether guardian ad litem appointment is warranted in a particular case.

Although courts identify no substantive differences between the responsibilities of guardians ad litem and next friends,<sup>131</sup> courts tend to describe the responsibilities of guardians ad litem in loftier language than that used to describe the role of next friends. This tendency might stem from professional and economic considerations. Many courts traditionally favor lawyers for guardian ad litem appointment,<sup>132</sup> and several courts have held that guardians ad litem are entitled to a fee for the services they render,<sup>133</sup> as well as quasi-judicial immunity for actions taken in conjunction with their role.<sup>134</sup> Courts, for example, describe guardians ad litem as "officer[s] of the court,"

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<sup>130</sup> See *supra* note 26 and accompanying text; Martin, *No Right to Counsel*, *supra* note 18 and accompanying text (collecting cases in which courts expressed a dim view of the motivations of parents bringing cases on behalf of their children, including by identifying them as repeat litigants).

<sup>131</sup> See, e.g., *C.M.J. ex rel. D.L.J. v. Walt Disney Parks & Resorts US, Inc.*, No. 6:14-cv-1898-Orl-22GJK, 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.")

<sup>132</sup> See *United States v. E.I. du Pont de Nemours & Co.*, 13 F.R.D. 98, 105 (N.D. Ill. 1952) ("It is customary practice to appoint attorneys to serve in this capacity although, of course, there is no statute or rule of law to this effect."). Courts and scholars note that simultaneous service as a guardian ad litem and a lawyer for a child may create a conflict of interest for the lawyer. Moore, *supra* note 23, at 1842–43. But, unlike non-lawyer adult representatives, whom courts typically direct to retain counsel or face dismissal of a child's case, lawyers may be able to represent children's interests as guardians ad litem without retaining separate counsel for the child. See, e.g., *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 284 (2d Cir. 2005) ("[A] parent not admitted to the bar cannot bring an action *pro se* in federal court on behalf of his or her child."); *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 170–72 (E.D. Va. 1994) (stating that a non-lawyer parent cannot serve as next friend for a child litigant without retaining counsel). See generally Martin, *No Right to Counsel*, *supra* note 18, at 840–54.

<sup>133</sup> See *Gaddis v. United States*, 381 F.3d 444, 456 (5th Cir. 2004) (holding that guardians ad litem can be awarded fees as expert costs authorized under 28 U.S.C. § 1920(6) because they "liaise with the court and are charged with the important duty of providing their insight as to how the judicial process is or is not comporting with the best interests of the minor or incompetent person involved"); *United States v. Simmons*, No. 4:13-CV-066-A, 2013 WL 5873366, at \*4–7 (N.D. Tex. Oct. 31, 2013) (dismissing case brought against minor defendant because of plaintiff's failure to pay for attorney guardian ad litem or offer solution for how costs would be paid). My research has not uncovered any cases awarding fees to next friends or expressing a preference for next friends who are attorneys.

<sup>134</sup> *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989) (finding guardians ad litem entitled to quasi-judicial immunity).

who “perform independent functions that are integral and essential to the judicial process,”<sup>135</sup> and alleviate the risk of the minor party becoming “a pawn to be manipulated on a chess board larger than his own case.”<sup>136</sup> Guardians ad litem must “assist the court ‘to secure the just, speedy [sic] and inexpensive determination’ of the action,”<sup>137</sup> examine the case, determine the rights and defenses and interests of the child, “vigorously” present the child’s defense, and “submit to the court for its consideration and decision every question involving the rights of the infant which may be affected by the action.”<sup>138</sup> One court explained that “through a guardian ad litem the court itself assumes ultimate responsibility for determinations made on behalf of the child.”<sup>139</sup> Thus, courts may view guardians ad litem as professionals in whom the court has made a financial investment, and this view may thereby inflate the relative importance of guardians ad litem in relation to other adult representatives in the eyes of the court.

Perhaps because guardians ad litem are appointed by courts, courts treat their qualification for appointment as a matter within courts’ discretion and generally do not articulate factors that qualify an individual for service in this role. Instead, court analysis focuses primarily on whether the appointment of *any* guardian ad litem is warranted to protect a child’s interests in a particular case. Courts’ understanding of the circumstances warranting guardian ad litem appointment vary widely. This understanding may be influenced by state law,<sup>140</sup> although many courts make clear that guardian ad litem appointment is a procedural matter controlled by federal doctrine.<sup>141</sup> A small subset of courts appear to refer to all adult representatives as

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<sup>135</sup> *Gaddis*, 381 F.3d at 456.

<sup>136</sup> *Lenhard v. Wolff*, 443 U.S. 1306, 1312 (1979).

<sup>137</sup> *Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir. 1955) (Boldt, J., concurring) (quoting FED. R. CIV. P. 1).

<sup>138</sup> *United States v. E.I. du Pont de Nemours & Co.*, 13 F.R.D. 98, 104–05 (N.D. Ill. 1952).

<sup>139</sup> *Noe*, 507 F.2d at 12.

<sup>140</sup> *T.W. ex rel. Enk v. Brophy*, 954 F. Supp. 1306, 1309 (E.D. Wis. 1996), *aff’d as modified*, 124 F.3d 893 (7th Cir. 1997) (“While a guardian ad litem is appointed by the court and, in Wisconsin, must be a lawyer, neither of those restrictions apply to a next friend.”).

<sup>141</sup> *See, e.g., Burke v. Smith*, 252 F.3d 1260, 1264 (11th Cir. 2001) (“The appointment of a guardian ad litem is a procedural question controlled by Rule 17(c) of the Federal Rules of Civil Procedure.” (quoting *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 38 (5th Cir. 1958)); *Montgomery Ward & Co. v. Callahan*, 127 F.2d 32, 36 (10th Cir. 1942) (“How appellee was required to proceed, in whose name the action must be filed, is procedural, and therefore determined by the law of the forum.”); *see also Meyers v. United States*, No. 6:13-CV-1555-ORL, 2014 WL 5038585, at \*3 (M.D. Fla. Sept. 29, 2014) (concluding that although *Burke* was an *Erie* case its holding is broad enough to extend to cases raising federal questions).

guardians ad litem and require all to secure court appointment.<sup>142</sup> More often, courts appear to reserve the designation “guardian ad litem” for adult representatives recruited and appointed by courts to represent children who lack a willing, appropriate volunteer.<sup>143</sup> Courts’ views on when circumstances warrant guardian ad litem appointment run the gamut: Some courts presume that guardians ad litem generally *should* be appointed for child litigants,<sup>144</sup> some courts have held that guardians ad litem always *must* be appointed when a litigant is a child,<sup>145</sup> whereas others appoint as a last resort, only where a child lacks an adult who will voluntarily serve as a next friend.<sup>146</sup>

Rule 17(c)(2) requires that where a child is unrepresented in a case, a court must appoint a guardian ad litem or take other action to protect the child’s interests in the case.<sup>147</sup> Although the Rule limits appointment to cases in which a child is unrepresented, courts claim broad authority to appoint guardians ad litem under their inherent powers if a child’s representative has or *may have* a conflict of interests, or if a court believes that appointment will serve a child’s best interests.<sup>148</sup> Several courts have held that where a parent appears on a child’s behalf, the child is “otherwise represented” in the case and

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<sup>142</sup> This approach is particularly common, although not exclusive, to federal courts in California that apply California law when addressing this question. *See, e.g.*, *Mayall v. USA Water Polo, Inc.*, No. SACV 15-171-AG (RNBx), 2015 WL 12907832, at \*3 (C.D. Cal. June 8, 2015) (stating that the mother must seek appointment as guardian ad litem before she may bring suit on behalf of her child); *see also* *B.D. ex rel. Dragomir v. Griggs*, No. 1:09CV439, 2010 WL 2775697, at \*1 (W.D.N.C. June 8, 2010) (“Minors may not appear as litigants in federal civil procedures without the assistance of guardians *ad litem*.”).

<sup>143</sup> *United States v. Noble*, 269 F. Supp. 814, 816 (E.D.N.Y. 1967).

<sup>144</sup> *E.g.*, *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958) (“(1) . . . [T]he court should usually appoint a guardian ad litem; (2) but the Court may . . . issue such order as will protect the minor in lieu of appointment of a guardian ad litem; (3) and may even decide that such appointment is unnecessary.”).

<sup>145</sup> *See, e.g.*, *Mayall*, 2015 WL 12907832, at \*3; *Griggs*, 2010 WL 2775697, at \*1.

<sup>146</sup> *Noble*, 269 F. Supp. at 816.

<sup>147</sup> A court may even permit a child’s case to proceed without an adult representative where the court finds that the child’s interests will be adequately protected. *See* *Westcott v. U.S. Fid. & Guar. Co.*, 158 F.2d 20, 22 (4th Cir. 1946) (affirming a judgment against a minor who was represented by an attorney but not a guardian ad litem).

