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Top-Down or from the Ground?: A Practical Perspective on Reforming the Field of Children and the Law

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INTRODUCTION

Children get a raw deal in this country—at the federal, state, and family levels. Consider, for example, the start of 2018, when Congress recast children as bargaining pieces, leveraging continued funding of the Children's Health Insurance Program (CHIP) over extending deportation protections to the Dreamers.[1] While such debate raged in Washington, D.C., California police arrested two parents who had been horrifically torturing their thirteen children for years, unbeknownst to the state.[2] Headlines aside, the law indisputably treats children in many limiting and paternalistic ways, typically designating them as objects to be controlled either by their parents or the government—two parties perpetually duking it out for authority.[3]

1. *See* Thomas Kaplan & Robert Pear, *G.O.P. To Use Children's Health Insurance as Lure for Averting Shutdown*, N.Y. Times (Jan. 16, 2018), http://www.nytimes.com/2018/01/16/us/politics/government-shutdown-immigration-childrens-health.html [http://perma.cc/CU9S-T3J3].

2. *See, e.g.*, Madison Park et al., *Found Shackled and Emaciated, Children of Torture Suspects Are Freed*, CNN (Jan. 18, 2018), http://www.cnn.com/2018/01/16/us/california-turpin-13-siblings-held-captive/index.html [http://perma.cc/A7ZG-A9W6].

3. *See generally, e.g.*, Robert H. Mnookin & D. Kelly Weisberg, Child, Family, & State 2 (6th ed. 2009) ("Law outlines a framework for the distribution of decisional power among the child, the family, and various agencies of the state. Although the pattern of the law is complex,

Anne C. Dailey and Laura A. Rosenbury propose a seismic shift to this current framework in their article, *The New Law of the Child*. They advance a "new paradigm for describing, understanding, and shaping children's relationship to the law," which "values the extraordinary richness and variety of children's lives" as they exist in the present, and not just as future adults.[4] Specifically, they identify five "broader interests that the law should recognize and promote,"[5] and describe a new "tripartite framework" to recenter the field of children and the law around these broader interests – their "new law of the child."[6]

Through their new framework, Dailey and Rosenbury envision overhauling constitutional law to better promote children's broader interests.[7] They believe that this law reform, in turn, will normatively "signal[] that certain, presently unrecognized aspects of children's lives should be valued by society,"[8] as law has the power to "shape multiple aspects of children's lives."[9] Theirs is thus a top-down approach to change: by extending the Constitution to safeguard more robust rights for children in a way that "values children as full persons with broad interests and rights of their own," our communities will also come to embrace and respect children as such beings.[10]

The article presents a compelling case for reform. It details the many ways in which our current legal scheme imposes a myopic frame on children, viewing them on a one-dimensional continuum from dependency to autonomy.[11] Their proposed fix is fresh and innovative, making a real contribution to scholarly conversations about children and the law. However, because their framework demands broad constitutional reform, unabashedly reflecting "a direct departure from existing constitutional law,"[12] actual implementation of their new paradigm

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it seems plain that children generally have less liberty than adults . . . ."); *see also* Anne C. Dailey and Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L. J. 1448, 1456 & nn.10 & 13 (2018) (noting the field's classic dynamic of competition between parents and the state over control of children).

4. Dailey & Rosenbury, *supra* note 3, at 1451.

5. *Id*.

6. *Id*.

7. As they explain, the new law of the child necessarily requires overturning or revising the vast body of Supreme Court precedent that contours the current field of children and the law. *Id.* at 1454 ("The new law of the child thus lays the foundation for revising or overruling many foundational Supreme Court decisions . . . .").

8. *Id.* at 1455.

9. *Id.*

10. *Id.* at 1483; *see also id.* at 1455 (explaining that law reform via the new law of the child will "encourage new ways of living for both children and adults").

11. *Id.* at 1467-70 (describing the focus "on the developmental arc from dependency to autonomy to the exclusion of other meaningful aspects of children's lives").

12. *Id.* at 1453.

is ultimately quixotic. Moreover, even if their framework were somehow adopted in principle, it would disappoint in practice because, by design, it relies heavily on the state to vindicate children's rights, either through state enforcement actions or through lawsuits against or involving the state.[13] As such, when played out, the framework necessarily maintains the same troubling dynamic the article describes between parents and state officials now who wrangle for control over children.[14] Moreover, given that states struggle presently to fulfill their obligations towards children, piling on new responsibilities seems unwise.

This Response submits that, rather than force change through a constitutional hammer as Dailey and Rosenbury propose, a more practical and effective path forward to alter our cultural narrative and achieve the article's goal of valuing and respecting children as children is through a youth-led approach. Youth-driven efforts within our current framework, rather than widespread constitutional reform directed by adults, are more likely to produce real changes to the ways in which society views, honors, and treats children. Such a method allows youth to self-select the issues and interests that matter to them, promotes their agency, and capitalizes on their effectiveness as change-agents specifically because of their youth.

Part I of this Response provides a brief overview of Dailey and Rosenbury's thoughtful accounting of the present field of children and the law, which they term the "authorities framework,"[15] and their proposed reconfiguration under the new law of the child, where relationships would be valued, parents and state actors would have responsibilities, and children would possess affirmative rights and a mechanism for enforcement against the state. Part II takes the article at face value and details the presumable steps required to effectuate the new tripartite framework, which are unlikely to happen in the near (or distant) future. Part III sets aside the hurdles of actually creating new constitutional rights for children and assumes the adoption of the new law of the child, analyzing the framework in action. It shows that some aspects might be seamless to institute, while others would be both hard to implement and likely to yield disappointing results.

Part IV offers an alternative, youth-driven approach to achieving at least some of the new law of the child's important aims. To the extent the article's

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13. *See, e.g.*, *id.* at 1530 (explaining that, under the framework, children can protect their rights to "custodial care, education, safety inside and outside the home, and rehabilitation in the juvenile justice system" through state agency enforcement actions, ongoing litigation where the state is already involved and where judges will weigh children's interests, or affirmative litigation that they bring against the state)*; see also id.* 1528-32 (articulating children's rights under the new framework). For further explanation, *see infra* Part III.

14. *See id.* at 1454-55.

15. *Id.* at 1457.

ultimate hope is to change our culture's view of children — to see them as valuable members of society in their own right, with worthy relationships, ideas, and identities — this Response suggests that we foster that new perspective through efforts at the community level that children steer. Such efforts admittedly will not create constitutionally protectable rights, but they could achieve many of the same ends that the article advances, and by a means that actually demonstrates children's real value and agency. Moreover, this grassroots, child-directed approach might help create a groundswell that could lead to broader law reform in the future.

I. THE AUTHORITIES FRAMEWORK AND THE NEW LAW OF THE CHILD

The dominant narrative about how we currently conceptualize the field of children and the law ultimately boils down to analyzing the negotiation of rights and responsibilities among children, parents, and the state.[16] As the article explains, this understanding reflects a triangulation with parents and the government at the top points of a triangle, trading control over children, who are situated at the bottom point.[17] Children's dependency justifies this prevailing setup.[18] Accordingly, as children mature, the triangle starts to shift, until children reach the age of majority, thereby triggering full-on adult autonomy rights and all their attendant features.

Dailey and Rosenbury want to scrap this model, which they coin the authorities framework. First, they outline its dubious historical roots, detailing how the doctrine evolved from property theory — where parents (more accurately, fathers) controlled every aspect of a child's life — to the rise of *parens patriae* and

16. *Id.* at 1457-67; *see e.g.*, DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 1 (2d ed. 2003) (noting "the delicate interrelationships of rights and responsibilities among children, parents, and the government" as a major theme in the field).

