

Confronting Categorical Exclusions Based on Age: The Rights of Children and Youth

Jonathan Todres*

A significant percentage of the population of the United States, as in all other countries, lives without voting rights, is prohibited from holding public office, has restricted access to employment opportunities, and is subjected to greater restrictions on their participation rights such as freedom of expression, association, and assembly.¹ Children (individuals under eighteen years of age)² constitute more than twenty percent of the U.S. population.³ In other countries, they represent close to half the population.⁴ If this were another group, such categorical denials of rights would likely spur uproar and accusations of discrimination. However, because the group is children, such differential treatment is rarely questioned.

The construct of a bright-line rule dividing childhood and adulthood, while advantageous for administrative reasons, fails both to recognize the full personhood of young people and account for the developing nature of childhood. It also deprives communities and countries of valuable contributions from their youngest members. Moreover, it does not even accurately reflect the state of the law, as various areas of law draw the line at different ages.⁵

This Article questions this bright-line distinction, which most commonly has been drawn at eighteen years old. It focuses in particular on

* Jonathan Todres is a Distinguished University Professor & Professor of Law, Georgia State University College of Law. Thank you to Russ Covey and Nirej Sekhon for their feedback on earlier drafts of this Article and to Cody A. Choi for his valuable research assistance. This Article builds on a shorter essay, *Age Discrimination and the Personhood of Children and Youth*, HARV. HUM. RTS. J. ONLINE (Dec. 2022).

1. See Jonathan Todres, Charlene Choi, & Joseph Wright, *A Rights-based Assessment of Youth Participation in the United States*, 95 TEMPLE L. REV. 411, 422–425 (2023).

2. See Convention on the Rights of the Child Art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 (defining a child as any individual under eighteen years of age) [hereinafter CRC].

3. Stella U. Ogunwole et al., *Population Under Age 18 Declined Last Decade*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html#:~:text=BY%20comparison%2C%20the%20younger%20population,from%2074.2%20million%20in%202010> [https://perma.cc/7LET-DDEH] (approximately twenty-two percent of the U.S. population is under eighteen years of age).

4. Canela López, *The Countries with the Youngest Populations in the World*, BUS. INSIDER (Sept. 6, 2019, 2:32 PM), <https://www.businessinsider.com/countries-youngest-populations-most-children-2019-9> [https://perma.cc/7QBS-7F5N].

5. For example, in the United States, the minimum ages for voting, work, and criminal responsibility vary considerably. See generally Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107 (2012).

young people's participation rights. Evolving understandings of both children's rights and child and adolescent development necessitate a rethinking of the legal regulation of childhood and emerging adulthood.⁶ Such a reconsideration could also bring the United States closer to a construct of human rights that genuinely reflects the ideal that rights are inherent in every human being.

This Article begins by providing a brief overview of the U.S. legal framework governing children and adolescents. It then examines the primary justifications for differential treatment of children and adolescents. Following that, this Article discusses the impact that categorical denials of children's rights have on young people, and then closes by offering a proposal for reconsidering how we think about and govern young people's lives.

I. THE LEGAL REGULATION OF CHILDREN AND ADOLESCENTS

The legal regulation of childhood is an inconsistent blend of rules and standards. Legal scholars have long debated the relative merits of framing legal mandates as rules versus standards.⁷ Rules—such as minimum age laws—offer greater clarity *ex ante*, but they can be both over- and under-inclusive.⁸ For example, a bright-line minimum age rule might exclude individuals below that age who are very capable of partaking in that particular activity.⁹ Conversely, some individuals above the age cutoff might not have the capacity to participate appropriately, but the law allows them to do so.¹⁰ In contrast, standards—which “employ more ‘evaluative’ criteria, such as reasonableness, . . . or use multi factor or ‘totality of the circumstances’ tests that do not specify the weight to be given to individual factors”¹¹—offer greater flexibility but less *ex ante* certainty.

The law in the United States tends to rely heavily on rules with respect to rights and opportunities for young people but often turns to standards

6. In this article, I use “child” as defined in the Convention on the Rights of the Child (any individual under eighteen years of age), *see* CRC, *supra* note 2, Art. 1. The term “emerging adulthood” covers the transition stage from eighteen to twenty-five years old. *See* Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCH. 469, 469 (2000) (defining emerging adulthood as the “period from the late teens through the twenties, with a focus on ages 18–25”). The term “adolescence,” which is often described as covering ages ten to twenty-four, spans both categories. *See, e.g.*, Susan M. Sawyer et al., *The Age of Adolescence*, 2 LANCET CHILD & ADOLESCENT HEALTH 223, 223 (2018) (“Rather than age 10–19 years, a definition [of adolescence] of 10–24 years corresponds more closely to adolescent growth and popular understandings of this life phase”).

7. For a concise explanation of the “rules” versus “standards” debate, *see* Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 456–63 (2016). *But see generally* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (critiquing the debate).

8. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 31–32 (1991).

9. *Cf.* Covey, *supra* note 7, at 458–59 (“[a]ll rules are over- and under-inclusive”).