<sup>148</sup> *See, e.g.*, *In re Chi.*, *Rock Island & Pac. R.R. Co.*, 788 F.2d 1280, 1282 (7th Cir. 1986) (“If there were some reason to think that [the infant’s] mother would not represent [the infant’s] interests adequately, the district court would, we may assume, be required (and certainly would be empowered) to appoint a guardian ad litem to represent [the infant].”); *Hoffert v. Gen. Motors Corp.*, 656 F.2d 161, 164 (5th Cir. 1981) (“[T]he courts have consistently recognized that they have inherent power to appoint a guardian ad litem when it appears that the minor’s general representative has interests which may conflict with those of the person he is supposed to represent.” (citations omitted)); *von Bulow ex rel. Auersperg v. von Bulow*, 634 F. Supp. 1284, 1293 (S.D.N.Y. 1986) (“Both federal and New York state courts have repeatedly affirmed the power of the court to determine that the interests of a child or incompetent would best be represented not by a general representative, such as parent or guardian, but by a guardian ad litem or ‘next friend.’”).

court appointment of a guardian ad litem is thereby precluded under Rule 17(c)(2).<sup>149</sup> Notably, such courts describe the possibility of guardian ad litem appointment as “unnecessary” rather than improper or unlawful.<sup>150</sup> Although perhaps an implicit recognition of parental authority, the use of the term “unnecessary” permits courts to sidestep the question of the impact of guardian ad litem appointment on parents’ constitutionally protected decisionmaking rights.

#### D. Harms of the Doctrinal Tangle of Rule 17(c)

As discussed more fully in Part II, the failure of Rule 17(c) and its doctrine to defer to parents as representatives for children deprives parents of their constitutionally protected decisionmaking authority over their children and deprives children of the assurance that their parents will make important decisions on their behalf. In addition to these parenting-related harms, the many inconsistencies in courts’ interpretation of Rule 17(c) create several inefficiencies that burden access to justice for children and impede court administration. First, parents, counsel, and courts themselves must invest time and resources to determine how to proceed with a claim and, potentially, correct errors. These challenges pose a particularly significant barrier for low-income parents, who may be unable to retain counsel without court appointment, and therefore must attempt to sort out for them-

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<sup>149</sup> See, e.g., *Kile v. United States*, 915 F.3d 682, 687 (10th Cir. 2019) (“[A]bsent an apparent conflict of interest, the appointment of a guardian ad litem is not necessary where a parent is a party to the lawsuit and presses the child’s claims before the court.”); *Burke v. Smith*, 252 F.3d 1260, 1264 (11th Cir. 2001) (“Tammy was ‘otherwise represented’ by her mother who brought this action on her behalf. Thus, Rule 17(c) did not require . . . a guardian ad litem. . . . [U]nless a conflict of interest exists . . . a district court need not even consider the question whether a guardian ad litem should be appointed.” (citations omitted)); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir. 1980) (“Rule 17(c) authorizes the district court to appoint a guardian ad litem ‘for an infant . . . not otherwise represented in an action . . . .’ In the instant case the infant was ‘otherwise represented’ . . . . [T]here was no need for the court to appoint a guardian ad litem.”).

<sup>150</sup> See, e.g., *In re Chi., Rock Island & Pac. R.R. Co.*, 788 F.2d at 1282 (“If [a minor] is a party and represented, the appointment of a guardian is not required, provided the representation is adequate . . . and there was no conflict of interest between the party and his representative.” (citation omitted)); *Croce*, 623 F.2d at 1093 (concluding that there was “no need” for a guardian ad litem to be appointed); *Gonzalez-Jimenez de Ruiz v. United States*, 231 F. Supp. 2d 1187, 1196–97 (M.D. Fla. 2002) (“[The plaintiffs’ mother] was not required to file the current lawsuit as a ‘next friend.’ When a parent ‘brings an action on behalf of a child, and . . . the interests of each are the same, no need exists for someone [else] to represent the child’s interests under Rule 17(c).’” (citing *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))).

selves at the outset of a case how to convey the role in which they intend to proceed and why they qualify to serve.<sup>151</sup>

These inefficiencies are exacerbated by the disconnect between Rule 17(c) doctrine and the contemporary reality of decisionmaking regarding minors. The absence of a clear fit for parents within Rule 17(c) and its doctrine is a relic disconnected from modern life and from historic practice.<sup>152</sup> Courts have long recognized parents as the adults most likely to advance children's claims in practice, and the empirical research undertaken for this project supports that parents are indeed the adults who typically bring federal civil claims on behalf of their children.<sup>153</sup> As most children lack court-appointed general representatives and have little tangible property,<sup>154</sup> the more critical

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<sup>151</sup> Civil litigants have no constitutionally guaranteed right to the assistance of counsel. *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (holding that state appointed counsel is not necessarily required to protect the due process rights of indigent defendants in civil child support enforcement cases); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25–27 (1981). Federal courts can, but rarely do, request counsel to represent litigants who cannot afford counsel and have not shown a special propensity to appoint counsel for cases brought on behalf of indigent children. See 28 U.S.C. § 1915(e)(1) (2012); Martin, *No Right to Counsel*, *supra* note 18, at n.132 and accompanying text. There is a dearth of free and affordable legal assistance available to those with low and moderate incomes. 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](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf) (reporting that in 2007, there was “only one legal aid lawyer” available for every “6,415 low-income people in the country” while there was one lawyer providing legal services for private individuals and families “for every 429 people in the general population”).

<sup>152</sup> See *supra* notes 74, 76 and accompanying text.

<sup>153</sup> See Table: Cases 2015–18, *supra* note 18; see also *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.”); *Bank of United States 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.”); *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.”); see also *Ritchie*, 33 U.S. (8 Pet.) at 144 (“It is not error, but it is calculated to awaken attention that, in this case, though the infants, as the record shows, had parents living; a person not appearing from his name, or shown on the record to be connected with them, was appointed their guardian *ad litem*.”); *Reno*, 86 F. Supp. 2d at 1185 (“The participation of a non-parent [as next friend] should give the Court some pause, but may be appropriate in certain circumstances.”).

<sup>154</sup> “Guardianship of children with living parents became less common once laws provided widows the right to oversee their minor children's property.” *Smith*, *supra* note 67, at 280 n.53; *id.* at 274 (“Today, guardianships are rarely needed to ensure appropriate management of a child's property. Instead, they are most commonly employed to address a child's need for care of their ‘person’ when a living parent is in a crisis that limits their ability—at least temporarily—to provide such care.”); see also Scott J. Shackelford & Lawrence M. Friedman, *Legally Incompetent: A Research Note*, 49 AM. J. LEGAL HIST. 321 (2007) (explaining that most children, including orphans, had no money of their own and



contemporary determinant of a parent's day-to-day legal authority is whether a parent is a child's legal guardian or custodian, not whether a parent has administrative domain over a child's estate.<sup>155</sup> The failure of Rule 17(c) and its doctrine to recognize parents as the default decisionmakers for children thus significantly departs from the public's common understanding of the rights and responsibilities of parents and creates an unnecessary administrative burden for children, parents, and courts, as courts undertake anew the exercise of determining how parents fit within the rule in every case.

Finally, the failure to defer to parents as children's default representatives creates a potential cost barrier that may impede low-income children from securing access to justice. This barrier stems from courts' practice of awarding fees to court-appointed guardians ad litem (who have no pre-existing relationship with a child litigant).<sup>156</sup> Courts already typically order parents to retain private counsel as a condition of the litigation.<sup>157</sup> This requirement already frequently leads to the dismissal of cases brought by parents who cannot afford counsel.<sup>158</sup> Guardian ad litem appointment potentially saddles parents with an even further increased cost burden beyond that normally associated with attorney's fees.<sup>159</sup> To the extent that courts might be more

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guardianship typically concerned cases of inheritance or rare instances of minors who earned money).

<sup>155</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 14–15 (2004) (holding that the father could not bring a case on behalf of his child nor to vindicate his own parental rights over the objection of the child's mother because the mother had sole legal custody); *Croce*, 623 F.2d at 1093 (finding that the lower court did not err by failing to consider the appointment of a guardian ad litem where “the child's legal guardian, his mother, brought this action on his behalf”).

<sup>156</sup> See *supra* note 133 and accompanying text; *United States v. Noble*, 269 F. Supp. 814, 816 (E.D.N.Y. 1967) (“Every effort should be made by the District Courts of the United States to reduce costs by avoiding the appointment of independent guardians unless there is a substantial probability of a conflict of interest and need for protection.”).

<sup>157</sup> See, e.g., *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002) (explaining that a parent cannot appear pro se on behalf of their minor child because the cause of action does not belong to the parent); *Johns v. County of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997) (holding that a parent or guardian cannot bring an action on behalf of a minor child without retaining counsel); *Osei-Afryie v. Med. Coll. of Pa.*, 937 F.2d 876, 882–83 (3d Cir. 1991) (finding that a non-attorney parent is not entitled to act as his children's attorney in federal court and must be represented by counsel); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) (holding that a non-attorney father must hire a lawyer in order to bring an action on behalf of his child); *Meecker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (finding that a parent does not have the right to represent their minor children and the parent must be represented by an attorney in order to act as next friend of the child). See generally *Martin, No Right to Counsel, supra* note 18, at 834–35.

<sup>158</sup> *Martin, No Right to Counsel, supra* note 18, at 839.

<sup>159</sup> See, e.g., *Gaddis v. United States*, 381 F.3d 444, 454–55 (5th Cir. 2004) (finding it is within the court's discretion to tax guardian ad litem fees as costs to the non-prevailing party or to designate guardian ad litem fees “as an expense to be payable out of any funds

likely to supplant parents that courts view as less sophisticated or possibly constrained by limited financial resources, the risk of guardian ad litem fees may disproportionately fall upon the families least able to afford them.<sup>160</sup>

Across the many variations in courts' interpretations of Rule 17(c), courts understand the question of adult representation for child litigants as a matter wholly within their discretion and act to preserve their power.<sup>161</sup> Courts entirely fail to consider the extent to which constitutional protections for parental decisionmaking limit courts' authority over the representation of child litigants and shape how that discretion must be exercised. Part II aims to redress this gap.

