

COMMENT

PARENTS’ RIGHTS OR PARENTS’ WRONGS?: THE  
POLITICAL WEAPONIZATION OF PARENTAL RIGHTS TO  
CONTROL PUBLIC EDUCATION

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In recent years, state legislatures across the country have introduced “Parents’ Bills of Rights,” codifying the right of parents to direct the upbringing and education of their minor children. Politicians supporting these bills claim that the bills empower parents by putting their existing rights in one place. The fundamental rights of parents are rooted in Supreme Court precedent from nearly a century ago and have been consistently protected by courts. Considering that these rights remain firmly protected, it is not immediately clear why there is a swell of support for the Parents’ Bill of Rights. Additionally, the statutory language leaves many wondering what the Parents’ Bill of Rights means and how it functions.

Parents’ rights advocates claim that these bills are necessary because their rights are under attack in the courts and in the classroom. These advocates further contend that their rights are threatened by those who argue that the wellbeing of children should outweigh the interests of parents. Moreover, the latest swell of support for parents’ rights is rooted in fear that outside forces threaten to harm children through teaching concepts such as Social Emotional Learning and Critical Race Theory. However, the statutory language and its application in court makes clear that existing Parents’ Bills of Rights have not produced the results desired by parents’ rights advocates. Furthermore, it is unlikely that the proposed Parents’ Bills of Rights will expand their rights as intended, as they are limited by the states’ interest in the welfare of the child. Politicians are using these bills as political posturing to garner support from constituents, while keeping statutes vague enough to have little weight in court. Nonetheless, it is likely that this political grandstanding in support of the Parents’ Bills of Rights, based in fearmongering that the state is trying to control children through public education, will further damage public trust to the detriment of schools and children.

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#### INTRODUCTION

In 1925, the Supreme Court declared that the Constitution gives parents the liberty and right “to direct the upbringing and education of children under their control.”<sup>1</sup> Justice Sandra Day O’Connor later described this right as “perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>2</sup> Yet, nearly a century after the Court proclaimed this right, parents’ rights groups now claim that right is threatened. In response, states across the country passed, or are attempting to pass, legislation that codifies the rights of parents to “direct the upbringing, education, and care of their minor children.”<sup>3</sup> What has changed in the last century that would require bolstered protection for this “fundamental liberty interest?”<sup>4</sup>

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1. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

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

3. *See, e.g.*, FLA. STAT. § 1014.02 (2021); ARIZ. REV. STAT. ANN. § 1-602 (2022); GA. CODE ANN. § 20-2-786 (2022). For a list of proposed legislation regarding parents’ rights and their status, see Bella DiMarco, *Legislative Tracker: Parent-Rights Bills in the States*, FUTUREED (June 6, 2022), <https://www.future-ed.org/legislative-tracker-parent-rights-bills-in-the-states> [<https://perma.cc/YC6Q-D5AC>]. As of June 2022, FutureEd identified bills in twenty-six states that sought to expand parents’ rights, particularly pertaining to schools.

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

Florida is one of the states that recently enacted such a bill codifying the rights of parents.<sup>5</sup> On June 29, 2021, Florida Governor Ron DeSantis signed Florida House Bill 241 into law, enacting what has been referred to as the “Parents’ Bill of Rights.”<sup>6</sup> In addition to the rights listed above, the Florida Parents’ Bill of Rights also includes the right to make healthcare decisions for their child, “unless otherwise prohibited by law.”<sup>7</sup> The Parents’ Bill of Rights garnered attention in the press, as concerns from advocacy groups grew about what the statute actually means, in contrast to what elected officials say it means, and its potential consequences for children’s rights.<sup>8</sup>

The quest to protect parents’ rights has gained momentum in recent years. As state legislatures challenge how schools can teach about topics such as race, gender, and sexuality, it seems likely that the parents’ right to direct the education of their child will remain a topic of discussion for both politicians and parents, despite the fact that there has not been a clear decrease of parents’ rights as historically understood. Proponents of the Florida Parents’ Bill of Rights point out that the statute’s language is rooted in 1920s Supreme Court cases and that its purpose is to “bring all parental rights together in a single statute . . . so lay parents can find them.”<sup>9</sup> This presents the question: will the statutes have any practical effect from a legal perspective?

States that have already passed these Parents’ Bills of Rights have not seen an increase in the protection of parents’ rights, particularly through the courts. It is unclear what effect, if any, the Parents’ Bill of Rights has on parents’ rights to direct their child’s upbringing. If this precedent exists, and has remained intact nearly a century later, what is the actual purpose of Parents’ Bill of Rights? And what does it actually

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5. Jacob Ogles, *Parents’ Bill of Rights Signed into Law in Florida*, FLA. POLS. (June 30, 2021), <https://floridapolitics.com/archives/438620-parents-bill-of-rights-signed-into-law-in-florida> [<https://perma.cc/3CQT-2TZU>].

6. Fisher Phillips, Suzanne Bogdan & Ten Stallings, *Controversial Florida Parents’ Bill of Rights Law Takes Effect July 1: What Private Schools Should Know*, JDSUPRA (July 2, 2021), <https://www.jdsupra.com/legalnews/controversial-florida-parents-bill-of-5946687/> [<https://perma.cc/QFH3-DFTN>].

7. FLA. STAT. § 1014.04 (2021).

8. Danielle J. Brown, *A Controversial “Parents’ Bill of Rights”: What Is It? And What Does It Mean for Students and Families?*, FLA. PHX. (May 6, 2021, 5:19 PM), <https://floridaphoenix.com/2021/05/06/a-controversial-parents-bill-of-rights-what-is-it-and-what-does-it-mean-for-students-and-families> [<https://perma.cc/X4BB-EPNN>]; Elizabeth Koh & Emily L. Mahoney, *Parental ‘Bill of Rights’ Raises Concern About Florida LGBTQ Minors*, TAMPA BAY TIMES (April 21, 2019), <https://www.tampabay.com/florida-politics/2019/04/21/parental-bill-of-rights-raises-concern-about-florida-lgbtq-minors> [<https://perma.cc/AGS8-3XMJ>].

9. Ogles, *supra* note 5; see also *The Supreme Court’s Parental Rights Doctrine*, PARENTALRIGHTS.ORG, [https://parentalrights.org/understand\\_the\\_issue/supreme-court/](https://parentalrights.org/understand_the_issue/supreme-court/) [<https://perma.cc/B67B-QVA6>] (last visited Oct. 24, 2022).

accomplish? Or are the statutes simply an attempt to appeal to a base of voters that would not know that they already have these rights?

This Comment argues that the Parents' Bills of Rights serve as tools of political posturing, passed by legislative bodies, and signed by governors to boost support from concerned parents while, in turn, harming members of historically marginalized groups. Proponents of the Parents' Bill of Rights argue that the statutes are necessary because of the increasing support for children's rights in opposition to parental control.<sup>10</sup> Additionally, some parents' rights advocacy groups argue that the Supreme Court has weakened its once strong stance on parents' rights.<sup>11</sup> Other parents are concerned about a public education system they claim has changed and which they can no longer trust.<sup>12</sup> While it is true that state involvement in parental control of their children has increased since the early twentieth century through child labor laws, laws requiring attendance in school, and enforcement from child protection agencies,<sup>13</sup> this Comment will argue that parents' rights, particularly the right to direct their child's education and religious upbringing, remain firmly protected today, as the Supreme Court originally intended. The Supreme Court continues to support parents' rights, as do many state courts. Children's rights and parents' rights can co-exist without eliminating each other.

The latest swell of support for parents' rights goes further than previous movements, as parents advocate for a decrease in state control of education within public schools, substituting the expertise of educators with their own ideas of what education should look like, and what kinds of information all students should be receiving. Parents' rights advocates, by extension, seek to direct not only the education of *their* minor child, but *all* children attending their child's school. This claim lacks precedent, but parents' rights advocates continue to argue it. Politicians, recognizing this support as an opportunity to score points with voters, have grasped onto this movement in campaigns and in the legislature. This political posturing is not innocuous; it has and will continue to result in an increase in animosity and distrust aimed toward public education. Ultimately, the

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10. See Erik M. Zimmerman, *Defending the Parental Right to Direct Education: Meyer and Pierce as Bulwarks Against State Indoctrination*, 17 REGENT U. L. REV. 311, 353 (2005). See generally Christopher J. Klicka & Douglass W. Phillips, *Why Parental Rights Laws Are Necessary*, 55 EDUC. LEADERSHIP 80 (1997).

11. See, e.g., PARENTALRIGHTS.ORG, *supra* note 9.

12. On their website, the Wisconsin Institute for Law and Liberty includes quotes from several parents urging Wisconsin Governor Tony Evers to recognize the Parents' Bill of Rights. Governor Evers later vetoed the bill. *Governor Evers: It's Time to Recognize Parental Rights in Education*, WIS. INST. FOR L. & LIBERTY, <https://will-law.org/governor-evers-its-time-to-recognize-parental-rights-in-education/> [https://perma.cc/8V7G-GEML] (last visited Oct. 30, 2022).

13. ALAN SUSSMAN & MARTIN GUGGENHEIM, *THE RIGHTS OF PARENTS: THE BASIC ACLU GUIDE TO THE RIGHTS OF PARENTS* xiii-iv (Norman Dorsen ed., 1980).

Parents' Bills of Rights are an example of political posturing that will harm children and public education while failing to provide any consequential support to the rights of parents.

## I. FROM THE COURT TO CODIFICATION

This Part begins with an overview of the Supreme Court's decisions that built the foundation for parents' rights. These foundational cases, along with several federal statutes, provided parents' rights advocates with a basis for their claims. Then, this Part discusses opponents of the expansion of parents' rights, who are concerned with the infringement of the rights of children. This Part concludes by explaining how the battle between parents' rights advocates and proponents of children's rights has led to a growing call for the codification of parents' rights at both the federal and state level.

### A. *The Development of Constitutional Parents' Rights*

The U.S. Constitution does not mention the rights of parents; nonetheless, the concept of constitutionally protected parents' rights has evolved greatly since the founding.<sup>14</sup> In the nineteenth century, particularly after World War I, the movement for "common schools" gained momentum, garnering support for a tax-funded public education that would instill republican, American values in children.<sup>15</sup> Common schools became standardized, government-run education systems.<sup>16</sup> Parents who previously had a great deal of control over their child's education and upbringing soon found themselves transferring some of this power to the government, as states selected curricula and required attendance.<sup>17</sup> Some parents, who believed that it was their right to determine how their child was raised, fought to protect their rights as parents.<sup>18</sup> Prior to Supreme Court validation of these rights in the 1920s, parents relied on common law to resolve their disputes with schools.<sup>19</sup> Parents often found support from courts against local school boards in instances when they opposed required classes that would violate their religious beliefs.<sup>20</sup> However, parents found difficulty when challenging

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14. *Id.* at 1.

15. Todd A. DeMitchell & Joseph J. Onosko, *A Parent's Child and the State's Future Citizen: Judicial and Legislative Responses to the Tension over the Right to Direct an Education*, 22 S. CAL. INTERDISC. L.J. 591, 600, 602 (2013).

16. *Id.* at 601.

17. *Id.* at 602.