17. Dailey & Rosenbury, *supra* note 3, at 1456; *see e.g.*, MNOOKIN & WEISBERG, *supra* note 3, at 2-3; Laura A. Rosenbury, *Between Home and School,* 155 U. PA. L. REV. 833, 833-34, 833 n.1 (2007). Indeed, several law schools term their family law course some iteration of Child, Family, and State, reflecting this triangulation. *See, e.g.*, Harvard Law School ("Child, Family and State"); Loyola University Chicago School of Law ("Child, Parent and State"), Georgetown Law (Family Law II: "Child, Parent, and the State").

18. Dailey & Rosenbury, *supra* note 3, at 1457.

the state's claimed duty to specially protect children.[19] They then expose its incoherence: the field is a patchwork of bright-line age-based tests,[20] subjective judicial determinations,[21] and limited adult-like rights.[22] But most problematic is that the authorities framework obscures children's interests in the "here and now" because of its laser-focus on children's trajectory from dependency to autonomy. [23] Children, however, lead rich and meaningful lives *as children*: they have relationships, identities, ideas, experiences, opinions, and more that the law should take into account.[24] But because our laws treat children "as lesser versions of adult[s]," those interests are eclipsed.[25]

In response, the article proposes a provocative and groundbreaking reconfiguration of the law based on the identification of five normative interests (in nonparental relationships, exposure to new ideas, expressions of identity, personal integrity and privacy, and participation in civic life),[26] but which adults, namely "courts, legislatures, and scholars," may further debate and revise.[27] They then organize these interests into a tripartite framework of relationships, responsibilities, and rights. The first arm recognizes children's relationships that merit legal support.[28] These include relationships with parents, but also extend to other adults, such as relatives, teachers, mentors, coaches, doctors, lawyers, and therapists; and with other children, including siblings and peers.[29]

The second arm details the legal responsibilities that adults—both parents and state actors—would have to further children's broader interests.[30] For example, under the new framework, parents would still be tasked with children's caregiving and protection, but states would also be required to better support parents in this duty by providing more extensive social services.[31] Additionally, both

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19. *Id.* at 1457-59.
20. *Id.* at 1465 (laws concerning driving, drinking, employment, sexual activity, and criminal prosecution).
21. *See id.* at 1461 nn.35 & 36 (noting, for example, that courts may consider a child's wishes in custody and other family disputes and when evaluating a child's health care decisions).
22. *Id.* at 1464 (e.g., free speech and due process).
23. *Id.* at 1467.
24. *Id.* at 1468.
25. *Id.* at 1451.
26. *See id.* at 1484.
27. *Id.* at 1478.
28. *Id.* at 1507, 1508-14.
29. *Id.*
30. *Id.* at 1515-27.
31. *Id.* at 1516-19.

parents and states would be required to foster children's education.[32] Parents would be obligated to expose children to ideas outside the home, most concretely by not homeschooling their children,[33] and states would have an affirmative duty to provide meaningful, high-quality education including free daycare and preschool.[34] Parent and state responsibilities would also mean, for instance, that states would "interrogate" parental bodily intrusions like circumcision and surgery for intersex infants, which undermine children's interests in bodily integrity among other things.[35] Further, both parents and states would need to treat children's misconduct through the lens of rehabilitation.[36] Corporal punishment would be effectively prohibited and juvenile justice systems would need to commit fully to rehabilitating system-involved youth.[37] Lastly, parents and states would be tasked with "further[ing] children's engagement as members of the broader society" via work, volunteerism, sports, political action, and more.[38] This would require both parents and states to facilitate children's engagement by providing both the opportunities and the access to them, meaning everything from transportation to state-funded reproductive healthcare.[39]

The third arm announces the rights children would have to safeguard their interests. Under the framework "[n]ot all adult responsibilities will give rise to affirmative rights enforceable by children. But many will."[40] Indeed, the article rejects the Supreme Court's express pronouncement in *Deshaney v. Winnebago County Department of Social Services* that children have no affirmative constitutional rights.[41] Rather, under the new law of the child, children would have af-

32. *Id.* at 1521.

33. *Id.* at 1522–23.

34. *Id.* at 1521–22.

35. *Id.* at 1518.

36. *Id.* at 1523–25.

37. *Id.* at 1523–24.

38. *Id.* at 1526–27.

39. *Id.* at 1526 (noting parental and state obligations to help children overcome concrete barriers to participation includes access to reproductive healthcare because "older children's ability to attend school, to work, and to participate in political activities often turns on meaningful access to such care").

40. *Id.* at 1530.

41. *Id.* at 1453, 1529; *see also* Deshaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 195 (1989) ("[The Due Process Clause] forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."). The article asserts that *Deshaney* was wrongly decided because it relied on cases that rejected adult affirmative constitutional rights and neglected to consider

firmative federal constitutional rights to custodial care, education, safety, and rehabilitation, and perhaps also to relationships, exposure to ideas, and access to play, sports, creative arts, and other activities.[42] The article posits that under the framework, a judge might weigh these interests when undergoing a "best interest of the child" analysis in an ongoing proceeding.[43] In other contexts, however, the article envisions state enforcement actions against parents for failing to honor children's rights (presumably ones children could trigger by filing a complaint with the appropriate state agency).[44] It also anticipates children initiating legal proceedings against the state for failing to uphold its affirmative duties (and presumably, for failing to prevent parents from failing to uphold their affirmative duties, too).[45] The article additionally fleshes out children's autonomy, equality, and other rights, including perhaps even the right to vote.[46]

The new law of the child thus offers a blueprint for a radical reworking of the law, which Dailey and Rosenbury believe will better protect and promote children's wide-ranging interests, and ultimately transform our culture's understanding and views about youth.[47] Although the new framework is exciting from a theoretical perspective, its approach to change — through widespread constitutional reform — makes actual implementation doubtful.

II. THE STEPS NEEDED TO EFFECTUATE THE NEW LAW OF THE CHILD

The article is quick to concede that many rights under the new law of the child do not exist under our current constitutional doctrine.[48] Indeed, in addition to *Deshaney*, a slew of other Supreme Court cases touching on children would also need to be greatly revised or overturned. These include, among others, cases: affirming parents' rights to direct the upbringing of their children,

whether children — wholly different than adults — have affirmative constitutional rights. *See* Dailey & Rosenbury, *supra* note 3, at 1529-30.

42. *Id.* at 1530.

43. *Id.* at 1479; *see also* 1452, 1469-70, 1512-13, 1533.

44. *Id.* at 1534.

45. *Id.*

46. *Id.* at 1528-36.

47. *See, e.g.*, *id.* at 1451-56.

48. *Id.* at 1528 ("Some of these rights exist under current constitutional doctrine, but many do not."); *see also id.* at 1453-54.

and, with that, restrict their children's relationships with others;[49] limiting children's (and adults') rights to sue for services;[50] denying children a fundamental right to education;[51] restricting student speech in schools;[52] condoning corporal punishment;[53] permitting drug testing in schools;[54] allowing school officials to search a student's property;[55] and upholding a state's right to try a child as an adult.[56] The framework also seemingly implicates, for example, cases deciding

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49. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down a compulsory education statute); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (striking down statute requiring all children to attend public school); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state statute prohibiting foreign-language instruction); *see also* Troxel v. Granville, 530 U.S. 57 (2000) (finding unconstitutional a state statute permitting third parties to petition for visitation with children over the parent's objection); Michael H. v. Gerald D., 504 U.S. 905 (1992) (finding that biological fathers have no constitutionally protected rights to a relationship with their children when a mother remarries, and children have no right to a relationship with the biological fathers).

50. *See, e.g.*, Suter v. Artist M., 503 U.S. 347 (1992) (finding no congressional intent to allow the private enforcement of the Adoption Assistance and Child Welfare Act, thus determining that children could not sue for enforcement); *see also* Harris v. McRae, 448 U.S. 297 (1980) (finding that states are not required to fund abortions otherwise not reimbursable under Medicaid due to the Hyde Amendment, which restricts the use of federal funds for abortion). *Harris v. McRae* would either need to be reversed or severely limited to find a teenager's right to a state-funded abortion.

51. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

52. Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

53. Ingraham v. Wright, 430 U.S. 651 (1977) (allowing corporal punishment in schools).

54. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002) (finding the mandatory drug testing of public school students participating in extracurricular activities to be constitutional); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (finding the random drug testing of student athletes to be constitutional).

55. New Jersey v. T.L.O., 469 U.S. 325 (1985) (permitting school officials to conduct warrantless searches upon "reasonable suspicion" that a student violated the law or a school rule). Although *T.L.O.* recognizes that children have some privacy rights, it is likely that the new law of the child would still require a re-reading of this case to better capture children's privacy interests (among others), particularly since the ruling relies on a standard lower than probable cause and allows for searches upon suspicion that a student violated "even the most trivial school regulation." *See id.* at 377 (Stevens, J., dissenting).

56. Kent v. United States, 383 U.S. 541 (1966) (finding a minor may be tried and punished as an adult based on an evaluation of various factors including the seriousness of the crime, the minor's age, and the minor's criminal background and mental state). Although *Kent* affords children specific procedural safeguards before a juvenile court may waive jurisdiction over them, it is likely that the new law of the child would still require a re-reading of this case perhaps to find any waiver unconstitutional. Alternatively, the new law of the child might find *Kent* troubling because it triggered "automatic waiver" statutes and "prosecutorial waiver"

parental and other caregiver due process rights in child welfare proceedings[57] as well as cases concerning federal child welfare statutes like the Indian Child Welfare Act.[58] As such, a full-throttled, comprehensive litigation strategy to reread or reverse these and other Supreme Court decisions would be necessary to actually bring the new framework to life. Alternatively, a new constitutional amendment would be required. As explained below, neither approach seems achievable in the near, or perhaps even distant, future.

Widespread law reform through strategic litigation can certainly alter or reverse Supreme Court precedent that fails to recognize sought-after constitutional rights. For example, the NAACP's campaign to overturn *Plessy v. Ferguson* and the "separate but equal" regime that condoned racial segregation began in the mid-1920s and, through a series of structured test cases, culminated in *Brown v. Board of Education* in 1954, which found that "in the field of education the doctrine of 'separate but equal' has no place."[59] Similarly, gay rights advocates fought for decades to attain relationship equality, initially challenging state sodomy laws through impact litigation and culminating with a federal constitutional right to marry.[60]

But impact litigation campaigns meant to destabilize existing legal regimes face significant hurdles. First, overturning or dramatically revising precedent is hard. Stare decisis tethers lower courts to past Supreme Court rulings, and it cabins the Supreme Court from departing except for limited and justifiable reasons,[61] assuming the Court even grants plenary review, which occurs only one

practices where juveniles are automatically transferred to adult criminal court, thereby circumventing the procedural protections that *Kent* provides. *See* MNOOKIN, *supra* note 3, at 782-83; Kristin Simms Cross, Commentary: *When Juvenile Delinquents Are Treated as Adults: The Constitutionality of Alabama's Automatic Transfer Statute*, 50 ALA. L. REV. 155, 156-57 (1998). This practice has led to greater numbers of youth being transferred to adult court, often at increasingly younger ages. MNOOKIN, *supra* note 3, at 783.

57. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (finding indigent parents have no due process right to counsel during termination of parental rights proceeding); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1977) (finding New York's procedures for removing foster children from foster homes were sufficient).

58. 25 U.S.C. §§ 1901-1963; *see, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

59. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); *see generally* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (2004) (chronicling the litigation strategy in *Brown*).

60. *See* ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 501-07 (2013); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (holding that same-sex couples have a fundamental constitutional right to marry).

61. *See* Citizens United v. FEC, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring).

percent of the time.[62] As such, the Supreme Court will overrule one of its cases only if it was wrongly decided, if "a series of prudential and pragmatic considerations" demand overruling, or if a "special justification [requires] departing from precedent."[63] To be sure, strategic impact litigation schemes have reversed past precedent in the civil and gay rights contexts, among others. But those wins were not guaranteed, and their decades-long fights speak to the inherent challenges of overcoming stare decisis and reforming the Constitution.[64]

Further, the change envisioned in the new law of the child is arguably much harder to achieve than past wins. Whereas the racial and marriage equality campaigns sought to bring disenfranchised groups to equal status with the majority, the new law of the child wants no such thing. Indeed, the article takes pains to explain that the new framework does not simply confer adult-like rights on children or make children equal to adults.[65] Rather, the rights sought under the new law of the child are diffuse and dynamic. They are not viewed through the lens of freely autonomous adults, and indeed may extend farther than adults' rights.[66] Accordingly, there is no majority against which to measure children's new rights: there is no clear end-game. This setup thus would force judges not only to cast aside large swaths of Supreme Court precedent, such as the cases noted above, but also to do so beyond a known bar of what is equal and fair—a seemingly far greater reach than other law reform litigation efforts.

Second, litigation does not in itself yield change on the ground. Favorable outcomes are not guaranteed, and even when won, they are simply slips of paper.

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62. *See* Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015*, 61 VILLANOVA L. REV. 795, 795 (2016).

63. Steven J. Burton, *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication*, 35 CARDOZO L. REV. 1687, 1687-98 (2014) (explaining Justice Kennedy's and Chief Justice Roberts's opinions in *Citizens United*, 558 U.S. 310; quoting the plurality opinion in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); and quoting Justice Sotomayor's concurring opinion in Alleyne v. United States, 570 U.S. 99 (2013)).

64. *See, e.g.*, CHEN & CUMMINGS, *supra* note 60, at 225 (noting an "important limit" to progressive public interest litigation is its dependency on receptive courts, which are waning due to the "increasing conservatism" on the Supreme Court and lower federal courts, and thus making courts "potentially unstable and unreliable institutions for sustaining reform"); TUSHNET, *supra* note 59, at 169 (noting that public interest litigation campaigns died down at the end of the twentieth century due to an increasingly conservative bench).

65. *See, e.g.*, Dailey & Rosenbury, *supra* note 3, at 1482 ("To be clear, we do not simply seek to transfer a regime of adult liberal values on children. Our normative account of children's interests goes well beyond an understanding of the core values that animate law's regulation of persons more generally.").

66. *Id.* at 1482-83. For example, under the new law of the child, female children would be guaranteed a right to a state-funded abortion, even though adult women own no such right. *Id.* at 1526.

Judgments must be monitored and enforced to have meaning, which often amounts to a lifetime of battle.[67] Subsequent lawsuits, contempt actions, and other advocacy is routinely needed to make judgments stick.[68] Indeed, Thurgood Marshall, who shepherded *Brown* to success, is quoted as saying to those celebrating its victory: "You fools go ahead and have your fun, but we ain't begun to work yet."[69] Post-*Brown* litigation reflects this reality: decades of lawsuits have ensued to try to eradicate segregation in our schools, which continues to this day.[70] As such, even if lawyers were able to secure reversals and reinterpretations of past Supreme Court precedent governing children, such wins would not in themselves bring about the societal change the article envisions to honor children in the here and now.

Lastly, litigation can lead to client disempowerment and provoke widespread backlash that undermines gains. Because litigation necessarily requires a lawyer's specialized skills, education, and access, an inherent imbalance exists between lawyers and clients.[71] This is especially so when lawyers advocate on behalf of marginalized groups that society already sidelines,[72] and especially children, who are by nature dependent on adults.[73] Additionally, litigation that aims to change our culture, as the article envisions, can spark a counter-mobilization movement.[74] For example, *Roe v. Wade*, although undoubtedly a hallmark of women's rights, is also criticized, most notoriously by Justice Ruth Bader Ginsburg, for sparking a far-reaching right-wing movement to erode the decision.[75] Similar

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67. *See, e.g.*, CHEN & CUMMINGS, *supra* note 60, at 226-27; TUSHNET, *supra* note 59, at 143-44; Derrick Bell, Brown v. Board of Education*: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 26 (2004).

