

THE PAST AND FUTURE OF PARENTAL RIGHTS: POLITICS, POWER, PLURALISM, AND PUBLIC HEALTH

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The COVID-19 pandemic and growing political polarization have activated parental grievance against the government in recent years. Politicians have capitalized on this grievance by campaigning on, proposing, and passing legislation providing greater protections for parental rights in decision-making about health care and public education. This Article tracks the history of how courts have sought to balance parental rights with the public interest, and then explores contemporary controversies surrounding parental rights, including healthcare decision-making, public health mandates, public education, and the child welfare system. These controversies illuminate the incoherence in courts', policy-makers', and the general public's framing of parental rights and demonstrates the need to identify shared values and promote equity in order to effectively balance individual rights with the common good.

INTRODUCTION

Nearly a century ago, the Supreme Court declared that parents have the right to direct their children's education and upbringing under the Due Process Clause of the Fourteenth Amendment.¹ Over time, courts have further recognized parental authority to make decisions about their children's healthcare without undue interference from the government.² But never have courts suggested that parental rights are absolute. Under a state's *parens patriae* authority, it may intervene when a child's health or safety is at risk or when there is a public interest, including the protection of public health.³ While the line between state interests and parental rights has always been somewhat fuzzy, the politicization of parental rights in recent years has illuminated the inconsistencies and ambivalence among courts and policymakers about the balance among parental autonomy, children's independent interests, and the public good.

Since the beginning of the COVID-19 pandemic, Republican state lawmakers and political candidates have increasingly sought to capitalize

¹ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

² See *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000); see also *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 484 (Utah 2011); *Kanuszewski v. Mich. Dep't of Health & Hum. Services*, 927 F.3d 396, 418 (6th Cir. 2019).

³ *Parens patriae*, Latin for "parent of the country or homeland" is the principle that the state has a paternalistic authority to protect the interests of those who are incompetent or need special protection. LEGAL INFORMATION INSTITUTE, *parens patriae*, https://www.law.cornell.edu/wex/parens_patriae (last visited Apr. 28, 2023).

on parental grievance to solidify their base of support. From proclaiming that vaccine and mask mandates in schools violate parental authority,⁴ to reinforcing anti-vaccination falsehoods,⁵ they have banked on parental rights as a winning hot-button political strategy. Schools, school boards, and school curricula have proven an especially fertile ground for politicians to further incite parental anger and grievance. As of March 2023, legislation focused on expanding parental rights in public education has been proposed in thirty-two states.⁶

Republican 2024 presidential hopefuls are employing parental rights in their talking points⁷ and members of Congress have proposed legislation to strengthen parental rights in schools. In March 2023, Republican lawmakers in the House of Representatives introduced the *Parents Bill of Rights Act*, strengthening parents' rights in reviewing curricula and library books, as well as input in school policies.⁸ In October 2022, Arizona Congresswoman Debbie Lesko proposed a constitutional amendment to guarantee the fundamental right of parents to make educational decisions for

⁴ See, e.g., Maeve Restin & Donald Judd, *GOP candidates seize on decision about Covid-19 vaccines for children as a rallying cry for parental rights*, CNN (Oct. 22, 2022, 12:17 PM), <https://www.cnn.com/2022/10/21/politics/covid-19-vaccines-children-cdc-republicans/index.html>; *Bill would let parents 'opt out' of school mask mandates*, ASSOCIATED PRESS (Apr. 12, 2023, 3:57 PM), <https://apnews.com/article/alabama-face-mask-schools-980aab35f98a686c3a954ed9465d64ed>.

⁵ Katherine Eban, *Inside Ron DeSantis's Plan to Ride Anti-vaxxism to the White House*, VANITY FAIR (Mar. 21, 2023), <https://www.vanityfair.com/news/2023/03/desantis-antivax-florida-trump>.

⁶ Jackie Valley, *32 states and counting: Why parents bills of rights are sweeping US*, CHRISTIAN SCI. MONITOR (Mar. 24, 2023), <https://www.csmonitor.com/USA/Education/2023/0324/32-states-and-counting-Why-parents-bills-of-rights-are-sweeping-US>.

⁷ Gabby Orr & Steve Contorno, *Republicans elevate 'parental rights' as top issue while looking to outflank each other heading into 2024*, CNN (Feb. 4, 2023), <https://www.cnn.com/2023/02/04/politics/republicans-2024-parental-rights-trump-desantis/index.html>.

⁸ Parents Bill of Rights Act, H.R. 5, 118th Cong. (2023). The bill would mandate public schools to publish information on curricula and list the books in the library and expand parents' rights at school board meetings. It would also require schools to report if a transgender girl participates in sports and mandates parental consent for a child to change their gender, pronouns or name. Stephen Groves, *House Republicans pass 'parents' rights' bill in fight over schools*, PBS (Mar. 24, 2023, 2:45 PM), <https://www.pbs.org/newshour/education/house-republicans-pass-parents-rights-bill-in-fight-over-schools>. But see Mychael Schnell, *Why 5 House Republicans voted against the GOP's Parents Bill of Rights*, HILL (Mar. 24, 2023, 6:26 PM), <https://thehill.com/homenews/house/3917248-why-5-house-republicans-voted-against-the-gops-parents-bill-of-rights/>.

their children.⁹ One goal advocates of such a federal constitutional amendment have is to ensure that courts apply strict scrutiny, which would preclude the state from interfering with parental rights without a compelling interest.¹⁰ Some state policymakers — for example, Governor Greg Abbott of Texas — have also called for state constitutional amendments to burnish parental rights into state law.¹¹

At the same time that parental rights have become a rallying cry for Republican lawmakers, it is clear that not *all* parents' rights are equally valued in this discourse. While there is increasing attention in the legal academy and the media to the persistent racial and socioeconomic inequities in the child welfare system, in which Black and Indigenous parents disproportionately have their children removed and placed in foster care,¹² this inequity has not received the attention of politicians promoting the supremacy of parental rights. Indeed, the structural roots of racial disparities in American institutions — including the child welfare system — is a topic many parents' rights advocates target as inappropriate in school curricula. Specifically, they falsely claim that schools are indoctrinating children through the teaching of Critical Race Theory — a legal theory that considers how racism is imbedded in the law.¹³ Historians of previous

⁹ *Lesko Introduces Constitutional Amendment to Protect Parental Rights*, LESKO (Oct. 18, 2022), <https://lesko.house.gov/2022/10/lesko-introduces-constitutional-amendment-to-protect-parental-rights>.

¹⁰ *See The Parental Rights Amendment*, PARENTALRIGHTS.ORG, <https://parentalrights.org/amendment/> (last visited Nov. 18, 2023) (“Neither the United States nor any State shall infringe these rights without demonstrating that its governmental interest as applied to the person is of the highest order and not otherwise served.”).

¹¹ Brian Lopez, *Gov. Greg Abbott taps into parent anger to fuel reelection campaign*, TEX. TRIB. (Jan. 26, 2022, 5:00 AM), https://www.texastribune.org/2022/01/26/greg-abbott-parental-bill-of-rights/?utm_source=articleshare&utm_medium=social.

¹² *See, e.g.*, Haley Negrin, *Native American children are under threat — again*, WASH. POST (Nov. 15, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/11/15/brackeen-haaland-indigenous-tribes/>; Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/11/22/nyregion/nyc-acf-racism-abuse-neglect.html>; DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).

¹³ Critical race theory was developed by legal scholars starting the 1980s. One of those scholars, Kendall Thomas describes it this way: “Critical race theory views race law and policy as tools of power . . . Its focus on the politics of race has helped break the stranglehold of ‘racial moralism’ by challenging the egocentric belief that racism is always only about personal fault, private prejudice, and invidious individual intent. Critical race theory tells a story about institutionalized racial disadvantage and systemic racial inequality. It highlights the structural harms of the ‘colorblind racism’ we see at work in laws that don’t mention race per se.” Susan Ellingwood, *What Is Critical Race Theory, and Why Is Everyone*

parental rights in education movements in the United States note that white parents' anxiety about race has often played a key role.¹⁴ Public education, long heralded as the great equalizer in American society, is a logical site for some parents who perceive growing diversity as a threat to the status quo to seek greater control.

Like many of the politically polarizing issues of our time, the inconsistencies in the current discourse around parental rights demonstrate a failure to develop and apply shared values and principles to guide the state's role in managing the delicate balance among child well-being, parental autonomy, and broader social and community interests. It is not surprising that the latest controversies over parental rights were inflamed by a public health crisis. Public health, at its core, contemplates the ethical and legal questions inherent in balancing individual rights with the common good.¹⁵ Furthermore, the guiding principles of public health decision-making — considering and balancing freedom and autonomy, equity and justice, and evidence and truth¹⁶ — have much to say about the current parental rights debate. This Article explores current legal, policy, and political debates surrounding parental rights and proposes framing the core questions of this debate — appropriately balancing individual rights with public interests — through the lens of public health ethics.

Part I of this Article reviews how the Supreme Court has sought to balance *parens patriae* with individual parental rights to direct their children's education and upbringing. Part II explores the multiple contemporary controversies surrounding parental rights, including in the areas of healthcare decision-making, public health mandates, public education, and the child welfare system. The discourse surrounding these controversies illuminates the incoherence in courts', policymakers', and the general public's framing of parental rights. Part III considers how parental rights may be analyzed by courts in the future following recent Supreme Court decisions. Part IV suggests how a public health ethical analysis, which

Talking About It?, COLUM. NEWS (July 1, 2021), <https://news.columbia.edu/news/what-critical-race-theory-and-why-everyone-talking-about-it-0>.

See Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?* EDUC. WEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05>; Melissa Moschella, *Critical Race Theory, Public Schools and Parental Rights*, HERITAGE FOUND. (Mar. 24, 2022), <https://www.heritage.org/education/commentary/critical-race-theory-public-schools-and-parental-rights>, for perspectives on its role in primary and secondary education.

¹⁴ Will Stancil, *The Radical Supreme Court Decision That America Forgot*, ATLANTIC (May 29, 2018), <https://www.theatlantic.com/education/archive/2018/05/the-radical-supreme-court-decision-that-america-forgot/561410/>.

¹⁵ LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (3d ed., 2016).

¹⁶ Sandro Galea, *The Values That Guide Public Health*, PSYCH. TODAY (Sept. 7, 2022), <https://www.psychologytoday.com/intl/blog/talking-about-health/202209/the-values-that-guide-public-health>.

seeks to balance individual rights with the common good, is useful in order to identify shared values that can support a more coherent approach to parental rights.