18. See Ralph D. Mawdsley, *The Changing Face of Parents' Rights*, 2003 BYU EDUC. & L.J. 165, 166.

19. *Id.* at 165-66.

20. See *id.* at 167.

state-legislated rules, particularly as more states enacted compulsory attendance laws.<sup>21</sup>

In 1923, parents found the support they sought from the Supreme Court. In *Meyer v. Nebraska*,<sup>22</sup> the Court first declared that parents had the right to direct the education of their child.<sup>23</sup> In *Meyer*, a teacher was charged under a Nebraskan law criminalizing teaching “any subject to any person in any language other than the English language” when he taught reading in German at the request of a child’s parents.<sup>24</sup> The law was rooted in a xenophobic fear of “foreigners” who “educate their children in the language of their native land,” which would “naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.”<sup>25</sup> While the Supreme Court was sympathetic to the Nebraskan legislature’s concerns, the Court determined that this statute as construed “infringes [on] the liberty guaranteed . . . by the Fourteenth Amendment.”<sup>26</sup> The Fourteenth Amendment’s liberty clause, the Court held, protected the parents’ right to direct their child’s education, including the language in which their child is taught.<sup>27</sup>

Two years later, the Court affirmed this declaration in *Pierce v. Society of Sisters*.<sup>28</sup> In *Pierce*, the Court reiterated its holding from *Meyer* as it struck down an Oregon statute that would require all parents to send their children to a public school.<sup>29</sup> The Court emphasized the right of parents to direct the upbringing and education of their children in stating, “[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.”<sup>30</sup> In this opinion, the Court made a clear, defined statement on the rights of parents.<sup>31</sup> The holding in *Pierce* emphasized that the parents’ right and duty to care for their child meant that parents had the right to choose nonpublic schools that they believed were in their child’s best interest.<sup>32</sup>

In 1944, the Supreme Court again affirmed the parents’ right to direct the upbringing of their children—this time, specifically for religious purposes—in *Prince v. Massachusetts*.<sup>33</sup> In *Prince*, Sarah

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21. *Id.* at 168.

22. 262 U.S. 390 (1923).

23. *Id.* at 400.

24. *Id.* at 396–97.

25. *Id.* at 397–98.

26. *Id.* at 399, 401.

27. Mawdsley, *supra* note 18, at 168.

28. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

29. *Id.* at 530, 532.

30. *Id.* at 535.

31. Mawdsley, *supra* note 18, at 170.

32. *Id.* at 173.

33. 321 U.S. 158 (1944).

Prince, a Jehovah's Witness, brought her niece, of whom she had custody, with her to sell religious magazines on the street.<sup>34</sup> Charged with violating state child labor laws, Prince argued that such a charge was a violation of her and her niece's freedom of religion, as this act was central to their faith.<sup>35</sup> Moreover, Prince argued that her choice to bring her niece with her was further supported by "a claim of parental right as secured by the due process clause" of the Fourteenth Amendment.<sup>36</sup> The Court wrestled between two dueling interests: the parent's right to the "authority in her own household and in the rearing of her children" and the "interests of society to protect the welfare of children," along with the state's authority to enforce this protection.<sup>37</sup> Parents and families are "not beyond regulation in the public interest," the Court pointed out, as a "democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens."<sup>38</sup> Ultimately, however, parents' rights prevailed as the Court proclaimed: "[i]t 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 supply nor hinder."<sup>39</sup> In other words, parents have the primary right to direct their child's upbringing, particularly in terms of religion.

Two decades later, the Supreme Court simultaneously protected the rights declared in the previous cases while limiting the scope of these claims, confusing some state courts.<sup>40</sup> In *Wisconsin v. Yoder*,<sup>41</sup> parents from the Old Order Amish community were convicted of violating a compulsory attendance law by not sending their children to high school.<sup>42</sup> The parents argued that the application of this law violated their First and Fourteenth Amendment rights, as they believed that "children's attendance at high school was contrary to the Amish religion and way of life."<sup>43</sup> High school, they contended, would "expose [their children] to the danger of the censure of the church community" and "endanger their own salvation."<sup>44</sup> The Court determined that despite the law's facial neutrality, this application of the law "unduly burdens the free exercise of religion."<sup>45</sup> Building on the precedent in *Meyer* and *Pierce*, this ruling

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34. *Id.* at 159–60.

35. *Id.* at 160–64.

36. *Id.* at 164.

37. *Id.* at 165.

38. *Id.* at 166, 168.

39. *Id.* at 166.

40. Mawdsley, *supra* note 18, at 172.

41. 406 U.S. 205 (1972).

42. *Id.* at 207–08.

43. *Id.* at 208–09.

44. *Id.* at 209.

45. *Id.* at 220.

strengthened parents' right to direct their child's education under both the Fourteenth Amendment's Liberty Clause and the First Amendment's Free Exercise Clause.<sup>46</sup> However, this may have restricted parents' abilities to bring claims, as it focused on protection against statutes and regulations that violated or threatened religious beliefs.<sup>47</sup>

In a series of cases following *Yoder*, the Supreme Court continued to uphold the right of parents to direct the care, custody, and control of their children.<sup>48</sup> At the same time, Congress passed legislation that expanded and protected the rights of parents.<sup>49</sup> In 1974, Congress passed the Family Educational Rights and Privacy Act (FERPA), which gave parents the right to access their minor child's education records as well as the right to control disclosure of those records.<sup>50</sup> The following year, Congress enacted the Education for All Handicapped Children Act, now titled the Individuals with Disabilities Education Act (IDEA).<sup>51</sup> IDEA strengthened the role of parents of children with disabilities to direct their child's education, requiring schools to include parents as part of the team that develops and approves their child's education and support plan.<sup>52</sup> These federal laws, in tandem with Supreme Court precedent, established a solid foundation for the right of parents to direct the upbringing and education of their children.

### *B. Children as Individuals: The Development of Children's Rights*

The Supreme Court precedent set in *Meyer*, *Pierce*, and *Yoder* has not escaped criticism.<sup>53</sup> One source of the criticism of parents' rights comes from those who advocate for the right of the child.<sup>54</sup> Parents' rights and children's rights often coincide, as demonstrated by the role of parents as advocates for their child under IDEA; however, there are situations when those interests diverge.<sup>55</sup> For example, when a child suffers from abuse at the hands of their parent, should that parent

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46. Mawdsley, *supra* note 18, at 172.

47. *Id.*

48. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (listing subsequent cases in which the Court recognized this "fundamental right") (first citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); then citing *Parham v. J. R.*, 442 U.S. 584, 602 (1979); and then citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

49. Mawdsley, *supra* note 18, at 175–77.

50. *Id.* at 175–76; 20 U.S.C. § 1232g.

51. Mawdsley, *supra* note 18, at 175; Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 797 (codified as amended at 20 U.S.C. § 1400).

52. Mawdsley, *supra* note 18, at 176.

53. Zimmerman, *supra* note 10, at 329–30.

54. *Id.* at 330.

55. Mawdsley, *supra* note 18, at 179



maintain the right to direct their child's upbringing? As children age and their values and beliefs form, should the parent still direct their education? And what if the parents' wants for their child differ from what the state has determined will create the "healthy, well-rounded growth of young people?"<sup>56</sup>

James G. Dwyer, a professor of family law and a children's rights advocate, has argued that children's rights, rather than parents', should "be the legal basis for protecting the interests of children," because our current legal culture does not support the right to "control the life of another person."<sup>57</sup> Parents' rights advocates admonish this "radical" conclusion, arguing that "these scholars actually seek to transfer child-rearing authority from parents to the State."<sup>58</sup> They argue that prioritizing children's rights over parents' rights would hurt the American family.<sup>59</sup>

Parents' rights advocates were further enraged by the Supreme Court's plurality opinion in *Troxel v. Granville*.<sup>60</sup> The central issue in *Troxel* was whether a Washington law that allowed nonparents to be granted visitation rights of children violated parents' liberty interest in the care, custody, and control of their children.<sup>61</sup> Justice O'Connor, writing for the plurality, relied on the extensive precedent described in Section I.A above to declare that parents have the right to limit visitation of their children with nonparents as part of their right to make decisions concerning the care of their children.<sup>62</sup> Justice Souter, concurring, wrote that while the precedent had not "set out exact meters and bounds to the protected interest of the parent," it was clear that it would "be a sham" if precedent did not protect the parents' right to determine who could have visitation rights with their child.<sup>63</sup>

It would seem that this case supported the parents' rights found in precedent; however, parents' rights advocates argue that this case, as Justice Thomas pointed out in his concurrence, does not use the same level of "strict scrutiny" used in cases which consider other "infringements of fundamental rights."<sup>64</sup> This lack of strict scrutiny, coupled with the fact that it was a plurality opinion, has caused parents'

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56. *Prince v. Massachusetts*, 321 U.S. 158, 165–66, 168 (1944).

57. James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1373–74 (1994).

58. Zimmerman, *supra* note 10, at 312.

59. *Id.* at 339.

60. See Charles Snow, *Everything You Need to Know About Parents' Rights in Public Schools*, ALL. DEFENDING FREEDOM, <https://adflegal.org/article/everything-you-need-know-about-parents-rights-public-schools> [https://perma.cc/LM7B-DURZ] (Oct. 28, 2022).

61. *Id.* at 64–65.

62. *Id.* at 66.

63. *Id.* at 78 (Souter, J. concurring).

64. *Id.* at 80 (Thomas, J. concurring).

rights advocates to proclaim that the Supreme Court has “opened the door for individual judges and States to apply their own rules to parental rights.”<sup>65</sup> For this reason, they argue, states need to pass Parents’ Bills of Rights to protect and defend the right of parents to direct the education and upbringing of their child.<sup>66</sup>

Moreover, parents’ rights advocates found that the right to direct the education of their child has its limits, particularly in public schools. When parents challenge decisions made by local education authorities, courts have repeatedly found that the right to direct the upbringing of their child does not mean that parents have a right to direct how a public school teaches their child.<sup>67</sup> For example, in *Fields v. Palmdale School District*,<sup>68</sup> the Ninth Circuit held that a school district did not violate parents’ right to substantive due process under the Fourteenth Amendment “by administering a psychological assessment questionnaire containing several questions that referred to subjects of a sexual nature.”<sup>69</sup> The Ninth Circuit recognized the rights protected under due process in *Meyer* and *Pierce*, but emphasized that this right does not include the “right to restrict the flow of information in the public schools.”<sup>70</sup> Parents’ rights do not entitle individual parents to dictate what information public schools make available to their children, as that is a “matter for the school boards, not the courts, to decide.”<sup>71</sup>

The Sixth Circuit made a similar ruling in *Blau v. Fort Thomas Public School District*,<sup>72</sup> holding that a parent did not have a right to exempt his daughter from the school’s strict dress code.<sup>73</sup> The Sixth Circuit found that the school board’s decision to enact a dress code to “focus attention upon learning and away from distractions” was an issue of public education “committed to the control of state and local authorities.”<sup>74</sup> In making this decision, the Sixth Circuit cited decisions from circuits across the country, all finding that parents’ right to direct

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65. PARENTALRIGHTS.ORG, *supra* note 9. ParentalRights.org also argues that Justice Scalia’s dissent disregards parents’ rights entirely. See *infra* Part II.