68. *See* CHEN & CUMMINGS, *supra* note 60, at 216, 226-27.

69. Bell, *supra* note 67, at 25.

70. Bell, *supra* note 67, at 26. Children's Rights, a leading nonprofit focused on reforming child welfare systems through impact litigation, also highlights this. Of their thirteen open cases, ten are in the monitoring phase, some of which reflect settlements dating back 25 years. Children's Rights responsibly considers monitoring a central part of its strategy to bring about reform, but the fact that such intensive monitoring is necessary demonstrates the real struggle in effectuating legally recognized rights. *See Class Actions*, CHILD. RTS., http://www.childrensrights.org/our-campaigns/class-actions [http://perma.cc/X5C7-TAZ9].

71. *See* CHEN & CUMMINGS, *supra* note 60, at 222.

72. *Id.* at 223.

73. *See, e.g.*, Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil* Gideon *Experiment*, 37 FORDHAM URB. L.J. 93, 93-96, 104, 107-10 (discussing lawyers' resistance to client-centered representation of children because of entrenched notions that children are not capable of making rational decisions for themselves).

74. *See* CHEN & CUMMINGS, *supra* note 60, at 229.

75. *See, e.g. Justice Ginsburg on How She Thinks* Roe v. Wade *Should Have Been Decided Differently*, WASH. POST (Mar. 2, 2016, 10:11 AM), http://www.washingtonpost.com/video/national

backlash occurred in the gay rights movement in 2003, where *Lawrence v. Texas* decriminalized sodomy laws and subsequently led to thirteen state constitutional amendments defining marriage as between a man and a woman.[76] The new law of the child might marshal even broader resistance, as backlash would likely spring from both ends of the political spectrum. Conservatives would likely challenge extensions of children's rights for fear that doing so undermines parental sovereignty—the same reason they have staunchly opposed ratifying the U.N. Convention on the Rights of the Child.[77] Liberals might oppose the new framework for fear that it may undercut women's rights, particularly rights of single-mothers to make choices for their children and perhaps even adult women's abortion rights.[78] The Jewish community would also likely oppose the framework, at least to the extent it prohibits circumcision.[79] As such, if the new law of the child were to gain momentum in the courts, states might counter with a surge of laws buoyed by bipartisan support aimed at strengthening parental control.

In view of these challenges, advocates might attempt an alternative tack to effectuate the new law of the child through a constitutional amendment, drafted to hold states accountable to protecting children's interests and (arguably for the

/justice-ginsburg-on-how-she-thinks-roe-v-wade-should-have-been-decided-differently/2016/03/02/5c4c7820-e08d-11e5-8c00-8aa03741dced_video.html [http://perma.cc/Q79T-UVVK]; Meredith Heagney, *Justice Ruth Bader Ginsberg Offers Critique of* Roe v. Wade *During Law School Visit*, UNIV. OF CHI. L. SCH. (May 15, 2013), http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit [http://perma.cc/H5GB-XXDG].

76. CHEN & CUMMINGS, *supra* note 60, at 501.

77. *See* Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 267 & nn. 2-3, 269-70 (1995); Amy Rothschild, *Is America Holding Out on Protecting Children's Rights?*, ATLANTIC (May 2, 2017), http://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652 [http://perma.cc/T3V8-YG3E] (noting conservative opposition to the Convention on the Rights of the Child); *see also, e.g.*, S. Res. 99, 112th Cong. (2011) (explaining that the Convention would supplant parental authority and therefore should not be ratified, as sponsored by then South Carolina Republican Senator Jim DeMint).

78. Indeed, women's rights advocates might find offensive that the new law of the child would protect a child's right to a free, state-funded abortion, even though an adult woman owns no such right. *See* Dailey & Rosenbury, *supra* note 3, at 1526. Such advocates might also voice concern that children's rights might attach in utero and restrict a woman's access to abortion. *Cf.* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 229-30 (1999) (noting pro-choice advocates' concerns about attempts to control substance abuse during pregnancy, against child-rights advocates who seek to protect children from substance effects); Minow, *supra* note 77, at 283-87 & n.101 (noting the complicated and sometimes hostile relationship between the women's right and children's rights movements).

79. *See* Dailey & Rosenbury, *supra* note 3, at 1518.

first time) positive rights.[80] A well-crafted amendment could theoretically effectuate the new law of the child and reverse Supreme Court precedent—such an amendment would not be the first aimed at negating past Supreme Court decisions.[81] But this approach is even more doomed to fail. The U.S. Constitution is one of the most difficult in the world to alter.[82] Change is possible, but only with significant effort and near unanimity in view of Article V's requirements for two supermajorities at both the federal and state level.[83] Indeed, Justice Scalia once calculated that it would take fewer than two percent of the population to prevent a constitutional amendment.[84] As such, no one should pin their hopes of law

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80. Scholars debate whether or not "the Constitution is a charter of negative rather than positive liberties." Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.). *Compare, e.g.*, *id.* (asserting that the federal Constitution does not afford citizens positive rights), *with* David P. Currie, *Positive and Negative Constitutional Right*, 53 U. CHI. L. REV. 864, 886-90 (1986) (arguing that while Posner is generally correct that the Constitution protects negative liberties, the Constitution may also be read as imposing certain positive duties).

81. *See, e.g.*, U.S. CONST. amend. XI (superseding Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)); *id.* amends. XIII, XIV (superseding Dred Scott v. Sandford, 60 U.S. 393 (1857)). Recent efforts include a constitutional amendment to supersede Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). *See, e.g.*, *Getting Big Money Out of Politics and Restoring Democracy*, BERNIE, http://berniesanders.com/issues/money-in-politics [http://perma.cc/9GEM-Z2Z8]. In his last book, Justice John Paul Stevens proposed six constitutional amendments that would supersede various Supreme Court decisions. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).

82. Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 CONST. COMMENT. 171, 172 (1995); *see also* Eric Posner, *The U.S. Constitution Is Impossible To Amend*, SLATE (May 5, 2014, 4:22 PM) http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_much_too_hard_blame_the_founders.html [http://perma.cc/TGK9-2AY8] (noting the U.S. Constitution is "an outlier" compared to most other liberal democracies that amend their constitutions fairly frequently, sometimes even yearly).

83. *See* U.S. CONST. art. V. Under Article V, an amendment may be proposed only if two-thirds of each House of Congress vote in favor of it and then three-quarters of the states ratify it. *Id.* Alternatively, two-thirds of state legislatures can vote for a Constitutional Convention, where an amendment is proposed and then adopted if, again, three-quarters of the states ratify it. *Id.* The former route has occurred twenty-seven times in history (really only eighteen, since the Bill of Rights was adopted all at once in 1791). *See id.* amends. I-XXVII; *see also* Griffin, *supra* note 82, at 172 (noting that the Constitution has been amended so infrequently because "Article V comes close to requiring unanimity to approve any amendment as a practical matter). The latter route, never. *See* STEVENS, *supra* note 81, at 4; Michael B. Rappaport and David A. Strauss, *Common Interpretation*, CONST. CTR., http://constitutioncenter.org/interactive-constitution/articles/article-v/article-v-by-michael-b-rappaport-and-david-a-strauss/interp/22 [http://perma.cc/Q2C8-HR6L].

84. Debra Cassens Weiss, *How Scalia and Ginsberg Would Amend the Constitution*, ABA J. (Apr. 21, 2014, 11:30 AM CDT), http://www.abajournal.com/news/article/how_scalia_and_ginsburg_would_amend_the_constitution [http://perma.cc/446S-9HLE].

reform on this method.[85] Consider the Equal Rights Amendment (ERA), one of the most recent near misses. The ERA soared through both houses of Congress in the early 1970s,[86] but failed (and continues to fail) to achieve ratification from thirty-eight states.[87] Defeat occurred despite there being a comprehensive and concerted campaign for passage, building on the momentum of the women's rights movement in the 1960s.[88] Even though Congress granted a ratification extension beyond the now conventional seven-year limit,[89] the ERA still did not come to fruition. The ERA has been reintroduced to Congress every year since 1982 to no avail.[90] As such, the possibility of an amendment bringing to life the new law of the child seems remote. In view of these practical obstacles towards implementation, the new law of the child seems more poised for scholarly debate rather than a means to actual change.