## II

### LITIGATION AS PARENTING

This Part first explores the constitutional doctrine that establishes parents' decisionmaking rights. It then connects that doctrine to parents' role as litigation representatives for their children. In doing so, it fills the gap in courts' analysis of Rule 17(c) by reconceiving of parent representatives as parenting through litigation. Recognizing parent representatives as parenting suggests that constitutional jurisprudence must guide the selection of adult representatives for children under Rule 17(c). Finally, this Part evaluates the policy benefits of applying these constitutional principles for parents, children, and the courts.

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recovered by or payable to the minor or incompetent person on whose behalf the guardian ad litem was appointed"); *Bhatia v. Corrigan*, No. C 07-2054 CW, 2007 WL 1455908, at \*2 (N.D. Cal. May 16, 2007) (ordering guardian ad litem fees to be paid "either out of any damages award or by Jane Doe, through her father"); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 533 F. Supp. 895, 900-01 (D.D.C. 1982) (finding that the court has the authority to tax guardian ad litem fees as costs to the non-prevailing party). See generally *Martin, No Right to Counsel*, *supra* note 18, at 835.

<sup>160</sup> Court determinations about parent capacity to represent a child could be influenced by implicit bias against less privileged groups. See *infra* note 206 and accompanying text. Moreover, because courts typically dismiss cases brought pro se by low income parents for lack of counsel, it is not possible to determine whether courts are more likely in practice to permit higher-income parents to serve as children's litigation representatives than lower-income parents, but hints of courts' concern about parent sophistication and ability appear in court opinions applying the counsel mandate. See *supra* note 130 and accompanying text.

<sup>161</sup> See, e.g., *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281, 285-86 (1st Cir. 1982) (holding a parent is a "like fiduciary" who can bring a claim on behalf of a child under Rule 17(c)(1), but since a parent is not a court-appointed representative, the court retains the power to appoint a next friend or guardian ad litem if the court chooses); *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) ("The participation of a non-parent [as next friend] should give the Court some pause, but may be appropriate in certain circumstances.").

### A. *Constitutional Protections for Parental Decisionmaking*

Parents' caretaking rights are not only rooted in the law of guardianship but also guaranteed by the Constitution. The Supreme Court recognizes the relationships between parents and children as protected from governmental interference by a sphere of family privacy created by the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>162</sup> Specifically, the guarantee of liberty within the Due Process Clauses includes parents' fundamental interest in the "care, custody, and control of their children"<sup>163</sup>—"perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."<sup>164</sup> Parental liberty interests are deemed fundamental rights and strongly protected, in part, because of the centrality of the family within our history and traditions, but Justices articulate a range of views on how such traditions should be identified and understood.<sup>165</sup> Although the

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<sup>162</sup> See *Moore v. City of East 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))). 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. See *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1187 (1980).

<sup>163</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (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))).

<sup>164</sup> *Troxel*, 530 U.S. at 65; see also 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).

<sup>165</sup> Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) (Scalia, J., plurality opinion) (finding the Court must identify the most specific level of tradition available when determining whether to recognize a liberty interest as protected by substantive due process) with *id.* at 132 (O'Connor, J., concurring) (arguing the Court should remain open to considering traditions at broader levels of generality when evaluating whether asserted interests warrant due process protection), and *id.* at 137 (Brennan, J., dissenting) (explaining the traditional importance of asserted interests is the proper concern of due process analysis, not whether the specific asserted interest was traditionally protected).

full scope and extent of parents' protected liberty interests remain unclear,<sup>166</sup> those interests, at a minimum, include the right to "establish a home and bring up children,"<sup>167</sup> the entitlement to maintain custody of their children absent a showing of unfitness,<sup>168</sup> and the ability to make choices about their children's health,<sup>169</sup> education,<sup>170</sup> contact with non-parents,<sup>171</sup> and involvement with religion.<sup>172</sup>

Government actions or policies that substantially and directly infringe upon fundamental rights generally trigger strict scrutiny.<sup>173</sup> To survive strict scrutiny, the government must demonstrate that infringements upon fundamental rights are narrowly tailored to serve a compelling government interest.<sup>174</sup> Yet, despite its repeated recognition of parental rights as fundamental, the Supreme Court has not consistently applied strict scrutiny to questions of parental decision-making.<sup>175</sup> This disconnect may result from the reality that questions regarding parental rights often require the Court to reconcile those

<sup>166</sup> Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1085–86 (2010) (noting that the "magnitude and contours" of the substantive right to parent are "notoriously indistinct").

<sup>167</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>168</sup> *Stanley*, 405 U.S. at 658.

<sup>169</sup> *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).

<sup>170</sup> *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").

<sup>171</sup> *Troxel v. Granville*, 530 U.S. 57, 65, 67 (2000) (plurality opinion).

<sup>172</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972).

<sup>173</sup> See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007) (describing how strict scrutiny was adopted as a test for protecting fundamental rights). The burden must be direct to trigger strict scrutiny. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (noting that the housing ordinance at issue directly interfered with the ability of family members to choose to live together by singling out particular family relationships; it did not merely incidentally burden that choice). See generally Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1177 (1996) (noting that the Supreme Court draws a sharp distinction between direct and incidental burdens on fundamental rights, applying strict scrutiny to direct burdens and more deferential scrutiny to incidental burdens, and arguing that incidental burdens also deserve heightened scrutiny).

<sup>174</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that laws that "impinge on personal rights protected by the Constitution," are "subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest").

<sup>175</sup> Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 COLO. L. REV. 941, 985–86 (2019) (arguing that many of the Supreme Court's parental rights decisions appear to implement a reasonableness test or heightened review rather than strict scrutiny).

rights with the government's authority to protect children<sup>176</sup> and, sometimes, with children's own constitutional rights.<sup>177</sup>

Nonetheless, at a minimum, Supreme Court doctrine dictates that government actions that substantially and directly interfere with fit parents' decisions must survive heightened scrutiny.<sup>178</sup> In reviewing such intrusions, courts must give parents' decisions "special weight" and must presume that fit parents act in their children's best interests.<sup>179</sup> The Court has said: "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 . . . further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."<sup>180</sup> In fact, the Supreme Court has protected parents' discretion to make a number of arguably bad decisions for their children, including terminating children's education beyond the eighth grade<sup>181</sup> and "voluntarily" committing children to mental institutions.<sup>182</sup> According to the

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<sup>176</sup> State power to protect children derives from two distinct sources. First, states are entitled to employ the police power to regulate conduct that poses a harm to all citizens. Second, states exercise the *parens patriae* power to ensure the welfare of children and vulnerable adults. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (noting that the Court has upheld the state's police power authority to provide for the health, safety, and morality of the public as a basis for legislation); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (recognizing that, as *parens patriae*, the state has an interest in promoting the welfare of children); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (determining that when "[a]cting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control"); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (finding that police power justifies state vaccination mandates).

<sup>177</sup> 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."). 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); Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099 (2011) (presenting a developmental theory of children's constitutional rights).

<sup>178</sup> *Moore*, 431 U.S. at 499 (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 v. Granville*, 530 U.S. 57, 69 (2000) (plurality opinion) (applying heightened scrutiny but neither specifying the standard applied nor clarifying whether the "special weight" framework used extends to other contexts).

<sup>179</sup> *Troxel*, 530 U.S. at 68–69.

<sup>180</sup> *Id.*

<sup>181</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (explaining that the *parens patriae* power did not permit 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").

<sup>182</sup> *Parham v. J.R.*, 442 U.S. 584 (1979). Indeed, the Court has advised: "That some parents 'may at times be acting against the interests of their children' . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that

Court, “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”<sup>183</sup>

### B. Parenting in Court

Despite the strong constitutional protections for parental decisionmaking, Rule 17(c) doctrine permits courts to push parents aside and allow non-parents to represent children’s interests.<sup>184</sup> Federal courts’ consistent failure to recognize the relevance of parents’ constitutional rights to the question of who should represent a child stems in part from courts’ failure to understand parent representatives as engaged in *parenting*. Courts largely overlook that, just as parental decisions about school and medical care can have short- and long-term implications on a child’s well-being, litigation decisions can have both short- and long-term impacts on child well-being, including by determining the rights, defenses, and interests of a child,<sup>185</sup> controlling the litigation, deciding whether to go to trial or accept a settlement, and retaining (and financing) counsel.

Indeed, litigation undertaken by parents can be understood as part of a chain of decisionmaking intended to protect a child’s interests. For example, Leonard Tinker’s decision to represent his children’s interests in court was integral to his parenting because he believed he should support his children in matters of conscience. On

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teach that parents generally do act in the child’s best interests.” *Id.* at 602–03 (quoting *Bartley v. Kremens*, 402 F. Supp. 1039, 1047–48 (E.D. Pa. 1975), *vacated*, 431 U.S. 119 (1977)).

