PARENTAL RIGHTS ARE WRONG: TOWARD A REGULATORY MODEL OF PARENTAL AUTHORITY IN EDUCATION

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ABSTRACT

The constitutional framework of education must be revised, beginning with its biggest predicament: the institution of parental rights. Parental rights are the only legal instrument used to explain the source of parental discretion in education. But it does not account for the state's reluctance to override this discretion, falsely constructs parental choice as a counterbalance to the rights of children, and stifles the possibility to adapt the scope of parental control to changes in the socio-political perception of education. This article argues that parental prerogatives in education must not be framed as rights, but as an exercise of a regulatory authority stemming from the social interest to provide the child with a "good" education. I claim that the reliance on the concept of parental rights distorts the constitutional debates about educational priorities by focusing on levels of scrutiny in judicial review, and explore how the alternative model could shift attention to the crucial questions of what good education is and why parents should be allowed to define it.

I.

About a century after first emerging as a constitutional dilemma in U.S. Supreme Court jurisprudence, the doctrine of parental rights is experiencing an unprecedented revival. The idea that parents should have substantive control over the development and well-being of their children is being translated, through the vocabulary and logic of rights, into political claims, judicial proceedings, and even quasi-constitutional appeals such as parental "Bills of Rights." The "Parental Bill of Rights" initiative in Florida[1] and similar proposals in as many as thirty-five U.S. states over the past years are some of its recent manifestations.[2] The aspect of parental rights generating most dispute and controversy is education, especially in what concerns the public-school curriculum. Legal academic literature has picked up on this zeitgeist and has recently offered some intriguing explanations for its historical-political causes and socio-political prospects. However, even a century

[1] Ron DeSantis, *Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education* (Mar. 22, 2022), https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/.

[2] Nadra Nittle, *Parental Rights Bills Have Been Introduced in Most States. Teachers Are Pushing Back* (Apr. 2, 2022), https://www.the74million.org/article/parental-rights-bills-have-been-introduced-in-most-states-teachers-are-pushing-back/.

later, the conceptual foundations of the doctrine of parental rights remain strikingly vague and previous theories stop short of explaining the rationales behind their scope and function.

The U.S. Supreme Court has so far provided few insights into the rationales of parental rights and their relative weight when balanced against the interests of the state and, to a lesser extent, the interests of children. The constitutional canon on this question is concise. It consists primarily of three pivotal cases, *Meyer*,[3] *Pierce*,[4] and *Yoder*,[5] in which the Supreme Court has, respectively, invalidated a Nebraska law prohibiting instruction in public or private schools in any language other than English, an Oregon law prohibiting private education of the vast majority of children in the state, and a Wisconsin law compelling Amish parents to make their children attend a formal school after eighth grade.[6] *Yoder* is the most influential and most favorable-toward-parental-rights decision of the three—and perhaps of any opinion of the Supreme Court on education rights.[7] *Yoder* reached the Court as a case of infringement on the religious liberties of the Amish parents and was decided on the grounds of the Free Exercise Clause. Hence, whereas the two earlier cases went only as far as using the rational basis test to protect the interests of parents,[8] the *Yoder* Court added that if these interests are grounded in religious motives, they are protected from state interference using the test of strict scrutiny.[9] The mandate given to the parents in *Yoder* was sweeping. It granted parents the right to exempt their children from any formal institution—public or private—and raise them in a "church community separate and apart from the world and worldly influence."[10]

Yet, until recently, *Yoder*'s legacy seemed to have faded. First, the Supreme Court has all but renounced *Yoder*'s approach to the protection of religious liberties. In *Employment Division, Department of Human Resources of Oregon v. Smith*,[11] the Court held that, "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment."[12] Although the Wisconsin statute considered in *Yoder* fell under the "neutral, generally applicable law" definition, *Smith* did not reverse it, making an exception for circumstances involving "not the Free Exercise Clause alone, but the

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[3] *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[4] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
[5] *Wisconsin v. Yoder*, 406 U.S. 205 (1971).
[6] *Troxel* is not part of this canon as it touches upon education only incidentally and so does not account for its specificities in relation with parental rights. *Troxel v. Granville*, 503 U.S. 57 (2000).
[7] In 1998 Dwyer considered *Yoder* "the most important decision to date relating to parents' right of control over children's upbringing." JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 49 (Cornell University Press 1998).
[8] *See Meyer*, *supra* note 3, at 399–400 ("The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect"); *Pierce*, *supra* note 4, at 535 ("rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state").
[9] *Yoder*, *supra* note 5, at 233 ("when the interests of parenthood are combined with a free exercise claim . . . more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment").
[10] *Id.* at 210.
[11] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878–82 (1989).
[12] *Holt v. Hobbs*, 574 U.S. 352, 356–57 (2015).