III. THE NEW LAW OF THE CHILD IN PRACTICE

But let's assume that the new law of the child improbably becomes the law of the land. States would then need to develop mechanisms to give effect to children's new rights. Some newfound rights might be integrated seamlessly into state codes. For example, states could simply pass legislation that would outlaw homeschooling, so as to protect children's interests in exposure to new ideas.[91]

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85. Even an advocate for the Equal Rights Amendment confessed that she "was not surprised" when the amendment failed, as she "knew from the beginning" how difficult the Constitution is to amend. Mary Frances Berry, *Amending the Constitution; How Hard It Is to Change*, N.Y. TIMES (Sept. 13, 1987), http://www.nytimes.com/1987/09/13/magazine/amending-the-constitution-how-hard-it-is-to-change.html [http://perma.cc/CBK7-5KEN].

86. 118 Cong. Rec. 9,598 (1972) (counting 84 senators in favor); 117 Cong. Rec. 35,815 (1971) (counting 354 House members in favor).

87. Alexander White, *Keep 'Em Separated: Article I, Article V, and Congress's Limited and Defined Role in the Process of Amending the Constitution*, 113 COLUM. L. REV. 1051, 1075 n.137 (2013). ERA legislation continues to be introduced, as recently as last year, but passage has still yet to occur. *See, e.g.*, S.J. Res. 6, 115th Cong. (2017); H.R.J. Res. 33, 115th Cong. (2017).

88. Roberta W. Francis, *The History Behind the Equal Rights Amendment*, EQUAL RTS. AMEND., http://www.equalrightsamendment.org/history.htm [http://perma.cc/UUG9-R4GP].

89. RONALD D. ROTUNDA & JOHN E. NOWAK, 6 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE, app. M (6th ed. 2017) ("Beginning with the proposed Eighteenth Amendment, Congress has customarily included a provision requiring ratification within seven years from the time of the submission to the States.").

90. *See* Francis, *supra* note 88.

91. This aspect, however, reflects one of the authors' most extreme positions, and is seemingly contrary to the ethos of their new framework. The article envisions a categorical ban on homeschooling for secondary school children, *see* Dailey & Rosenbury, *supra* note 3, at 1522-23, without any consideration of the individual child's circumstances. Although the authors claim that the new law of the child "embrac[es] diversity" among children, *id.* at 1478, and acknowledges

They could additionally outlaw circumcision and intersex surgeries, and strip licenses for doctors who perform them. States could also enact laws prohibiting corporal punishment to protect a child's bodily integrity, and adopt key juvenile justice reforms to meet states' responsibilities towards rehabilitation.

The article's five interests could also be introduced into the family law context without much heavy lifting. As the article contemplates, states could simply require courts to incorporate the new interests into their "best interests of the child" analysis, which all states, U.S. territories, and the District of Columbia already use when deciding various actions implicating children.[92] In fact, many state statutes already account for at least some of them. Twenty-eight states reference avoiding removal of the child from his or her home, thereby recognizing a child's relationship with non-parental adults and children,[93] and twenty-one states specify that courts should consider the relationships between children and their siblings, family, household members, and/or other caregivers when making decisions.[94] With respect to children's autonomy and other interests, twelve states and the District of Columbia already require courts to consider a child's wishes when undergoing a "best interests" determination.[95]

Moreover, at least seventeen states direct courts to consider *all* relevant factors, even those not articulated in their statutes, such that courts in these states can already weigh children's broader interests in their decisions.[96] Indeed, a Massachusetts court recently did just that. In *In re Adoption of Odetta*, a court granted post-adoption visitation rights to a child's paternal uncle, although he was not explicitly covered by statute.[97] After the father, who was Muslim, killed the mother, who was Christian, and lost his parental rights, the child was placed with her maternal aunt and uncle.[98] The court held—and the appeals court affirmed—that visitation with the paternal uncle was in the child's best interests as it would further her contact with her father's side of the family and continue her

that children's interests vary and are "deeply situational," *id.* at 1468, they take an incompatible position in refusing to acknowledge that homeschooling might in some circumstances serve a child's broader interests.

92. *See id.* at 1452; *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY, http://www.childwelfare.gov/pubPDFs/best_interest.pdf [http://perma.cc/EB8E-A6PB].

93. *See Determining the Best Interests of the Child, supra* note 92, at 2 & n.1.

94. *See id.* at 2 & n.6, 3 & n.15.

95. *See id.* at 3 & n.16.

96. *See id.* at 2 & n.12 (listing fourteen states whose statutes do not require courts to consider only the specified factors). Additionally, three states require courts to consider "any other factor" or "other factors" relevant to the decision. *See* GA. CODE ANN. § 15-11-26(20) (2014); MICH. COMP. LAWS § 722.23(l) (2016); VA. CODE ANN. § 20-124.3 (2012).

97. *See In re* Adoption of Odetta, 32 N.E.3d 1277, 1279 (Mass. App. Ct. 2015).

98. *Id.* at 1279-80.

exposure to her Muslim religion and culture, thereby respecting her interests in the relationship, her exposure to new ideas, and her expressions of identity.[99] Similarly, an Alabama appellate court affirmed visitation with an aunt and uncle, absent a statutory right to it, and let stand an order not to homeschool the children for at least one year.[100] The court found such a ruling was based on the children's best interests, including their interests in maintaining ties to their deceased mother's family, relationships with their peers, and involvement in extracurricular activities.[101]

But even though some aspects of the framework might be relatively easy to administer, others prove unadvisable at best and unimaginable at worst. To play out one scenario under the new model, an aggrieved child would be able to file a complaint with a state agency to investigate her parents' alleged failure to satisfy their duties in, for example, her education, by insufficiently exposing her to new ideas outside of the home.[102] Assuming the state adopts an enforcement model similar to that used in the child welfare context, the state would then presumably open an investigation and send a social worker to the home to interview the parents and child, make observations, and write a report. The complaint might be found unsubstantiated and "screened out," or substantiated and "screened in." If substantiated, presumably the state would provide various supports to help the parents fulfill their obligations. If the parents nonetheless failed to improve, the state might take more coercive actions, including court intervention.

Alternatively, the article anticipates that the child might be able to file a lawsuit to vindicate her rights. Since the child's rights are grounded in the Constitution, the suit would necessarily be against the state and not her parents, who are private actors and beyond the Constitution's reach.[103] Presumably then, a suit could involve not only the state's failure to uphold its primary obligation to pro-

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99. *Id.* at 1279-83. Although the article casts the Best Interest of the Child analysis as an exercise of "unprincipled judicial discretion," Dailey & Rosenbury, *supra* note 3, at 1452, lawyers often rely on a judge's discretion and "broad equitable powers," *see Odetta*, 32 N.E.3d at 1280, to advocate for recognition of child's broader interests.

100. D.B. v. K.B., 67 So. 3d 114, 119-21 (Ala. Civ. App. 2011).

101. *Id.* at 116-17. There, the juvenile court ordered the aunt not to home school the children for a minimum of one year because they were "accustomed to going to a public school and being involved in both classes with other non-related children and in public school related extracurricular activities." *Id.* at 116. The aunt argued the ruling was unconstitutional, but the appeals court found that issue not properly raised. *Id.* at 117. One judge in concurrence found the homeschooling prohibition constitutional on the merits.

102. *See* Dailey & Rosenbury, *supra* note 3, at 1530 (contemplating agency action to vindicate children's rights).