<sup>183</sup> *Troxel*, 530 U.S. at 72–73; see also 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, 1204–08 (2000) (finding the *parens patriae* power authorizes the state to interfere with parental authority to enforce minimum social standards of child well-being—ensuring children are protected from abuse and neglect and comply with obligations about which there is significant social consensus—but it does not authorize state intervention to provide a child with an “optimal” experience). The state will be justified in its use of the *parens patriae* power where the risk of harm is deemed to be sufficiently high. See *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (holding that prohibiting children from preaching in public spaces to protect them from the risk of physical or psychological injury was a valid exercise of the *parens patriae* power and justified overriding parents’ liberty interests in the care and control of their children and in religious liberty).

<sup>184</sup> Although federal courts observe that parents often do represent children before courts, courts frequently fail to recognize that parents should as a matter of constitutional right. See *supra* note 153 (providing examples of cases where courts recognized the ability of parents to represent their children in court).

<sup>185</sup> See, e.g., *Noe v. True*, 507 F.2d 9, 11–12 (6th Cir. 1974); *United States v. E.I. du Pont de Nemours & Co.*, 13 F.R.D. 98, 104–05 (N.D. Ill. 1952) (noting that it is the duty of a guardian ad litem to determine the interests of a child and vigorously defend that interest).

December 17, 1965, as John Tinker prepared to leave for school with a black armband in his pocket, his father stopped him.<sup>186</sup> John's sister, Mary Beth, had been suspended from school the day before for wearing an armband. John's father asked John if he was sure he wanted to do the same, saying, "[t]he school made a rule and maybe that's the way it should be."<sup>187</sup> John told him: "This is a piece of black cloth. People are dying in Vietnam."<sup>188</sup> John's father asked, "You believe it's a matter of conscience?" "I guess so," John replied.<sup>189</sup> "Then I support you," his father said.<sup>190</sup> After his children were both suspended, Leonard Tinker initially resisted the idea of litigation, believing the dispute would be better resolved through conversation.<sup>191</sup> But when it became clear that the school board was unwilling to compromise, Mr. Tinker agreed that litigation was required.<sup>192</sup> To Tinker, then, that litigation was more than a matter of last resort, it was a parenting decision to support his children.

Similarly, the case of *Briggs v. Elliott*,<sup>193</sup> one of the consolidated cases heard as *Brown v. Board of Education*,<sup>194</sup> resulted from the concerns of Eliza and Harry Briggs and several other parents in Summerton, South Carolina, about the dangers to their children's health and well-being from their long daily walks to and from school.<sup>195</sup> Eight year-old Harry Briggs, Jr. had to walk five miles each way between home and school, and some children were forced to walk as far as ten miles.<sup>196</sup> During their trek, children frequently faced flood waters that covered roads behind the newly constructed Santee Dam, requiring them to cross in a rowboat.<sup>197</sup> The Reverend Joseph

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<sup>186</sup> Mike Kilen, *The Eccentric Life of the Former Des Moines Student Who Still Inspires Student Marches*, DES MOINES REGISTER (Mar. 22, 2018), <https://www.desmoinesregister.com/story/news/2018/03/22/tinker-supreme-court-armband-protest-student-march-our-lives/441296002>.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *40th Anniversary of Supreme Court Decision on Student Speech*, CSPAN (Feb. 11, 2009), <https://www.c-span.org/video/?283995-1/40th-anniversary-supreme-court-decision-student-speech>.

<sup>192</sup> *Id.*

<sup>193</sup> 98 F. Supp. 529 (E.D.S.C. 1951).

<sup>194</sup> 347 U.S. 483 (1954).

<sup>195</sup> Sam Roberts, *Harry Briggs Jr., a Catalyst for Brown v. Board of Education, Dies at 75*, N.Y. TIMES (Aug. 17, 2016), <https://nytimes.com/2016/08/18/us/harry-briggs-jr-a-catalyst-for-brown-v-board-of-education-dies-at-75.html>.

<sup>196</sup> *Id.*

<sup>197</sup> Orville Vernon Burton et al., *Seeds in Unlikely Soil: The Briggs v. Elliott School Segregation Case*, in TOWARD THE MEETING OF THE WATERS: CURRENTS IN THE CIVIL RIGHTS MOVEMENT OF SOUTH CAROLINA DURING THE TWENTIETH CENTURY 179 (Winfred B. Moore Jr. & Orville Vernon Burton eds., 2008).

Armstrong De Laine, a school principal, organized the Briggs and eighteen other parents to petition the school board for buses to transport the children, like the thirty the county provided for white children. When the school board rejected their request, they decided to sue, ultimately challenging not only the lack of transportation, but also the inferior conditions of their schools and the harm wrought by segregation itself.<sup>198</sup> Although the case also pursued higher ideals of equality, for the parents, the litigation was also fundamentally about what was best for their children. As Maize Solomon, another of the parents, put it, “[o]ur children didn’t have a bus; they didn’t have desks.”<sup>199</sup>

These anecdotes shine light on the hidden threads of parenting woven throughout litigation. Litigation is an extension of parents’ rights to make decisions regarding their children and one step in a course of conduct undertaken to advance children’s interests. Like other decisions made by parents on behalf of their children, the choice to pursue litigation entails a cost-benefit analysis that encompasses numerous factors beyond the issues entailed in the legal dispute, and that relates to events and consequences preceding and following the course of a case itself.

The parenting that occurs within litigation becomes evident when a legal matter is viewed in its full context. The operative incidents underlying a child’s legal claims may result from parenting decisions and concerns, like Mr. Tinker’s decision to permit John to leave for school prepared to wear his armband, and the Briggs’ concerns about the impact on their son of the long daily walks to and from school. Likewise, the choice to pursue litigation may result from parents’ failed attempts to redress harms done to children through other means, like the Tinkers’ attempt to address the policies that led to their children’s suspensions with the school board, and the Briggs’ attempt to petition their school board for bus funding. Finally, choices about the course of litigation and how to navigate whatever outcomes result from a case have real and potentially significant impacts on a

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<sup>198</sup> Roberts, *supra* note 195. Whereas the school for white children in Clarendon County had science labs and a cafeteria, the schools for black children often lacked electricity and running water. *Bitter Resistance: Clarendon County, South Carolina*, SMITHSONIAN NAT’L MUSEUM OF AM. HIST., <https://americanhistory.si.edu/brown/history/4-five/clarendon-county-2.html> (last visited Jan. 29, 2020). The National Association for the Advancement of Colored People (NAACP), which served as counsel to the plaintiffs in the *Brown* consolidated cases, initially hesitated to take on *Briggs* out of concerns about the severity of reprisals the plaintiffs were likely to face, which they feared would cause the plaintiffs to abandon the litigation. Burton et al., *supra* note 197, at 181.

<sup>199</sup> Darryl Lorenzo Wellington, *Ambiguous Legacy: Summerton, South Carolina, and Briggs v. Elliott*, 51 *DISSENT* 45, 47 (2004).



child's daily life that parents will have to help children navigate. Such choices include those Eliza and Harry Briggs faced when they both were fired from their jobs after signing the petition, their son was fired from his paper route, and the family was warned away from entering any white neighborhoods for fear they would be harmed.<sup>200</sup> The family ultimately moved to Florida after local merchants thwarted the Briggs' efforts to support themselves by farming by refusing to sell seed to Harry Briggs, Sr.<sup>201</sup> In dealing with this backlash, the Briggs' decision to continue with the case necessarily entailed more than just their view that it served their son's legal interests—it also required them to decide as parents what broadly served the interests of their family: continuing to stand up for what they thought was right, or taking another course to protect their family's safety and well-being.<sup>202</sup> Around this same time, Congressman John Lewis's parents made a different, understandable choice. Fearing the loss of their tenant farm and violence to their family, friends, and neighbors, Congressman Lewis's parents declined to bring suit on his behalf to challenge the whites-only admission policy at Alabama's Troy State University.<sup>203</sup>

These examples not only demonstrate the connections between representing children in litigation and parenting, but also illustrate the benefits of having *parents* play this role. Litigation decisions made by a parent on behalf of a child can be understood as actions taken to protect a child's best interests both within and beyond litigation. In short, the representation of children's interests in litigation has a caretaking component that deserves courts' respect.

It could be argued that deference to parents as children's litigation representatives should be subject-matter specific. That is, deference to parents may be appropriate in cases involving substantive topics that fall within the parental decisionmaking purview under existing constitutional doctrine (such as education), but parents should not have priority in other types of cases.<sup>204</sup> For several reasons,

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<sup>200</sup> See Roberts, *supra* note 195.

<sup>201</sup> *Id.*

<sup>202</sup> Indeed, for all the Briggs sacrificed, Harry Briggs, Jr. never “attend[ed] an integrated class.” *Id.*

<sup>203</sup> Helen Mondloch, *Profile: Congressman John Lewis*, NORTHERN VA. MAG. (May 6, 2016), <https://www.northernvirginiamag.com/culture/news/2016/05/06/profile-congressman-john-lewis>.

<sup>204</sup> See, e.g., Alison M. Brumley, Comment, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 337–38 (1991) (arguing that parents should not have authority to represent children in cases regarding children's property rights and financial interests, including tort claims, but should be considered as possible representatives in claims seeking relief within the scope of parental authority).

this Article proposes that a caretaking element is present in all types of litigation, and therefore constitutional principles should guide the analysis of whether courts should defer to a parent—as opposed to another adult—as the decisionmaking representative for a child litigant across all substantive case types.