66. PARENTALRIGHTS.ORG, *supra* note 9.

67. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005).

68. 447 F.3d 1187 (9th Cir. 2006) (per curiam).

69. *Id.* at 1188–91.

70. *Id.* at 1189–90.

71. *Id.* at 1190; see also Stephen D. Lott, *Culture War in the Classroom: A Legal Analysis of the 2010 Texas Curriculum Controversy*, 13 TEX. TECH. ADMIN. L.J. 101, 108 (2011).

72. 401 F.3d 381 (6th Cir. 2005).

73. *Id.* at 396.

74. *Id.* at 385, 395–96.

the upbringing of their child is limited by the control given to public education authorities.<sup>75</sup>

Even when the Third Circuit found that school officials *did* violate parents' rights to direct the upbringing of their child, the court indicated that parents' authority "should yield only where the school's action is tied to a compelling interest."<sup>76</sup> In protecting the rights of parents, the Third Circuit reminded public schools that "'*in loco parentis*' does not mean 'displace parents.'"<sup>77</sup> Considering these cases together, parental rights in public schools, though respected, are not boundless; when state and local education authorities make decisions within their expertise and purview that are tied to a compelling educational interest, parents do not have a fundamental right to prevent them from doing so. Parents, as demonstrated in *Pierce* and *Yoder*, have a "fundamental right to decide *whether* to send their child to a public school," but "they do not have a fundamental right generally to direct *how* a public school teaches their child."<sup>78</sup>

### *C. Emergence of Parents' Bills of Rights*

Parents' rights advocates, believing that their rights are not adequately protected by the courts—and that the rights they do have do not go far enough—have turned to legislatures at both the federal and state level. At the federal level, Republicans introduced Senate Bill 984, Parental Rights and Responsibilities Act of 1995, which defined the "right of a parent to direct the upbringing of a child" as "directing or providing for the education of the child; . . . making a health care decision for the child . . . ; disciplining the child, including reasonable corporal discipline; . . . and directing or providing for the religious teaching of the child," with no further clarification of what those rights entail.<sup>79</sup> Under the bill, no state, local, or federal government could

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75. *Id.* at 395–96 (first citing *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001); then citing *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003); then citing *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998); then citing *Herndon v. Chapel Hill–Carrboro City Bd. of Educ.*, 89 F.3d 174, 176 (4th Cir. 1996); then citing *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996); then citing *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995); and then citing *Kite v. Marshal*, 661 F.2d 1027, 1029 (5th Cir. 1981)).

76. *Gruenke v. Seip*, 225 F.3d 290, 304–05 (3d Cir. 2000).

77. *Id.* at 307. Black's Law Dictionary defines "*in loco parentis*" as "relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent," adding that the "Supreme Court has recognized that during the school day, a teacher or administrator may act *in loco parentis*." *In loco parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

78. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005).

79. DeMitchell & Onosko, *supra* note 15, at 623–24; S. 984, 104th Cong. § 3(4)(A) (1995).

infringe on these rights, unless the government could prove that the measure survived strict scrutiny.<sup>80</sup> Senate Bill 984, with its vague and uncertain language, failed.<sup>81</sup> Similar efforts at the state level met the same fate. Two states—Colorado and New Hampshire—attempted to codify parental rights but both attempts failed.<sup>82</sup>

The fight for parents’ rights obviously did not die in the nineties. In 2009, Republican Representative Peter Hoekstra, concerned by a United Nations treaty that would protect the rights of children, introduced a proposal for a new constitutional amendment protecting parents’ rights.<sup>83</sup> The resolution for the amendment stated that the “liberty of parents to direct the upbringing and education of their children is a fundamental right.”<sup>84</sup> Although the resolution had 141 cosponsors, the resolution has not moved since being referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties in April of 2009.<sup>85</sup>

Since the amendment has been stalled, several interest groups and nonprofits continued to advocate for parents’ rights—a fight that has only increased in volume in the past decade. One such political action organization is ParentalRights.org, which advocates for legislation that “will protect families by preserving parental rights.”<sup>86</sup> According to their website, eleven states have already passed statutes that “define and protect” parents’ rights, the earliest being Michigan in 1996.<sup>87</sup> Additionally, sixty percent of states, according to the organization’s data, have either statutes or precedent that protect parents’ rights by requiring courts to apply “strict scrutiny.”<sup>88</sup> Of those states, only Oklahoma and Arizona call their statute the “Parents’ Bill of Rights.”<sup>89</sup> The Arizona Supreme Court has cited this statute twice: once in a visitation dispute

80. DeMitchell & Onosko, *supra* note 15, at 623–25; S. 984 § 5.

81. DeMitchell & Onosko, *supra* note 15, at 626.

82. *Id.*

83. David Crary, *Kids’-Rights Pact Finds Critics in Congress*, SF GATE (Apr. 30, 2009), <https://www.sfgate.com/news/article/Kids-rights-pact-finds-critics-in-Congress-3243539.php> [<https://perma.cc/7E9J-PD7L>].

84. H.R.J. Res. 42, 111th Cong. § 1 (2009).

85. *H.J.Res.42 - Proposing an Amendment to the Constitution of the United States Relating to Parental Rights.*, CONGRESS, <https://www.congress.gov/bill/111th-congress/house-joint-resolution/42/all-actions?> (last visited Oct. 31, 2022).

86. *Protecting Children by Empowering Parents*, PARENTALRIGHTS.ORG, <https://parentalrights.org/about> [<https://perma.cc/633X-MQDV>] (last visited Oct. 31, 2022).

87. *Protecting Parental Rights at the State Level*, PARENTALRIGHTS.ORG, <https://parentalrights.org/states> [<https://perma.cc/3VXC-VXWC>] (last visited Oct. 31, 2022). Their list does not include Florida. The Michigan statute states, “it is [a] natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children.” However, the right to direct education is limited to participation in sexual education. MICH. COMP. LAWS § 380.10 (2022).

88. PARENTALRIGHTS.ORG, *supra* note 9.

89. OKLA. STAT. tit. 25, § 2001 (2022); ARIZ. REV. STAT. § 1-602 (2022).

between parents,<sup>90</sup> and once in a case involving a motion to suppress the blood draw of a minor.<sup>91</sup> In both cases, the Arizona Court recognized the rights of parents but determined that the statute was not relevant to that situation.<sup>92</sup> Notably, neither case involved education or religious upbringing. Oklahoma's Supreme Court has not addressed the Parents' Bill of Rights yet; however, the Western District of Oklahoma determined that the Parents' Bill of Rights does not "imply a private cause of action."<sup>93</sup> Florida has not yet determined its application.<sup>94</sup>

At the federal level, the fight for parental rights re-emerged in January 2019 as Republican Representative Jim Banks introduced a similar—but more expansive—constitutional amendment as the 2009 attempt.<sup>95</sup> With nineteen cosponsors, this proposed amendment not only protects the "fundamental right" to direct the upbringing of their children, but clarifies that this right "includes the right to choose, as an alternative to public education, private religious, or home schools, and the right to make reasonable choices with public schools for one's child."<sup>96</sup> As with the 2009 proposal, the 2019 edition remains in subcommittee.<sup>97</sup>

## II. PARENTS' RIGHT TO DIRECT WHAT EXACTLY?

Parents' rights advocates are growing in number and volume as more parents join the chorus, voicing concerns about state interference with their right to raise their children. In order to better understand where these concerns originate, this Part will first analyze recent Supreme Court decisions, particularly concerns from parents' rights groups about *Troxel*. Next, this Part will look to how parents' opposition to children's rights advocates, including their argument that the state should have any role in upbringing children, has further motivated parents' rights movements. This opposition, along with growing concerns about outside forces impacting the upbringing of minor children, thereby resulting in an "indoctrination" of their children, has prompted many parents to advocate for parents' rights.

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90. *In re Marriage of Friedman*, 418 P.3d 884, 892–93 (Ariz. 2018).

91. *State v. Butler*, 302 P.3d 609 (Ariz. 2013).

92. *In re Marriage of Friedman*, 418 P.3d at 892–93; *Butler*, 302 P.3d at 614.

93. *Nation v. Piedmont Indep. Sch. Dist. No. 22*, 2019 WL 4452953, at \*11 (W.D. Okla. Sep. 17, 2019).

94. *See Hayes v. DeSantis*, 561 F. Supp. 3d 1187, 1210 (S.D. Fla. 2021).

95. H.R.J. Res. 36, 116th Cong. (2019).

96. *Id.* §§ 1–2.

97. *Actions Overview H.J.Res.36 – 116th Congress (2019-2020): Proposing an Amendment to the Constitution of the United States Relating to Parental Rights*, CONGRESS, <https://www.congress.gov/bill/116th-congress/house-joint-resolution/36/actions> (last visited Oct. 31, 2022).

After exploring why parents are fighting to protect their rights so ardently, this Part will analyze legislation from states to discern what the statutes say from what they do. Ultimately, much of what the Parents' Bills of Rights actually mean for parents, children, and public education in the United States has not been determined, even by the legislators who wrote the bills. After reaching this conclusion, it may leave legal scholars wondering what the hubbub about these bills is all about. This Comment will argue that the efforts to pass Parents' Bills of Rights are part of a larger political scheme to undercut public education for the purposes of fueling religious liberty and concepts of American exceptionalism to the detriment of students across the country.

A. *"We Do Not Co-Parent with the Government:"<sup>98</sup> Parents' Rights Advocates' Quest for Protection*

What had most recently been a local or state legislative talking point has reappeared on the national stage.<sup>99</sup> On November 19, 2021, the Republican members of the House Committee on Education and Labor introduced their own, new Parents' Bill of Rights Act.<sup>100</sup> In the current text of the bill, any "local educational agency receiving [federal] funds" is required to ensure that their schools post on their website or otherwise disseminate the rights of parents in education in a format understandable to parents.<sup>101</sup> The "minimum" of these rights include "the right to review the curriculum of their child's school; the right to know if the State alters the State's challenging State academic standards; . . . [and] the right to a list of the books and other reading materials contained in the library of their child's school."<sup>102</sup> While the language and scope of the act differ from the versions enacted by states,<sup>103</sup> the Republican congressmembers'

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98. Slogan found on t-shirts for the organization Moms for Liberty. Tim Craig, *Moms for Liberty has Turned 'Parental Rights' into A Rallying Cry for Conservative Parents*, WASH. POST (Oct. 15, 2021, 6:00 AM) [https://www.washingtonpost.com/national/moms-for-liberty-parents-rights/2021/10/14/bf3d9ccc-286a-11ec-8831-a31e7b3de188\\_story.html](https://www.washingtonpost.com/national/moms-for-liberty-parents-rights/2021/10/14/bf3d9ccc-286a-11ec-8831-a31e7b3de188_story.html) [https://perma.cc/N3V7-RA6X].

99. See *supra* Part II.

100. Press Release, House Comm. on Educ. & Lab. Republicans, Parents Bill of Rights (Nov. 17, 2021), <https://republicans-edlabor.house.gov/news/documentsingle.aspx?DocumentID=407890> [https://perma.cc/ZUU5-CV3G].