I. THE LEGAL ORIGINS OF PARENTAL RIGHTS IN THE UNITED STATES

While a thorough legal history of the development of parental rights in the United States is beyond the scope of this paper, some background on Supreme Court jurisprudence is warranted. Some scholars argue that modern day notions of parental autonomy to control nearly all aspects of children's lives derives from the English common law doctrine of "coverture," which subsumed the rights of wives and children under those of husbands and fathers.¹⁷ American law, in adopting these coverture laws, further propagated the idea of children as the property of their fathers until the age of majority.¹⁸ While marital coverture was formally abolished in the mid-nineteenth century by the Married Women's Property Acts and Earning Statutes, the notion of children deserving state protection did not take root until the Progressive Era of the late nineteenth century.¹⁹

Progressive reformers advanced the state's *parens patriae* ("parent of the country") authority to protect children from abuse and exploitation.²⁰ During this era, compulsory school attendance and child labor laws were enacted and child protection agencies were established in the private and public sectors.²¹ But the Progressive Era invocation of state authority to protect children from parents who might refuse to educate them, put them to work, or mistreat them did not eradicate the notion that parents had a fundamental right to direct their children's upbringing.

Two important Supreme Court cases in the 1920s set constitutional standards for parental rights. In *Meyer v. Nebraska*²² and *Pierce v. Society of Sisters*,²³ the Court found that parents have a fundamental liberty interest under the Due Process Clause of the Fourteenth Amendment — what is referred to as "substantive due process" — to control the upbringing of their children and to direct their education. In *Meyer*, decided in 1923, the court struck down a state law prohibiting the teaching of foreign language in public and private schools.²⁴ The Court found that the law violated the Fourteenth Amendment by not only infringing on the teacher's liberty interest — in that case, to teach a foreign language — but also that of parents

¹⁷ Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 85-86 (2021).

¹⁸ *Id.*

¹⁹ Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1379-80 (2020).

²⁰ *Id.* at 1379-84.

²¹ *Id.* at 1381-82.

²² 262 U.S. 390 (1923).

²³ 268 U.S. 510 (1925).

²⁴ *Meyer*, 262 U.S. at 400-03.

to direct their children's education.²⁵ The Court, however, noted that its ruling was narrow in protecting some parental decision-making with regard to their children's education.²⁶ Notably, the Court upheld the state's power to compel school attendance and to regulate schools, including prescribing their curricula.²⁷

Pierce, decided in 1925, involved the question of whether Oregon's compulsory education law requiring children to attend public schools violated parents' liberty interests under the Due Process Clause.²⁸ The law was challenged by parents of children attending private schools. While acknowledging the state's vital interest in producing an educated populace, the Supreme Court famously asserted: "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."²⁹ As in *Meyer*, the Court upheld the state's authority to compel school attendance, but rejected state regulation that removed all parental decision-making regarding how and where education took place. In both *Meyer* and *Pierce*, the Court sought to balance the state's authority both to protect children's growth and to safeguard the public value of a well-educated populace with the rights and obligations of parents to care for their children. In weighing the importance of the private role of the family against the state's public interests, the Court sided with parents, but with some caveats.

In 1944 in *Prince v. Massachusetts*,³⁰ the Court confronted the question of when a state may invoke its *parens patriae* authority to override parental decision-making if a parent's actions, based on their religious beliefs, may burden a child's development. The court grappled with whether a Jehovah's Witness could require her child to sell religious magazines in violation of a state child labor statute prohibiting children under age eighteen from selling magazines and newspapers.³¹ The Court noted that balancing the substantive due process rights of parents to raise their children as they see fit, the First Amendment right to the free exercise of religion, and the state's interest in child protection "always is delicate," but determined that the purpose of the state's *parens patriae* authority is to ensure that children are not harmed by parental decisions undermining their development and future opportunity.³² The Court held that the state's broad

²⁵ *Id.* at 399-401.

²⁶ *Id.*

²⁷ *Id.* at 402.

²⁸ *Pierce*, 268 U.S. at 530-35.

²⁹ *Id.* at 535.

³⁰ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

³¹ *Id.*

³² *Id.* at 165. The Court goes on to explain: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither

authority to protect children through its child labor laws outweighed the religious freedom interests asserted by parents.³³ Notably, the *Prince* Court viewed the state as protecting not just the child but also the public's interest in producing "well developed men and citizens."³⁴

In the 1972 case *Wisconsin v. Yoder*,³⁵ the Court again confronted the tensions among religious rights, parental rights, and the state's interest in producing "well developed" citizens for a democratic society. Three Amish parents challenged the state's compulsory school law which required all children to attend public schools until the age of sixteen. The parents challenged the law, arguing that sending their children to public school after the eighth grade violated their First Amendment right to the free exercise of religion.³⁶ Balancing the state's *parens patriae* interest in ensuring that all children receive secondary education with the parent's interest to direct the religious upbringing of their children, the Court sided with the parents, finding that their religious and parental rights outweighed compulsory school attendance for Amish children after eighth grade.³⁷

The Court reasoned that the values and activities of secondary schools were "in sharp conflict with the fundamental mode of life mandated by the Amish religion."³⁸ In assessing how far the state's authority extends in compelling school attendance, the Court rejected the state's argument that doing so promotes American democracy because "education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."³⁹ As discussed later, in modern times, the parental right to determine the religious and cultural values of children are increasingly coming into conflict with the view that public education is critical to preserving democracy. Many parental rights advocates cite *Meyer*, *Pierce*, and *Yoder* to argue that state officials are violating parents' religious rights by promoting certain types of school curricula that conflict with their religious values.⁴⁰

supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's wellbeing, the state, as *parens patriae*, may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." *Id.* at 166. (citations omitted).

³³ *Id.* at 168-71.

³⁴ *Id.* at 165.

³⁵ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 217.

³⁹ *Id.* at 221.

⁴⁰ See *infra* Part II.

In 1989 in *DeShaney v. Winnebago County Department of Social Services*, the question of the state's *parens patriae* authority was flipped on its head. Rather than questioning the rights of parents to be free from unnecessary state intrusion, the case rested on the question of a *child's right* to state protection against parental harm.⁴¹ The Court considered whether the county child welfare agency's failure to intervene to remove Joshua DeShaney from his father's custody after well-documented severe physical abuse was a violation of Joshua's right to substantive due process under the Fourteenth Amendment.⁴² In finding no constitutional violation, the Court made clear that the state may intervene to protect children from abuse by parents, but the state has no affirmative obligation to do so. The Due Process Clause, the Court declared, "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."⁴³ While not a parental rights case *per se*, *DeShaney* further deepened the divide between private and public responsibility for child and family well-being by detaching the state's *parens patriae* authority to intervene from its obligation *to act* in support of child well-being. This distinction is foundational to the current debate about the role of state child welfare systems which tend toward punitive interventions against parents rather than supportive services that empower parents.

Decided in 2000, the Court's most recent parental rights case, *Troxel v. Granville*,⁴⁴ focused squarely on the prioritization of parental rights over others who also have interests in a child's well-being. The Court struck down what it viewed as a "breathhtakingly broad" Washington State statute that afforded a court the authority to grant visitation rights to any person if the court deemed it in the child's best interests.⁴⁵ Reaffirming the right of parents to make decisions regarding the "care, custody and control" of their children, the Court declared: "There is a presumption that fit parents act in their children's best interests. . . . Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family."⁴⁶ While the *Troxel* Court's plurality opinion is narrow in striking down the Washington statute, the Court reiterated that parental rights are fundamental and should be accorded heightened protection.⁴⁷

⁴¹ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

⁴² *Id.* Joshua experienced severe abuse by his father ultimately leading to permanent brain damage. Several people, including the father's second wife and emergency room personnel, complained to the agency multiple times and case-workers visited the home and interviewed the father many times, but did nothing.

⁴³ *Id.* at 195.

⁴⁴ *Troxel v. Granville*, 530 U.S. 57 (2000).

⁴⁵ *Id.* at 67.

⁴⁶ *Id.* at 68.

⁴⁷ Citing the court's precedent, the majority declares: "[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the

A. *Considerations in Articulating the Standard of Review for Parental Rights Cases*

As legal scholars have pointed out, the Supreme Court has yet to articulate a coherent standard of review in parental rights cases. The early cases — *Meyer*, *Pierce* and *Prince* — weighed state authority not just to protect children from potential harm but also to advance certain public interests such as children’s development and future opportunity, as well as an educated populace. In *Troxel*, Justice Thomas criticized the plurality for failing to articulate a standard of review, arguing that strict scrutiny is the appropriate standard to apply to cases involving parental rights.⁴⁸ The first consideration arising from application of strict scrutiny to any case falling under the banner of parental rights is the challenge stemming from the diversity of issues that may arise — ranging from “student uniforms in public schools to removal of children from their home.”⁴⁹

A second consideration in applying strict scrutiny to cases involving parental rights is where to draw the line in cases involving the state’s *parens patriae* authority. Advocates of the strict scrutiny standard acknowledge that the state has the power to intervene in cases of serious abuse or neglect.⁵⁰ But current state statutory standards defining abuse and neglect are subject to widely varying interpretations of severity and need for intervention. Additionally, child protection systems afford state actors vast discretion.⁵¹ As a consequence, intervention is significantly more likely in low-income families of color, especially Black and Native American families, based on allegations of neglect.⁵² As discussed later in detail, Black and Native American children are far more likely to be removed from their parents than white children.⁵³ Thus, from an equity perspective,

fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Id.* at 66.

⁴⁸ As discussed *infra*, Justice Thomas’ declaration that parental rights are constitutionally protected warranting strict scrutiny directly contradicts his concurrence in *Dobbs v. Jackson Women’s Health Org.* calling into question the Court’s designation of certain rights as fundamental under substantive due process doctrine. *Id.* at 80.

⁴⁹ Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 131 (2018).

⁵⁰ First Person, *Will Estrada and the Long Roots of Parental Rights*, N.Y. TIMES (June 16, 2022), <https://podcasts.apple.com/us/podcast/will-estrada-and-the-long-roots-of-parental-rights/id1624946521?i=1000566616945>.

⁵¹ Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL’Y REV. 217 (2022).

⁵² Elisa Minoff & Alexandra Citrin, *SYSTEMICALLY NEGLECTED: How Racism Structures Public Systems to Produce Child Neglect*, CENTER FOR THE STUDY OF SOCIAL POLICY (2022), <https://cssp.org/wp-content/uploads/2022/03/Systemically-Neglected-How-Racism-Structures-Public-Systems-to-Produce-Child-Neglect.pdf>.