10. *Id.*

11. *Id.* at 461.

when imposing responsibility on children.¹² That is, for voting rights and economic opportunities (e.g., work, entering into contracts), the law relies on minimum age rules that exclude young people regardless of their individual capacity. However, when it comes to punishment of young people, the law often relies on standards to evaluate individuals to determine whether they are mature enough to be held accountable for their actions.¹³

From a human rights perspective, a default stance that categorically denies participation rights and other rights but allows flexibility to hold those individuals accountable and punish them for missteps is inherently problematic. Each side of this equation merits further examination, but this Article focuses primarily on the use of rules to categorically deny young people's participation rights.¹⁴ Every rule has a justification—that is, a “purpose or goal that the rule is thought to advance”¹⁵—and the anti-discrimination framework of human rights law offers a vehicle for reexamining justifications for rules that deny young people their participation rights.

II. JUSTIFICATIONS FOR DIFFERENTIAL TREATMENT

Under international law, “[a]ll human beings are born free and equal in dignity and rights.”¹⁶ Therefore, any differential treatment must advance a legitimate aim and be proportionate.¹⁷ As the European Court of Human Rights has held, “the principle of equality of treatment is violated if the distinction has no objective and reasonable justification . . . and there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.”¹⁸ With respect to young people, the state has two important functions: protecting young people from harm and supporting their healthy development. Differential treatment of young people

12. Todres, *supra* note 5, at 1111.

13. In this article, I focus on the regulation of young people's agency. So, for example, “the best interests of the child” is a standard that allows decision-makers to make case-specific decisions, but it is frequently used in matters, such as child custody, in which the child is primarily a passive actor subject to adult decision-making.

14. In theory, the flexibility of a standards approach to juvenile justice could account for the developmental nature of childhood in a way that is supportive of young people's healthy development, rather than taking a punitive approach to what is often typical adolescent behavior. See KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* 228 (2021) (“Black youth who act out as a symptom of their mental health challenges are often punished, excluded from school, or arrested.”).

15. Covey, *supra* note 7, at 457.

16. G.A. Res. 217 (III) A, Universal Declaration of Human Rights Art. 1 (Dec. 9, 1948) [hereinafter UDHR].

17. Daniel Moeckli, *Equality and Non-Discrimination*, in *INTERNATIONAL HUMAN RIGHTS LAW*, 148, 157 (3d ed. 2018).

18. Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, App. Nos. 1474/62 et al., Merits, Eur. Ct. H.R., ¶ 10 (July 23, 1968).

has long been justified by the need to protect children.¹⁹ For example, child labor laws seek to protect children from work that would interfere with their education or healthy development.²⁰ Similarly, the law limits children's right to enter into enforceable contracts because minors are "perceived as having far less capability to engage in fair exchange over the long term."²¹ Both of these constraints are justified as protective measures, even though they limit young people's autonomy and could adversely affect the economic well-being of the child and their family.

But while the state has a legitimate interest in protecting children from harm,²² the legal regulation of childhood extends well beyond protective measures. On many issues—particularly ones implicating children's agency—the law opts for rules that treat children as lacking capacity, as "becomings" not "beings."²³ Such restrictions do not appear to serve either the purpose of protecting children from harm or ensuring their healthy development.²⁴ Instead, minimum age rules on young people's agency—e.g., voting and holding public office—are typically not justified on protec-

19. See Barbara Bennett Woodhouse, *The Courage of Innocence: Children As Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1568 (2009) ("Minors' rights to participation even in matters involving their own destinies have been severely limited, based on the twin principles that children need protection from harsh realities and are too immature to speak and act in matters of importance."); see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well-being, the state as *parens patriae* may . . . requir[e] school attendance, regulat[e] or prohibit[] the child's labor. . . .").

20. See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., CHILD LABOR PROVISIONS FOR NONAGRICULTURAL OCCUPATIONS UNDER THE FAIR LABOR STANDARDS ACT 1 (2016), <http://www.dol.gov/whd/reg/compliance/childlabor101.pdf> [<https://perma.cc/47LF-ZKFE>] (stating that the federal youth employment provisions "were enacted to ensure that when young people work, the work is safe and does not jeopardize their health, well-being or educational opportunities.").

21. Michael Glassman & Donna Karno, *On Establishing a Housing Right of Contract for Homeless Youth in America*, 7 SEATTLE J. SOC. JUST. 437, 438 (2008); Todres, *supra* note 5, at 1125.

22. Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL'Y REV. 459, 516 n.274 (2019) ("The notion that the state is empowered and indeed required to step in to protect children in certain circumstances has a long history in our legal tradition. Broadly speaking, the *parens patriae* principle recognizes that the state has a right and responsibility to protect those who cannot protect themselves.").

23. See Aoife Daly, *Assessing Children's Capacity: Reconceptualising Our Understanding through the UN Convention on the Rights of the Child*, 28 INT'L J. CHILD.'S RTS. 471, 474 (2020) (describing how under the law in England and Wales, "[a]dults are assumed to have capacity, and under-18s are generally legally assumed to lack it, on the basis that they ostensibly do not have the cognitive abilities to make decisions."); see also MICHAEL FREEMAN, *A MAGNA CARTA FOR CHILDREN? RETHINKING CHILDREN'S RIGHTS* 39 (2020) (noting that the CRC was a "milestone in the history of childhood" because it "includes recognition that children are 'beings', and not merely pre-adult 'becomings'").