To begin with, many of the same interests that support giving parents primary decisionmaking authority over their children in general warrant deferring to parents as the appropriate decisionmakers for their children in litigation, regardless of the subject of the case. First, protecting parents' decisionmaking authority ensures that decisions impacting children are made by people who care deeply about and know children best.<sup>205</sup> Parents are also best situated to anticipate the likely impact of litigation decisions on the broader family and the family's resources, including time, emotional energy, and money, all of which can affect a child's overall well-being. Preserving parents' discretion to decide whether their children should pursue litigation and how such litigation should proceed may help prepare and motivate parents to protect their children from any negative consequences that result from the choice to litigate.

In addition to their relational bonds, parents also have special insight into their children's interests because parents are more likely to share cultural and socio-economic characteristics and associated life experiences with their children that may not match those of courts or appointed non-parent representatives.<sup>206</sup> These characteristics and experiences inform parents' understanding of their children's needs and interests and what will best advance them.<sup>207</sup> And as with other

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<sup>205</sup> See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.”); GUGGENHEIM, *supra* note 29, 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.”); Spitzko, *supra* note 183, at 1209 (suggesting that parents' deep knowledge of their children makes parents the best prepared to make decisions about them).

<sup>206</sup> See Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 142 (2013) (“Since 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 their courtrooms.” (quoting Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, JUDGES J., Winter 1985, at 6, 53 (1985))); cf. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1162–63 (2012) (describing how, when deciding on motions to dismiss, “the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge's assessment in the absence of a well-developed evidentiary record”).

<sup>207</sup> See generally Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1075 (2015) (suggesting that parental involvement in decisionmaking is essential to a just child-welfare system, particularly for those children impacted by racism or poverty).

difficult decisions, fit parents can reasonably differ as to whether litigation best meets their children's needs and is worth its potential risks.<sup>208</sup>

Critics might dispute the notion that parents actually have a sufficient understanding of their children's interests and experiences to represent their interests effectively.<sup>209</sup> This disconnect might result because of children's reticence to discuss their interests, reluctance to contradict a parent or disclose all relevant facts, inability to identify violations of their legal rights, or fear of expressing a legal grievance about an authority figure.<sup>210</sup> These critiques make the important point that a parent's knowledge of a child's interests is likely only partial at its best and a parent could easily misunderstand a child's wishes. Nonetheless, these barriers to understanding are not specific to parents and would be present for anyone who seeks to understand and effectively represent a child's interests.<sup>211</sup> In general, involved parents are likely to be better situated to discern children's interests, desires, and intentions than another adult would be.<sup>212</sup>

Second, protecting parental freedom in litigation decisionmaking ensures that lawsuits brought on behalf of children advance a pluralistic range of values and bring a diverse range of legal issues before the courts—not simply those values and claims selected as worthy of vindication by the state or representatives appointed by the state to act for children.<sup>213</sup> As litigation occurs as a matter of public record, litigation provides the opportunity to inform the community about harms done to children. Further, because children are precluded from participation in the electoral process, litigation provides a rare opportunity for children to shape how laws are interpreted and applied and

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<sup>208</sup> Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (noting that two parents may have different views on potential litigation, particularly litigation over a “highly public debate”).

<sup>209</sup> See David H. Neely, *Handicapped Advocacy: Inherent Barriers and Partial Solutions in the Representation of Disabled Children*, 33 *HASTINGS L.J.* 1359, 1363 (1982).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* (explaining that although parents might not always accurately interpret children's desires, “parents in most cases have a more intimate familiarity with their children's communications and intentions than anyone else”).

<sup>213</sup> Cf. *Pierce*, 268 U.S. at 535 (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . .”); GUGGENHEIM, *supra* note 29, 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)).

make their voices heard on policies that impact them.<sup>214</sup> Through litigation, parents also prepare children for citizenship by demonstrating what it means to participate in the judicial process, stand up for one's beliefs, and resolve disputes via the rule of law.<sup>215</sup> Replacing parents with court-appointed representatives risks homogenizing the choices made on behalf of child litigants according to the perspectives of the professional classes more likely to be called upon to serve as court-appointed guardians ad litem by the courts.<sup>216</sup>

Finally, constitutional doctrine regarding the scope and extent of parental decisionmaking authority remains underdeveloped and neither accounts for the full range of concerns that parents should have the primary opportunity to control,<sup>217</sup> nor encompasses the full universe of case types that could directly and indirectly implicate children's well-being.<sup>218</sup> For example, Carmen Crespo's decision to file multiple tort claims on behalf of her daughter against the family's former landlord can be understood at a surface level to entail the right to be compensated for private wrongdoing, which may not appear to be a matter related to parental caretaking.<sup>219</sup> But the case was also fundamentally about a mother seeking to mitigate the long-term impacts of lead poisoning upon her daughter, who had an intellectual disability as a result of exposure to lead in the family's apartment, which the landlord failed to eradicate despite the mother's repeated

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<sup>214</sup> See, e.g., *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (denying a motion to dismiss in a case brought by minors against the federal government for environmental harms and future climate change).

<sup>215</sup> See, e.g., *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."); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (explaining that preparing children for "additional obligations," per *Pierce*, should be understood to include "the inculcation of moral standards, religious beliefs, and elements of good citizenship"); cf. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.").

<sup>216</sup> See *supra* note 132 and accompanying text (explaining that courts have often appointed other lawyers as guardians ad litem).

<sup>217</sup> *Troxel v. Granville*, 530 U.S. 57, 78 (2000) (Souter, J., concurring) ("Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child . . ."); see also Moore, *supra* note 23, at 1851–52 (noting that courts are still in the early stages of deciding issues of children's rights versus parental rights as a matter of constitutional law).

<sup>218</sup> Cf. *Huntington & Scott*, *supra* note 29 (manuscript at 35) (positing that doctrine relating to parental authority and children's constitutional rights can sometimes be understood as aimed at promoting children's well-being in addition to protecting liberty interests).

<sup>219</sup> *Caban ex rel. Crespo v. 600 E. 21st St. Co.*, 200 F.R.D. 176 (E.D.N.Y. 2001).

complaints.<sup>220</sup> For all of these reasons, limiting the legal topics over which parents should have decisionmaking control to those that have been explicitly considered by the Supreme Court would overly circumscribe parental authority and undermine parents', children's, and the community's interests served by vesting authority for decisionmaking about children in their parents.<sup>221</sup>

Recognizing that parents' fundamental liberty interest in caretaking extends to litigation decisionmaking has some basis in practice. At least one federal court has recognized parents' interests in representing their children to have a constitutional foundation in a case addressing issues squarely within the parental purview—education and the regulation of homeschooling.<sup>222</sup> Moreover, a few courts have referenced constitutional principles in considering whether a child litigant's interests were adequately protected in a case. At least one court cited the presumption that fit parents act in children's interests to support its decision not to appoint a guardian ad litem.<sup>223</sup> Another federal court upheld a default judgment entered against a child defendant where there was proper service upon the child's parent, noting that “a federal court should, as a matter of sound policy, be cautious in attempting to step between the parent and his or her child.”<sup>224</sup> The court concluded that “[t]here may well be solid reasons why the

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<sup>220</sup> *Id.* at 178.

<sup>221</sup> See *supra* notes 162–72 and accompanying text (listing domains where the Supreme Court has addressed parental rights in decisionmaking).

<sup>222</sup> In such cases, parents vindicate not only a child's legal interests, but also the parents' decisionmaking authority over the substantive matter at hand. See *Jeffery v. O'Donnell*, 702 F. Supp. 513, 515–16 (M.D. Pa. 1987) (declining to appoint a guardian ad litem where parents represented their children in the case, because “[p]arents have a substantial constitutional right to direct and control the upbringing and development of their minor children,” and there was no evidence of a conflict between the interests of the parents and the children in the case). Such circumstances also may confer independent standing on parents to bring their own claims to advance children's rights (in their own names, not their children's). See *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 528–29 (2007) (holding the IDEA grants parents independent standing to enforce children's statutory rights as real parties in interest, in part, because of the recognized independent legal interest that parents have in the education of their children); *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 523–24 (1982) (Blackmun, J., dissenting) (distinguishing the question of whether a mother could appropriately pursue a habeas petition for the return of her children as “next friend” from the question of whether she had standing to assert her own rights to their custody); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977) (recognizing that the guardianship rights of children's natural parents, foster parents, and the state entitle each to be heard on the question of what best serves the interests of the children in question, who were under the state's care in the foster care system).

<sup>223</sup> *United States v. Noble*, 269 F. Supp. 814, 816 (E.D.N.Y. 1967) (“This Court is permitted by Rule 17 to rely upon a fundamental assumption on which our society rests, that parents are concerned about the welfare of their children.”).