⁵³ See *infra* Part II.

application of strict scrutiny to cases involving parental rights could provide greater rights for these parents. However, heightened scrutiny would subject public institutions such as public schools to individual or particular subsets of parental interests.

A third quandary in subjecting cases involving parental rights to strict scrutiny is that it would further enshrine the dyadic construction of rights — *i.e.*, state *parens patriae* authority versus parental authority, and private (family) versus public (state) — therefore dismissing the complexity inherent in these relationships. As legal scholar Elizabeth Scott points out, parental rights disputes have been typically deemed “zero-sum, centering on whether the state, in seeking to override parental authority on a particular issue, excessively burdens parental authority in light of the state’s purpose,” without broader considerations, including children’s independent interests.⁵⁴ This zero-sum approach has also obscured broader considerations of the common good. Recent public health controversies illustrate this point: parental decisions about masks, vaccines, and even demands about school curricula have significant consequences for the health and well-being of other children, teachers, families, and the community at large. Indeed, parental rights have multidimensional effects that extend well beyond one parent, one child, and the state; therefore, parental rights are not just private rights — they are also public ones.

II. CURRENT CONTROVERSIES

While the jurisprudence of parental rights continues to evolve in the courts, state statutes have long defined the balance between parental rights and the state’s interest in protecting the health, welfare, and safety of children. In particular, state and local laws regulate parental decision-making regarding children’s healthcare and determine educational standards for children attending public schools. States also administer large bureaucratic child welfare agencies that wield enormous power to intervene when parents are alleged to have threatened their children’s safety. I summarize existing state laws in these three areas — health, education, and child welfare — and discuss current controversies involving clashes between parents and state and local governments. I then analyze these controversies through the lens of three questions: (1) what standard of review should courts use to determine when state interests may override parental rights?; (2) whose parental rights are protected from unjust state intervention and how do government agencies and courts ensure that parental rights are treated equitably across all groups?; and (3) when should parental rights yield to public interests and the common good?

A. Healthcare Decision-making

Overall, state laws afford parents broad discretion to make decisions regarding their children’s healthcare; but there are limits. State legislatures

⁵⁴ Huntington & Scott, *supra* note 19, at 1383-84.

and courts have grappled with parental decision-making authority in cases in which parents refused to consent to lifesaving treatment or treatment that could prevent serious harm to a child's health — most often in cases involving parents' religious objections to treatment. On the one hand, starting in the 1970s, many state legislatures passed laws protecting parents from charges of medical neglect if they refused medical treatment for their children due to religious beliefs.⁵⁵ On the other hand, state courts have stepped in under *parens patriae* authority when parental decisions risked death or serious injury to a child. Courts, for example, have ordered medical care such as blood transfusions for children of Jehovah's Witnesses when parents objected.⁵⁶

A separate consideration for state legislatures and state courts is: Under what circumstances may minors have an autonomy interest in making their own medical decisions without parental consent? Once again, the default in state laws is to require parental consent for medical treatment of minors.⁵⁷ But states have carved out specific instances in which they grant minors — usually adolescents, sometimes as young as twelve — autonomy to make independent medical decisions. All states have laws that allow minors to seek care without parental consent for sensitive issues related to sexual health, contraception, and substance use disorders.⁵⁸ State courts may also deem an older adolescent a “mature minor” for purposes of making other independent medical decisions.⁵⁹

But even the consensus around allowing some minors to seek reproductive health care, including contraception, without parental consent seems to be eroding. In December 2022, a federal district court in Texas struck down a U.S. Department of Health and Human Services rule interpreting Title X, the federal program that funds confidential reproductive health care and family planning services for low-income people.⁶⁰ The rule formalized longstanding policy and practice in Title X clinics that prohibits providers from requiring parental consent for minors seeking access to contraceptives. In the Texas case, the plaintiff, a father, objected based on his Christian religious views to his three daughters having access to birth control and “other family planning services, that facilitate sexual

⁵⁵ These laws were often passed in response to advocacy by Christian Scientists, some of whom object to many types of medical treatment. See Huntington & Scott, *supra* note 19, at 1395-36.

⁵⁶ See, e.g., *In re McCauley*, 565 N.E.2d 411 (Mass. 1991); *In re Guardianship of L.S. & H.S.*, 87 P.3d 521 (Nev. 2004).

⁵⁷ See B. Jessie Hill, *Medical Decision Making by and on Behalf of Adolescents: Reconsidering First Principles*, 15 J. HEALTH CARE L. & POL'Y 37 (2012).

⁵⁸ Ross D. Silverman et al., *Vaccination over Parental Objection — Should Adolescents Be Allowed to Consent to Receiving Vaccines?*, 38 NEW ENGLAND J. MED. 104, 104 (2019).

⁵⁹ *Id.*

⁶⁰ 42 C.F.R. § 59.10(b).

promiscuity and pre-marital sex” without parental consent.⁶¹ Citing *Troxel*, Texas District Court Judge Matthew Kacsmayk⁶² held that the Title X prohibition on requiring parental consent violates the substantive due process rights of parents to direct their children’s upbringing.⁶³ Previously, courts had rejected parental rights claims in cases involving publicly funded family planning clinics’ provision of contraception to minors without parental consent.⁶⁴

Abortion has long been cordoned off in the debate about whether minors may consent to reproductive health care. In *Planned Parenthood of Southeast Pennsylvania v. Casey* (1992), the Supreme Court found that parental notification and consent laws do not create an undue burden on access to abortion services.⁶⁵ As of March 1, 2023, thirty-six states had parental consent laws,⁶⁶ with thirty-five of these states providing an alternative to parental consent or notification through judicial bypass — allowing a minor to plead to a court that she is sufficiently mature to make the abortion decision. This process allows courts to intervene in cases in which requiring parental consent may jeopardize a minor’s safety or is not possible because parents are unreachable. Because judges have wide discretion to determine whether a minor may make the decision to have an abortion, they may inject their own bias about abortion.⁶⁷

Since *Dobbs v. Jackson Women’s Health Organization* was decided in June 2022,⁶⁸ some states have further restricted access to abortion for minors, without parental consent. Fearing that minors may leave the state for

⁶¹ *Deandra v. Becerra*, 645 F. Supp. 3d 600, 608 (N.D. Tex. 2022).

⁶² Judge Kacsmayk is a former deputy counsel for the First Liberty Institute, a conservative religious rights organization. See Mimi Swartz, *How a Right-wing Law Firm Shaped the Judge Who Will Rule on the Abortion Pill*, TEX. MONTHLY (Mar. 14, 2023), <https://www.texasmonthly.com/news-politics/first-liberty-abortion-pill-lawsuit/>.

⁶³ *Id.*

⁶⁴ See, e.g., *Anspach ex rel. Anspach v. City of Phila., Dep’t of Pub. Health*, 503 F.3d 256 (3d Cir. 2007); *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980).

⁶⁵ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

⁶⁶ *Parental Involvement in Minors’ Abortions*, GUTTMACHER INST. (Sept. 1, 2023), <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions>.

⁶⁷ In some judicial bypass cases, parental rights are not even at stake. A recent case in Florida highlights the irony inherent in judicial bypass. A Florida state judge deemed a parentless 16-year-old not mature enough to choose to have an abortion despite her own acknowledgement that “she is not ready for the emotional, physical, or financial responsibility of raising a child.” Rachel Treisman, *Can a Teen be too Immature to Choose Abortion? This Court Case Shows the Complexities*, NPR (Aug. 18, 2022), <https://www.npr.org/2022/08/18/1118114568/florida-court-teen-abortion-immature-parental-consent>.

⁶⁸ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

an abortion now that it is banned, Idaho passed a law in April 2023 deeming it “abortion trafficking,” a felony, for an adult to transport a minor to another state to obtain an abortion or to aid the minor in a medication abortion without the knowledge and consent of the parent.⁶⁹

Historically, state laws governing parental rights in medical decision-making, though far from uniform, have tended to balance parents’ interests with minors’ health and safety and larger public health concerns. But as parental rights and public health are increasingly politicized, some state legislatures are prioritizing parental rights over other competing interests.

B. Public Health

In no context is the friction between parental decision-making about a child’s healthcare and the common good more apparent than the current controversies over vaccination requirements. The COVID-19 pandemic escalated the tensions between state authority to require certain vaccinations for school entry and parental discretion. While all states require vaccination against common childhood diseases for school attendance, laws vary in several respects: which vaccines are required, what exemptions are allowed, and the process by which those exemptions are assessed and granted.⁷⁰ For example, Rhode Island requires that all children begin receiving the HPV vaccine by seventh grade and have received three doses for entry into ninth grade.⁷¹ All states allow medical exemptions from vaccines, more than half allow religious exemptions, and seventeen allow philosophical exemptions.⁷² But following the backlash to the COVID vaccination, a recent “surge of bills in state legislatures are taking aim at routine vaccinations for children.”⁷³ These laws seek to reverse vaccine mandates for school attendance or participation in school activities, expand exemptions, or restrict where vaccines may be administered.⁷⁴

Parents’ objections to vaccines often do not fit neatly into these exemption categories. Legal scholars Lois Weithorn and Dorit Rubenstein Reiss detail the types of concerns expressed by parents:

⁶⁹ *Idaho Governor Signs ‘Abortion Trafficking’ Bill into Law*, ASSOCIATED PRESS (Apr. 6, 2023), <https://apnews.com/article/idaho-abortion-minors-criminalization-b8fb4b6feb9b520d63f75432a1219588>

⁷⁰ *State School Immunization Requirements and Vaccine Exemption Laws*, CDC (Feb. 2022), <https://www.cdc.gov/phlp/docs/school-vaccinations.pdf>.

⁷¹ *HPV (Human Papillomavirus) Vaccine*, R.I. DEP’T HEALTH, <https://health.ri.gov/immunization/about/hpv/#:~:text=Rhode%20Island%20students%20are%20required,into%20its%20school%20immunization%20regulations> (last visited Oct. 8, 2023).

⁷² *State School Immunization Requirements and Vaccine Exemption Laws*, *supra* note 70, at 10.

⁷³ Mike Barna, *Proposals take aim at school vaccination requirements: Public health endangered in states*, THE NATION’S HEALTH (July 2022), <https://www.thenationshealth.org/content/52/5/1.3>.