103. *See* 42 U.S.C. § 1983 (2012).

vide an education, but also its failure to uphold its secondary obligation to prevent parents from failing to uphold their primary obligation to provide an education.

Both scenarios expose inherent defects of the new law of the child. First, at a fundamental level, the new framework reinforces—rather than abandons—our current triangular model where parents and the state battle for decision-making authority over children. A child unhappy with her parents' actions can pull the state lever and initiate an investigation or a lawsuit. In turn, the state will either vindicate the parent, or vindicate the child, but ultimately still remain the final arbiter when a conflict arises. The field will not be recentered. Rather, all the same players will still fight for control. The framework cannot escape this triangulation because the rights are constitutional and are therefore bound up with state action.

Second, the framework necessarily foists numerous new affirmative responsibilities on the state to protect and promote children's rights in the areas of (at least) caregiving and protection, education, rehabilitation, and civil engagement.[104] This is unwise. To begin, states have a remarkably poor track record of safeguarding children's rights and interests as currently conceived, let alone as reimagined. For instance, in the child welfare context, states generally fail to adequately address and prevent child abuse and neglect.[105] The federal Department of Health and Human Services estimates that, on our states' watch, 1,750 children died from abuse and neglect in 2016, reflecting an average of five children per day and a 7.4% increase from 2012.[106] An estimated 3.5 million children received a child protective services investigation or alternative response, an uptick of 9.5% in the past five years, and 676,000 children are estimated to have suffered from abuse and neglect in 2016.[107] The ongoing opioid crisis seems to have only made matters worse, having an "immeasurable" impact on our child welfare systems, as states report exponential increases in the number of children placed

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104. *See* Dailey & Rosenbury, *supra* note 3, at 1515-27.

105. *See generally* Children's Advocacy Inst., *Shame on U.S.: Failings by All Three Branches of Our Federal Government Leave Abused and Neglected Children Vulnerable to Further Harm*, U. SAN DIEGO SCH. L., http://www.firststar.org/wp-content/uploads/2015/02/Shame-on-U.S._FINAL.pdf [http://perma.cc/D3SU-Z4XR] (arguing that all three branches of the federal government and the states have failed to adequately protect abused and neglected children); *see also, e.g.*, Tom Morton, *The Pernicious Failure of Child Welfare Reform*, CHRONICAL OF SOC. CHANGE (Nov. 21, 2017), http://chronicleofsocialchange.org/child-welfare-2/pernicious-failure-child-welfare-reform [http://perma.cc/5677-7L68] (identifying the structural faults in child welfare agencies).

106. Admin. for Children & Families, *Child Maltreatment 2016*, U.S. DEP'T HEALTH & HUM. SERVICES 54, http://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf [http://perma.cc/6V6Q-WPJW].

107. *Id.* at 17, 18.

in foster care.[108] Various federal laws,[109] state laws,[110] and programs[111] exist to curtail these rising statistics to no avail, vexing federal and state governments alike.

States also fail children in the education context, another sphere of state control. The United States lags in student achievement compared to other nations, based on the Programme for International Student Assessment (PISA) test, which measures the academic performance of fifteen-year-old students around the globe.[112] The most recent results show that the United States ranks, out of seventy-three countries: fortieth in math, twenty-fifth in science, and twenty-fourth in reading.[113] Our students are stagnating or falling further behind their international peers compared to previous years' PISA results, demonstrating a decline in our states' abilities to educate our youth.[114] In view of state failures in the child welfare and education contexts, adding new state responsibilities, including expanded obligations cin these two areas, seems likely unproductive.

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108. *Substance Abuse and Child Welfare Resources*, NAT'L CONF. ST. LEGISLATURES (Feb. 2, 2017), http://www.ncsl.org/research/human-services/substance-abuse-and-child-welfare-resources.aspx [http://perma.cc/X873-L82D]; *see also, e.g.*, Sherry Lachman, Opinion, *The Opioid Plague's Youngest Victims: Children in Foster Care*, N.Y. TIMES (Dec. 28, 2017), http://www.nytimes.com/2017/12/28/opinion/opioid-crisis-children-foster-care.html [http://perma.cc/4Z8S-YUMX] (reporting that since 2010, the number of children in foster care has doubled in Montana, increased by eighty percent in Georgia, and increased by forty-five percent in West Virginia).

109. *See, e.g.*, The Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4; The Keeping Children and Families Safe Act of 2003, Pub. L. No. 108–36, 117 Stat. 800; *see also Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, CHILD WELFARE INFO. GATEWAY (March 2015), http://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf [http://perma.cc/NX4H-TLUE] (providing an overview of child protective legislation at the federal level).

110. For a compilation of state laws, see *State Statutes Search*, CHILD WELFARE INFO. GATEWAY, http://www.childwelfare.gov/topics/systemwide/laws-policies/state [http://perma.cc/D6XG-LXJB].

111. *Prevention Programs*, CHILD WELFARE INFO. GATEWAY, http://www.childwelfare.gov/topics/preventing/prevention-programs [http://perma.cc/C9W8-U2AX].

112. *PISA 2015 Results (Volume 1): Excellence and Equity in Education*, ORG. FOR ECON. CO-OPERATION & DEV. 25 (2016), http://www.oecd-ilibrary.org/docserver/download/9816061e.pdf?expires=1520466916&id=id&accname=guest&checksum=6CF4D9B4381F297246B6865DE730E881 [http://perma.cc/UL4Z-F5YS].

113. *Id.* at 149, 177, 207; *see* Joe Heim, *On the World Stage, U.S. Students Fall Behind*, WASH. POST (Dec. 6, 2016), http://www.washingtonpost.com/local/education/on-the-world-stage-us-students-fall-behind/2016/12/05/610e1e10-b740-11e6-a677-b608fbb3aaf6_story.html [http://perma.cc/EU3Z-J3CF].

114. *See* Heim, *supra* note 113.

Moreover, satisfaction of states' new responsibilities under the new law of the child would require an immense scaling up of states' administrative apparatuses and would produce a resulting eruption in costs. The new framework would call for myriad additional state employees at every level, including social workers, educators, licensors, court personnel, judges, lawyers, administrative officers, mental health specialists, doctors and other health care providers, juvenile detention specialists, parks and recreation staff, transportation workers, accompanying support personnel, among countless others. New agencies, buildings, offices, parks, transportations systems, programs, health facilities, schools, daycare centers, juvenile detention facilities, and other structures would be needed to carry out the state's new affirmative duties. Yet, states are in fiscal distress: thirty-three were facing real or projected budget gaps for fiscal year 2017-2018, amounting to a collective revenue shortfall of $15.9 billion.[115] Further, recent data show that at the close of the 2017 fiscal year, states' total balances in their general fund budgets would allow them to run operations for a median of only 29.3 days.[116] The United States is an incredibly wealthy society, but it dramatically underfunds social programs. Under these circumstances, it is difficult to foresee how the state and federal economies would be restructured to supply the qualified human capital and the infrastructure needed to faithfully execute the new law of the child.

IV. A YOUTH-LED APPROACH INSTEAD

Rather than orchestrate a widespread lawyer-driven campaign to constitutionalize children's interests in order to change the ways in which we parent, care for, teach, rear, and respect youth—a campaign that seems destined to fail at all levels—children would be better served by an alternative, ground-level approach that they control and direct. The article proposes forcing change through a trickle-down method: if we change our laws, we will in turn change society's limited views of children.[117] But laws do not necessarily change society. The

115. *State Budget Shortfalls, SFY 2017 and SFY 2018*, KAISER FAM. FOUND., http://www.kff.org/other/state-indicator/state-budget-shortfalls/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Facing%20Shortfalls%20in%20either%20SFY%202017%20or%20SFY%202018%3F%22,%22sort%22:%22asc%22%7D [http://perma.cc/Y4CC-EA3H].