24. Arguably, minimum age laws on children's agency protect society from children in certain respects. For example, prohibiting ten-year-olds from driving protects others on the roads. However, minimum age laws that deny children's agency in the context of civic engagement (e.g., voting, holding office) are inevitably overinclusive, as they bar capable youth from contributing to their communities, and conversely deny society the benefits of those contributions. See Benjamin Oosterhoff, Laura Wray-Lake, & Daniel Hart, *Reconsidering the Minimum Voting Age in the United States*, 17 PERSP. ON PSYCH. SCI. 442, 443 (2022).

tive or supportive grounds.²⁵ Rather, young people are denied access to these spaces because they are deemed incompetent or lacking maturity.²⁶

Not only does the law deny individuals under eighteen years of age the right to vote—that is, to have a say in who represents them—but young people must wait even longer to be eligible to hold public office. The U.S. Constitution requires that individuals be at least twenty-five years old to serve in the House of Representatives²⁷ and at least thirty years old to serve in the Senate.²⁸ In *The Federalist*, No. 62, James Madison offered a justification for the even higher minimum age of Senators by saying that serving in the Senate necessarily required a “greater extent of information and stability of character.”²⁹ Said another way, the founders believed that elected government leaders should have experience and maturity, and that the amount of maturity required was proportional to the scope of responsibility associated with the position. Commentators and voters have also expressed that they consider experience and wisdom to be relevant when assessing candidates’ qualifications for political office.³⁰

25. Oosterhoff et al., *supra* note 24, at 443 (explaining that “research on public opinion regarding changing the minimum voting age from 21 to 18 years indicated that most adults opposed lowering the voting age on the basis of their belief that young people possessed insufficient political knowledge, independence, cognitive capacity, interest, and life experience.”). In some cases, minimum age laws appear to have been adopted and perpetuated without any clear rationale. See Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63, 65 (2017) (explaining that “for the first 182 years of our history (until the ratification of the Twenty-Sixth Amendment), using twenty-one for the voting age was, in many ways, a historical accident. There was no sustained discussion or reasoned justification for not allowing individuals aged twenty or younger to vote. It was just common practice left over from colonial England.”).

26. See Michael S. Merry & Anders Schinkel, *Voting Rights for Older Children and Civic Education*, 30 PUB. AFFS. Q. 197, 200 (2016) (“Opponents of lowering the voting age typically use developmental arguments that refer to qualities such as immaturity, lack of judgment, emotion instability, impressionability, and impulsiveness.”); *but see* Oosterhoff et al., *supra* note 24, at 443 (reviewing developmental science and finding that “public concern over whether youths have the cognitive capacity to vote is unsupported by research. Youth have the cognitive capacity to make informed decisions, especially when provided with a context that allows for unhurried, logical deliberation [which the voting process provides].”). See Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 367 (1972) (arguing that minimum age laws for any activity “should have a reasonable basis in terms of the general maturity and behavior of youth with reference to the particular activity.”).

27. U.S. CONST., ART. 1 § 2. See also *Whereas: Stories from the People’s House: Experience, Wisdom, Knowledge . . . Before Twenty-Five*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPS. (Jan. 18, 2019), <https://history.house.gov/Blog/2019/January/1-17-Young-Members/> [<https://perma.cc/C93N-WLMR>] (reporting that initially “the framers had fixed the minimum age at 21” for service in the House of Representatives but raised that to twenty-five years old at the Constitutional Convention).

28. U.S. CONST., ART. 1 § 3. See also *Constitutional Qualifications for Senators*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Constitutional_Qualifications_Senators.htm [<https://perma.cc/63LV-9CAW>] (last accessed Aug. 11, 2023).

29. Constitutional Qualifications for Senators, *supra* note 28. When the drafters of the Constitution decided on these requirements, they were aware that members of parliament in the United Kingdom at that time needed to be only twenty-one years old, yet they opted for a higher minimum. *Id.*

30. See, e.g., Arthur M. Simon & Joseph E. Uscinski, *Prior Experience Predicts Presidential Performance*, 42 PRESIDENTIAL STUD. Q. 514, 514 n.1 (2012) (“Polls show that voters consider presidential candidates’ political, military, and private sector experiences . . . Polls also show that presidency scholars prefer ‘experienced’ presidential candidates”); Igor Grossmann & Justin P. Brienza, *The Strengths of Wisdom Provide Unique Contributions to Improved Leadership, Sustainability, Inequality, Gross National Happi-*

Age, however, is a poor proxy for experience. Although (older) age may offer more potential years in which one could gain the experience needed for a job, it does not guarantee that an individual gains the requisite experience.³¹ Moreover, age-based rules discount the expertise in the lived experience of young people.³² For example, a sixteen- or seventeen-year-old may in fact have more relevant lived experience with respect to particular social issues than a twenty-five-year-old or thirty-year-old. To take just one example, young people today are the only ones alive who know what it is like to go to school during a global pandemic.³³ That lived experience imbues them with insights that many adults will not have when evaluating education policy options.³⁴

Moreover, in recent years, individuals in the United States have been elected to office with little to no relevant policymaking experience. Their campaigns often tout their lack of political experience as one of their primary strengths, suggesting that they offer fresh perspectives that political insiders do not have.³⁵ That such individuals are nonetheless considered qualified enough to be chosen by the electorate suggests that young peo-

ness, and Civic Discourse in the Face of Contemporary World Problems, 6 J. INTEL. 23 at 1, 5 (2018) (“Contemporary leadership requires wisdom to tackle the challenges of life in the 21st century”). With respect to experience, there may be differences of opinion as to what types of prior experiences are most important, but voters typically value experience. See, e.g., *1 in 5 Voters Cannot Be Pinned Down on Either Dimension*, MONMOUTH UNIVERSITY (Jan. 6, 2020), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_010620/ [<https://perma.cc/WW6M-CGRY>] (“Political experience outpolls both conservative (55% to 40%) and progressive (52% to 36%) issue positions as the quality voters value more.”) But see Gautam Mukunda, *Great Leaders Don’t Need Experience*, HARV. BUS. REV. (Oct. 2012), <https://hbr.org/2012/10/great-leaders-i-need-experience> [<https://perma.cc/2XJT-EH9M>] (finding that leaders with little experience ended up either the best or worst leaders and concluding that experience might not be as vital as some argue).