⁷⁴ *Id.*

[T]he reasons include (generally ill-founded) safety concerns, misconceptions about preventable diseases that underestimate disease risks and the efficacy of vaccines, distrust of doctors and government (shading, in the extreme, into conspiracy theories), preferences for alternative medicine as well as "natural" approaches to health without scientific foundation, and a view that governmental vaccination policies reflect unjustified governmental intrusion that violate their civil rights. In addition, occasionally religious beliefs underlie parental objections. While some parents' objections to vaccines may be grounded in sincere religious views, courts and commentators have concluded that such assertions at times mask the parents' true reasons for their anti-vaccine positions.⁷⁵

Working within the framework of exemptions for medical, religious, and philosophical reasons, school officials and state legislatures have contended with how to determine what evidence should be required for exemption applications. Often, parents are simply required to submit a notarized statement that vaccinations conflict with their religious or philosophical beliefs.⁷⁶

Whether mature minors should have the autonomy to pursue vaccination without parental consent is not a new question, but it has been even more newsworthy and controversial during the COVID-19 pandemic. Responding to growing vaccine hesitancy in 2019, the American Medical Association's (AMA) House of Delegates voted to encourage state legislatures to adopt policies allowing minors to consent to vaccination when

⁷⁵ Lois A. Weithorn & Dorit Rubinstein Reiss, *Providing Adolescents with Independent and Confidential Access to Childhood Vaccines: A Proposal to Lower the Age of Consent*, 52 CONN. L. REV. 772, 786 (2020). The rhetoric of Democratic presidential candidate Robert F. Kennedy Jr.'s anti-vaccination organization, Children's Health Defense, which purports to represent the science on the dangers of vaccines, exemplifies the types of arguments cited by Weithorn and Rubenstein Reiss. The Children's Health Defense website describes its advocacy goals this way: "Preserving parental rights, bodily autonomy and ending medical mandates is an ongoing battle that will take perseverance, consistent action and the weaponization of truthful, science-based information. Regulatory authorities and mainstream media continue their campaign of coercion, pharmaceutical narratives and fear tactics, and sadly, many people fall prey to it. The devastation and adverse effects on our children and future generations cannot be fully measured despite the significantly growing number of deaths and injuries." *Advocacy Hub*, CHILD.'S. HEALTH DEF., <https://childrenshealthdefense.org/community-forum/advocacy-hub/> (last visited Oct. 17, 2023).

⁷⁶ *State School Immunization Requirements and Vaccine Exemption Laws*, *supra* note 70, at 10.

their parents failed to do so.⁷⁷ In 2021, Washington, D.C. enacted the first law in the country allowing minors ages eleven and older to provide informed consent for vaccines recommended by the Advisory Committee on Immunization Practices.⁷⁸ The AMA, along with the American Academy of Pediatrics (AAP) and the Society of Adolescent Health and Medicine (SAHM), submitted an amicus brief defending the D.C. law, arguing that physicians are well-equipped to assess if a minor is sufficiently mature to consent to vaccination.⁷⁹ Permitting minors of vaccine-hesitant parents to consent to COVID-19 vaccinations has profound implications for preventing the spread of the virus to friends, family, and the public.⁸⁰

The D.C. law and similar proposed laws in other states like California have become a major flashpoint for the parental rights movement. In March 2022 in *Booth v. Bowser*, a federal district court judge issued a preliminary injunction blocking D.C.'s law after Children's Health Defense and the Parental Rights Foundation filed suit on behalf of four D.C. parents arguing that the law subverts parental authority and infringes on their constitutional right to the free exercise of religion.⁸¹ The court directly called out D.C. officials for creating a "pressure-cooker environment, enticing and psychologically manipulating [children] to defy their parents and take vaccinations against their parents' wills."⁸² Rather than appealing the preliminary injunction, the District of Columbia settled the case, agreeing not to enforce the law.⁸³

⁷⁷ *AMA Adopts New Policies on First Day of Voting at 2019 Annual Meeting*, AM. MED. ASSOC. (June 10, 2019), <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-first-day-voting-2019-annual-meeting>.

⁷⁸ D.C. Law 23-193. *Minor Consent for Vaccinations Amendment Act of 2020*; see also Robert S. Olick, Y. Tony Yang & Jana Shaw, *Adolescent Consent to COVID-19 Vaccination: The Need for Law Reform*, 137 PUB. HEALTH REPS. 163 (2022).

⁷⁹ *AMA Adopts New Policies on First Day of Voting at 2019 Annual Meeting*, *supra* note 77. Legal and medical ethicists noted that the authority to consent to the COVID-19 vaccine when parents refused was especially important to adolescent health and well-being because it gave them the opportunity to participate in school and social activities that had been off-limits during the early period of the pandemic. The right to access the vaccine "responds to the widespread pain and anguish of loss, remote learning, separation from friends and peers, and the associated challenges many adolescents have experienced in mental health and psychosocial development." Olick, Yang & Shaw, *supra* note 78, at 165.

⁸⁰ Max A. Seibold, Camille M. Moore & Jamie L. Everman et al., *Risk factors for SARS-CoV-2 infection and transmission in households with children with asthma and allergy: A prospective surveillance study*, 150 J. ALLERGY & CLINICAL IMMUNOLOGY 302 (2022).

⁸¹ *Booth v. Bowser*, 597 F.Supp.3d 1, 8 (D.D.C. 2022).

⁸² *Id.* at 11.

⁸³ *DC Minor Consent Case, Update: November 2022*, PARENTAL RTS. FOUND., <https://parentalrightsfoundation.org/dc-minor-consent-case/> (last visited Oct. 17, 2023).

An additional point of contention during the COVID-19 pandemic has been school mask mandates. A foundational public health measure to reduce the spread of COVID-19 quickly became a parents' rights issue. Some parents feared that being forced to wear a mask would harm their children's comfort, development, and mental health.⁸⁴ Others simply objected to what they viewed as inappropriate government overreach, setting in motion significant backlash.⁸⁵ Politicians quickly made mask mandates a parents' rights issue. For example, Florida Governor Ron DeSantis issued an Executive Order titled "Ensuring Parents' Freedom to Choose – Masks in Schools," forbidding school districts to require masks.⁸⁶ Evidence-based discussions about the relative harms and benefits of school masking requirements to protect against the spread of COVID-19 were rarely part of the discourse.⁸⁷ Local school boards that ignored the order and imposed mask mandates during the height of the pandemic were harassed, threatened, and attacked by parents carrying signs saying, among other slogans, "[m]y child, my choice."⁸⁸

The voices of parents of immunocompromised children and children with chronic illnesses or disabilities were largely drowned out by the public anti-government rhetoric. However, some parents found success in arguing that state laws barring school mask mandates violate the Americans with Disabilities Act⁸⁹ and Section 504 of the Rehabilitation Act,⁹⁰ which requires that schools make reasonable accommodations for children to en-

⁸⁴ Dan Goldberg, *POLITICO-Harvard poll: 40 percent of parents believe masks at school harmed their kids*, POLITICO (Mar. 25, 2022), <https://www.politico.com/news/2022/03/25/parents-masks-harm-kids-poll-00020250>.

⁸⁵ This backlash drove the formation of new organizations focused on promotion of parental rights. For example, Moms For Liberty was founded in 2021 to fight "for the survival of America by unifying, educating and empowering parents to defend their parental rights at all levels of government." Homepage, <https://www.momsforliberty.org/about/>.

⁸⁶ Executive Order 21-175 (Ensuring Parents' Freedom to Choose – Masks in Schools), July 30, 2021, <https://www.flgov.com/2021/07/30/governor-desantis-issues-an-executive-order-ensuring-parents-freedom-to-choose/>.

⁸⁷ Recent assessment of the evidence suggests that masking in school poses little, if any, harm to children's development and mental health. See Amy McKeever, *Do masks really harm kids? Here's what the science says*, NAT'L GEOGRAPHIC (Feb. 17, 2022), <https://www.nationalgeographic.com/science/article/do-masks-really-harm-kids-heres-what-the-science-says#:~:text=Some%20parents%20and%20teachers%20have,t%20back%20up%20those%20worries>.

⁸⁸ Julia Carrie Wong, *Masks off: how US school boards became 'perfect battlegrounds' for vicious culture wars*, GUARDIAN (Aug. 24, 2021), <https://www.theguardian.com/us-news/2021/aug/24/mask-mandates-covid-school-boards>.

⁸⁹ 42 U.S.C. § 12101 (1990).

⁹⁰ 28 CFR § 35.104.

able them the equal opportunity to participate in public education. In *Seaman v. Commonwealth of Virginia*, parents of children with disabilities sued the commonwealth, challenging Virginia Governor Glenn Younkin's Executive Order and Senate Bill 739 barring schools from requiring masks during the height of the COVID-19 pandemic.⁹¹ The case was settled in December 2022 with the Virginia Department of Education agreeing that parents of children with disabilities could seek community masking as a reasonable accommodation.⁹²

The growing parental rights movement has found sympathetic ears from both conservative judges eager to build upon the Supreme Court's growing expansion of religious rights and in Republican state and federal lawmakers eager to leverage Trump-era theories about government overreach, demonizing state officials as seeking to control and indoctrinate children. But the clash between parental consent and state authority in the healthcare and public health contexts also represents the complexities of legal line drawing. They implicate many important questions about how evidence bears on decision-making in public health and about broader values — when are adolescents mature enough to make health care decisions? What is the appropriate balance between individual parental rights to govern their children's upbringing (including their healthcare) and state *parens patriae* authority to protect individual child health and safety and that of the general public?

These are complex questions. Perhaps it is no accident that the Supreme Court has been hesitant to settle upon a single standard of review for determining when laws that restrict parental rights are constitutional. Despite Justice Thomas' aggressive assertion in *Troxel* that strict scrutiny is the appropriate standard of review,⁹³ it is not clear how courts would assess the government's compelling interest to intervene against its *parens patriae* authority. Politicians who are employing the rhetoric of parents' rights are neither willing to consider evidence of the costs and benefits of an individual parent's ability to deny their children vaccines or determine that their children need not abide by public health safety precautions like mask wearing, nor do they seem concerned with applying a consistent analysis in determining the extent and limits of parental rights across different contexts.

Like the growing tensions over healthcare decision-making and public health, the conflict between parents' rights to direct their children's education and state authority to set educational standards was brewing long before the COVID-19 pandemic. But by unleashing challenges to school vaccine and mask mandates, the pandemic provided a useful narrative for

⁹¹ *Parents and State Settle Lawsuit on School Masking Accommodations for Students with Disabilities*, ACLU OF VA. (Dec. 12, 2022), <https://www.acluva.org/en/press-releases/parents-and-state-settle-lawsuit-school-masking-accommodations-students-disabilities>.