116. *Fiscal 50: State Trends and Analysis*, PEW CHARITABLE TR. (Mar. 1, 2018), http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/fiscal-50 [http://perma.cc/9J9N-9PHQ].

117. *See, e.g.*, Dailey & Rosenbury, *supra* note 3, at 1478 (discussing how law both reflects and shapes reality, and that adopting the new law of the child, which values children's broader interests, will signal to society to value children's broader interests, too).

#MeToo movement is a prime example. Multiple laws, regulations, and Supreme Court cases have come down since the 1960s to create a robust legal framework that treats women as equal to men.[118] And yet sex discrimination persists in our offices, paychecks, schools, and communities. Only with the #MeToo movement—started, led, and galvanized by women—is our culture facing a reckoning and accomplishing what the law could not.[119] Thus, if the article's real aim is to value children and honor their many dimensions, why not skip the constitutional step and simply work at the community level to help children achieve this themselves? I propose that, rather than use the article to spark top-down constitutional reform, we instead use its premise to inspire youth, with parents, lawyers, and other adults as support, to produce real change on the ground.

Children across the country are already advocating for our communities to fully respect them as they exist now. For example, in Burlington, Vermont, students recently petitioned the school board to fly the Black Lives Matter flag on its high school campus so as to recognize students of color and create a welcoming space.[120] The board passed the measure unanimously, with the support of 450 students, the principal, and the superintendent.[121] Theirs was the second community in Vermont to take such action: Montpelier High School did the

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118. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2(a) to (d) (2012)) (prohibiting employment discrimination "because of . . . sex"); Education Amendments of 1972, Pub. L. No. 98-318, tit. IX, 86 Stat. 373 (codified at 20 U.S.C. § 1681(a) (2012) (prohibiting sex discrimination in federally funded schools); Pregnancy Discrimination Act of 1978, Pub. L No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e (2012)) (prohibiting, as discrimination "because of sex," discrimination on the basis of pregnancy, childbirth, or related medical conditions); Violence Against Women Act of 1994, Pub L. No. 103-322, tit. IV, 108 Stat. 1902 (protecting women from gender and sexual violence); 29 C.F.R. § 1604.11 (1980) (EEOC guidelines prohibiting sexual harassment in the workplace and finding it to be a form of sex discrimination under Title VII); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (finding sexual harassment, in the form of a hostile work environment, to be a violation of Title VII); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993) (clarifying the definition of a "hostile work environment" under sexual harassment law); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998) (finding employer liability for supervisor sexual harassment); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (same).

119. Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb 4, 2018), http://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html [http://perma.cc/6UV2-XZXZ].

120. Nicole Higgins DeSmet, *Burlington Students Win Approval to Fly Black Lives Matter Flag*, BURLINGTON FREE PRESS (Feb. 13, 2018, 3:41 PM EST), http://www.burlingtonfreepress.com/story/news/local/vermont/2018/02/13/burlington-students-ask-school-board-permission-raise-black-lives-matter-flag-high-school/328510002 [http://perma.cc/4QXE-Z9WA].

121. *Id.*

same weeks earlier after an appeal from students the previous year.[122] In another expression of children's identity and civic participation, students in Portland, Oregon, spoke at a 2015 school board hearing to protest their school's discriminatory dress code policies, which were unevenly enforced against young women.[123] The school board adopted the students' recommendation to form a committee of students and adults to create a nondiscriminatory gender-neutral dress code.[124] That code was enacted the following year.[125] Students in Evanston, Illinois, got wind of the change and petitioned their own school board to adopt a similar measure, adding protections against racially discriminatory dress-code enforcement, too.[126] It passed in 2017.[127]

More recently, since the high-school shooting that killed seventeen people in Parkland, Florida in February 2018, youth have mobilized to lead a sweeping and unprecedented campaign against gun violence, dubbed #NeverAgain.[128] They are inspiring youth (and adults) not only in the United States, but around the globe, to join in their activism for safe schools.[129] #NeverAgain has already orchestrated national school walkouts and a historical march on Washington, D.C., along with 800 sister marches worldwide.[130] The surviving students from Marjory Stoneman Douglas High School have also launched mass lobbying efforts at state houses, rallies, and other events, while also educating voters about

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122. AJ Willingham, *Why a High School That's Just 5% Black Is Raising the Black Lives Matter Flag*, CNN (Feb. 2, 2018, 3:30 PM EST), http://www.cnn.com/2018/02/02/us/black-lives-matter-flag-vermont-montpelier-trnd/index.html [http://perma.cc/NK9D-V6JJ].

123. Emily McCombs, *Sexist School Dress Codes Are a Problem, and Oregon May Have the Answer*, HUFFINGTON POST (Sept. 6, 2017, 4:29 PM EST), http://www.huffingtonpost.com/entry/sexist-school-dress-codes-and-the-oregon-now-model_us_59a6cd7ee4b00795c2a318e5 [http://perma.cc/2EZS-TAWR].

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See* Arian Campo-Flores & Nicole Hong, *How the Florida School Shooting Turned into a Gun-Control Movement*, WALL ST. J. (Feb. 23, 2018, 3:15 PM EST), http://www.wsj.com/articles/how-the-florida-school-shooting-turned-into-a-gun-control-movement-1519416915 [http://perma.cc/DGA8-TDJZ].

129. *See id.*; *see also Photos From the "March for Our Lives" Protests Around the World*, N.Y. TIMES, (Mar. 24, 2018), http://www.nytimes.com/interactive/2018/03/24/us/photos-march-for-lives.html [https://perma.cc/85G3-RFR9] (capturing student-led protests against gun violence across the United States and world, including in Germany, Majorca, Colombia, Haiti, France, England, among other places).

130. *After Parkland Shooting, Worldwide "March for Our Lives,"* N.Y. TIMES (Mar. 22, 2018), http://www.nytimes.com/aponline/2018/03/22/us/ap-us-school-shooting-mobilizing-a-movement.html [http://perma.cc/P3EV-SKHZ]; *see also* Campo-Flores & Hong, *supra* note 128 (noting the use of social media in the #NeverAgain movement).

gun control issues.[131] They appear regularly on television,[132] their activism dominates in the press,[133] and their social media accounts have been followed by millions.[134]

Their reform effort is working. Since the shooting, Oregon lawmakers have passed gun-control legislation to ban convicted domestic abusers and stalkers from buying and owning guns.[135] In signing the bill, Governor Kate Brown recalled the #NeverAgain movement, noting that "the voices and outrage of youth devastated by gun violence" spurred the state to act.[136] Further, despite deep resistance from the NRA, Florida lawmakers passed a $400 million gun control and school safety bill—the first successful gun control law in the state in more than twenty years, all because of the #NeverAgain movement.[137] Although the Stoneman Douglas students sought further reforms, the legislation is still considered a major victory, raising the minimum age for all gun purchases to twenty-one from eighteen, creating a three-day waiting period to purchase guns, and banning bump stocks, among other things.[138]

Youth advocates and youth movement scholars are not surprised by the power of #NeverAgain movement—they believe the movement is formidable precisely because youth are leading it.[139] As history and research shows, youth

131. *See* Campo-Flores & Hong, *supra* note 128.

132. *E.g.*, *Sixty Minutes* (CBS television broadcast Mar. 18, 2018) (interviewing Emma González, Cameron Kasky, David Hogg, Alex Wind, and Jaclyn Cornin); *Meet the Press* (NBC television broadcast Feb. 18, 2018) (same).

133. *See* Rachel Siegel, *The Parkland Shooting Is Different. The News Coverage Proves It*, WASH. POST (Mar. 2, 2018), http://www.washingtonpost.com/news/wonk/wp/2018/03/02/the-parkland-shooting-is-different-the-news-coverage-proves-it [http://perma.cc/3TLU-2YUX].

134. *See, e.g.*, Campo-Flores & Hong, *supra* note 128. As of April 18, 2018, Emma González has 1.56 million Twitter followers. Emma González (@Emma4Change), TWITTER, http://twitter.com/Emma4Change [http://perma.cc/4CQR-7ZSU].