31. See Axel Gosseries, *What Makes Age Discrimination Special: A Philosophical Look at the ECJ Case Law*, 43 NETH. J. LEGAL PHIL. 59, 63 (2014) (arguing that “the strength – in factual terms – of age as a proxy rests more with its connection with the *passage of time* than with the *precision* and the *diversification* that its high divisibility allows for. There is no question that chronological age and the passage of time are perfectly correlated. The crucial issue is whether the passage of time and our level of intellectual, physical, affective abilities – i.e., the target variables – are *significantly* correlated as well.”) (emphases in original).

32. On lived experience as expertise, see Ben Classen et al., *Embedding Lived Experience Expertise Across the Mental Health Tertiary Education Sector: An Integrative Review in the Context of Aotearoa New Zealand*, 28 J. PSYCHIATRIC & MENTAL HEALTH NURSING 1140, 1146 (2021); Erin G. Fox, Nicole F. Kahn & Gabrielle Battle, *When Youth Are Experts in the Field*, ISSUES SCI. & TECH. (May 3, 2022), <https://issues.org/youth-experts-bcyf-nasem-fox-kahn-battle/> [<https://perma.cc/T6T2-Y28B>]; Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript, at 55) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335644 (“[L]earning through the lived experience of those with expertise in law’s injustice can reveal the reality of how law functions in a way that simply reading case law and even courtroom observation never could.”).

33. Tammy Chang & Jonathan Todres, *Listening to Young People Could Help Reduce Pandemic-related Harms to Children*, THE CONVERSATION (June 2, 2022, 8:14 AM), <https://theconversation.com/listening-to-young-people-could-help-reduce-pandemic-related-harms-to-children-179745> [<https://perma.cc/42ZD-B66Y>].

34. Fox, Kahn & Battle, *supra* note 32.

35. Britt Peterson, *A Brief History of Washington Insiders Claiming to be Outsiders*, WASHINGTONIAN (Apr. 8, 2016), <https://www.washingtonian.com/2016/04/08/a-brief-history-of-washington-insiders-claiming-to-be-outsiders/> [<https://perma.cc/QC7A-S83R>].

ple's relative inexperience in policymaking cannot be enough to justify their categorical disqualification.³⁶ Of course, voters could always decide that a particular young person did not have the necessary experience, but that approach would allow a young person to participate politically rather than excluding them entirely.

Beyond questions about whether the state advances a legitimate aim by categorically excluding young people from the political arena, under human rights law differential treatment must be proportionate to be sustained. Unlike standards, rules are blunter instruments that make proportionality harder to achieve. Categorical denials of rights—such as barring those under twenty-five from holding office or those under eighteen from voting—should be considered inherently suspect. Can we say categorically that twenty-two-year-olds are more akin to twelve-year-olds than they are to thirty-two-year-olds when it comes to serving in public office? Are sixteen-year-olds more akin to six-year-olds than twenty-six-year-olds in terms of capacity to choose which candidates for office to support? Although age may be a better proxy for maturity than it is for experience, it is still imperfect. Minimum age rules are inevitably overinclusive in that they deny participation rights to many young people who are fully capable of responsibly exercising those rights. Moreover, such categorical denial of civil and political rights seems to ignore what development science has shown: First, with respect to some tasks—including activities like voting³⁷—adolescents' capacity is not significantly less than that of adults.³⁸ And, second, lumping all young people into a single category of “children” fails to account for the dramatic differences in capacities across the span of childhood.

36. Moreover, some young people have experience in policymaking, having served in Youth Councils and Congresses. *See, e.g.*, THIRTY-THIRD GUAM YOUTH CONGRESS, (last accessed Aug. 11, 2023), <https://guamyouthcongress.wixsite.com/33rdgyc> [perma.cc/5VPQ-AQYH]; YOUTH COMMISSION, CITY AND COUNTY OF SAN FRANCISCO, <https://sfgov.org/youthcommission/> (last accessed Aug. 11, 2023) [https://perma.cc/TW3T-A8PA]; YOUTH COMMISSION, CITY OF BALTIMORE, (last accessed Aug. 11, 2023) <https://youth.baltimorecity.gov/about-0> [https://perma.cc/8GRL-MSQM].

37. *See* Douglas, *supra* note 25, at 70 (“Voting requires ‘cold’ cognition. It occurs on a certain, known date, so individuals can take the time to learn about the candidates and issues in advance. There is typically little emotion or stress involved. Although there may be peer pressure to support a particular candidate, peer pressure is not a concern when individuals actually vote because of the secret ballot.”).