101. H.R. 6056, 117th Cong. (2021).

102. *Id.* § 104(1). This Bill, as opposed to the 1995 attempt at codifying parents' rights, does not require strict scrutiny. This is an important divergence—but outside of the scope of this article—from the positions of parents' rights advocates who argue that strict scrutiny, historically reserved for the most highly protected rights, is necessary to protect the constitutional rights of parents.

103. *Id.* The bill focuses solely on education and parents' right to be involved with curricula and other education decisions.

reasoning echoes that of state legislatures as they wrote: “America’s parents should never be made to feel powerless—they should be empowered and protected when it comes to having an influence in their own children’s education.”<sup>104</sup> This begs the question: what is making parents feel powerless?

While some parents’ rights advocates have argued that public schools have become a leftist institution,<sup>105</sup> it is not obvious that any fundamental changes in education have occurred in recent years, and improvements to curriculum and instruction have not been hidden from parents: public schools still teach to state standards that are publicly available.<sup>106</sup> Additionally, local and state education agencies have, if anything, increased transparency through monitoring and reporting required by the Every Student Succeeds Act.<sup>107</sup> It is true, though, that through the past decade, education has strived to become more responsive to the contemporary issues children face, such as school shootings and cyberbullying, incorporating an understanding of trauma and equity in classrooms.<sup>108</sup> While these changes in education have been done in plain sight, parents who may not have been aware were given a more inside look into what happens in the classroom due to shifts to virtual learning during the height of the pandemic.<sup>109</sup> For perhaps the first time, some parents saw how their children were being taught and some did not like what they saw.

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104. Press Release, House Comm. on Educ. & Lab. Republicans, *supra* note 100.

105. See, e.g., Douglas Blair, *I’m a Former Teacher. Here’s How Your Children Are Getting Indoctrinated by Leftist Ideology*, HERITAGE FOUND. (Aug. 17, 2020), <https://www.heritage.org/education/commentary/im-former-teacher-heres-how-your-children-are-getting-indoctrinated-leftist> [<https://perma.cc/2BJG-FA4H>].

106. Each state publishes the standards public schools teachers are expected to teach to and students are tested on. Parents and families can easily access this information, often readily available on the state education agency’s website. See, e.g., WIS. DEPT. OF PUB. INSTRUCTION, WISCONSIN STANDARDS FOR ENGLISH LANGUAGE ARTS (2020); TENN. DEPT. OF EDUC., EVERY STUDENT SUCCEEDS ACT: BUILDING SUCCESS IN TENNESSEE 29–43 (2018); CALIF. STATE BD. OF EDUC., CALIFORNIA COMMON CORE STATE STANDARDS (2013).

107. The Every Student Succeeds Act (ESSA) requires state education agencies to gather and report data on public schools regarding performance, attendance, teacher effectiveness and several other areas. See *What Is the Every Student Succeeds Act*, OFF. OF ELEMENTARY & SECONDARY EDUC., <https://oese.ed.gov/families/essa> [<https://perma.cc/E2F4-QDSF>] (Oct. 28, 2020).

108. Madeline Will, *Teaching in 2020 vs. 2010: A Look Back at the Decade*, EDUCATIONWEEK (Dec. 10, 2019), <https://www.edweek.org/teaching-learning/teaching-in-2020-vs-2010-a-look-back-at-the-decade/2019/12> [<https://perma.cc/3DGS-UJ6M>]; Steven Mintz, *K-12 Trends and the Future of Higher Education*, INSIDE HIGHER ED (Nov. 9, 2020), <https://www.insidehighered.com/blogs/higher-ed-gamma/k-12-trends-and-future-higher-education> [<https://perma.cc/C6MM-YKKL>].

109. Craig, *supra* note 98.

Legislators at the national and state level based their bills on the premise that parents feel powerless about their children's upbringing and education.<sup>110</sup> This Part will examine three sources of this sentiment. First, some parents' rights advocates cite *Troxel v. Granville* as evidence that the Supreme Court no longer supports parents' rights. On the contrary, *Troxel* affirmed parents' rights, rather than reversing them. Moreover, recent precedent affirms the constitutionally protected rights of parents. Next, this Part will explore the parents' rights advocates opposition to children's rights, analyzing their resistance to changing norms in the treatment of children. Finally, this Part assesses parents' rights advocates fear of outside forces influencing or "indoctrinating" their children, and their newfound scapegoat: America's public schools.

### 1. A "CONFUSING LEGACY:" CONCERNS ABOUT *TROXEL* AS PRECEDENT

The parents' rights advocacy organization ParentalRights.org argues that *Troxel* proves that the Supreme Court no longer supports parents' rights, stating that the decision "opened the door for individual judges and States to apply their own rules to parental rights."<sup>111</sup> The plurality decision in *Troxel*, they argue, "left a confusing legacy," as the Court "vacated the earlier strict scrutiny test that required proof of harm before the government could interfere with parental rights."<sup>112</sup> In addition, the advocacy organization points out that Justice Scalia's dissenting opinion further complicates precedent as he explains that parents' rights are not enumerated in the Constitution.<sup>113</sup> While there is some truth to the argument that the nature of the plurality decision complicates its use as precedent, it is not clear that this threatens parents' rights.<sup>114</sup> It seems more likely that *Troxel* strengthened the rights of

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110. See, e.g., Press Release, House Comm. on Educ. & Lab. Republicans, *supra* note 100 ("Their elected officials want to take power away from parents and hand over more control to politicians and teachers unions to dictate what our children should be taught in classrooms."); *Governor Greg Abbott Unveils Parental Bill of Rights*, TEXANS FOR GREG ABBOTT (Jan. 20, 2022), <https://www.gregabbott.com/governor-greg-abbott-unveils-parental-bill-rights/> [<https://perma.cc/5BSU-5X5R>] ("Parents are losing a voice when it comes to their children's education and health matters. Many parents feel powerless to do anything about it, and that must end.") (quoting Texas Governor Greg Abbott as he announced a Parental Bill of Rights for Texas).

111. *The Supreme Court's Parental Rights Doctrine*, PARENTALRIGHTS.ORG, [https://parentalrights.org/understand\\_the\\_issue/supreme-court](https://parentalrights.org/understand_the_issue/supreme-court) [<https://perma.cc/QFK7-SSHM>] (last visited Oct. 31, 2022).

112. *Id.*

113. *Id.*; *Troxel v. Granville*, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting).

114. See *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting).



parents, while bringing into question the rights of children and other nonparental figures, particularly grandparents.<sup>115</sup>

In *Troxel*, a parent challenged a Washington law allowing “any person” to petition the court for visitation rights after her children’s grandparents were granted visitation with which the parent did not consent.<sup>116</sup> The Washington State Supreme Court found the state statute unconstitutional because it “infringes on the fundamental right of parents to rear their children,” as parents have the right to decide with whom their children spend time.<sup>117</sup> The United States Supreme Court affirmed in a six-to-three decision.<sup>118</sup> Justice O’Connor, for the plurality, stated in clear language: following the Court’s “extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the right of parents to make decisions concerning the care, custody, and control of their children.”<sup>119</sup> For that reason, the Supreme Court deemed the Washington nonparental visitation statute unconstitutional, continuing to uphold parents’ rights to direct the care of their children.<sup>120</sup>

In addition, it is not clear that the court vacated strict scrutiny as the standard of review.<sup>121</sup> While it is true that Justice Thomas stated in his concurrence that he would apply strict scrutiny to “infringements of fundamental rights,” the court did not say that it had abandoned that standard.<sup>122</sup> Rather, Thomas merely pointed out that the plurality did not “articulate[] the appropriate standard of review.”<sup>123</sup> There is a fundamental difference between vacating a standard and not addressing it. Moreover, even without addressing the standard, the Court continued to uphold the rights of parents, supporting the plaintiff’s right to direct the upbringing of her children, emboldening parents to resist state mandates.<sup>124</sup> *Troxel*, some scholars say, breathes “new life” into the rights outlined in past decisions like *Pierce*.<sup>125</sup>

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115. See Christina M. Alderfer, *Troxel v. Granville: A Missed Opportunity to Elucidate Children’s Rights*, 32 LOY. U. CHI. L.J. 963, 1000–10 (2001); Terra L. Henry Sapp, *Grandparent Visitation Statutes in the Aftermath of Troxel v. Granville*, 17 J. AM. ACAD. MATRIMONIAL L. 121, 122–23, 158 (2001).

116. *Troxel*, 530 U.S. at 60–61.

117. *Id.* at 63.

118. *Id.* at 59, 63.

119. *Id.* at 66.

120. *Id.* at 67.

121. *Id.* at 80 (Thomas, J., concurring).

122. *Id.*

123. *Id.*

124. Ira Bloom, *The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?*, 32 J.L. & EDUC. 139, 169 (2003).

125. See, e.g., *id.*

Perhaps parents' rights advocates' real issue with the opinion in *Troxel* stems from the justices' articulation of an issue within parents' rights that has long existed: parents' rights are not and have never been absolute.<sup>126</sup> Courts have established limitations on parents' rights as balanced against the "State's long-recognized interests as *parens patriae*"—*i.e.*, the state's paternal role to protect those who cannot protect themselves.<sup>127</sup> The state's general interest in protecting the well-being of children allows the state to "restrict the parent's control" if the parent's actions could result in harm to the child, such as the regulation of child labor or compulsory school attendance, as discussed in *Prince*.<sup>128</sup> Parents' rights advocates strongly oppose the concept of the state's role in the upbringing of the child, but none can deny that that role exists.<sup>129</sup> The federal and state government cannot abdicate their duty to regulate some matters pertaining to the welfare of minor children, a fact openly acknowledged in the existing Parents' Bills of Rights.<sup>130</sup>

Justice Scalia's dissent in *Troxel* provides parents' rights advocates with the support they need for the Parents' Bill of Rights, as he explains that, while the parents' right to direct the upbringing of their children is an unalienable right, it is not protected in the Constitution.<sup>131</sup> Indeed, the Constitution does not contain the word "parent" or "child."<sup>132</sup> However, as held in *Yoder*, *Prince*, *Meyer*, *Pierce*, and numerous other cases—as well as in several federal laws—parents' rights exist and courts routinely protect them.<sup>133</sup> A Parents' Bill of Rights at the state level would, as discussed *infra* Section II.B.1., put the exact language—the right to direct the upbringing and education of their minor child—into the statutes, but it is not clear whether that would provide the kind of protection parents' rights advocates seek.<sup>134</sup>

Following *Troxel*, and despite parents' rights advocates claims, the Supreme Court has continued to protect parents' right to direct the upbringing and education of their child. In 2020, the Court determined

126. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

127. *Id.*

128. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

129. *See id.*

130. *See, e.g.*, OKLA. STAT. 25, § 2002(B) (2021) ("This section does not authorize or allow a parent to engage in conduct that is unlawful or to abuse or neglect a child in violation of the laws of this state . . . . This section does not prohibit courts, law enforcement officers or employees of a government agency responsible for child welfare from acting in their official capacity within the reasonable and prudent scope of their authority.").

131. *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting).

132. *See* U.S. CONST.