Free Exercise Clause in conjunction with other constitutional protections," such as ". . . the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children."[13] But this so-called "hybrid-rights" doctrine that was meant to keep *Yoder* alive is widely considered to be unconvincing and hardly coherent.[14] The relevance of the *Yoder* precedent to subsequent cases is therefore doubtful.[15] Considering that the *Smith* standard is "not especially generous to parents" either,[16] the Supreme Court does not seem to go out of its way to guarantee that religious parents should at least be able to exempt their children from compulsory school legislation.

In line with the doubts about the validity of *Yoder*, some lower courts refuse to apply its rationale in cases concerning private education and homeschooling as well as exemption from classes in public schools. Judges distinguish *Yoder* by invoking the unique culture of the Amish community or the specific claims made by the Amish parents.[17]

Remarkably, despite the shift in paradigms since the rulings in *Meyer* and *Pierce*, the relatively weak protection they provide for parental rights, the questionable validity of *Yoder*, and the increasing reluctance of lower courts to accommodate parental wishes in public and private education, the parental constitutional right remains the first and main go-to justification for the power parents exercise over their children's education.

In the past, courts tended to accommodate parental opposition by ordering school authorities to excuse children from attending specific "undesirable" classes, but in recent decades this outlet has been closing as judges become "noticeably less receptive to requests for individual exemptions from public school curricula."[18] The beginning of the shift is associated with the landmark *Mozert* case, where Christian

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[13] *Smith*, *supra* note 11, at 881 (citations omitted).

[14] *See e.g.*, *Combs v. Homer-Center School Dist*., 540 F.3d 231, 246–47 (2008); *Leebaert v. Harrington*, 332 F.3d 134, 143–44 (2003). *See also* James G. Dwyer, *Religious Schooling and Homeschooling before and after Hobby Lobby*, 2016 U. ILL. L. REV. 1393, 1400 (2016) ("It would be ironic and troubling if Smith did in fact leave Yoder intact. It would mean that the Supreme Court has effectively accorded stronger constitutional protection against state oversight to adults exercising power over the lives of other, dependent beings than to adults engaged in self-determination. Constitutional protection of one's control over one's own life ought to be far stronger than protection of one's desire to control someone else's life. And in fact, outside the parenting context, that is uniformly true").

[15] MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 33 (5th ed. 2011). But see some lower courts that do consider *Yoder* to be valid even after *Smith*: *A.A. ex rel. Betenbaugh v. Needville Independent School Dist*., 701 F.Supp.2d 863, 881 (S.D. Tex. 2009); *Hicks v. Halifax County Bd. of Educ*., 93 F.Supp.2d 649, 663 (1999). See also Dwyer, *supra* note 14, at 1400.

[16] YUDOF ET AL., *supra* note 15, at 33.

[17] See e.g., *Combs v. Homer-Center School Dist.*, 540 F.3d at 250–52; *State v. Patzer*, 382 N.W.2d 631, 637 (1986); *Duro v. District Attorney, Second Judicial Dist. of North Carolina*, 712 F.2d 96, 98 (1983). For more examples see Patricia M. Lines, *Private Education Alternatives and State Regulation*, 12 J.L. & EDUC. 189, 202–8 (1983); YUDOF ET AL., *supra* note 15, at 34.

[18] Even if previous policy was not categorically protecting parental wishes to opt their children out of classes, the courts were at least receptive to them: "Though the decisions were not uniform before and during the early 1980s parents experienced a measure of success in obtaining exemptions for their children, particularly when their objections were based upon religious conviction", Eric A. DeGroff, Parental Rights and Public School Curricula: Revisiting Mozert after 20 Years, 38 J.L. & Educ. 83, 89 (2009).