38. *See, e.g.*, Oosterhoff et al., *supra* note 24, at 443 (reviewing developmental science and finding that “Youth have the cognitive capacity to make informed decisions, especially when provided with a context that allows for unhurried, logical deliberation [which the voting process provides.]”); Megan E. Hay, *Incremental Independence: Conforming the Law to the Process of Adolescence*, 15 WM. & MARY J. WOMEN & L. 663, 679 (2009) (“Using a conservative reading of the research, the general framework presumes that by age fifteen, adolescents have the requisite cognitive maturity to understand each of these activities [voting] and articulate reasonable decisions.”).

III. THE MESSAGING OF CATEGORICAL EXCLUSIONS OF YOUNG PEOPLE

Categorical exclusions of young people from participation in their communities has a range of adverse consequences. Such rules may deny young people opportunities to learn and develop the skills needed to become engaged adult citizens in their communities. Equally important, such exclusions and denials of rights send a powerful message to young people: that they do not count in the eyes of adults and that their views and opinions do not matter.

Such a message—delivered through these categorical denials of rights—risks further marginalizing young people. Despite this framework, in recent years, we have seen young people overcome such barriers to participation and come to the forefront of human rights and social justice movements. At age seventeen, Malala Yousafzai became the first child to receive the Nobel Peace Prize for her work on girls' education. Greta Thunberg has become a global leader on climate change mitigation. Many other young people have assumed leadership roles on issues including gun violence, immigration, racial justice, climate change, and other pressing challenges.³⁹ However, a significant characteristic of these actions is that most of them occur outside of, and often in spite of, the state.⁴⁰ Categorical exclusions of young people have left them few official pathways to contribute to and shape the direction of their communities and nations. By not providing young people formal pathways, we risk alienating young people and having them view government as unresponsive, irrelevant, or worse.

IV. ELEVATING CHILDREN'S RIGHTS AND AFFIRMING HUMAN RIGHTS

A. *A Modest, but Potentially Far-Reaching, Proposal*

If, as universally affirmed, rights are inherent and inalienable, then every human being has rights from birth.⁴¹ Further, if, as asserted by John Locke

39. See, e.g., SUNRISE MOVEMENT (last accessed Aug. 11, 2023), <https://www.sunrisemovement.org/> [<https://perma.cc/29J7-UVX5>]; FRIDAYS FOR FUTURE, (last accessed Aug. 11, 2023), <https://fridays-forfuture.org/> [<https://perma.cc/CU24-66NB>]; MARCH FOR OUR LIVES, (last accessed Aug. 11, 2023), <https://marchforourlives.com/> [<https://perma.cc/6PXB-X52A>]; YOUTH JUSTICE COALITION, (last accessed Aug. 11, 2023), <https://youthjusticela.org/> [<https://perma.cc/RN43-445N>]; see also YOUNG WOMEN'S FREEDOM CENTER (last accessed Aug. 11, 2023), <https://youngwomenfree.org/freedom-2030-charter/> [<https://perma.cc/L6EM-ZNRK>]; UNITED WE DREAM, (last accessed Aug. 11, 2023), <https://unitedwedream.org/> [<https://perma.cc/U25D-3AT2>].

40. Indeed, young people must navigate additional restrictions on speech in schools or limitations on assembly rights imposed by status offence laws.

41. See also Patricia Bander et al., *Compass: Manual for Human Rights Education with Young People*, COUNCIL OF EUROPE, at 385 (2020), <https://rm.coe.int/compass-eng-rev-2020-web/1680a08e40> [<https://perma.cc/5QLY-ZL9U>] (“Human rights are inalienable. This means that you cannot lose them, because they are linked to the very fact of human existence, they are inherent to all human beings.”). See also THE DECLARATION OF INDEPENDENCE, ¶ 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

and countless others, the legitimacy of government depends on its respect for the rights of all individuals,⁴² then any differential treatment of young people must be justifiable, and the burden must be on the state or entity that seeks to treat young people differently.⁴³ After all, the Universal Declaration of Human Rights holds that every individual is “born free and equal in dignity and rights” and is entitled to their “rights and freedoms . . . without distinction of any kind.”⁴⁴ Therefore, by their very nature, categorical exclusions that disadvantage certain groups should be considered inherently suspect. When such exclusionary rules target young people, they often contradict core tenets of the human rights idea and fail to reflect a nuanced modern-day understanding of children’s capacities.

To correct this requires two simultaneous steps: (1) a shift in our assumptions about, and understanding of, children and youth, and (2) a genuine commitment to the foundational principle of human rights that rights are inherent in every individual.

First, we need to confront—and change—our assumptions about children that lead to undervaluing the views, opinions, and contributions of young people. If a primary driver of restrictions on children’s participation rights is the assumption that they lack capacity, then popular narratives about children’s capacities must be updated to reflect current scientific understanding of children’s development and capabilities.⁴⁵

The reality is that young people have unique perspectives and often express mature, thoughtful views.⁴⁶ They are also young, inexperienced, and

42. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 42–52 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690) (explaining that the legitimacy of government depended on its respect for the natural rights of individuals); David A.J. Richards, *Reconstructing Constitutional Interpretation*, 107 *HARV. L. REV.* 937, 938 (1994) (“[L]egitimacy of government depends on its respect for inalienable human rights”).

43. Some may assert that earlier rights philosophers did not focus on, or even consider, children as rights holders. However, such an argument fails to account for two important issues: First, rights evolve. Early rights documents, such as the Declaration of Independence, did not mention women, for example, but today we recognize women as rights holders and subjects of the Declaration of Independence and other foundational instruments. Second, and arguably more important, if rights are inherent, it does not make sense to say individuals below a certain age do not have rights.