133. Justice O'Connor compiled a list of cases affirming parents' rights to "make decisions concerning the care, custody, and control of their children," demonstrating that this protection has not waived. *Troxel*, 530 U.S. at 66.

134. *See* discussion *infra* Section II.B.2.

in *Espinoza v. Montana Department of Revenue*<sup>135</sup> that a Montana statute barring state aid to religious schools, and thereby preventing state scholarship funds from going to such schools, unjustly burdened families who chose religious education.<sup>136</sup> This burden infringed on the parents' "long recognized" right to direct the religious upbringing of their children.<sup>137</sup> In holding the statute unconstitutional for this and other related Free Exercise Clause reasons, the Supreme Court demonstrated a continued promise to protect the rights of parents.<sup>138</sup>

Following the recent decision in *Espinoza*, one would think that parents' rights advocates would feel more emboldened and empowered in their right to direct the upbringing of their children. And yet, the fight has intensified as more states consider Parents' Bill of Rights legislation.<sup>139</sup> This would seem to indicate that there are other reasons that are fueling this push for the codification of parents' rights. One of those reasons is the opposition to theories of children's rights.

## 2. PARENTS' RIGHTS VERSUS CHILDREN'S RIGHTS: WHO IS THE BOSS?

A video on ParentalRights.org features James Dwyer, who has been the focus of parents' rights advocates' animosity, making a statement that strikes fear in the hearts of parents' rights advocates: "The reason parent-child relationships exist," Dwyer says, "is because the State confers legal parenthood."<sup>140</sup> As extreme as this claim may sound, particularly when positioned as a scare tactic as done here, the state as *parens patriae* has a duty to guard the welfare of children, including through child labor and school attendance laws.<sup>141</sup> However, Dwyer's arguments regarding the legitimacy of parents' rights concerns their proponents.<sup>142</sup>

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135. 140 S. Ct. 2246 (2020).

136. *Id.* at 2261.

137. *Id.*

138. *Id.* at 2261–63. The Court expanded on this holding in *Carson v. Makin*, finding that a similar program in Maine—that provided tuition assistance but excluded private schools that were not "nonsectarian"—also violated the Free Exercise Clause. 142 S.Ct. 1987 (2022).

139. *See, e.g.*, Blythe Bernhard, *Missouri Attorney General Pushes Parents' Bill of Rights in Schools*, PANTAGRAPH (Dec. 1, 2021), [https://pantagraph.com/news/national/missouri-attorney-general-pushes-parents-bill-of-rights-in-schools/article\\_da4f4039-c799-5899-830f-e27be9b92611.html](https://pantagraph.com/news/national/missouri-attorney-general-pushes-parents-bill-of-rights-in-schools/article_da4f4039-c799-5899-830f-e27be9b92611.html) [https://perma.cc/726G-ZTQZ].

140. *Shocking Video: Law Professor Attacks Parental Rights*, PARENTALRIGHTS.ORG, <https://parentalrights.org/dwyer> [https://perma.cc/5RUZ-HNU8] (last visited Oct. 31, 2022).

141. *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

142. *See, e.g.*, Zimmerman, *supra* note 10, at 334.

In his provocative article, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, Dwyer questions whether “parents should have any child-rearing rights at all.”<sup>143</sup> Dwyer finds that the claim that parents have the right to direct their child’s upbringing—particularly in terms of religious upbringing—is “inconsistent with principles in our law and morality.”<sup>144</sup> Parents’ rights, he says, violate the child’s right to self-determination, allowing individuals to control the lives of others.<sup>145</sup> Dwyer concludes that the law of parents’ rights should be reframed as parents’ privilege, representing the duties of parents with respect to their children.<sup>146</sup> In this reframing of the legal role of parents, conflicts would no longer be decided dependent on the balance between “parents’ rights against state interests in the care and education of children,” and instead would be decided “solely on the basis of children’s welfare interests.”<sup>147</sup> This would certainly limit parents’ authority as decision-makers for their children but would arguably limit the state’s authority as well.<sup>148</sup>

This viewpoint obviously concerns advocates and defenders of parents’ rights, as Erik Zimmerman explains.<sup>149</sup> In limiting parents’ rights, Zimmerman argues that Dwyer’s reframing would “radically and detrimentally alter American legal and family structures.”<sup>150</sup> This “attack,” Zimmerman claims, “comes at a time when the American family is experiencing crisis.”<sup>151</sup> While Zimmerman wrote his article in 2004, parents’ rights advocates today would likely still argue that the American family and American education system remain in crisis, creating a need for parents’ rights to be enforced, not cast aside.

Parents’ rights advocates argue that parents have the right to direct the educational, religious, and moral upbringing of their child because they are acting in the best interests of their child.<sup>152</sup> Because courts, particularly the Supreme Court, have historically agreed with this, the current legal parents’ rights doctrine places the rights of parents over the rights of children, so much so that the United States is the only country that has not ratified the United Nation’s Convention on the Rights of the Child.<sup>153</sup> This resistance speaks both to the continued prevalence and

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143. Dwyer, *supra* note 57, at 1373.

144. *Id.* at 1373, 1377.

145. *Id.* at 1373.

146. *Id.* at 1374–76.

147. *Id.* at 1376.

148. *Id.* at 1376–77.

149. Zimmerman, *supra* note 10, at 348.

150. *Id.*

151. *Id.* at 353.

152. *See, e.g., id.* at 352.

153. *See* Kim Hai Pearson, *Children Are Human*, 8 TEX. A&M L. REV. 495, 496–97 (2021) (“There are compelling and persuasive theories about the United States’

strength of parents' rights in the United States, and the fear that those rights will be stripped away. Those who argue for parents' rights believe that parents know what is best for their child, not the government and not the courts. They fear that there will soon come a day that courts no longer believe that parents have the right to decide how to raise their child.<sup>154</sup> This fear motivates proponents of parents' rights to advocate for the codification of Parents' Bills of Rights. Other outside forces have made their way into the public consciousness, further fueling this fear, as parents increasingly worry about what some call "indoctrination."

3. "SCHOOLING SHOULD BE ABOUT EDUCATION NOT  
INDOCTRINATION!"<sup>155</sup>: CONCERN ABOUT OUTSIDE FORCES ON MINOR  
CHILDREN

The conversation about parents' rights has shifted away from directing the religious upbringing of the child and toward upbringing and education more broadly, as advocates speak equally about opposing sexual education and Social Emotional Learning.<sup>156</sup> Gains in parents' rights in the past have largely pertained to instances in which the state infringes on the freedom of religion of children, and thereby infringes on the parents' right to direct their child's religious upbringing.<sup>157</sup> This shift in the claims of parents' rights advocates stretches this right more

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resistance to ratifying the CRC and endorsing it as the 'authoritative expression of children's rights.' The primary reasons presented are (1) sovereignty concerns based on attitudes that the United States is a moral force in international laws, but should be immune from international jurisdiction; (2) the current legal regime subsumes children's rights into parents' rights or, in the alternative, to local state government; and (3) popular beliefs that children in the United States have adequate legal protection in the existing system.").

154. In an impressive logical leap, David Fowler of Family Action Council of Tennessee (FACTennessee) argues that the Supreme Court in *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Roe v. Wade*, 410 U.S. 113 (1973), signal that the Court is "systematically re-ordering the coercive powers of the civil government," which will ultimately result in the unraveling of parents' rights. David Fowler, *Parental Rights and School Mask Mandates: It Is Worse Than You Think*, FACT (Aug. 26, 2021) <https://www.factennessee.org/news-views/commentary/2020/parental-rights-and-school-mask-mandates-it-is-worse-than-you-think> [https://perma.cc/HPE2-3AM5]. These claims were made prior to the overturning of *Roe*, however, and it is unclear how this reasoning would stand today.

155. *Parents STRIKE Back!*, MOMS FOR AM., <https://momsforamerica.us/mfa-action/parents-strike-back> [https://perma.cc/UB9J-ZGY7] (last visited Oct. 31, 2022).

156. *Id.* The website lists Social Emotional Learning, Comprehensive Sex Education, and Critical Race Theory as major concerns for the advocacy group Moms for America and recommends that its members "fight[]" back against them.

157. Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years*, 38 J.L. & EDUC. 83, 89 (2009).

broadly, arguing that parents have the right to direct not only their child's education but the school's curriculum for all children.<sup>158</sup>

Parents' rights advocates argue that changes in education are contrary to what they believe their children should be taught. Ironically, one such evolution in education is actually centered on working with parents and families to better meet the goals of public education.<sup>159</sup> This approach is called Culturally Responsive Teaching,<sup>160</sup> in which educators draw on the cultures and differences of their students to create lessons and curriculum that are responsive to their students' needs.<sup>161</sup> Studies show that Culturally Responsive Teaching improves comprehension, engagement, and promotes meaningful learning.<sup>162</sup> Nearly all fifty states have integrated components of Culturally Responsive Teaching into their state teaching standards, particularly as it relates to engaging with parents and maintaining high expectations for students—both concepts that most parents would likely support.<sup>163</sup> Nonetheless, parents' rights advocates oppose these ideas.

On October 21, 2021, *The Washington Post* published an article titled, "Parents Claim They Have the Right to Shape their Kids' School Curriculum. They Don't."<sup>164</sup> The title alone would clearly anger and fuel parents' rights advocates—and it certainly did.<sup>165</sup> In the article, the authors explain that courts have upheld the right of parents to direct the education and upbringing of the child but that "does not mean that public schools must cater to parents' individual ideas about education."<sup>166</sup> Citing both *Yoder* and *Pierce*, the authors explain that the state has a

158. Jack Schneider & Jennifer Berkshire, *Parents Claim They Have the Right to Shape Their Kids' School Curriculum. They Don't*, WASH. POST (Oct. 21, 2021, 12:00 PM), [https://www.washingtonpost.com/outlook/parents-rights-protests-kids/2021/10/21/5cf4920a-31d4-11ec-9241-aad8e48f01ff\\_story.html](https://www.washingtonpost.com/outlook/parents-rights-protests-kids/2021/10/21/5cf4920a-31d4-11ec-9241-aad8e48f01ff_story.html) [https://perma.cc/MPH2-JR73].

159. JENNY MUÑIZ, CULTURALLY RESPONSIVE TEACHING: A 50-STATE SURVEY OF TEACHING STANDARDS 13, 16 (2020).

160. Culturally Responsive Teaching is not to be confused with the vilified concept of Critical Race Theory. See David L. Hudson Jr., *Legislators Take Aim at Critical Race Theory: Nonexistent Curriculum Is Caught in the Crosshairs*, 108 A.B.A. J. 20, 20–21 (2022).

161. Muñiz, *supra* note 159, at 6, 9.

162. *Id.* at 10–11.

163. *Id.* at 21.

164. Schneider & Berkshire, *supra* note 158.

165. See Emilie Kao & Lindsay M. Burke, *Parents Have Every Right to Be Involved in Their Children's Education*, HERITAGE FOUND. (Dec. 2, 2021), <https://www.heritage.org/education/commentary/parents-have-every-right-be-involved-their-childrens-education> [https://perma.cc/4L4S-FBS6]; Kerry McDonald, *Sorry, Washington Post, But Parents Do Have Every Right to Shape Their Kids' Curriculum*, FEE STORIES (Oct. 27, 2021) <https://fee.org/articles/sorry-washington-post-but-parents-do-have-every-right-to-shape-their-kids-curriculum> [https://perma.cc/2MYJ-7SKT].