⁹² *Id.*

⁹³ See *supra* note 48 and accompanying text.

those concerned about excessive state intervention into parental authority, accelerating a simmering parental rights movement. During the height of the pandemic in 2020, political polarization over the Black Lives Matter Movement in the wake of the murder of George Floyd provided an additional spark for politicians to ignite parental grievance by framing diversity, equity, and inclusion as another example of school officials usurping parents' decision-making authority.

C. Public Education

Parental “choice” in education has a long and sordid history in relation to racism and racial segregation. Some of this history is important to this discussion. One of the primary ways that school districts sought to accommodate the desegregation mandate set by the Supreme Court in 1954 in *Brown v. Board of Education*⁹⁴ was to promote “freedom of choice,” which enabled white parents to remove their children from schools that were integrating.⁹⁵ In 1968 in *Green v. New Kent County*, the Supreme Court confronted the reality that, despite its decision in *Brown*, little had changed in the makeup of public schools — not just in the deep South but also in the states such as Virginia.⁹⁶ Most schools in 1968 were still deeply segregated and desegregation plans were failing to budge intransigence by white parents.⁹⁷ While Black parents had voluntarily sent their children to predominantly white schools, white parents had refused to send their children to predominantly Black schools.⁹⁸ The Warren Court described continuing school segregation as a “dual system” which helped to maintain a racial caste system in the United States. In *Green*, the Court disposed with the voluntary desegregation scheme of parental choice, instead requiring that school districts address underlying factors, such as housing segregation, in order to further desegregate schools.⁹⁹ In response, some cities such as Boston, which had de facto, if not de jure segregation, instituted “busing.” Finding that the Boston School Committee had intentionally resisted integration of the city’s schools, the Federal District Court developed a remedial plan ordering the city to bus white children to predominantly Black schools and Black children to predominantly white schools. The busing

⁹⁴ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁹⁵ Nancy Maclean, ‘School choice’ developed as a way to protect segregation and abolish public schools, WASH. POST (Sept. 27, 2021), <https://www.washingtonpost.com/outlook/2021/09/27/school-choice-developed-way-protect-segregation-abolish-public-schools/>.

⁹⁶ *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

⁹⁷ *Id.*

⁹⁸ *Id.* at 441.

⁹⁹ *Id.* at 442.

scheme was met with resistance and violence by white parents and teenagers.¹⁰⁰

Backlash to desegregation policies from white politicians and parents was robust, with allegations that such plans constituted “reverse discrimination.”¹⁰¹ Civil rights leaders continued to call for laws and policies that would address the root causes of school segregation. But by 1971, a newly configured Burger Court rejected structural solutions to school segregation. In *Swann v. Charlotte-Mecklenburg*,¹⁰² the Court imposed a vague “reasonableness” standard to school district plans for desegregation, making it easy for them to avoid any systemic solutions.¹⁰³ Later court cases further unraveled the goals of *Brown* and *Green*.¹⁰⁴ Aggrieved white parents found an ally in President Richard Nixon, who appealed to the “Silent Majority” who, he argued, wanted local control of their schools.¹⁰⁵

Why is this history of school desegregation important to the current parental rights movement? It represents not only the enormous political power afforded to white parents who seek to assert their will in state and local education policy, but it also demonstrates how politicians have long sought to exploit white parental grievance for political gain. As discussed below, politicians like Florida Governor Ron DeSantis and Texas Governor Greg Abbott are currently employing a similar playbook, not only giving voice to, but also inciting white parents’ frustrations with racial and ethnic diversification of schools and school curricula. Furthermore, in the current parental rights movement, advocates routinely cite *Meyer* and *Pierce* to argue that parents have the legal right to dictate “community values” that should drive curricula and educational policies.¹⁰⁶ Specifically, they assert that school curricula with which they disagree “usurp[s] our rights as parents and undermin[es] our family roles within our community.”¹⁰⁷

¹⁰⁰ Will Stancil, *The Radical Supreme Court Decision That America Forgot*, ATLANTIC (May 29, 2018), <https://www.theatlantic.com/education/archive/2018/05/the-radical-supreme-court-decision-that-america-forgot/561410/>.

¹⁰¹ Nikole Hannah-Jones, *It Was Never About Busing*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/opinion/sunday/it-was-never-about-busing.html>.

¹⁰² *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

¹⁰³ *Id.*

¹⁰⁴ See e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding that the school district’s use of race as part of a “tie breaker” plan to balance enrollments across schools violated the Equal Protection Clause).

¹⁰⁵ Gareth Davies, *Richard Nixon and the Desegregation of Southern Schools*, 19 J. POL. HIST. 19, 367 (2007).

¹⁰⁶ Mark Walsh, *What Do ‘Parents’ Rights’ Mean Legally for Schools, Anyway?*, EDUC. WK. (Oct. 20, 2022), <https://www.edweek.org/policy-politics/what-do-parents-rights-mean-legally-for-schools-anyway/2022/10>.

¹⁰⁷ *About, PARENTS’ RTS. IN EDUC.*, <https://parentsrighsineducation.com/about/> (last visited Nov. 19, 2023).

The current parental rights in education agenda has its roots in the homeschooling movement. The Home School Legal Defense Association (HSLDA) was initiated in the early 1980s by two lawyers to support parents wishing to challenge compulsory school laws.¹⁰⁸ The HSLDA represented parents seeking to teach their children at home rather than send them to public schools — often to shield their children from societal values that conflicted with their religious views.¹⁰⁹ The HSLDA pursued both legal action and legislation to legalize homeschooling in states across the country.¹¹⁰ All states now allow for homeschooling, with varying degrees of state regulation.¹¹¹ Out of the HSLDA sprung another parents' rights organization — parentalrights.org, a 501(c)(4) nonprofit political action organization. [Parentalrights.org](https://parentalrights.org) stands for the principle that “[c]hildren need to be raised and represented by parents who love them, not by disconnected government officials. When it comes to raising children, parents are better than the government.”¹¹² The organization advocates for a parental rights amendment to the federal Constitution and promotes federal and state legislation protecting parental rights. On its website, the organization suggests that parental rights are “slipping away” and that “more and more, parental rights are not being upheld in courts.”¹¹³

Over time, federal appeals courts have interpreted the extent of parental rights in education inconsistently. For example, in 2005 in *Fields v. Palmdale School District*,¹¹⁴ the Ninth Circuit upheld the school district's administration of a survey to elementary school children about their experiences of trauma. The survey included some questions about sexuality. Although parents were asked for consent, they were not apprised of the content of the survey. The court rejected the plaintiff parents' claim that their rights were violated under *Meyer* and *Pierce*, saying that parents have the right to choose where to educate their children, but not to determine the type of instruction they will receive.¹¹⁵ In contrast, that same year, in *C.N. v. Ridgewood Board of Education*, the Third Circuit Court of Appeals disagreed that parents rights were limited to solely determining *where* their children should be educated. Instead, the court held that parents' rights may override school interests when school actions “strike at the heart of parental decision-making.”¹¹⁶

¹⁰⁸ *History of HSLDA*, HOME SCH. LEGAL DEF. ASS'N. (Sept. 18, 2019), <https://hsllda.org/post/history-of-hsllda>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights To Education & Protection*, 62 ARIZ. L. REV. 1 (2020).

¹¹² *Protecting Children by Empowering Parents*, PARENTALRIGHTS.ORG, <https://parentalrights.org/about/> (last visited Nov. 18, 2023).

¹¹³ *Id.*

¹¹⁴ *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005).

¹¹⁵ *Id.* at 1206.

¹¹⁶ *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184-85 (3d Cir. 2005).

More recently, in 2021 during the COVID pandemic, parents challenged California's school reopening framework which suspended in-person instruction in both public and private schools.¹¹⁷ In *Brach v. Newsome*,¹¹⁸ parents argued that the framework violated their constitutional right to direct their children's education. Specifically, they asserted that the state's policy infringed not only on their right to select the school their children would attend, but also to choose the mode of instruction their children would receive.¹¹⁹ The Ninth Circuit held that while public school parents did not have a constitutional right to determine that the state provide a particular manner of education, the state had violated rights of private school parents to determine the manner of instruction by which their children would be educated.¹²⁰ The court deemed these private school parental rights to direct children's education fundamental and said that strict scrutiny should apply, holding that the state must demonstrate a compelling interest, which it had not shown.¹²¹ However, upon appeal from Governor Gavin Newsome's administration, the court agreed to rehear the case en banc. The en banc panel vacated the judgment, saying that the issue was moot since the administration's order had been rescinded.¹²²

Clearly, courts continue to struggle with where to draw lines in determining the extent of parental rights in the education context: the right to choose where to educate children, the right to determine how instruction is delivered, and the right to dictate what children may learn or may be exposed to in school. Recent politicization of parental rights in education are centering on the latter: how much control should parents have over the content their children learn or are exposed to in public schools? This question raises important sub-questions, some old and some new: What is the purpose of public education? If community standards dictate school curricula, who determines what those standards are? Which parents' rights matter?

In the past two years there has been a flurry of state legislation focused on giving parents the right to be informed about what is being taught in their children's schools and to have a say in decisions about curricula. In 2022, FutureEd, a think tank at Georgetown's McCourt School of Public Policy, tracked eighty-five bills in twenty-six states expanding parental

¹¹⁷ California Governor Newsom proclaimed a state of emergency under California's Emergency Services Act. Proclamation of a State of Emergency (Mar. 4, 2020) (citing Cal. Gov't Code § 8625). The governor then issued an executive order under the State of Emergency ordering "to stay home or at their place of residence." Schools were closed.

¹¹⁸ *Brach v. Newsom*, 6 F.4th 904 (9th Cir. 2021).

¹¹⁹ *Id.* at 910.

¹²⁰ *Id.* at 925.

¹²¹ *Id.* at 931.

¹²² *Id.*, *rev'd en banc*, 38 F.4th 6, 9 (9th Cir. 2022).

rights in schools.¹²³ These bills expand upon existing laws governing parental rights in public education or create new “parental bill of rights” legislation. In 2022, six laws had been enacted.¹²⁴ Many of these laws focus on transparency about selection of curricula by school officials and parents’ right to challenge curricular choices.