44. UDHR, *supra* note 16, Arts. 1 & 2.

45. Many laws governing children’s lives today predate modern understandings of children’s development and capacities. For a more up-to-date picture of young people’s capacities, see, for example, Oosterhoff et al., *supra* note 24, at 443–6; Douglas S. Diekema, *Adolescent Brain Development and Medical Decision-making*, 146 *PEDIATRICS* S18, S20 (Supp. 1) (2020) (reviewing scientific evidence and finding that “many adolescents older than the age of 14 years appear capable of making rational decisions that approximate those of adults”); Laurence Steinberg, *Let Science Decide the Voting Age*, *NEW SCIENTIST* (Oct. 8, 2014), <https://www.newscientist.com/article/mg22429900-200-let-science-decide-the-voting-age/> [<https://perma.cc/DZA4-H2EK>] (“Adolescents’ judgement in situations that permit unhurried decision-making and consultation with others – what psychologists call ‘cold cognition’ – is likely to be as mature as that of adults by 16.”).

46. Ironically, when young people imagine and demand a more peaceful, just, sustainable world, many adults respond dismissively that they are naïve or impractical. See Robinson Meyer, *Why Greta Makes Adults Uncomfortable*, *THE ATLANTIC* (Sept. 23, 2019), <https://www.theatlantic.com/science/archive/2019/09/why-greta-wins/598612/> [<https://perma.cc/4QKY-WXF9>] (quoting several conservative adult commentators critiquing Greta Thunberg). Greta Thunberg offers but one of many possible

sometimes just delightfully silly. Adding to the complexity, young people may express mature and immature ideas in the same conversation. Too often, adults use examples of “immature” moments to discount anything else children might be able to do or any insights they may offer. Yes, adults need to teach and guide children and youth. And, yes, many times, it is appropriate for adults to be the decision-maker. But that does not mean children have no value to add. We must go beyond this devaluation of young people and shift to seeing young people as partners in our communities—partners who, based on their age and maturity, may be able to contribute at different levels. But contribute they can.

Among other things, their lived experience offers important insights. For example, Black male adolescents living in urban areas may understand how policing works on the streets of a city far better than white adult policymakers who do not encounter police except those that are part of their security detail.⁴⁷ And, as highlighted above, children today understand better than adults what it is like to attend school during a global pandemic. In short, adults must make space for, and support, children’s expertise, developing agency, and participation in their communities. Not only will children be better off, but so will their adult counterparts and their communities.

Second, if we believe in human rights, we must genuinely commit to the idea that rights are inherent in every human being.⁴⁸ If rights are inherent to all human beings, they exist from birth. To say otherwise—for example, to say young people do not have rights, or to allow constraints on children’s rights that do not advance any compelling government interest—is to reject the idea that rights are inherent. Children’s rights law recognizes the rights and agency inherent in every young person, as it holds that every child “capable of forming a view” has the right to express that view on matters affecting them.⁴⁹ In contrast, not accepting that children have rights equates to saying rights are not inherent but are granted by governments when individuals reach adulthood. Depending on government largesse is precisely what rights are *not* in theory and should *never* be in practice.

responses to adults’ criticism of young people’s idealism: “We don’t say, *Oh, we cannot change this because it’s always been this way*, which a lot of old people say. We definitely need that new perspective to see the world.” *Id.* (emphasis in original).

47. See López, *supra* note 32, at 51–52.

48. See Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1061 (2017) (“Voting, after all, is a fundamental right. It provides the foundation of our democracy. Children are part of and affected by that democracy. . . . Allowing youth to vote is preservative of youth rights in our democracy.”).

49. CRC, *supra* note 2, Art. 12. Under the CRC, the child’s right to express their views is not conditioned on their age or maturity. See U.N. Committee on the Rights of the Child, General Comment 12: The Right of the Child to Be Heard, U.N. Doc. CRC/C/GC/12, ¶¶ 20, 21 (July 1, 2009). The CRC, however, did not recognize voting rights for children.

B. *Implications and Considerations*

What flows from these two principles—accepting that rights are inherent and adopting an updated, nuanced understanding of children’s development? First, it means greater recognition of children as rights holders. It would also mean that governments would need to reassess laws and policies based on the idea that children lack competence. In other words, the default presumption when engaging young people or making policy decisions that affect children would be that children’s rights must be ensured, and not that young people must prove a level of competence before being granted their rights.⁵⁰ If law and policy were driven by an obligation to ensure young people’s rights and informed by a deeper understanding of child and adolescent development, it likely would spur more nuanced laws and policies that provide age- and stage-appropriate support for children (and their families) in the exercise of their rights.⁵¹

To move forward successfully in this direction requires acknowledgment of three important considerations. First, it is important to distinguish between rights and privileges. Those wary of children’s rights claim that recognition of children’s rights will upend societal norms and family hierarchies.⁵² But recognition of fundamental rights does not equate to giving young people unlimited privileges. Driver’s licenses offer an informative example. There is no right to drive, so driving is better classified as a privilege and, accordingly, can be restricted to ensure road safety. In other words, recognizing young people’s rights does not require that we extend them every privilege. Indeed, where protection of children (and others) is a genuine concern, bright-line rules may well be appropriate. Returning to driver’s licenses, the law employs both rules and standards. There is a minimum age. However, even if one is of age, they must still earn the privilege to be licensed by demonstrating they have the requisite aptitude to drive. Implementing the proposal discussed above would not change privileges. But it would require us to consider changes that would ensure children can realize their rights. So, driver’s license requirements may not change, but some jurisdictions may need to do more to ensure public transportation is adequate to support young people’s exercise of their rights.