135. Gordon R. Friedman, *Oregon Passes Gun Control Bill Aimed at Domestic Abusers*, OREGONIAN (Feb. 23, 2018), http://www.oregonlive.com/politics/index.ssf/2018/02/oregon_passes_gun_control_bill.html [http://perma.cc/Y992-4ANG].

136. *Id.*

137. Maggie Astor, *Florida Gun Bill: What's in It, and What Isn't*, N.Y. TIMES (Mar. 8, 2018), https://www.nytimes.com/2018/03/08/us/florida-gun-bill.html [http://perma.cc/K8H8-6GG3].

138. *Id.* The legislation also funds school security, expands mental health services and regulations, and allows certain school personnel to carry weapons—the latter being the most controversial of the measures. *Id.*

139. John Blake, *Four Reasons the NRA Should Fear the Parkland Student Survivors*, CNN (Feb. 22, 2018), http://www.cnn.com/2018/02/21/us/parkland-shooting-youth-social-change/index.html [http://perma.cc/B27N-P492].

are effective change agents for a variety of reasons.[140] To start, their activism has weight because it is passionate, as the issues they advance directly affect them.[141] The Stoneman Douglas students not only speak with rawness and urgency because of the tragedy the endured; they also make others feel it, too, posting pictures and videos of hiding from the gunman, giving others an inescapable view of their reality.[142] Their fervent speeches and tweets are unmatchable because they originate from first-person accounts, tapping a deep emotional response.[143] Relatedly, because many youth are digital natives, they can deftly use social media platforms to mobilize their peers and supporters and counter their critics.[144] Their facility with Twitter, Instagram, Facebook, and other outlets allows them to directly reach and galvanize other youth, pressure politicians, and ultimately influence the democratic process.[145]

Collectively, this nationwide advocacy, spanning dress codes to gun control, speaks to all of the broader interests that the article articulates, honoring children's relationships, ideas, identities, personal integrity, and participation in civic life. But this method of change differs from that advanced in the new law of the child: youth—not adults—are the ones prioritizing their interests and issues. Moreover, they are the ones directing the reform, and their successes are concrete and real. Our aim should be to spark more of this.

Adults can buoy youth activism in multiple ways. Perhaps most effectively, they can facilitate youth mobilization and organizing efforts, so that children can define the issues and interests for which they want to fight and also lead the charge in doing so. To that end, adults, including parents, can create spaces to bring youth together and unite around the matters affecting them, whether locally or nationally. They can also consult on strategy and provide needed trainings. Such support is helping to sustain the #NeverAgain movement.[146] Adult organizers of the Women's March have provided youth activists with background assistance in planning their walkouts and marches, the marketing firm 42West has helped students handle public relations, and gun-control advocacy groups have partnered with the students to help educate youth about the issue

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140. *Id.*; *see also* Sasha Costanza-Chock, *Youth & Social Movements: Key Lessons for Allies* (Dec. 17, 2012), http://cyber.harvard.edu/sites/cyber.harvard.edu/files/KBWYouthandSocialMovements2012_0.pdf [http://perma.cc/DML5-WYMN] (describing the importance of youth participation in major social movements).

141. *See* Blake, *supra* note 139.

142. *See id.*; Campo-Flores & Hong, *supra* note 128.

143. *See* Blake, *supra* note 139.

144. *See id.*; Campo-Flores & Hong, *supra* note 128.

145. *See* Campo-Flores & Hong, *supra* note 128.

146. *See id*.

and register them to vote, all with the aim of propelling youth forward on their mission for gun regulation.[147]

Lawyers can also provide strategic and tactical advice for organized youth, educate youth about their rights, offer advice about areas of the law most vulnerable to reform efforts, and represent youth or their groups when discrete legal issues arise.[148] For example, in support of the #NeverAgain movement, the ACLU held a "Know Your Rights Training" conference call with students around the United States to educate youth about their rights to free speech and expression in anticipation of planned school walkouts.[149] Lawyers can also promote children's lobbying efforts, draft sample policies or legislation that is supportive of the youth's goals, and assist with media campaigns to bring attention to the issues.[150] Such behind-the-scenes assistance from lawyers would actually put children at the center of a reform movement, rather than adults (as the new law of the child does), and allow youth to dictate the changes most meaningful to them in their communities. This approach thus helps shift society's perceptions about youth in two important ways: through the direct effects of youth's reform efforts that promote their interests, which create the policy reforms; and through the indirect effects of a method that showcases youth as full people with important ideas, interests, and identities advancing their own agendas. It may also in time spur expanded legal rights. As the marriage equality movement evinces, a societal sea change can pave the way to future constitutional reform.[151]

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147. *See id.* (reporting on support from Women's March and 42West); Vikki Ortiz Healy, *Ahead of Walkouts Over Gun Issues, Students and Schools Wonder: Can Kids Be Punished for Protesting?*, CHI. TRIB. (Mar. 2, 2018, 4:40 PM), http://www.chicagotribune.com/news/local/breaking/ct-met-student-walkout-rights-20180228-story.html [http://perma.cc/92RS-H95W] (noting how Women's March organizers have posted a national school walkout toolkit on its offshoot organization website); Kevin Modesti, *Post Parkland, Young Voters Might Show Up in 2018*, L.A. DAILY NEWS (Mar. 2, 2018, 4:32 PM), http://www.dailynews.com/2018/03/02/post-parkland-young-voters-might-show-up-in-2018 [http://perma.cc/92RS-H95W] (reporting on a partnership between NextGen America, a political action committee, and gun-control advocacy groups led by Gabby Giffords and Michael Bloomberg to register youth to vote).

148. For a general explanation of a lawyer's role in community organizing efforts, see CHEN & CUMMINGS, *supra* note 60, at 248-67. For specific examples in the #NeverAgain movement, see Campo-Flores, *supra* note 128 (explaining a role for lawyers to form a nonprofit, assist with permitting for the Washington D.C. march, and find support to handle the millions of dollars raised).

149. *See* Healy, *supra* note 147.

150. *See* CHEN & CUMMINGS, *supra* note 60, at 267-72.

151. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2596, 2605 (2015) (noting societal changes towards accepting marriage equality due to the many referenda, debates, grassroots campaigns, studies, papers, books, writings, litigation, opinions, and amicus briefs that have informed the discussion). Of course, we need not all become movement lawyers to help children change society's narrative about them. Lawyers in direct services can also use their day-to-day

CONCLUSION

The article represents a revolutionary call to arms to reform the field of children and the law, which rests on outdated and limited understandings about youth. It articulates the fundamental flaws and conflicts within the current doctrine and offers an inventive new framework to break free from the status quo. But when actually played out, the framework falters: the steps needed to put it in place are unlikely to occur in the foreseeable future, and even if adopted would not yield the desired outcomes.

Perhaps the article's real motivation is simply to spark an academic conversation about what the law could be, without real concern for the mechanics of how to get there. But if the conversation is worth having, then so too is actually achieving the results. A youth-directed approach that empowers children and supports their efforts to achieve their broader interests seems not only more likely to produce transformative change, but also more aligned with the article's ultimate purpose to honor and respect children in the here and now.

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advocacy to advance children's broader interests. For example, an education lawyer might press a school to promote a child-client's interest in fostering relationships with non-parents by adding a line item to an Individual Education Program (IEP) that allows the child to meet with a trusted coach or teacher when she feels overwhelmed. She might also advocate for certain elective courses that speak to the child's interest in new ideas, or structured social settings to build the child's peer relationships. Additionally, a child's lawyer in a guardianship case can use the state's existing Best Interest factors to honor her client's broader interests in relationships with peers and non-parental adults as part of her strategy in advocating for a particular placement. If in a state that allows the evaluation of all factors, she could intentionally articulate any of the child's broader interests for the court's consideration.