State legislation that has caught the greatest attention of the media are those banning the teaching of particular topics, most prominently laws forbidding the teaching of Critical Race Theory (CRT), known as anti-CRT laws,¹²⁵ and laws regulating discussion of gender diversity. Since January 2021, more than 300 “gag order” bills have been proposed in forty-seven states, with thirty bills passing.¹²⁶ These laws have been couched in the rhetoric of parental rights. The Florida anti-CRT law was promoted by Governor Ron DeSantis as “vindicating” parental authority: “We won’t allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other. We also have a responsibility to ensure that parents have the means to vindicate their rights when it comes to enforcing state standards.”¹²⁷ Florida’s law banning teachers from discussing sexual orientation of gender identity — the so-called “Don’t Say Gay” law — was passed under the moniker, “Parental Rights in Education.”¹²⁸

Using parental rights as the mantle upon which to ban certain race and gender-related educational content is problematic for at least two reasons. First, it excludes the parental rights, perspectives, and desires of Black, Indigenous, and LGBTQ+ parents and parents of LGBTQ+ children who may welcome this content. This exclusion in turn, privileges the parental rights of some parents over others. Many parents contend day to day with

¹²³ Bella DiMarco, *Legislative Tracker: 2022 Parent-Rights Bills in the States*, FUTUREED (June 6, 2022), <https://www.future-ed.org/legislative-tracker-parent-rights-bills-in-the-states/>.

¹²⁴ *Id.*

¹²⁵ Critical Race Theory is a legal theory that was developed in the early 1980s that interrogates the ways in which racism is embedded laws and policies. There is no evidence that CRT is explicitly taught in primary and secondary education as it is an academic discipline, not a curriculum. Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WK. (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05>.

¹²⁶ Pen America 100, *Educational Censorship*, <https://pen.org/issue/educational-censorship/> (last visited Oct. 7, 2023).

¹²⁷ See News Release, Ron DeSantis, Governor of Florida, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/>.

¹²⁸ Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022, 2:33PM), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis>.

the consequences of the erasure of their and their children's family history and experiences from school curricula and classroom discussion. Erasure of the experiences of racial and ethnic minority and LGBTQ+ parents and children can have serious effects for mental health.¹²⁹ Second, it is far from clear that the majority of parents even support banning certain types of curricula. A 2022 CBS poll found that eight in ten Americans disagree with banning content that criticizes American history or discusses subjects like slavery and race.¹³⁰ Instead, it appears politicians are inciting the parental rights rhetoric to rile up their grievances among their primarily white Republican base.¹³¹

The politicization of parental rights in education, like that in public health, has obstructed reasonable deliberation about what the *Pierce* Court recognized as the “delicate” balance between the state's interest in children's well-being and the public interest and the rights of parents to raise their children without excessive state intervention. In safeguarding the state's interests in public health and education of its citizens, the *Pierce* Court's admonition holds particularly true in current debates:

A democratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.”¹³²

Perhaps more than any other American institution, schools play a critical role in protecting democratic principles that value diversity in all its forms. Despite all the absolutist parental rights rhetoric perpetuated by elected officials for political gain, a careful weighing of public interests and individual (parental) rights is foundational to democracy. If community standards should dictate what public education should look like in a multiracial, multiethnic, and multifaith democracy, individual parental rights must be thoughtfully balanced against the interests of the wider community. The current parental rights movement, egged on by self-interested politicians, represents a minority — predominantly white Christian

¹²⁹ Melyssa Cristino, Sophia Ordonez, Bintou Diarra & Robert Rosales, *Don't Ignore the Effects of 'Don't Say Gay' and 'Stop WOKE' on LGBT Students of Color*, LAS VEGAS SUN (Aug. 17, 2022, 2:00 AM), <https://lasvegas-sun.com/news/2022/aug/17/dont-ignore-the-effects-of-dont-say-gay-and-stop-w/>.

¹³⁰ Fred Backus & Anthony Salvanto, *Big Majorities Reject Book Bans*, CBS NEWS (Feb. 22, 2022 6:00PM), <https://www.cbsnews.com/news/book-bans-opinion-poll-2022-02-22/>.

¹³¹ William H. Frey, *Anti-CRT Bills are Aimed to Incite the GOP Base—Not Parents*, BROOKINGS (Mar. 30, 2022), <https://www.brookings.edu/research/anti-crt-bills-are-aimed-to-incite-the-gop-base-not-parents/>.

¹³² *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

— perspective on community standards, excluding the values, perspectives, and interests of other groups. The constituency and focus of the current parental rights movement not only silences the voices of a wide range of parents who may not agree with its approach, it also ignores real concerns about government overreach into marginalized families.

D. *Parens Patriae and Racial and LGBTQ+ Injustice*

While some parents' rights advocates and politicians promote constitutional amendments and legislation in the arenas of health care decision-making and public education, they have largely ignored racial inequities resulting from the application of state *parens patriae* authority in the child welfare system.

Starting in the Progressive Era, concerns about child abuse and neglect led to the establishment of child protection organizations.¹³³ The U.S. Children's Bureau was created in 1912 as the lead federal agency devoted to child protection.¹³⁴ Through grants authorized under the Social Security Act of 1935, states began developing government child welfare agencies.¹³⁵ In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA), requiring states to establish procedures for abuse and neglect reporting and investigations.¹³⁶ CAPTA requires that states implement procedures for mandating that certain individuals report suspected child abuse or neglect to state authorities.¹³⁷ These mandatory reporters typically include physicians, nurses, social workers, teachers, and child-care providers.¹³⁸ Some states, however, require that all persons report suspected cases of child abuse or neglect. Each year roughly 650,000 children are reported to child protection agencies for maltreatment. The majority of these reports are for neglect: seventy-five percent, compared to sixteen percent for physical abuse and nine percent for sexual abuse.¹³⁹

¹³³ Historians point to the New York Society for the Prevention of Cruelty to Children (NYSPCC), initiated in 1875, as the first such organization and as leading the way for other cities to develop child protection organizations. Christina Paddock, Debra Waters-Roman & Jessica Borja, *Child Welfare: History and Policy*, 2022 ENCYC. SOC. WORK.

¹³⁴ *Id.*

¹³⁵ See generally Patricia P. Martin & David A. Weaver, *Social Security: A Program and Policy History*, 66 SOC. SEC. BULL. (2005).

¹³⁶ The Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a (2019).

¹³⁷ 42 U.S.C. § 5106a(b)(2)(B)(i) (2019).

¹³⁸ U.S. DEP'T HEALTH & HUM. SERVICES, ADMIN. ON CHILD., YOUTH AND FAMILIES, CHILDREN'S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND Neglect (2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf>.

¹³⁹ *National Statistics on Child Abuse*, NAT'L CHILD.'S ALL., <https://www.nationalchildrensalliance.org/media-room/national-statistics-on-child-abuse/> (last visited Oct. 7, 2023).

State laws defining “child maltreatment” often use broad language providing wide discretion to state actors to determine the presence or lack thereof of such maltreatment. For example, Rhode Island law defines neglect as when a parent or other person responsible for a child:

Fails to provide the child with a minimum degree of care or proper supervision or guardianship because of his or her unwillingness or inability to do so by situations or conditions such as, but not limited to: social problems, mental incompetency, or the use of a drug, drugs, or alcohol to the extent that the parent or other person responsible for the child's welfare loses his or her ability or is unwilling to properly care for the child.¹⁴⁰

Child Protective Services (CPS) has broad authority to determine if there is credible evidence supporting the allegation of abuse or neglect and what further action will be taken, including removing the child from parental care. As described earlier, the Supreme Court held in *DeShaney* that while the state has enormous power to remove a child from parental custody, it has no duty to do so. While the Supreme Court also held that parental rights may not be permanently terminated without presentation of clear and convincing evidence by CPS,¹⁴¹ indigent parents have no constitutional right to counsel at termination of parental rights hearings.¹⁴²

Each year, 250,000 children are removed from their parents’ care by CPS agencies.¹⁴³ It is estimated that roughly the same number of parents are pressured by CPS to give up custody through informal arrangements without court involvement.¹⁴⁴ Racial, ethnic, and socioeconomic disparities in the child welfare system are rampant.¹⁴⁵ Because most CPS investigations involve allegations of neglect,¹⁴⁶ families living in poverty — especially Black and Native American families — are most subject to state intervention. Approximately three times as many Black and Native American children and twice as many Latinx children live in poverty as do white and Asian children, thus making Black, Native American, and Latinx children most susceptible to state intervention.¹⁴⁷

¹⁴⁰ Chapter 11: Abused and Neglected Children, R.I. GEN. LAWS § 40-11-2(v) (2018).

¹⁴¹ *Santosky v. Kramer*, 455 U.S. 745 (1982).

¹⁴² *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18 (1981).

¹⁴³ ROBERTS, *supra* note 12, at 28.

¹⁴⁴ Josh Gupta Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 857 (2020).

¹⁴⁵ See Frank Edwards, Sara Wakefield, Kieran Healy & Christopher Wildeman, *Contact with Child Protective Services is pervasive but unequally distributed by race and ethnicity in large US counties*, 118 PNAS 1 (2021).

¹⁴⁶ *National Statistics on Child Abuse*, *supra* note 139.

¹⁴⁷ The Annie E. Casey Foundation, *Children in Poverty by Race and Ethnicity in the United States*, <https://datacenter.aecf.org/data/tables/44-children-in->

Consider these even more detailed statistics: A 2017 study found that fifty-three percent of Black children experience a CPS investigation in their lifetimes. One in ten Black children will spend time in foster care by age 18.¹⁴⁸ Native American families are four times as likely to have children placed in foster care as white families.¹⁴⁹ Black and Native American parents are more than two times as likely as white parents to have their parental rights terminated.¹⁵⁰ And above all, the United States removes more children from parental custody than any other country.¹⁵¹ Legal scholar Dorothy Roberts compares the American child welfare system to its mass incarceration system, calling it a “foster-industrial complex — and, like the prison industrial complex, it’s a multibillion-dollar government apparatus that regulates millions of vulnerable families.”¹⁵²

The controversies and racial disparities in child welfare policy and practice beg the question: Whose parental rights matter? One answer, asserted by legal scholar Elizabeth Bartholet and others, is that the child welfare system is simply doing its job to protect children from harm, and Black and Native American children are simply more in danger of maltreatment.¹⁵³ But given the profound racial, ethnic, and socioeconomic disparities in the system and the vast discretion provided to CPS workers to interpret what constitutes “neglect,” disparities cannot be divorced from the social, political, and historical contexts in which CPS functions. The long and troubling history of removing Native American children from their parents and tribes to place them in boarding schools, for example, cannot be swept under the rug in assessing current state intrusion into Native American families.¹⁵⁴ Nor can the history of oppression suffered by Black families across United States history — the removal of Black children during slavery, the legacy of legalized segregation driving economic deprivation and inequality, and the tendency to blame Black parents for continuing systemic and structural inequities, including poverty.¹⁵⁵

poverty-by-race-and-ethnicity#de-tailed/1/any/false/2048,1729,37,871,870,573,869,36,868,867/10,11,9,12,1,185,13/324,323.