166. Schneider and Berkshire, *supra* note 158.

responsibility for the education of children as well as their well-being.<sup>167</sup> In response, analysts from the Heritage Foundation<sup>168</sup> argued that *The Washington Post* article neglected a critical line in the *Pierce* decision, which stated that “the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>169</sup> This right and duty, the Heritage authors claim, includes knowing what is being taught in the child’s school.<sup>170</sup> As the Heritage authors point out, this concern about a lack of parental control over what happens in their children’s classrooms helped motivate the passage of the Florida Parents’ Bill of Rights, which they argue should be “posted on the website of every school district in America.”<sup>171</sup>

The Heritage Foundation and other conservative media outlets’ responses seem to miss the section of *The Washington Post* article that explains why parents’ rights to direct their child’s education has become a talking point.<sup>172</sup> The increase in volume surrounding parents’ rights results not from any “substantive changes in education or the law,” but rather continues to grow louder because it is a “political tactic.”<sup>173</sup> Politicians, such as those who presented the bill in Florida and other states, use parents’ worst fears—the fear of someone indoctrinating their child, putting sinister thoughts in their heads—as an organizing tool, resorting to “‘paranoid style’ politics.”<sup>174</sup> This paranoid style politics, using suspicion, conspiratorial fantasy, and exaggeration, seems to be working as more states’ legislatures, and both the House and Senate, announce their own versions of the bill, gathering more and more support.<sup>175</sup>

In the 2021 Virginia gubernatorial election, this tactic ensured the victory of Republican candidate Glenn Youngkin after the Democratic

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167. *Id.*

168. The Heritage Foundation is a conservative think tank that describes its goal as “returning power to the people,” as they “ceaselessly advocate[] for individual liberty, limited government, free enterprise, traditional American values, and a strong national defense to protect it all.” *About Heritage*, HERITAGE FOUND., <https://www.heritage.org/about-heritage/mission> [<https://perma.cc/3GSV-T8BF>] (last visited Oct. 31, 2022).

169. Kao & Burke, *supra* note 165 (citing *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 535 (1925)).

170. *Id.*

171. *Id.*

172. Schneider & Berkshire, *supra* note 158.

173. *Id.*

174. *Id.* (highlighting Hofstadter’s “paranoid style politics”) (citing Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER’S MAG. (Nov. 1964), <https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics> [<https://perma.cc/9L9E-SYC5>]).

175. Schneider & Berkshire, *supra* note 158.

candidate stated that he did not “think parents should be telling schools what they should teach.”<sup>176</sup> This predictably aroused fears of parents’ rights advocates and focused the election on education, despite the fact that the statement is supported by case law.<sup>177</sup> Now-Governor Youngkin has continued to fight for parents’ rights, whether in opposing mask mandates<sup>178</sup> or curriculum.<sup>179</sup> Based on the success of this tactic, it seems likely that candidates will continue to argue that schools, and thereby the government, must be prevented from making decisions about minor children’s upbringing. If the Virginia election is any indicator, this tactic is likely to be very successful.

For children’s rights and education advocates, this growing chorus of voices increases concern about the well-being of children and the future of education. As *The Washington Post* article explained, despite the claims of parents’ rights advocates, parents do not have the right to hand-select the curriculum for the whole school.<sup>180</sup> Within public schools, as demonstrated in *Blau*, parents’ rights are not unlimited.<sup>181</sup> While parental involvement and engagement in public schools is essential to the success of both students and school systems alike, parents cannot dictate the curriculum, turning the “public school into a private tutor.”<sup>182</sup> Education is a public good and is a key element of the general welfare, placed above the rights of individual parents.<sup>183</sup> As the Court explained

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176. Rick Hess, *5 Takeaways for Education From Virginia’s Governor Race*, EDUC. WK. (Nov. 5, 2021), <https://www.edweek.org/policy-politics/opinion-5-takeaways-for-education-from-virginias-governor-race/2021/11> [https://perma.cc/4AVL-463M].

177. *Id.*

178. Hannah Natansen, *Va. Parents File Lawsuit, Schools Vow Resistance Against Youngkin’s Order Making Masks Optional*, WASH. POST (Jan. 18, 2022, 7:51 PM) <https://www.washingtonpost.com/education/2022/01/18/virginia-schools-youngkin-masks/> [https://perma.cc/WC73-CF3N].

179. Hannah Natansen & Karina Elwood, *Virginia Education Department Rescinds Diversity, Equity Programs in Response to Youngkin’s Order*, WASH. POST (February 25, 2022, 6:29 PM) <https://www.washingtonpost.com/education/2022/02/25/maryland-youngkin-education-diversity/> [https://perma.cc/6DQV-L255]. It should be noted that the tip line Governor Youngkin set up to allow citizens to file complaints about teachers teaching Critical Race Theory was recently shut down because they were not receiving many calls. This further supports the argument that these claims were paranoid style politics with no basis in reality. Rebecca Cohen, *Virginia’s GOP Governor Shut Down a Hotline That Parents Could Use to Report ‘Critical Race Theory’ Complaints Because Not Enough People Were Sending Tips*, BUS. INSIDER (Nov. 4, 2022, 11:58 AM) <https://www.businessinsider.com/virginia-governor-shut-down-critical-race-theory-hotline-2022-11>.

180. Schneider & Berkshire, *supra* note 158.

181. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005); Mawdsley, *supra* note 18, at 190.

182. DeMitchell & Onosko, *supra* note 15, at 634.

183. *Id.* at 634–35.



in *Prince*, it is in the public interest of the state to ensure that “healthy, well-rounded” children grow into healthy, well-rounded adults.<sup>184</sup> In fact, our democracy relies on it.<sup>185</sup>

If parents disagree with the choices of the public school, their main avenue for remedy is to remove their child from the public school, either to a private, public-charter, or home school.<sup>186</sup> School choice is a hotly debated issue in America, but most states do provide some sort of assistance to parents who choose to remove their child from public education, whether through publicly funded voucher programs or charter schools.<sup>187</sup> Many parents already pursue this route; data from the fall of 2019 showed that 4.7 million students were enrolled in private elementary or secondary schools—about nine percent of all students from kindergarten through twelfth grade.<sup>188</sup> A more recent survey of private schools demonstrates that that number likely grew in the past two school years.<sup>189</sup> As parents’ rights advocates’ voices grow to disavow public school curriculum, many provide the solution of home schooling as a ready alternative.<sup>190</sup> As with students enrolled in private schools, the number of students whose parents chose to home school them has also

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184. *Prince v. Massachusetts*, 321 U.S. 158, 166, 168–69 (1944).

185. *Id.* at 168.

186. Richard S. Myers, *Same-Sex Marriage, Education, and Parental Rights*, 2011 BYU EDUC. & L.J. 303, 322 (2011).

187. Bloom, *supra* note 124, at 150–52, 157–58. A recent Supreme Court decision will likely result in an expansion of the use of public funds for religious schools. In *Carson v. Makin*, the Court held that excluding religious schools from an “otherwise generally available public benefit” violated the Free Exercise Clause of the First Amendment. 142 S. Ct. 1987, 1998 (2022).

It is worth mentioning that school choice looks different in different communities, particularly in historically marginalized communities. For a discussion of school choice in the Black community, see Monique Langhorne, *The African American Community: Circumventing the Compulsory Education System*, 33 BEVERLY HILLS BAR ASS’N J. 12 (2000).

188. *Fast Facts: Public and Private School Comparison*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=55> [<https://perma.cc/8UER-RL6V>] (last visited Oct. 31, 2022).

189. Neal McCluskey, *Survey: Private Schools Appear to See Rising Enrollment, This Year and Last*, CATO INST. (Oct. 28, 2021, 12:30 PM), <https://www.cato.org/blog/survey-private-schools-appear-see-rising-enrollment-year-last> [<https://perma.cc/B24U-QJJ3>].

190. “Pacific Justice Institute supports parental rights to opt their children out of biased classes, and are working for alternate solutions to stop sex education and bad curriculum. We also support and defend parents’ rights of home education.” *Parental Rights and Students’ Rights*, PAC. JUST. INST., <https://pacificjustice.org/lp/parental-rights> [<https://perma.cc/BKM3-2MZ5>] (last visited Oct. 31, 2022); *see also* CHRISTOPHER J. KLIKA, *THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS’ RIGHTS IN EDUCATION* 2–3 (3d ed. 2002).

grown in recent years.<sup>191</sup> Since the COVID-19 pandemic began, 1,268,000 students left public schools.<sup>192</sup>

While parents may have many reasons for enrolling their children in private schools or home schooling their children, a wave of withdrawal from public schools brings great concern for public school advocates, as it could in turn damage the public good of public education.<sup>193</sup> In many states, the number of students enrolled in a school indicates how much funding that school receives.<sup>194</sup> Public schools, often already operating on a small budget, will likely face further funding decreases should more parents remove their children from public education. In turn, the remaining students will receive fewer resources and sit in crowded classrooms, reducing the likelihood that students are able to have an excellent education. In time, this further chips away at the public good of public education.

This reiteration of parents' rights, however, differs from movements of the past in that instead of opting out of public education entirely, parents are fighting the public schools themselves, appearing at school board meetings and protesting outside of schools, arguing that the public-school board does not speak for their interests.<sup>195</sup> Although courts have indicated that parents do not have the right to control the school as individuals, parents do have another tool at their disposal: democracy. School boards, which are often the authorities who decide how and what children are taught in schools, are elected positions.<sup>196</sup> If a majority of parents in a district truly believe that the school board has made decisions contrary to all parents' interests, school board members can be challenged in future elections, or even recalled. Some parents' rights advocates have even gone this route recently, one example occurring in the school district of Mequon-Thiensville, Wisconsin.<sup>197</sup> While their

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191. Carolyn Thompson & The Associated Press, *Homeschooling Surged During the Pandemic. As Schools Reopen, Many Parents Continue to Educate Their Children*, FORTUNE (Apr. 14, 2022, 9:36 AM), <https://fortune.com/2022/04/14/pandemic-homeschooling-surge-us-school-reopening/> [https://perma.cc/BB5A-8HXT].

192. *Enrollment Tracker: 2020-2022*, RETURN 2 LEARN TRACKER, <https://www.returntolearnteacher.net/2020-22-enrollment-changes/> (last visited Oct. 31, 2022).

193. DeMitchell & Onosko, *supra* note 15, at 634–35.

194. Shawn Hubler, *With Plunging Enrollment, a 'Seismic Hit' to Public Schools*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/17/us/public-schools-falling-enrollment.html>.

195. Craig, *supra* note 98.

196. *About School Board and Local Governance*, NSBA, <https://www.nsba.org/about/about-school-board-and-local-governance> [https://perma.cc/7D2G-PHWM] (last visited Oct. 31, 2022).