Fundamentalist parents did not attempt to change the curriculum of their children's public school, but only sought to excuse them from studying a textbook adopted by the state's Board of Education. The two consequential arguments made in *Mozert* that fueled the no-exemption turn were, first, that exposure to contents objected to by parents on religious grounds does not create an unconstitutional burden under the Free Exercise Clause as long as the school does not compel the children to affirm or deny any religious beliefs,[19] and, second, that parents' choice to send their child to a public school significantly limits their right to control the contents of her education.[20] Both of these points continue to justify affirming the constitutionality of mandatory school policies expanding a public school's authority beyond general instructions for every child attending the school.[21]

Looking at the balance of power in public school cases between the state and parents from the federal perspective, it is apparent that states have a broad mandate to devise school programs according to what they consider important, even when the curriculum is contrary to parents' religious beliefs and educational vision. If the state wants to influence children attending public schools and transmit to them specific "skills, information, ideas, attitudes, and values" that will prepare them for citizenship, a vocation, or a satisfactory personal life, it has a constitutional green light to do so.[22]

It is therefore highly revealing—and at first sight, all the more surprising—that for the most part, states choose to not exercise this authority and instead defer to parents' wishes even in the system of public education, where the government has the most control over children's upbringing. Consider the example of sex education and HIV education. As of June 2020, thirty-nine states and the District of Columbia require public schools to provide students with information on either sex or HIV, or both. However, only thirty states and the District of Columbia require that the teaching of these topics meet any standards. Most importantly, forty states and D.C. require school districts to defer to parental discretion in teaching sex education, HIV

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[19] *Mozert v. Hawkins County Bd. of Educ.*, 827 F. 2d at 1064, 1071 (Lively, CJ; Kennedy, J, concurring). On the nature of the harm—alleged by the parents in this case—caused by exposing children to certain contents without coercing them to accept or reject them (termed by Chief Judge Lively in *Mozert* as "mere exposure", *id.* at 1067), see the powerful analysis in Stolzenberg, *supra* note 229, at 599–610. See also DeGroff, *supra* note 18, at 90–91.

[20] *Mozert*, *supra* note 19, at 1080–81 (Boggs, J., concurring). According to Boggs only the Establishment Clause limits the state's authority to impose contents on children.

[21] *Parker v. Hurley*, 514 F.3d 87, 105 (2008), cert. denied, 555 U.S. 815 (2008); *Morrison ex rel. Morrison v. Board of Educ. of Boyd County, Kentucky*, 419 F.Supp.2d 937, 943 (2006), *rev'd on other grounds*, 507 F.3d 494 (6th Cir. 2007); *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 395 (2005); *Fields v. Palmdale School Dist.*, 427 F.3d at 1210; *Fields v. Palmdale School Dist*., 271 F.Supp.2d 1217, 1223 (2003); *Swanson By and Through Swanson v. Guthrie Independent School Dist. No. I-L*, 135 F.3d 694, 699 (1998).

[22] Hirschoff, *supra* note 224, at 874, 878. See also *Id.* at 918–19; JOSEPH TUSSMAN, GOVERNMENT AND THE MIND 54 (Oxford University Press 1977); *Education and the Law: State Interests and Individual Rights*, 74 MICHIGAN LAW REVIEW 1373, 1384–85 (1976); MACMULLEN, *supra* note 22; Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 THE UNIVERSITY OF CHICAGO LAW REVIEW 131 (University of Chicago Law Review 1995); ROBERT WEISSBERG, POLITICAL LEARNING, POLITICAL CHOICE AND DEMOCRATIC CITIZENSHIP (Prentice-Hall 1974).

education, or both. Thirty-six states and D.C. allow parents to opt out of instruction and five states require parental consent for content on these subjects to be provided.[23]

Sex education is not the only topic on which parents are invited to weigh in. A 2010 study of state legislation shows that eighteen states allow parents, on behalf of their children, to opt out of the broader category of health education (not to be confused with "family life education"), which may include classes not only on sexuality, but also on nutrition, mental health, or drug education.[24] Fourteen states allow opting out of animal dissection and seven states allow opting out of physical education.[25] Finally, unlike in cases of federal protection of parental choice, the states allow parents to exempt their children from some content on other than religious grounds: five states allow opt outs due to moral objections and thirty-six states do not require parents to provide any justification for the exemption.[26] The public school system is receptive to parental wishes even when it is not required to be. Non-public education is an even better demonstration of the nonintervention policy of the majority of states.