¹⁴⁸ ROBERTS, *supra* note 12, at 29.

¹⁴⁹ National Indian Child Welfare Association, *Disproportionality in Child Welfare*, <https://www.nicwa.org/wp-content/uploads/2019/10/2019-AIAN-Disproportionality-in-Child-Welfare-FINAL.pdf>.

¹⁵⁰ ROBERTS, *supra* note 12, at 29.

¹⁵¹ *Id.*

¹⁵² *Id.* at 32.

¹⁵³ See, e.g., Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009).

¹⁵⁴ Roxanna Asgarian, *How a white evangelical family could dismantle adoption protections for Native children*, VOX (Feb. 20, 2020), <https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care>.

¹⁵⁵ ROBERTS, *supra* note 12, at 97.

Why have advocates and politicians championing parental rights largely been silent on the role of the child welfare system in usurping parental authority? One answer is that they believe that low-income, Black and Native American parents are bad parents who deserve to have their parental rights terminated. Notably, the parentalrights.org website does include a reference to the disproportionate number of Black children in foster care and cites racial bias as the cause.¹⁵⁶ But few politicians heralding parental rights have focused on the issue of child welfare system overreach.

Indeed, the rights of white parents are often pitted against the rights of Black and Native American parents in child welfare cases. Emblematic of this conflict was the highly publicized case, *Haaland v. Brackeen*.¹⁵⁷ The case tested whether the Indian Child Welfare Act (ICWA), which provides a preference for Native American families in adoptive placements in order to preserve tribal identity, violated Article I of the Constitution and the Tenth Amendment by the federal government usurping the authority of state courts to make child welfare decisions and whether such actions were race-based discrimination under the Equal Protection Clause.¹⁵⁸ In a 7-2 decision, the Supreme Court held that ICWA is consistent with Congress's Article I authority and rejected the plaintiffs' — three couples seeking to adopt Native American children and the State of Texas — Tenth Amendment anticommandeering challenge.¹⁵⁹ The Court also held that the plaintiffs did not have standing to bring their Equal Protection claim.¹⁶⁰

In addition to raising important questions about tribal sovereignty under ICWA, *Brackeen* implicated fundamental questions about who is deemed to be a good parent or even an adequate parent. In asking the court to allow the Brackeens to adopt the child rather than place her with an aunt, the Brackeens' lawyers highlighted the fact that the adoption would protect the child from the poverty on the reservation.¹⁶¹ While *Brackeen* was not explicitly a parental rights case, it signified some of the issues inherent in state decision-making within the child welfare context: When

¹⁵⁶ *Racial Discrimination in Child Welfare*, PARENTALRIGHTS.ORG (Mar. 25, 2022), <https://parentalrights.org/racial-discrimination-in-child-welfare/>.

¹⁵⁷ *Haaland v. Brackeen*, 599 U.S. ___, 143 S. Ct. 1609 (2023).

¹⁵⁸ *Id.* at 1626.

¹⁵⁹ *Id.* at 1631-38.

¹⁶⁰ *Id.* at 1640.

¹⁶¹ The Brackeens are a white evangelical couple with two biological children who have fostered two Native children. They successfully adopted one of their foster children and when seeking to adopt his sister, were confronted by a challenge from the child's relatives under ICWA. They claimed that they wished to adopt the child because they believed it was their religious duty. Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html>.

should the history of oppression be considered as a factor in parental/family rights? Is poverty equated with bad parenting/childrearing? What values underlie the state's determination of the child's best interests?

The questions of whose parental rights matter and who determines a child's best interests — parents or the state — has also been on full display with Texas Governor Greg Abbott's directive to the Department of Family and Protective Services (DFPS) "to investigate the parents of a child who is subjected to . . . abusive gender-transitioning procedures, and on other state agencies to investigate licensed facilities where such procedures may occur."¹⁶² Abbott claims that it is the job of DFPS to protect vulnerable children from inappropriate parental decision-making that causes them harm. Once again, through its child welfare system, the state has wide discretion in defining "harm." Major medical associations, including mental health specialists, support gender affirming care as being in the best interests of transgender youth.¹⁶³ Indeed, many suggest that it saves lives.¹⁶⁴ In May 2022, the Texas Supreme Court declined to issue a statewide injunction against the order, allowing DFPS investigations to continue.¹⁶⁵

The Abbott directive highlights a fundamental inconsistency in the current political rhetoric surrounding parental rights. Abbott has been at the forefront of championing parental rights in decision-making about education. In January 2022, he proposed an amendment to the Texas Constitution to solidify parental rights, saying that "parents will be restored to their rightful place as the preeminent decision-maker for their children."¹⁶⁶ Legal scholars point out that the proposed amendment does little to expand parental rights in education beyond what existing law provides.¹⁶⁷ Nevertheless, politicization of parental rights thus far has been a winning strategy for Abbott.¹⁶⁸ But the failure to recognize the hypocrisy of pro-

¹⁶² Governor Gregg Abbott, *Letter to Jaime Masters, Commissioner of Texas Department of Family and Protective Services* (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf>.

¹⁶³ *Medical Association Statements in Support of Health Care for Transgender People and Youth*, GLAAD (June 21, 2023), <https://www.glaad.org/blog/medical-association-statements-supporting-trans-youth-healthcare-and-against-discriminatory>.

¹⁶⁴ See, e.g., Karen M. Matouk & Melina Wald, *Gender-affirming Care Saves Lives*, COLUMBIA UNIV. DEP'T OF PSYCHIATRY (Mar. 30, 2022), <https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives>.

¹⁶⁵ Writ of Mandamus, *In re Greg Abbott in His Official Capacity as Governor of the State of Texas* (No. 22-0229), 2022, <https://www.txcourts.gov/media/1454197/220229.pdf>.

¹⁶⁶ Brian Lopez, *Gov. Greg Abbott taps into parent anger to fuel reelection campaign*, TEX. TRIB. (Jan. 26, 2022), <https://www.texastribune.org/2022/01/26/greg-abbott-parental-bill-of-rights/>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

moting some parents' rights to control school curriculum while simultaneously using state power to strip some parents' rights to make healthcare decisions for their LGBTQ+ children seems to be lost on Abbott and his supporters. Employing the child welfare system to police some parents who are viewed, based on their status, as pathological and blameworthy while advocating near absolute rights for other parents to dictate school curricula underscores the fundamental contradictions of the current parental rights movement.

III. THE FUTURE OF PARENTAL RIGHTS IN THE COURTS — IS THERE A COHERENT CONSTITUTIONAL THEORY OF PARENTAL RIGHTS?

The inconsistencies in political rhetoric and state policy surrounding parental rights are mirrored in the recent jurisprudence of the conservative majority of the Supreme Court. Court's recent decisions provide conflicting clues about how it might analyze the fundamental nature of parental rights under the Constitution should such a case make its way through the system. The Court has been increasingly skeptical of government actions that seek to protect public health and other public interests when those actions may infringe on individual rights, especially religious rights.¹⁶⁹

For example, in *Tandon v. Newsom*, the Court struck down California's limits on the number of people from separate households who could gather during the height of the COVID-19 pandemic saying that the rules violated the free exercise rights of the plaintiffs to hold prayer groups in their homes. The Court has also expanded protections for plaintiffs asserting religious rights at the expense of other minority interests, especially those of LGBTQ+ people.¹⁷⁰ In 2018 in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court held that the Colorado Civil Rights Commission violated the Free Exercise Clause because it acted with hostility toward the religious beliefs of a baker who refused to decorate a cake celebrating a same-sex marriage. In 2023, the Court held in favor of a wedding website designer who argued that her First Amendment free speech rights would be violated if she were forced to design a website for a gay couple under the Colorado anti-discrimination statute.¹⁷¹ Based on these decisions, it is easy to imagine this Court privileging the parental rights of those asserting religious rights while also rejecting parental rights arguments from LGBTQ+ parents challenging anti-LGBTQ+ educational curricula or asserting their right to seek gender-affirming care for their transgender children.

Some of the originalists on the Court, particularly Justice Thomas, have also indicated a desire to revisit substantive due process rights. Since *Meyer* and *Pierce* held that parents' rights are grounded in their liberty

¹⁶⁹ See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

¹⁷⁰ *Masterpiece Cakeshop, Ltd. v. Colorado*. C.R. Comm'n, 138 S. Ct. 1719 (2018).

¹⁷¹ *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

interest under the Fourteenth Amendment Due Process Clause, some on the Court might view these cases as wrongly decided. In striking down *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, Justice Alito was careful to distinguish abortion from other rights that the Court had previously held to be fundamental under substantive due process doctrine.¹⁷² But Justice Thomas' concurring opinion in *Dobbs* directly attacks the very premise of substantive due process doctrine, leaving open the question of which rights — including parental rights — should be constitutionally protected.¹⁷³ At the same time, it was Justice Thomas who demanded that state actions that infringe on parental rights be analyzed under strict scrutiny.¹⁷⁴

After *Dobbs*, some legal commentators argue that there is a “crucial distinction” between a constitutional right to abortion as found in *Roe v. Wade* — which they argue was wrongly decided — and constitutionally protected parental rights found in *Meyer* and *Pierce*. These commentators argue that, unlike the right to abortion, parental rights are “deeply rooted in this nation's history and tradition” and “implicit in the concept of ordered liberty.”¹⁷⁵ But Justice Scalia, an avid originalist, acknowledged in *Troxel* that the Court's embrace of parental rights as constitutionally protected under a theory of substantive due process set the Court on a dangerous track by “embracing this unenumerated right.”¹⁷⁶ This inconsistency would appear to afford the Court's conservative majority the ability to decide when to apply substantive due process doctrine based on the rights that they value — a decision that could depend upon *which* parents were alleging a constitutional violation and the type of violation asserted. Indeed, a flexible standard makes it easy for courts to interpret parental rights based on particular values.

IV. PARENTAL RIGHTS, PUBLIC HEALTH, AND THE COMMON GOOD

A. *Reconceiving Rights*

Courts have historically analyzed parental rights through the guise of individual autonomy and state intervention: individual parental autonomy in directing the health, education, care, and custody of their children; and the state's authority to intervene in a family when parents do not meet their care obligations. The parental rights debate demonstrates the problems with understanding rights as a zero-sum game in which one party wins and the other loses. Feminist legal theorists have long critiqued assumptions about autonomy and individual rights that ignore the significance of

¹⁷² *Dobbs v. Jackson Women's Health Org.*, 597 US ___, 142 S. Ct. 2228, 2242-43 (2022).

¹⁷³ *Id.* at 2301.