197. Alec Johnson & Rory Linnane, *Mequon-Thiensville Recall Fails to Unseat Any School Board Members After High-Spending Race with National Attention*,

attempt failed, the organizers viewed it as a success because of the national attention, and funding, they received.<sup>198</sup> Based on this example, it will be clear throughout upcoming elections what kind of impact these groups have on education. Having established why parents' rights advocates feel that the Parents' Bill of Rights is important to protect and empower parents, the following section will now explore how, and if, the statutes actually protect the rights that proponents claim that they protect.

### *B. Parents' Bill of Rights Protection in Theory and in Practice*

When questioned about the Parents' Bill of Rights, Florida State Senator Ray Rodrigues explained that the purpose of the statute was to bring all of the parents' rights into a single statute.<sup>199</sup> "What we are doing," he explained, "is putting them in one central location so lay parents can find them."<sup>200</sup> Putting aside the assumption that "lay parents" actually read statutes passed by legislatures, this claim begs the question: what is the basis for these rights? Senator Rodrigues's explanation implies that these rights exist elsewhere, either in statute or in case law, and that this statute does not establish new rights. If the former is true, and this bill merely codifies existing rights, it would seem to be a superfluous statute and a waste of the Florida legislature's time in the midst of a pandemic. If the latter is true, and the evidence leans in that direction, then this statute expands on precedent, providing more rights to parents. Either way, how do the Parents' Bill of Rights actually work in practice?

This Section will examine the provisions of the Parents' Bill of Rights from several states to determine to what extent the statutes match, or expand upon, existing law. This Section will focus on three states whose statutory language is nearly identical regarding parents' rights: Arizona, Oklahoma, and Florida.<sup>201</sup> Of the states with statutes pertaining to parents' rights, these three states resemble the rights declared in precedent. Additionally, Arizona's and Oklahoma's state courts have

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MILWAUKEE J. SENTINEL, <https://www.jsonline.com/story/communities/northshore/news/mequon/2021/11/02/mequon-thiensville-school-board-recall-election-results-november-2-2021/6250162001/> [https://perma.cc/B9ZT-BUTV] (Nov. 3, 2021, 9:21 AM).

198. *Id.* The fact that the advocates' chosen candidates lost reinforces the notion that they do not constitute a majority, but a vocal minority. It is possible that this will not always be the case, but, for the time being, it is.

199. Ogles, *supra* note 5.

200. *Id.*

201. ARIZ. REV. STAT. ANN. § 1-602 (2022); OKLA. STAT. tit. 25, § 2002 (2014); FLA. STAT. § 1014.04 (2021). While the statutes are named in some variation of "parents" or "parental" rights, I collectively refer to the statutes as the Parents' Bill of Rights.

directly addressed each state's Parents' Bill of Rights, providing insight into how these statutes operate in practice.

### 1. PARENTS' RIGHTS IN STATUTE

The Parents' Bill of Rights from the three states reviewed here contained ten to eleven enumerated rights and duties of parents, although all three states contain a clause indicating that the statute "does not prescribe all rights of parents."<sup>202</sup> Parents' rights, unless otherwise limited by law, "shall not be limited or denied."<sup>203</sup> While this is a logical word choice, as parents' rights advocates would most likely want to avoid any future limitation on parents' rights that are not enumerated, it already indicates that this statute goes beyond putting all the rights in a central location.

Several provisions of the statutes have bases in other law, either common law or existing statute. One provision, the right to access and review all school records, reiterates the rights granted by the Family Educational Rights and Privacy Act (FERPA).<sup>204</sup> Three enumerated rights have a clear basis in Supreme Court precedent: the rights to direct the education, upbringing, and moral or religious training of the minor child all stem from the precedent discussed in Section I.B.<sup>205</sup> It seems the Florida legislature was aware of this, as the House of Representatives' Staff Analysis acknowledges that these rights are "well settled" both federally and by the Florida Supreme Court.<sup>206</sup>

These new statutes provide little clarification for the meaning of "directing" the education or moral training, which brings into question the purpose of the statute as those provisions are still open to the interpretation of courts. Courts looking to these statutes would likely have to engage in statutory interpretation to determine what the term "direct" means, which could lead to inconsistent results. It is possible, though, that the vagueness of the statutes is on purpose, designed to give an appearance of supporting parents' rights without providing enforcement mechanisms.

Florida's version does, however, include a section titled "School District Notifications on Parental Rights," outlining the subjects on which school districts must inform parents, including the "source of

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202. ARIZ. REV. STAT. ANN. § 1-602(D); OKLA. STAT. tit. 25, § 2002(D); FLA. STAT. § 1014.04(4).

203. ARIZ. REV. STAT. ANN. § 1-602(D); OKLA. STAT. tit. 25, § 2002(D); FLA. STAT. § 1014.04(4).

204. ARIZ. REV. STAT. ANN. § 1-602(A)(2); OKLA. STAT. tit. 25, § 2002(A)(2); FLA. STAT. § 1014.04(1)(d); 20 U.S.C. § 1232g(a)(1)(A).

205. See discussion *supra* Section I.A.

206. FLA. H.R. STAFF, FINAL BILL ANALYSIS, H.B. 241, at 1 (July 6, 2021).

supplementary education materials,” procedures for objecting to materials, and procedures and plans for informing parents about school choice options.<sup>207</sup> These provisions refer to other statutes that elaborate on these rights, indicating that these do, in fact, merely restate earlier established rights.<sup>208</sup> The only provision that does not refer to another is the requirement that schools notify parents of these procedures, and that a parent can request and receive the information required within ten days.<sup>209</sup> Rather than indicating a lack of legal protections for their rights, these restatements indicate a lack of parents’ *awareness* of these pre-existing rights empowering parents, exactly as state Senator Rodrigues explained.<sup>210</sup> However, a critical eye would recognize what these superfluous additions signal to fearful parents: that schools are hiding information from parents. This plays into parents’ fears, allowing politicians to capitalize on a nonexistent issue for their own election purposes.

In addition to the provisions regarding parents’ rights generally, several provisions in all three states’ Parents’ Bill of Rights enumerate rights related to health care and bodily autonomy: (1) protecting the right to medical records and medical decisions; and (2) the right to consent to biometric scans and DNA records.<sup>211</sup> As with Florida’s provisions regarding school disclosure requirements, these provisions regarding healthcare refer to other statutes in Arizona and Florida, but not in Oklahoma.<sup>212</sup> Again, with a critical eye, it is clear that the enumeration of these rights harkens to parents’ fears about outside influences affecting their child by making medical decisions on their behalf and using their DNA.

The Florida House of Representatives Staff Final Bill Analysis demonstrates that even those who drafted it and voted for it are unclear as to how it operates. In the section titled “Effect of Proposed Changes – Education” the analysis simply lists the enumerated rights in the bill. It states that the Parents’ Bill of Rights “requires the state, political subdivisions, governmental entities and other institutions to demonstrate as reasonable and necessary any action that would infringe on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child.”<sup>213</sup> The analysis goes

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207. FLA. STAT. § 1014.05(1)(a)–(f).

208. *Id.*

209. § 1014.05(2)–(3).

210. Ogles, *supra* note 5.

211. ARIZ. REV. STAT. ANN. § 1-602(A)(5)–(8); OKLA. STAT., tit. 25, § 2002(A)(5)–(8); FLA. STAT. § 1014.04(1)(e)–(h).

212. ARIZ. REV. STAT. ANN. § 1-602(A)(5)–(8); OKLA. STAT., tit. 25, § 2002(A)(5)–(8); FLA. STAT. § 1014.04(1)(e)–(h).

213. FLA. H.R. STAFF, FINAL BILL ANALYSIS, H.B. 241, at 4–7 (July 6, 2021) (referring to FLA. STAT. § 1014.03).

on to say that the state’s “action must be narrowly tailored, achieve a compelling state interest and may not be achieved by a less restrictive means.”<sup>214</sup> In other words, courts must apply strict scrutiny to analyze claims under this bill. But, how does it actually play out in court?

## 2. PARENTS’ BILLS OF RIGHTS IN COURT

From the three states addressed here, it is not clear if these statutes have a real impact on these rights. There has been limited application of these statutes to this point, however, when applied, the statute has not brought satisfactory results of which parents’ rights advocates would approve. In analyzing these cases, we find that there seems to be little practical application of these statutes, questioning the value of the statute in the first place.

In Arizona, the Parents’ Bill of Rights has been cited in seventeen cases, but only twice in cases that have gone to the Arizona Supreme Court. The lower court decisions seemingly all involve either custody disputes<sup>215</sup> or revocation of parental rights due to child endangerment.<sup>216</sup> In these cases, courts demonstrate that parents’ rights are not absolute, as the state has an interest in the welfare of children and can invade those rights when that welfare is “seriously jeopardized.”<sup>217</sup> These cases frame the issue as the state’s interest in the child’s welfare in conflict with the parents’ interest in directing the upbringing of their child—not the interest of the child.

The Arizona Supreme Court first addressed Parents’ Bill of Rights in *State v. Butler*,<sup>218</sup> involving a minor charged with driving under the influence.<sup>219</sup> The juvenile court granted a motion to suppress a warrantless blood draw, as the blood draw violated the Parents’ Bill of Rights.<sup>220</sup> The court of appeals reversed.<sup>221</sup> The Arizona Supreme Court reversed the court of appeals decision on other grounds and declined to address the Parents’ Bill of Rights argument.<sup>222</sup> The Parents’ Bill of

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214. *Id.* at 5.

215. *Bennie v. Johnson*, No. CA-CV 22-0026 FC, 2022 WL 3037167, at \*1 (Ariz. Ct. App. Aug. 2, 2022).

216. *Toni T. v. Dep’t of Child Safety*, No. 1 CA-JV 20-0409, 2021 WL 3871238 (Ariz. Ct. App. Aug. 31, 2021); *Donald W. v. Dep’t of Child Safety*, 444 P.3d 258 (Ariz. Ct. App. 2019); *Ramon G. v. Maegan C.*, No. 2 CA-JV 2017-0042, 2017 WL 2774231 (Ariz. Ct. App. June 27, 2017); *Aaron W. v. Dep’t of Child Safety*, No. 1 CA-JV 19-0039, 2019 WL 4695887 (Ariz. Ct. App. Sept. 26, 2019).

217. *Aaron W.*, 2019 WL 4695887, at \*7.

218. 302 P.3d 609 (Ariz. 2013).

219. *Id.* at 611.

220. *Id.*

221. *Id.* at 611–12.

222. *Id.* at 614.

Rights, the court stated, “concerns the rights of parents and does not purport to affect a juvenile’s right to consent to a search,” and even if it did, the Defendant, as the child and not the parent, would not have standing to argue it.<sup>223</sup> In declining to decide on this issue, the court essentially said that the statute had no weight in this area. Parents’ rights cannot act as a shield against criminal charges against children.

The Arizona Supreme Court addressed the Parents’ Bill of Rights a second time in *In re Marriage of Friedman & Roels*<sup>224</sup> in which two parents disagreed over visitation rights of the paternal grandparents.<sup>225</sup> The court ruled that since both parents have equal rights to direct the upbringing of their children that cannot be limited under the Parents’ Bill of Rights, the court must instead consider the best interests of the child.<sup>226</sup> Ironically, this is the standard against which parents’ rights advocates argue, preferring that parents’ interests dictate what is best for their child.