<sup>224</sup> *Seibels, Bruce & Co. v. Nicke*, 168 F.R.D. 542, 544 (M.D.N.C. 1996).

parent does not file an answer on the minor's behalf," and absent indication otherwise, "it may be presumed that a parent acts in the best interest of the child."<sup>225</sup> Similarly, at least one court characterized the choice of "whether, and where, the child should sue" as "parental policy decisions."<sup>226</sup> A California state court likewise held that a statute of limitations precluded the litigation of a medical malpractice claim by a child's aunt that the child's parents refused to bring when it was timely.<sup>227</sup> The court concluded that the decision whether to file a malpractice action was reserved to parents, admonishing: "[e]xcept in egregious situations calling for interference with legal custody, the parents, not the courts, make decisions for the minor."<sup>228</sup> The court further asserted that a court is not "well situated to judge the wisdom of the parental choice to sue or not to sue," concluding: "We are not inclined to hold . . . that a lawsuit is always the best use of family resources and energy. Nor are we inclined, or authorized, to take over the decisions relative to the care of minors."<sup>229</sup>

The Supreme Court recognized these connections in *Elk Grove Unified School District v. Newdow* when it held that Newdow, a father who lacked legal custody over his daughter, could not bring a claim challenging the recitation of the pledge of allegiance in his daughter's school over the objection of her mother and legal custodian.<sup>230</sup> The Court reasoned that Newdow's use of litigation was an attempt to shield his daughter from outside influences that the custody order gave her mother the right to control, and declined to rule on a matter of weighty constitutional concern that could negatively impact the child when the father's custodial rights were in dispute.<sup>231</sup> In dismissing Newdow's claim, the Court thus preserved the mother's rights as legal custodian and decisionmaker and deferred to her judgment against advancing the claim.

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<sup>225</sup> *Id.*

<sup>226</sup> *Hunt v. Yeatman*, 264 F. Supp. 490, 492 (E.D. Pa. 1967) (denying a mother's motion to intervene in a case brought on behalf of her child by the child's father since parents shared decisionmaking rights over the child).

<sup>227</sup> *Aronson v. Superior Court*, 191 Cal. App. 3d 294, 299 (1987).

<sup>228</sup> *Id.* ("Nowhere in the statute is there language authorizing special exceptions for the minor whose parents simply refuse to sue when, perhaps, some person would conclude they should.").

<sup>229</sup> *Id.*

<sup>230</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004).

<sup>231</sup> *Id.* at 17.

### C. *Extending Constitutional Principles to Parents' Litigation Decisions*

If we recognize parents' litigation decisions as a component of parents' fundamental liberty interests in caretaking, the Supreme Court's decision in *Troxel v. Granville*<sup>232</sup> offers guidance regarding the appropriate balance of decisionmaking authority between fit parents and courts under the Due Process Clause. In short, due process requires that courts give the decisions of fit parents special weight and that courts not substitute their own decisions just because they believe a "better" decision could be made.<sup>233</sup>

In *Troxel*, the Court held unconstitutional the decision of a Washington State superior court that awarded grandparents visitation against a mother's wishes.<sup>234</sup> The Washington court based the best interests determination entirely on the judge's own view of what was best for the children and did not presume that the mother's wishes served the children's interests.<sup>235</sup> To the contrary, the court essentially gave the mother the burden to prove that the visitation sought by the grandparents did not serve the children's interests.<sup>236</sup> Consequently, the Supreme Court viewed the resulting order as essentially the product of a "simple disagreement" between the mother and the court about what was best for the children, in which the judge necessarily prevailed.<sup>237</sup> With no evidence that the mother was unfit, the court's failure to give the mother's determination of what would serve her daughters' best interests special weight violated her "fundamental constitutional right to make decisions concerning the rearing of her own daughters."<sup>238</sup>

*Troxel's* principles readily extend to the allocation of decision-making authority between courts and parents regarding the representation of child litigants. Just as third party custody and visitation determinations require courts to evaluate what serves children's best interests in their broader lives, Rule 17(c) requires courts to evaluate what serves children's interests within a particular case.<sup>239</sup> Both contexts potentially require a court to evaluate a decision made by par-

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<sup>232</sup> 530 U.S. 57 (2000).

<sup>233</sup> *Id.* at 72–73.

<sup>234</sup> *Id.* at 61–63.

<sup>235</sup> *Id.* at 69.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 67, 72.

<sup>238</sup> *Id.* at 69–70.

<sup>239</sup> FED. R. CIV. P. 17(c); *see also supra* notes 147–50 and accompanying text (discussing interpretations of Rule 17(c)).

ents on behalf of their children and determine whether to affirm or override a parent's choice.

Thus, in determining what serves a child litigant's interests, *Troxel* requires courts to give special weight to the views of the child's parents as to who should represent the child, presuming that fit parents act in their children's interests. A mere disagreement between the court and the parents regarding how the case would *best* proceed does not justify the court infringing upon a parent's decisionmaking rights. Instead, consistent with the Due Process Clause, courts should override parents' decisions—for example, by appointing guardians ad litem or designating non-parent next friends over parents' objections—only where there is evidence that parental representation of the child (or parental failure to act) will cause actual and substantial harm to the child's interests in the case.

Litigation is a unique sphere of parental decisionmaking in that it allows the court ongoing oversight of parents and the impact of their decisionmaking on children. This unusual level of oversight should give courts confidence in deferring to parents, as courts will have future opportunities to intervene upon evidence of actual harm. Yet, the occurrence of this conflict of authority on courts' territory gives courts a coercive advantage over parents that courts must work to mitigate. This acute power disparity, coupled with courts' superior expertise in the litigation process, may encourage courts to override parents more often than they might in other contexts. Parents also might be timid in asserting their decisionmaking rights against the court, for fear of angering the judge and harming the ultimate success of their children's claims. In undertaking their responsibility to assure children's interests remain adequately protected, courts must act with restraint and recognize that parents' litigation decisions for children inevitably account for and balance many other interests significant to an individual child—interests about which courts may have little insight.<sup>240</sup> Courts must proceed with humility about what they do not know about children's lives outside the courtroom and resist the temptation to override parents simply because courts believe a "better" decision could be made.

In sum, the question of whether and how to represent a child's interests in litigation can be understood as a parenting choice (or series of choices) undertaken to protect and care for a child. Constitutional principles and practical realities provide doctrinal and policy

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<sup>240</sup> See *supra* notes 193–210, 229 and accompanying text (explaining that parents' decisions about whether to litigate, and how to litigate, are often influenced by factors outside of the legal action, including cultural, economic, and safety considerations).



foundations for a default of court deference to parents as the appropriate decisionmakers for their children in courts.

### III

#### A DEFAULT OF DEFERENCE TO PARENTS

Recognizing the constitutional dimensions of parents' litigation decisions provides a principled basis for unifying Rule 17(c) analysis with regard to parents through the establishment of a default rule of deference to parents. Establishing such a rule requires not only the reconciliation of parents' and courts' overlapping responsibilities for child litigants but also the rights of children themselves.

##### A. *Establishing a General Framework*

In implementing a default rule favoring parents, the full unification of Rule 17(c) doctrine would benefit the public and the courts by facilitating access to justice for child litigants and streamlining the administration of litigation involving child parties. To this end, parents' constitutional decisionmaking authority supports recognizing them as general representatives for purposes of federal law—either “general guardians” or “like fiduciaries”—who are automatically authorized to represent their children under Rule 17(c)(1).<sup>241</sup> At a minimum, constitutional doctrine requires courts to treat parents as next friends or guardians ad litem by default under Rule 17(c)(2).<sup>242</sup> Under each of these approaches, parents would be understood to have the right of first refusal to represent their children's litigation interests and have priority over all other potential representatives, *unless* a parent's decisionmaking rights have been limited by previous court order, such as a legal custody order or an order appointing another adult to serve as a child's general guardian.<sup>243</sup>

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<sup>241</sup> Several courts have reserved the authority to interpret Rule 17(c) without reference to state law to facilitate their ability to protect children's interests. *See* Neilson v. Colgate-Palmolive Co., 199 F.3d 642, 656 (2d Cir. 1999) (finding that “the district court was not obligated to apply” a New York statute that arguably limited the type of guardian permitted to seek settlement approval); *see also* 6A WRIGHT ET AL., *supra* note 41, § 1571, at 681 (“[I]nsofar as state law might be read to preclude the federal court from exercising its appointive power under Rule 17(c), it must give way, Rule 17(b) notwithstanding.”). *See generally* Scott & Scott, *supra* note 164 (conceiving of parenting as a fiduciary relationship between parent and child).

<sup>242</sup> FED. R. CIV. P. 17(c)(2).

<sup>243</sup> *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17 (2004) (holding that a state court order can deprive a parent of a right to sue on behalf of a child when the other parent was given sole legal custodianship). The doctrinal calculation changes in cases where parents have lost their decisionmaking rights as a result of family court orders. Parents who lack legal custody over their children are not entitled to the same constitutional deference that legal custodians receive. *Id.*; *see also* Smith, *supra* note 67, at

Yet, as a practical matter, because children's litigation representatives have the same authority and responsibilities within a case regardless of their particular designation, the implementation of a default rule favoring parents does not depend on how (or if) federal doctrine ultimately resolves the questions of whether parents qualify as "general guardians," "next friends," or "guardians ad litem." Moreover, because federal constitutional principles extend equally to federal and state law, the implementation of a default rule does not depend on how federal doctrine resolves the question of whether the designated role for parent representatives (as guardian, next friend, or guardian ad litem) is a matter of state or federal law. Under each of these permutations, constitutional principles require courts to inquire whether a child litigant has a parent or parents who possess rights of legal custody and to defer to the wishes of such parents as a general rule.

Adopting a deference to parents within Rule 17(c) analysis would not take away from courts' continued authority to act to protect child litigants, but it would limit the circumstances justifying court intervention when a parent seeks to represent a child. A court could not appoint a non-parent next friend or guardian ad litem over a parent's objection just because the court believes that doing so would be a "better" decision than allowing a parent to serve. While presuming in the ordinary case that parents seeking to represent their children are acting in the children's best interests, courts would retain their authority to override parents' decisions upon evidence of parental unfitness or that a parent's representation is harming a child's interests in the case.