Commonly, the gap between states' power to regulate education "in books" and the lack of its exercise "in action" is explained by a range of political factors including attempts to use education as reactionary leverage against liberal values, the growing power of evangelical groups, the popularity of libertarian, and other small-government theories among American conservatives. But these considerations fail to account for the constitutional structure of education in the United States that allows for this gap to persist. The reluctance of the Supreme Court to extend strict scrutiny constitutional protection to the child's right to education is one essential element in this framework. The right to education could potentially serve as a source of substantive curricular standards that would apply to all forms of education because of the child's individual interests. The Supreme Court could also impose minimum substantive educational standards on all forms of education, and de facto limit parental control by adopting a broad interpretation of the Equal Protection Clause to include a basic curricular core of skills and knowledge. The Court came close to taking this step in *Plyler v. Doe*,[27] but ultimately restricted the minimum core to the lowest possible level—illiteracy—below which a child would suffer from "an enduring disability."[28] A third crucial consideration is that while

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[23] Guttmacher Institute, *Sex and HIV Education*, Guttmacher Institute (2020). There is no strict correlation between mandating the teaching of sex education and the exemption from it. Delaware, for example, mandates to teach both sex education and HIV education but does not defer to parental discretion at all. See also, MICHAEL IMBER ET AL., EDUCATION LAW 66-67 (5th ed. 2014).

[24] See e.g., Ala. Code § 16-41-6 ("Any child whose parent presents to the school principal a signed statement that the teaching of disease, its symptoms, development and treatment and the use of instructional aids and materials of such subjects conflict with the religious teachings of his church shall be exempt from such instruction, and no child so exempt shall be penalized by reason of such exemption").

[25] Tommy Kevin Rogers, *Parental Rights: Curriculum Opt-Outs in Public Schools* 82–83 (University of North Texas 2010). See also, IMBER ET AL., *supra* note 23, at 64 ("In some states, statutes allow parents and even students themselves to force a local school to offer courses or programs that are not otherwise required by the state").

[26] Rogers, *supra* note 25, at 135–39.

[27] *Plyler v. Doe*, 457 U.S. 202.

[28] *Id.* at 222.

some state constitutions do recognize the right to education, they use it only as a claim directed against the state in the form of funding and adequate state education. States' constitutional guarantees do not protect the substantive educational right of the child against the potentially conflicting interest of their parents who hold the prerogative to pull the child out of the public education system.

These elements indicate that the reluctance of state and federal institutions to impose educational standards against parental preferences is motivated by more than political polarization. The key to its understanding is the core dilemma of liberal education theory: who should be assigned the power to define *the nature of the child's educational interests*? This power grants more than a mere claim to limit the child's educational interests in constitutional balancing. It allows to define these very interests so that the balancing against the child's interests is rendered redundant. In the United States, this power is shared by the parents and state institutions, but as indicated above, parents who have a specific educational project that misaligns with the public curriculum, generally become the ultimate interpreters of their child's interests.[29]

I argue that the source of this parental power is not grounded in parental rights, but in their de facto function as a regulatory educational authority stemming from the social interest to provide the child with a "good education." Like any other social interest, the child's "good education" must be guaranteed by the state, but it is also not allowed "to usurp authority over child-rearing that age-old societal consensus had assigned to parents."[30] When the constitutional structure of education vests the power to define good education with the parents, they become a quasi-regulatory authority that fills their child's interests with substance while being subject to regulatory checks for competence and proper discretion. Indeed, the exercise of this regulatory prerogative is easy to mistake for an exercise of the parental right to control the education of their child. This is because legal and political theory debates on education and on other areas of child law are trapped in the paradigm that parental authority may be justified only by the notion of parental rights, which frames educational relationships as a parent-child-state triangle of interests.[31]

The constitutional level of protection of parental prerogatives remains vague even beyond education but the reference to parental rights is constant and pervasive. The Supreme Court has previously framed parental authority as a "fundamental" right but has so far been reluctant to apply the "traditional strict scrutiny" test to

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[29] This power is divided between the government and the parents, but the share of each is determined by various historical, social, and constitutional factors in each educational regime. In the United States, these factors include the evolution of the public education system in the 19th and 20th centuries, the decisive role of the Establishment Clause in the design and funding of private education, and the relatively marginal role civic education has played in the formation of the American Republic.

[30] David D. Meyer, *The Paradox of Family Privacy*, 53 Vand. L. Rev. 525, 534 (2000).