Similarly, holding office is a privilege, not a right. Adults cannot claim they have a right to be president or governor. However, their political

50. Daniel Weinstock, *What’s So Funny About Voting Rights for Children?*, 18 GEO. J.L. & PUB. POL’Y 751, 754–55 (2020) (cautioning about the far-reaching implications of making voting rights based on competence).

51. It would also likely highlight the importance of human rights education, which critically teaches children not only about their rights but also about their responsibilities to respect the rights of others. See Jonathan Todres, *The Trump Effect, Children, and the Value of Human Rights Education*, 56 FAM. CT. REV. 331, 334–35 (2018).

52. See Luisa Blanchfield, *The United Nations Convention on the Rights of the Child*, CONG. RSCH. SERV., at 10 (2015) (discussing objections raised in some circles about the Convention on the Rights of the Child and children’s rights).

rights include the right to run for office. As the Universal Declaration of Human Rights affirms, “Everyone has the right of equal access to public service in his country.”⁵³ What is the justification for stripping younger people of the right to run for office? Presumably, as articulated in the Federalist Papers, we want our political leaders to have the requisite maturity and experience needed to successfully carry out the duties of the office to which they are elected. But we do not impose a minimum number of years of policy work or other experience on adults. Why then restrict young people? Surely the voters can assess who they think has the right qualifications for a job. If they deem a twenty-year-old too young, they will not vote for him. If, however, they believe a nineteen-year-old is who they want to represent them, why shouldn’t they be able to vote for her? This Article does not take a position on the correct rules for political office, but it does argue that we should reflect on and reconsider existing rules from a starting point of the recognition that rights are inherent in every individual.

Second, some of the issues mentioned in this article—e.g., voting in federal elections, serving in Congress—and others implicated by this proposal necessarily point to the U.S. Constitution. That is, they would require a constitutional amendment to address. The current polarized political environment makes passage of a constitutional amendment that, for example, lowers the voting age highly unlikely in the near term. However, states and local jurisdictions can take action to ensure young people’s civic engagement rights. Moreover, civic engagement is about more than voting and holding office.⁵⁴ It also is about having robust rights to freedom of expression, assembly, and association, among other rights. On that front, there are numerous opportunities for progress. Take, for example, status offenses, which can constrain young people’s freedom of expression, assembly, and association. Some status offenses expressly state that such acts would not be violations if committed by adults.⁵⁵ Why would we sanction youth for doing things that adults are permitted to do?⁵⁶ That is, why hold young people to a higher standard than we impose on adults? Although certain status offense laws arguably are aimed at producing outcomes that benefit young people’s development (e.g., regular attendance at school, not staying out late), punishing children when the root causes of these issues are often be-

53. UDHR, *supra* note 16, Art. 21(2).

54. See Todres, Choi & Wright, *supra* note 1.

55. Ala. Code § 12-15-201(4) (2020) (Alabama’s juvenile code defines status offender as “an individual who has been charged with or adjudicated for conduct that *would not*, pursuant to the law of the jurisdiction in which the offense was committed, *be a crime if committed by an adult*.”) (emphasis added). See Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261, 285 (2014).

56. To be clear, ensuring children’s rights would still permit governments to restrict young people from doing certain activities (see the earlier rights versus privileges discussion). However, if a fundamental right is implicated, then any restriction would need greater justification than simply wanting to control young people.

yond their control⁵⁷ is counterproductive and may also fail to achieve any broader societal benefits.⁵⁸ In other words, we should reconsider whether there is adequate justification for restricting young people's freedoms and, if so, whether there are more rights- and dignity-affirming means of achieving those goals. It is possible to make significant progress in forging a legal and regulatory framework that is more supportive of children's rights, without any constitutional amendments.

Third, the core values of human rights and the principle of non-discrimination⁵⁹ together demand that states not categorically deny people their fundamental rights without a compelling state interest. Protection of young people can be such an interest.⁶⁰ Returning to child labor laws, regulation of non-agricultural work by young people offers both protection and a grad-

57. The Center for American Progress reports that:

[T]ruancy is often not solely the individual student's problem. In fact, the reasons often have little to do with a person's individuality and more to do with situational factors. . . . Some of the situational factors that often contribute to truancy include financial and medical issues, as well as issues at home that pressure students to stay home to help their families. Other family or community related factors can include a lack of family support; poor home conditions; parents who do not highly value education; child abuse or neglect; siblings who performed poorly in school; a large number of household members; chronically ill parents; low parental education attainment; foreign-born parents; providing child care for younger siblings; teen pregnancy or parenthood; violence near one's home or school; homelessness; unreliable transportation; and having a family criminal history or an incarcerated parent. Lastly, school characteristics can keep students from attending school. Some characteristics are specific to a school's community and culture, such as students' fear of bullying or harassment in school; peer pressure from fellow students; an unsafe school environment; poor school culture; and school size. Others are particular to administration of the school, such as ineffective school attendance policies; poor record keeping or not informing a parent or guardian of truancy; and poor identification of special education needs.