Perhaps the clearest example of when harm warranting court intervention would arise occurs where a parent's own interests in the outcome of the matter are adverse to a child's.<sup>244</sup> Conflicts of interest

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276 ("[M]inor guardianship [is] used today primarily to give legal authority to relative caregivers when a parent is in crisis.").

<sup>244</sup> Such issues arise in cases brought by minors seeking to secure abortions through judicial bypass processes that obviate the need for parental consent. 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."). This posture would also arise if a parent was the defendant in a case brought by a child, see *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997), or it might arise in a case brought by a parent challenging actions taken by child services agencies. Perhaps because parents who have interacted with the child welfare system are disproportionately low income, such cases typically are dismissed for the parents' failure to retain counsel on behalf of the child without consideration of the parents' suitability to serve as the child's representative. See, e.g., *Santos v. Sec'y of Dep't of Human Servs.*, 532 F. App'x 29, 31 n.1 (3d Cir. 2013) (considering only the individual claims of appellant, acting pro se, and not the claims asserted by appellant on behalf of his minor children because the children were not represented by counsel); *Whitfield v. Johnson*, No. 18-CV-1232 (WFK) (LB), 2018 WL

that pose harm to a child may also arise where parents and children have divergent financial interests in a case, for example where a proposed settlement agreement would allot separate awards to a parent and child, one thus arguably detracting from an amount otherwise available to the other.<sup>245</sup> But experience suggests that courts should exercise restraint in identifying conflicts that would preclude parent representation, as the adoption of a broad view of disqualifying conflicts risks supplanting parent representatives in every case.<sup>246</sup> In reality, the interests of parents and children, including their financial interests and economic well-being, are often entangled.<sup>247</sup> Rather than supplanting parents at the mere prospect of conflict, implementing constitutional principles requires courts to presume that fit parents act in children's best interests, and exclude parents only upon evidence that parent representation is actually causing harm to a child at the time the question is raised.<sup>248</sup>

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1385890, at \*1 (E.D.N.Y. Mar. 16, 2018) (“It is well-settled that a non-attorney parent cannot appear on behalf of his or her child.”), *aff'd*, 763 F. App'x 106 (2d Cir. 2019).

<sup>245</sup> *Burns v. United States*, No. 12-CV-2957-DMS (MDD), 2015 WL 12564299, at \*5–6 (S.D. Cal. May 13, 2015) (recognizing that parents might have a conflict of interest as guardians ad litem if they were to receive money in a settlement that could have gone to their daughter, and requiring that the parents address this concern when petitioning for approval of the settlement award).

<sup>246</sup> For example, one court held that a parent's payment of attorney's fees on behalf of that parent's child created a financial conflict of interest that precluded the parent from serving as the child's representative in the case. See *Scott v. District of Columbia*, 197 F.R.D. 10, 11 (D.D.C. 2000). Combined with current doctrine prohibiting parents from litigating cases on behalf of their children pro se, and courts' reluctance to appoint counsel for parents bringing children's claims, a widespread adoption of the *Scott* court's view would result in the disqualification of parents as children's representatives in every case. But the *Scott* court's view is out of step with historical and modern day practice. See *Moore*, *supra* note 23, at 1846 (“[I]n the ordinary case (that is, excluding cases of inherent conflict such as custody, abuse or neglect, and termination of parental rights), parents are expected not only to ‘foot the bill,’ [for counsel] but also to play an active role in directing the course of the representation.” (citations omitted)).

<sup>247</sup> See, e.g., *Machadio v. Apfel*, 276 F.3d 103, 107 (2d Cir. 2002) (exempting children's claims for Supplemental Security Income brought by parents from the general mandate that parents retain counsel because parents' and children's financial interests in such cases intertwine); see also *Scott & Scott*, *supra* note 164, at 2437 (“Parents' and children's interests are extensively intertwined, and many decisions that parents make affect their own lives as well as those of their children.”).

<sup>248</sup> *Burke v. Smith*, 252 F.3d 1260, 1264 (11th Cir. 2001) (affirming district court's decision to permit mother to represent child's interests and not consider the appointment of a guardian ad litem where there was no evidence of a conflict of interest at the time of the litigation); *Jeffery v. O'Donnell*, 702 F. Supp. 513, 515 (M.D. Pa. 1987) (permitting parents to represent their children's interests in case asserting prerogative to home school because “it [was] not yet clear that a conflict of interests exists in this case”); *Aves ex rel. Aves v. Shah*, No. 88-1669-K, 1991 WL 126612, at \*15–16 (D. Kan. June 4, 1991) (declining to appoint guardian ad litem to replace parent representatives based on possibility of future conflicts of interest with regard to the distribution of damage awards to child where there was no evidence of present conflicts of interest).

Likewise, courts should not presume harm where a parent declines to act. As courts have recognized, a parent's decision *not* to pursue an available claim is not necessarily cause for intervention—parents can reasonably decide that litigation does not serve a child's best interests.<sup>249</sup> Absent specific evidence of harm, parental decisions not to litigate should be respected.

Where courts conclude a non-parent representative should be appointed, courts might provide an alternative means for parents to express their views of what best serves their children's interests to the court, for example, by permitting parents to intervene under Federal Rule of Civil Procedure 24,<sup>250</sup> or by appointing a guardian ad litem *in addition to* rather than *in lieu of* a parent representative.<sup>251</sup> Such alternatives are not an adequate substitute for a parent's sole representation of a child's interests in every case, as the participation of a second decisionmaker for a child necessarily dilutes the force and effect of parents' input into the case. Guardian ad litem appointment also potentially imposes additional financial costs on child litigants or their opponents.<sup>252</sup> Nonetheless, by permitting parents whom the court has excluded from representation to intervene, courts can provide a mechanism through which to gain insight into the complexities of children's needs and interests that parents are well-suited to provide.

### B. *Accounting for Children's Perspective*

Children are typically expected to play little to no role in advancing their legal claims precisely because of their legal incapacities as children. Yet, despite their general legal incapacity, a few circumstances warrant courts' consideration of children's own views when applying Rule 17(c).

First and foremost, courts may be called upon to consider children's views when cases involve questions of children's fundamental rights and children and their parents disagree on the issues at stake in the litigation.<sup>253</sup> Such cases present particularly thorny questions,

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<sup>249</sup> See *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281, 285–86 (1st Cir. 1982) (declining to permit non-parent next friend to bring case on behalf of child whose mother objected to the lawsuit, stating “while it seems clear that Harold's mother disagreed with Freda Smith over the wisdom of the present suit, there is no indication in the record that she abused her trust in doing so”).

<sup>250</sup> FED. R. CIV. P. 24.

<sup>251</sup> See *Horacek v. Exon*, 357 F. Supp. 71, 74 (D. Neb. 1973) (appointing a guardian ad litem to serve in addition to parent representatives).

<sup>252</sup> See *supra* note 160 and accompanying text (suggesting that guardian ad litem fees might disproportionately burden those least able to afford additional costs).

<sup>253</sup> See Robert B. Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 460 (1982) (stating that the

requiring courts to balance the general deference owed to fit parents with the protection the Constitution extends to children themselves as persons under the law.<sup>254</sup> Yet, “[s]imply because the decision of a parent is not agreeable to a child . . . does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.”<sup>255</sup> Children’s constitutional rights are not equal to adults’ precisely because of their “peculiar vulnerability,” “their inability to make critical decisions in an informed, mature manner,” and “the importance of the parental role in child rearing.”<sup>256</sup> In practice, the Supreme Court generally has not concerned itself with children’s own views about the matters their parents seek to redress, instead relying on parents’ representations about what serves children’s interests absent children’s active dissent.<sup>257</sup> Taken together,

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Supreme Court’s extension of constitutional privacy rights to children assures that the Court must undertake “the eventual task of reconciling the rights and interests asserted by children in actual or potential conflict with those of their parents. The claimed right to a child of privacy in individual matters inevitably clashes with the longstanding parental right of authority in directing the child’s life” (citations omitted)). Scholars continue to debate how this conflict of rights should be reconciled. *See generally* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 *YALE L.J.* 1448 (2018) (discussing a new framework for addressing children’s interests in relation to parental rights and state control); Martin Guggenheim, *The (Not So) New Law of the Child*, 127 *YALE L.J. FORUM* 942 (2018) (calling for a new vision of a “law of the child” centered around addressing structural inequality); Huntington & Scott, *supra* note 29 (manuscript at 3–4) (suggesting that a framework of “child wellbeing” might relax perceived tension between children’s rights and parental authority). A full accounting of how courts should respond to this problem is beyond the scope of this project and the subject of a work in progress by the author.

<sup>254</sup> *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion) (“The unique role in our society of the family, the institution by which ‘we inculcate and pass down many of our most cherished values, moral and cultural,’ requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children.” (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion))).

<sup>255</sup> *Parham v. J.R.*, 442 U.S. 584, 602–03 (1979).

<sup>256</sup> *Bellotti*, 443 U.S. at 634–35; *see also* *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion) (holding juveniles are not entitled to a trial by jury in delinquency cases and stating: “[O]ur cases show that, although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention’”).