¹⁷⁴ See *supra* note 48 and accompanying text.

¹⁷⁵ Michael Toth, *Parental Authority Gets a Boost From Dobbs*, WALL ST. J. (July 27, 2022) (citing *Washington v. Glucksberg*).

¹⁷⁶ *Troxel v. Granville*, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting).

power in relationships.¹⁷⁷ They argue that a relational approach to rights “envisages authority from within structures of power and authority” that calls out social inequities for marginalized groups “whose opportunity to shape their lives in self-determining directions are often meager and inadequate.”¹⁷⁸ In the context of family law, notions of autonomous private rights encompass gender hierarchy as well as historical legal conceptions of women and children as the property of the father.¹⁷⁹

Reconceiving rights as relational not only helps to broaden the conception of human experience and illuminate social inequity, but also helps to envision different kinds of public institutions: “[T]he focus of decisions regarding rights should be on the kind of relationship we want to foster and the different concepts and institutions that will contribute to that end . . . [P]rotected rights would be derived from inquiries into what is necessary to create the relationships needed for a free and democratic society.”¹⁸⁰

The politicization of parental rights comes at the cost of broader considerations — protection of public health, equity, justice, and the common good. As the COVID-19 pandemic has compounded anxiety about government overreach, politicians have seized on that anxiety by pitting parents against public health and government officials charged with representing larger societal interests, such as public education. Meanwhile, extreme far-right resistance to diversity, pluralism, and majority rule has privileged the grievances of predominantly white Christian parents over others and reinforced growing distrust of public institutions.

Conceiving parental rights without a relational perspective has obscured larger questions, such as: What is the role of government institutions in providing the best possible conditions to parent so that *all* children have the opportunity to develop, learn, and participate in an ever more complex and diverse country? Parents and families are fundamental to children’s moral, social, and educational development. But families are not independent organisms; they are part of complex ecosystems. Most children engage with a broad range of people and places: friends, relatives, schools, and communities. As Martin Luther King, Jr. said, “We are caught

¹⁷⁷ Robin West, *Re-Imagining Justice*, 14 YALE J.L. & FEMINISM 333, 344 (2002).

¹⁷⁸ Anne Donchin, *Autonomy and Interdependence: Quandaries in Genetic Decision Making*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 236, 240 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

¹⁷⁹ Katharine Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 476 (1999); ALISON DIDUCK & KATHERINE O’DONOVAN, FEMINIST PERSPECTIVES ON FAMILY LAW (1st ed. 2007).

¹⁸⁰ Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. (1993).

in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”¹⁸¹

Parens patriae recognizes that children are not the property of their parents and that government, as representative of community and societal interests, has a role to play in protecting and promoting children’s health, safety, and development. But when is state intervention warranted to protect children and when does it undermine their interests? How should parental and family interests be balanced with community and societal interests? How can parental rights be conceived of in a network of relationships? The current parental rights debate has not entertained any of these complex questions.

Framing individual parental rights versus state authority as a zero-sum game also erases the state’s obligation to support the health and well-being of *all* children: “Current notions of family privacy construct the allocation of authority between parents and the state as an on-off switch, precluding shared family-state responsibility for furthering children’s interests.”¹⁸² Policing of Black and Native American parents through child welfare systems while failing to address systemic racism, economic inequality, poverty, and discrimination employs state authority for harm, not for promotion of children’s interests or the public good. The state’s authority to intervene must be balanced by its obligation to ensure that families have the resources they need to protect and provide for their children.

B. Public Health Ethics and Parental Rights

As noted earlier, it is hardly surprising that a public health crisis helped spark the latest movement for parental rights. Perhaps at no other time is the inherent tension between individual autonomy and the public interest so stark as during a public health crisis. Public health ethical frameworks, therefore, seek to make transparent competing interests with an understanding that in balancing these interests, there is never one winner and one loser.

The CDC defines the public health decision-making process as an inquiry that “seeks to understand and clarify principles and values which guide public health actions.” It does so by “1) identifying and clarifying the ethical dilemma posed, 2) analyzing it in terms of alternative courses of action and their consequences, and 3) resolving the dilemma by deciding which course of action best incorporates and balances the guiding principles and values.”¹⁸³ While there is not a single, definitive set of val-

¹⁸¹ The version of the letter cited to in this Article is from MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES* 290 (James M. Washington ed., 1986).

¹⁸² Dailey & Rosenbury, *supra* note 17, at 107.

¹⁸³ CDC, *Public Health Ethics*, <https://www.cdc.gov/os/integrity/phethics/index.htm>

ues that guide public health, three are important to this discussion: freedom and autonomy, equity and justice, and pursuit of truth through scientific evidence.¹⁸⁴ Considering questions about the balance between parental rights and state authority through the lens of these three values is useful in moving the discourse beyond political rhetoric, as well as in bringing to light the core issues and tradeoffs that underlie the debate.

1. Freedom and Autonomy

Public health scholar Sandro Galea notes that freedom can mean different things to different people: “For some, freedom is simply the capacity to do what we wish to do, unhindered by all but the most basic restrictions. For others, freedom means being able to live free from preventable hazard and disease, which can mean accepting certain necessary constraints.”¹⁸⁵ Clearly, government — as representative of societal priorities — should be careful to only place constraints on individual freedoms when necessary to promote common interests such as health, safety, and public education that support equity and democracy. But, as discussed above in Part IV Section A, no individual lives in the world autonomously. All human beings are interdependent, especially in the context of public health. An individual’s rights always have implications for others. Parental decisions about whether to vaccinate their children or prioritizing their particular values over diversity in public schools have consequences for other parents and children.

Much of the rhetoric surrounding parental rights has been premised on a notion of freedom that is individualistic: parents having the near absolute right to determine what their individual children will be exposed to inside and outside of the home, without regard for the effects on other children, adults, and the community. This current framing of parental rights obscures many other considerations and values that are necessary for a healthy society: balancing of interests among individuals, the state, and the common good; an understanding of freedom and autonomy as collectively constructed through treating others with empathy and dignity; and supporting democratic institutions that represent multiple interests with the goal of best attaining a collective benefit.

2. Equity and Justice

The values of equity and justice require a probe into how history, power, and unfair advantage shape who has a voice in government and power structures and who does not. Like freedom and autonomy, equity and justice have different meanings. First, they require that when the state infringes on individual rights, it does so equitably — by not imposing a greater burden on some over others based on discrimination or historical

¹⁸⁴ Galea, *supra* note 16.

¹⁸⁵ *Id.*

disadvantage.¹⁸⁶ Second, equity and justice demand that the state use its authority to actively promote equitable distribution of resources.¹⁸⁷ For example, equity necessitates that the state apply its *parens patriae* authority not to police historically marginalized parents while ignoring its obligation to equitably protect and nurture all families.¹⁸⁸ Third, equity and justice require that state officials consider the consequences of all of their actions for marginalized and under-resourced populations and ensure that some parents' rights and interests are not privileged over others. Indeed, all parents have a stake in determining what is best for the collective good and public interest; government institutions should honor and seek to balance the needs and interest of *all* parents and children.

3. Pursuit of Truth through Scientific Evidence

With the politicization of the COVID-19 pandemic, truth has become elusive in the public square. Public health policy depends on weighing of scientific evidence, consideration of risks and benefits, and sometimes decision-making in the absence of full knowledge.¹⁸⁹ Decisions about what is in the public interest have to be informed by the best evidence, "resting as it does on the belief — in this age of subjective "truths" — that objective truth is real and knowable through a process of reasoned inquiry."¹⁹⁰ The politics of parental rights have not only allowed the subjective truths of a minority of people to determine public policy, but they have actively spread false information that further inflames and divides the public. Policies enacted in the name of parental rights have been based on false and misleading information about the safety of vaccinations and the prevalence of Critical Race Theory in elementary school curricula.¹⁹¹ On the other hand, solid evidence from medicine and public health demonstrating the value of gender-affirming care for transgender adolescents has been rejected by policymakers, who otherwise champion parental rights in health care decision-making for their children.¹⁹² Similarly, the data showing decades of widespread disparate treatment of low-income Black and Native American parents in the child welfare system is rarely cited in parents' rights rhetoric.

There will always be disagreement about the meaning of facts and their relevancy to a given policy decision. But the failure of courts and

¹⁸⁶ James C. Thomas et al., *A Code of Ethics for Public Health*, 92 AM. J. PUB. HEALTH 1057 (2002).

¹⁸⁷ James F. Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 J.L., MED. & ETHICS 170 (2002).

¹⁸⁸ See ROBERTS *supra* note 12.

¹⁸⁹ INSTIT. OF MED., NAT'L ACAD. OF SCIS., *Uncertainty and Decision Making: Lessons from Other Public Health Contexts*, in ENVIRONMENTAL DECISIONS IN THE FACE OF UNCERTAINTY 107-39 (2013).

¹⁹⁰ Galea, *supra* note 16.

¹⁹¹ See *supra* notes 70 and 128 and accompanying text.

¹⁹² See *supra* notes 166-168 and accompanying text.

policymakers to engage in rigorous evidence-based debate about how to balance individual interests with the common good reinforces the extreme polarization dividing the country. In the context of parental rights, it has not only exacerbated political polarization, but it has also enshrined the individual rights of some at the expense of productive consideration of other values such as collective freedom and equity.

CONCLUSION

While a budding parents' right movement was taking root long before the COVID-19 pandemic, state and federal politicians have seized on parental rights rhetoric to further stoke political polarization in the United States. Since the Supreme Court held in *Meyer* and *Pierce* that parents have a fundamental liberty interest under the Due Process Clause of the Fourteenth Amendment to control the upbringing of their children and to direct their education, the question of how to balance parental rights with children's and state interests has been debated in various contexts. The Supreme Court's unwillingness to date to apply a specific level of scrutiny to cases involving parental rights and their increasingly inconsistent approach to substantive due process rights leave many questions about how they might approach a case in the future.

One of the current parental rights movement's aims is the passage of a constitutional amendment protecting parental decision-making in health care, education, and the upbringing of children, requiring strict scrutiny. This approach would ignore the complexity of balancing important interests, as well as the complex relationships that exist among parents, children, and the state. On the other hand, context-specific analysis leaves room for biases among government officials and the judiciary in determining *whose* parental rights should be protected. As the current parental rights debate continues in courts, policy, and politics, there needs to be a framework in which to consider the complex questions that arise in this context. Applying a public health ethical analysis helps to make more transparent the fundamental questions and values involved — freedom and autonomy, equity and justice, and the pursuit of evidence-based truth. Employing this type of analysis is critical not only to our justice system, but also to our democracy.