Farah Z. Ahmad & Tiffany Miller, *The High Cost of Truancy*, CENTER FOR AMERICAN PROGRESS, at 17 (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/07/29113012/Truancy-report4.pdf>. [<https://perma.cc/5G6H-JEVD>]. See also Dana Goldstein, *Inexcusable Absences*, NEW REPUBLIC (Mar. 6, 2015), <https://newrepublic.com/article/121186/truancy-laws-unfairly-attack-poor-children-and-parents> [<https://perma.cc/2ZSV-JY2F>] ("More than 1,600 parents—most of them mothers—have been jailed in Berks County since 2000 for failure to pay truancy fines. In Pennsylvania, truancy is defined as more than three days of unexcused absence from school. After that, kids and parents can be referred to court and fined \$300 per additional unexcused absence, in addition to court costs."); Kenneth Adams, *The Effectiveness of Juvenile Curfews at Crime Prevention*, 587 ANNALS AM. ACAD. POL. & SOC. SCI. 136, 139–40 (2003) (noting that juvenile curfew laws incorrectly assume that all children have parents or caregivers who are available to watch over them and that they have safe homes to return to).

58. See Adams, *supra* note 57, at 155 ("[T]he weight of the scientific evidence . . . fails to support the argument that curfews reduce crime and criminal victimization. Studies consistently report no change in crime in relation to curfews. When changes in crime are observed, they are almost equally likely to be increases in crime as opposed to decreases. Furthermore, curfew enforcement rarely leads to discovery of serious criminal behavior precipitating arrest."); Mike A. Males, *Vernon, Connecticut's Juvenile Curfew: The Circumstances of Youths Cited and Effects on Crime*, 11 CRIM. JUST. POL'Y REV. 254, 265–66 (2000) (finding that juvenile curfews did not reduce crime, but instead ended up consuming police time removing otherwise law-abiding youth).

59. See, e.g., CRC, *supra* note 2, Art. 2(1) (mandating that states parties "respect and ensure" children's rights "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.").

60. For example, child maltreatment laws can result in the removal of a child from a home, disrupting their right to know and be cared for by their parents, CRC, *supra* note 2, Art. 7, but their

uated approach to granting economic rights.⁶¹ There is a minimum age below which the law says the risk of exploitation or harm is too great and thus children cannot work. After that, we incrementally allow children to do more. So, for example, while children under fourteen years old cannot work, when they are fourteen or fifteen years old, they can work limited hours in jobs that will not harm their health or interfere with their education and development.⁶² Then, at sixteen years old, their rights expand further, and at eighteen years old, they achieve the same rights as adults.⁶³ However, the bright-line rule for voting fails to articulate a compelling state interest in denying this right. As voting is an activity that takes place in the privacy of a voting booth, it is hard to imagine any significant risk of harm. Therefore, the restriction must be based on a presumption of lack of maturity. But that categorical exclusion is ill-informed, as advancements in our understanding of child development have given us a much clearer picture of what most young people can do at different ages. And there is strong evidence that the capacity to vote as maturely as adults do is achieved earlier than eighteen years old.⁶⁴

Young people today are showing us that they are ready and wanting to contribute to their communities and help create a more peaceful, just, and healthier world. At a minimum, we owe it to them to move beyond preconceived notions about their capabilities and recognize them as rights holders. Doing so has the potential to forge legal and policy frameworks that are far more responsive to all children and young people at all stages of their development. And it can be done without sacrificing our duty to protect children from harm.

immediate safety can override these rights. Notably, these are competing rights claims by the child, in contrast to the voting context.

61. U.S. DEP'T OF LABOR, *supra* note 20, at 3.

62. *Id.*

63. *Id.*

64. See Hiroharu Saito, *Equal Protection for Children: Toward the Childist Legal Studies*, 50 N.M. L. REV. 235, 262–64 (2020) (finding that “voting capacity of adolescents has been underestimated. . . . [For example,] political maturity for voting of adolescents at the age of 16 and 17 is no different from that of adults.”); Daniel Hart & Robert Atkins, *American Sixteen- and Seventeen-Year-Olds Are Ready to Vote*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 208 (2011) (“16-year-olds apparently know as much about the American political system as do many young adults; indeed, the average score for 16-year-olds is higher than the averages for civic knowledge for 19-, 21-, and 23-year-olds, all of whom are entitled to vote.”); Oosterhoff et al., *supra* note 24, at 445 (“Empirical data have shown that adolescents demonstrate adult-like levels of cognitive capacities, including working memory, verbal fluency, planning, and logical reasoning, by the age of 16 years and thus are capable of mature reasoning and decision-making”). See also Weinstock, *supra* note 50, at 754–55 (“Indeed, general voter incompetence is something that has been widely established, and so the requirement that citizens only qualify as voters if they pass a certain cognitive threshold would have far more radical implications than many of those who have argued for the exclusion, or for only partial and gradual inclusion, of children, have been willing to concede.”).

CONCLUSION

Ultimately, it is likely that any legal system will need to rely on a blend of rules and standards to optimize outcomes. As it pertains to young people, that means that minimum age laws will be appropriate in certain contexts. However, if such categorical exclusions implicate children's rights, then we ought to inquire whether there are more effective ways to reflect and allow space for children's evolving capacities while staying true to the core tenet of human rights—that rights are inherent in every human being.