<sup>257</sup> *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 4 (2004) (not questioning mother’s representation that, as a Christian, her daughter did not object to hearing or reciting the pledge of allegiance’s reference to God); *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting) (noting that the majority regards the religious rights of Amish parents as an interest shared with their children, even if that is not the case); *see also* *Jeffery v. O’Donnell*, 702 F. Supp. 513, 515–16 (M.D. Pa. 1987) (declining to appoint a guardian ad litem where a parent’s and child’s interests regarding the child’s education aligned, and noting that the court would reconsider the decision if evidence that the parent’s and child’s interests diverged appeared in the future).

Supreme Court doctrine regarding parent/child decisionmaking conflicts suggests that the presumption in favor of a fit parent may be overcome in such cases when three circumstances coincide: the substantive law at issue gives the child some decisionmaking authority, the child meets whatever preconditions exist for exercising that authority (e.g., maturity), and the parent and the child in fact disagree.<sup>258</sup>

To date, the Supreme Court has explicitly conferred independent decisionmaking authority to children solely within the context of abortion.<sup>259</sup> Here, the Court shifts the balance of decisionmaking authority between children and parents in light of the “unique nature and consequences of the abortion decision,”<sup>260</sup> namely, that the decision cannot be postponed and entails “grave and indelible” consequences.<sup>261</sup> These features make it inappropriate to give parents a blanket, absolute veto over their children’s decisions about whether to have an abortion or carry a pregnancy to term.<sup>262</sup> Yet, the Court con-

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<sup>258</sup> See Lisa Vollendorf Martin, *What's Love Got to Do with It: Securing Access to Justice for Teens*, 61 CATH. U. L. REV. 457, 468–85 (2012) (discussing the different ways states allow minors to vindicate their rights contra their parents). A full account of the reconciliation of parent/child conflicts over federal litigation is beyond the scope of this Article and is the subject of a work in progress by the author. Some have argued that courts should grant minors independent control when such conflicts arise. See, e.g., Sara Jeruss, *Empty Promises? How State Procedural Rules Block LGBT Minors from Vindicating Their Substantive Rights*, 43 U.S.F. L. REV. 853 (2009) (arguing that states should explore ways to allow certain minors to bring lawsuits without parent involvement or even notification); Brumley, *supra* note 204, at 351 (suggesting that courts should occasionally allow minors to make independent decisions when their interests might diverge with their parents’); Katharine A. Butler, Comment, *A Chance to be Heard: An Application of Bellotti v. Baird to the Civil Commitment of Minors*, 32 HASTINGS L.J. 1285, 1287–88 (1981) (same).

<sup>259</sup> The Court recognized the potential significance of the child’s own views regarding reciting or hearing the pledge of allegiance in *Newdow*, but was not required to decide whether the child’s or her parent’s views regarding the litigation should take precedence as the child’s and her legal custodian parent’s views aligned, and the Court found that her father, who held a different view, lacked standing to sue because he lacked legal custody. See *Newdow*, 542 U.S. at 9, 17. State legislatures have granted adolescents the right to make a range of additional decisions independent from their parents, including whether to seek a restraining order against a violent dating partner; “emergency and outpatient medical care”; “testing and treatment for sexually transmitted diseases”; “substance-abuse treatment”; “outpatient mental-health services”; and “reproductive health care.” Martin, *supra* note 258, at 471, 480–82, 503–04. At least one state appellate court has authorized adolescents to bring suit over parental objection or without notice to parents in a context outside of abortion. See *Buckholz v. Leveille*, 194 N.W.2d 427, 429 (Mich. Ct. App. 1971) (permitting sixteen-year-old to bring suit to challenge school dress code against parents’ wishes).

<sup>260</sup> *Bellotti*, 443 U.S. at 643.

<sup>261</sup> *Id.* at 642.

<sup>262</sup> *Id.* at 643; see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

cluded that not all children would be well-situated to make even this critical decision on their own. Thus, children who seek to receive an abortion without parental consent must seek judicial approval. To do so, children must demonstrate that they are sufficiently mature to make the decision independently, or that, despite their immaturity, an abortion serves their best interests.<sup>263</sup>

Because children must appear before courts to overcome parental consent requirements for abortion, courts must determine who should exercise decisionmaking authority for the child within the litigation. Courts disqualify parents as decisionmakers for children in such “judicial bypass” proceedings because parents’ and children’s decisionmaking rights are in direct conflict, and even notifying a child’s parents about the proceeding could significantly harm the privacy interests a child seeks to advance.<sup>264</sup> Thus, in judicial bypass proceedings, rather than defer to parents as decisionmakers, courts instead must consider the appropriateness of any non-parent next friend seeking to represent the child’s interests and whether the appointment of a guardian ad litem is required.<sup>265</sup> Courts have permitted children to represent their own interests without any adult representative in judicial bypass proceedings where the child was mature, represented by counsel, and was supported by other adults who did not formally appear in the litigation.<sup>266</sup>

Outside of the context of child/parent rights conflicts, it may also be appropriate and beneficial for courts to consider children’s wishes

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<sup>263</sup> *Bellotti*, 443 U.S. at 643–44.

<sup>264</sup> *M.S. v. Wermers*, 557 F.2d 170, 176 (8th Cir. 1977) (“Since it would be inappropriate to appoint the parents [as guardians ad litem] in this case, it was equally inappropriate and unnecessary to condition the further progress of the lawsuit upon notification to the parents of the hearing on the appointment.”).

<sup>265</sup> See, e.g., *Wermers*, 557 F.2d at 176; *Noe v. True*, 507 F.2d 9, 11–12 (6th Cir. 1974) (holding that a lower court’s failure to consider appointing a guardian ad litem for an unrepresented minor was an error, especially given that “the legal issues are controversial in nature, the plaintiff is a minor, pregnant out of wedlock, without the benefit of a natural parent or guardian, and . . . her legal guardian is the defendant in the lawsuit”); *Foe v. Vanderhoof*, 389 F. Supp. 947, 957 (D. Colo. 1975) (considering the appointment of a guardian ad litem, and ultimately concluding that plaintiff’s interests were sufficiently protected without a guardian ad litem).

<sup>266</sup> See *Foe*, 389 F. Supp. at 957 (“[P]laintiff’s interests were sufficiently protected by her attorneys and social worker . . . so as to obviate the necessity of appointment of a guardian to represent her. She has evidenced understanding of the legal and personal implications of this action and is capable of bringing the action on her own behalf.”). Relatedly, a number of states have granted adolescents the legal capacity to represent their own interests in state court cases brought to obtain civil restraining orders to protect themselves from domestic and dating violence, sexual assault, and stalking. See *Lisa V. Martin, Restraining Forced Marriage*, 18 NEV. L.J. 919, 998–99 (2018) (summarizing state statutes granting minors legal capacity to seek restraining orders on their own); *Martin, supra* note 258, at 468–86.

when exercising their discretion under Rule 17(c) where the parental presumption has been overcome. Courts might seek a mature child's input, for example, when deciding between prospective non-parent next friends<sup>267</sup> or determining whether and whom to appoint as a guardian ad litem. Permitting mature children's input into such decisions is consistent with best practices guidance for attorneys representing child clients, and it is reflective of the recognition that older children may have "the ability to understand, deliberate upon, and reach conclusions about matters affecting [their] own well-being . . . and thus have the right to make decisions [about the course of litigation/legal matters with attorneys] on their own behalf."<sup>268</sup> For all of these reasons, when courts act to protect children's interests under Rule 17(c), courts also should consider whether to take a child's expressed wishes into account.

### CONCLUSION

Currently, federal courts claim the authority to infringe on parents' constitutional rights when parents bring civil claims on behalf of their children. Courts exercise this authority without any analysis of the constitutional rights at stake. Instead, courts rely on the broad discretion seemingly offered to them under Federal Rule of Civil Procedure 17(c), combined with a lack of clarity about its meaning, to make whatever decision the court finds appropriate in a particular case—including appointing non-parents to represent children in court over a parent's objection. In the process, courts create doctrinal disarray and procedural confusion and inefficiencies. Most significantly, they deprive parents of the opportunity and right to parent by way of bringing those claims for their children, and they deprive children of the benefits of parental insight.

Parents should not be understood to leave their rights at the courthouse door. A parent's act of bringing litigation on behalf of her child is a parenting decision, the very caretaking protected by the Constitution. Deferring to parents as the default litigation representatives for children in the ways proposed here, therefore, would protect

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<sup>267</sup> See *Tinsley v. Flanagan*, No. CV-15-00185-PHX-ROS, 2016 WL 8200450, at \*6 (D. Ariz. May 13, 2016) (recognizing that consideration of a minor's expressed interests might be critical to a determination of who should serve as a minor's next friend, but noting that the minor's express permission is not required for an adult to serve in this role).

<sup>268</sup> Moore, *supra* note 23, at 1848–49 (citations omitted). Children also may indirectly control the outcome of Rule 17(c) analysis, as in some states, minors fourteen years and older have the power to designate the guardians of their estates, who would have priority in advancing their claims. See CLARK, *supra* note 64, § 9.4, at 563; L.S. Tellier, Annotation, *Right of Infant to Select His Own Guardian*, 85 A.L.R.2d 921, § 3 (1962); see, e.g., *In re Antonio R.A.*, 719 S.E.2d 850, 856 (W. Va. 2011).



parents' constitutional liberty interests, promote children's well-being, facilitate children's access to justice, and streamline court oversight of claims brought on behalf of children.