In Oklahoma, courts cited the Parent’s Bill of Rights once in a single, unreported opinion, in which the court determined that the statute “provides no indication of intent to use the regulation to create a private remedy against persons who do not conform to the provisions thereof,” thereby dismissing the claim.<sup>227</sup> Without a private remedy, it is unclear what the purpose of the Parents’ Bill of Rights is in Oklahoma.

Florida’s statute was enacted the most recently, and therefore, it is not clear how it will be addressed in court. Florida Governor DeSantis cited to the Parents’ Bill of Rights to ban mask mandates with no parental opt-out, leaving it to the parents to direct their children’s health.<sup>228</sup> While the Final Judgment was vacated as moot by the appellate court, the circuit court rejected the governor’s argument.<sup>229</sup> The Parents’ Bill of Rights, the court explained,

expressly gives governmental entities, such as school boards, the right to adopt policies regarding health care and education of children in school, even if the policies affect a parents’ rights to make decisions in these areas. However, the statute requires the governmental agency to show that the policy is reasonable and necessary to achieve a compelling state interest, and that

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223. *Id.*

224. 418 P.3d 884 (Ariz. 2018).

225. *Id.* at 886.

226. *Id.* at 891–92.

227. *Nation v. Piedmont Indep. Sch. Dist. No. 22*, No. CIV-18-1090-R, 2019 WL 4452953, at \*11 (W.D. Okla. Sept. 17, 2019).

228. *Scott v. DeSantis*, No. 2021-CA-001382, 2021 WL 3964493, at \*2 (Fla. Cir. Ct. Sep. 2, 2021), *vacated*, 330 So. 3d 1055 (2021) (Mem.).

229. *Id.* at \*6.

the policy is narrowly tailored and not otherwise served by a less restrictive means.<sup>230</sup>

The court continued to explain that if the mask mandate policy was reasonable, the Parents' Bill of Rights does not prohibit it.<sup>231</sup> In fact, school boards could not be punished if they "have been denied their due process rights under the Parents' Bill of Rights to show that this policy is reasonable and meets the requirements of the statute."<sup>232</sup> Clearly, this is not the result Governor DeSantis intended when he signed the Parents' Bill of Rights, proving there is a disconnect between the intentions and outcomes of the statute.

It is not clear what courts will make of the Parents' Bills of Rights in the future, as the case history is lacking any positive use of the statutes for the desired effects. This reinforces the argument that these statutes may have questionable worth, and instead are used as a political organizing tool to rally a base around an issue that does not exist in reality. For the statutes to actually enforce the rights that parents are demanding, such as having control over curriculum, legislators would need to include new language, not rooted in precedent or constitutionality. If they were to do so, the Parents' Bills of Rights would carry considerably more weight in the battle for parents' rights. However, as it stands, perhaps the most dangerous effect of the Parents' Bills of Rights will not play out in the courts but instead will take place in classrooms across the country.

### 3. PARENTS' RIGHTS VERSUS PUBLIC SCHOOLS

Throughout the history of the parents' rights movement, the doctrine has largely surrounded cases in which the state infringed on the parents' right to direct the upbringing of their minor child in terms of schooling. The history of parents' rights is intertwined with an opposition, and perhaps distrust, of public schools as an arm of the state. Parents have fought to ensure that their religion,<sup>233</sup> language,<sup>234</sup> and choice of school<sup>235</sup> are preserved, and the courts have ensured that parents have that right. The state cannot force parents to send their children to public school, and for most of the history of parents' rights, this seems to have been accepted.

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230. *Id.*

231. *Id.*

232. *Id.* at \*7.

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

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

235. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925).



Now, however, parents' rights advocates argue that they have a right to oppose and ban curricula and books.<sup>236</sup> Terms such as "Social Emotional Learning" and "Critical Race Theory" have become symbols of the dangers of public schools.<sup>237</sup> Instead of standing up for the right to direct their own child's education and upbringing, parents' rights advocates now push to direct other people's children's education and upbringing. While this argument may not have any impact in court, the public pressure school boards face from groups like Moms for Liberty can impact public education on a larger scale. The size and volume of these groups may intimidate school boards, resulting in education not rooted in pedagogy or best practices, but that is instead rooted in what a minority of parents want for their children. Should these groups grow to include the majority of parents, the tools of democracy would provide their ability to make their desired changes.<sup>238</sup>

Conceptually, this is antithetical to the primary purpose of public education, as the court explained in *Prince v. Massachusetts*, designed to create a well-educated, literate constituency able to actively participate in democracy.<sup>239</sup> Public schools are not designed to be a buffet from which you pick and choose what content your children learn. Public schools are designed to teach children how to be functioning, literate, successful adults. While public education has not always fulfilled this goal for all children, their existence is essential to our survival as a

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236. MOMS FOR AM., *supra* note 155.

237. *Id.* Moms for America explains that Social Emotional Learning "sounds harmless with explanations such as to 'apply the knowledge, skills, and attitudes to develop healthy identities, manage emotions and achieve personal and collective goals,' however groups like CZI, (Mark Zuckerberg's philanthropy group) are pushing a frightening version of SEL that teaches children to obsess about their race and their gender identities. You may have heard in the news of classroom surveys that were introduced by teachers by instructing their students not to talk to their parents about the survey's inappropriate questions." *Id.* Parents' Rights in Education (PRIE), a nonprofit organization "committed to valuing students, empowering parents[,] and supporting communities," describes Critical Race Theory as advocating for "assigning levels of 'privilege' and 'oppression' to individuals/students; therefore, creating animosity from the perceived oppressors, and a false sense of entitlement from the oppressed." *STOP RACIST "Anti-Racism" Curriculums: Critical Race Theory and Black Lives Matter*, PARENTS' RTS. IN ED., <https://www.parentsrightsined.org/stop-anti-racism-curriculum.html> (last visited Nov. 5, 2022).

238. There is a tension here, inherent in the system of local school board composed of community members who do not necessarily have a background in education. Teachers and education experts *should* be making determinations regarding methods that will achieve the strongest educational outcomes, but this may not always be the case. There is also, particularly in larger districts, the potential for disconnect between the school board and the decisions made in teachers' classrooms. What the district decides is not always implemented as intended.

239. *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944). Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189, 193 (2016).

democracy.<sup>240</sup> Parents' rights advocates shout indoctrination, vilifying the very system that should have taught them to recognize the difference. Therefore, even though there may be no legal impact of these statutes, the scare tactics, fearmongering, and paranoid style politics make the Parents Bill of Rights a threat to the principles and purposes that undergird the system of American public education.

In the short time since these bills have been introduced in states across the country, we have already seen the impact, even in states where bills are still pending. For example, in Tennessee, where the Parents' Bill of Rights was left in committee at the end of their 2022 session,<sup>241</sup> the legislature passed a statute fueled by parents' rights advocates that requires schools to create and review the lists of all books available to students.<sup>242</sup> Materials that are deemed "not appropriate for the age and maturity levels of the students who may access the materials...shall be removed."<sup>243</sup> In a viral TikTok video, a teacher showed how this affected her and her students, as she had to go through all of her books and wait for approval before students can actually read them.<sup>244</sup> Commenters were outraged; students who wanted to read were being told "no" because of decisions made by adults far away from their classroom.<sup>245</sup> This overreach of parents' rights was done without the Parents' Bill of Rights, pushed solely by those who seek to benefit by pitting parents against public schools.

Across the country, schools began the 2022 to 2023 school year with massive teacher shortages.<sup>246</sup> While teachers leave the classroom for

240. Wilson, *supra* note 239, at 222–23.

241. *SB 2360 Bill History*, TENN. GEN. ASSEMBLY, <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB2360> [https://perma.cc/WJV6-8N9Y] (last visited Oct. 31, 2022).

242. TENN. CODE ANN. § 49-6-3803 (2022).

243. *Id.* § 49-6-3803(d).

244. Sydney Rawls (@sydneyrawls), *Tennessee Teachers Can Relate*, TIKTOK (Aug. 13, 2022), [https://www.tiktok.com/@sydneyrawls/video/7131343584963398955?\\_r=1&\\_t=8VnlStjPnmY&is\\_from\\_webapp=v1&item\\_id=7131343584963398955](https://www.tiktok.com/@sydneyrawls/video/7131343584963398955?_r=1&_t=8VnlStjPnmY&is_from_webapp=v1&item_id=7131343584963398955).

245. Sara Santora, *Internet Decries Book 'Censorship' After Teacher Shares Impact of State Law*, NEWSWEEK (Aug. 17, 2022, 1:06 PM), <https://www.newsweek.com/internet-decries-book-censorship-teacher-shares-impact-tennessee-viral-tiktok-1734567> [https://perma.cc/39U2-S8HT].

246. Hannah Natanson, *'Never Seen It This Bad': America Faces Catastrophic Teacher Shortage*, WASH. POST, <https://www.washingtonpost.com/education/2022/08/03/school-teacher-shortage/> [https://perma.cc/PM8A-N7QM] (Aug. 4, 2022, 8:15 AM).

many reasons, such as low pay<sup>247</sup> and burnout,<sup>248</sup> some have noted that the “culture war” surrounding education is a contributing factor.<sup>249</sup> Politicians and parents’ rights advocates efforts push teachers to the door as they are further scrutinized and disrespected.<sup>250</sup> It is clear now that the next few elections and state legislative sessions will steer the course of public education for many years to come.

#### CONCLUSION

As fears over state control in education grow, so do the numbers and volume of parents’ rights advocacy groups. Politicians, seeing this as an opportunity to garner political support, continue to back Parents’ Bills of Rights across the country and in Congress. The actual impact of these bills is questionable, as the right to direct the upbringing of a child is incredibly vague and unclear in and of itself. Thus far, courts have not implemented the specific statutes to the ends that parents’ rights advocates would like, but that does not mean that these bills are not dangerous. Parents’ rights advocates and proponents of the Parents’ Bill of Rights are mounting to threaten the very nature of public schools as a means of benefiting the general welfare. In believing that they have the right to direct not only the education of their child, but by extension the education of other parents’ children, parents’ rights advocates undermine the values and goals of public education.

The Supreme Court has unequivocally supported parents’ right to direct the upbringing of their child for the past century. But with these new concepts of what that right truly means, will that support continue? Or will protecting the parents’ rights to direct curriculum undo these rights entirely, and bring the public education system with it? Throughout the next few political cycles, it seems likely that the fight for parents’ rights will only continue to grow in size and intensity. It will be up to the people to protect public education.

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247. See, e.g., Jennifer A. Kingson, *Quantifying An “Alarming” Teacher Shortage*, AXIOS (Sept. 13, 2022), <https://www.axios.com/2022/09/13/natiional-teacher-shortage-burnout-pandemic-education-deficit> [<https://perma.cc/2S9M-473Z>].

248. Nic Querolo, Olivia Rockeman & Ella Ceron, *America’s Broken Education System, Part 1: Why Teachers Are Quitting*, BLOOMBERG (Sept. 2, 2022, 5:00 AM), <https://www.bloomberg.com/features/2022-america-teachers-great-resignation/> [<https://perma.cc/3HZ9-SBM7>].

249. Natanson, *supra* note 246.

250. *Id.*

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