[31] See, e.g., William A. Galston, *Parents, Government, and Children: Authority Over Education in The Liberal Democratic State*, 44 NOMOS 211 (2003); Emily Buss, *Allocating Developmental Control among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27 (2004); Gregory Thomas, *Limitations on Parens Patriae: The State and the Parent/Child Relationship Rights of Parents: Part One: The Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51 (2007).

cases of parenting or to spell out its constitutional level of protection.[32] Lower courts likewise "tend to reject [claims] of substantive due process infringement [against] restrictions on parents' rights to control their children's upbringing".[33] This hesitancy to "narrowly cabin the state's regulatory authority"[34] seems to reflect the extensive repercussions of strong parental prerogatives for society and for children. In conflicts of interests between the parent and the child, "the stakes for the community are higher […] than in many other areas of important personal liberties", and more "than with other fundamental rights, an exercise of one of the rights of family privacy may be 'fraught with consequences for others,' often posing a clash between conflicting individual rights."[35]

Buying into the parental rights paradigm and framing the problem as a need for wider judicial discretion in balancing the rights of parents and the rights of children, liberal scholars suggest to address it by tweaking the level or flexibility of the constitutionality tests. Some argue that the Court should "embrace an intermediate-scrutiny approach, [which] would remove much of the current pressure on the Court to construe family privacy rights narrowly[, …] recognize a broader array of […] family activities as fundamentally worthy of respect, placing in each case a burden on the government to justify its intrusion on intimate family arrangements and choices."[36] Others claim that "the uniqueness of the parental right, resulting from the many roles of a parent as well as the complexity of the parental right and its place in both the public and private realms" requires a more "dynamic approach to selecting a level of scrutiny by offering two ways to view the parental right—as a bundle of rights or as a sliding scale."[37] More radical liberal views contend "that parental child-rearing rights are illegitimate" altogether and say that the "law should grant parents only a legal privilege to care for and make decisions on behalf of their children in ways that are consistent with the children's temporal interests."[38]

But whether the Supreme Court will ultimately reverse the previous precedent and protect parental rights in education with the strict scrutiny test or lower its protection is beside the point. The very possibility of moving on the scrutiny spectrum demonstrates that parental rights are the only legal instrument available in the judicial, academic, and even popular imagination to embody parental interests and grant them validity against the interests of children. It is a "well-established legal doctrine" in the United States that:

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[32] Meyer, *supra* note 30, at 549.

[33] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 864 (2006). In custody and visitation laws cases, state courts applied strict scrutiny but upheld the contested laws in "scores of cases", Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 864, ft 324 (2006).

[34] Meyer, *supra* note 30, at 550.

[35] *Id.* at 551.

[36] *Id.* at 570.

[37] Margaret Ryznar, *A Curious Parental Right*, S.M.U. L. Rev. 127, 146 (2018).

[38] JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 46, 100 (Cornell University Press 1998). For a similar claim, see, e.g., MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 50 (Oxford University Press 2002); Joshua E. Weishart, *Reconstituting the Right to Education*, ALA. L. REV. 915, 930-931 (2015–2016).

> parents possess a fundamental right under the Due Process Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment of the United States Constitution to direct the upbringing of their children as they see fit, largely free from state interference. The scholarly community has almost unanimously supported and adopted this doctrine; disagreement among scholars and criticism of judicial decisions center principally on the proper scope and weight of parental rights, rather than on the appropriateness of parents' having child-rearing rights at all.[39]

The resort to the concept of a parental right in education, however, brings about two problems. The first has to do with the scope of this right and is related to the current status quo of government *inaction* in overseeing the parents' decisions. Many US states have formed robust models of "good education" in the form of core curriculum obligations or competency-based graduation requirements and yet, allow parents to be shielded from these programs in cases of strong disagreement. When parents and children are left alone, the parental right to control the education of their children becomes a power to define "good education". In that case, the interests of parents collapse into the interests of children and preclude the contestation of parental choices in court on behalf of the children's interests.[40]

The other issue with the use of parental rights in the context of education risks to materialize if the Supreme Court decides to upgrade their constitutional status. In view of the *Dobbs* and *Loper* decisions,[41] it is not inconceivable that in the next few years, the U.S. Supreme Court will reconsider the weight of parental discretion and heighten the level of its protection vis-à-vis the child. This could be accomplished if the Court conclusively rejects the possibility of grounding the *child's* right to education in the Due Process Clause, further restrains the states' power to regulate public and private education, and establishes that the *parental* right to control education is a fundamental right that triggers strict scrutiny when balanced against the child's educational interests.[42] Indeed, some already suggest that "[n]otwithstanding the general reluctance of certain Justices to recognize new unenumerated liberty interests […] the 'essential' nature of procreational rights before birth and family association rights after birth, as reflected in many contemporary state laws, counsels that the U.S. Supreme Court should expand its recognitions of federal constitutional unenumerated parental liberty interests."[43] Such a change would allow parents to decrease regulatory supervision over private

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[39] DWYER, supra note 38, at 46.

[40] This de facto immunity would not be possible if parental prerogatives were not framed as individual rights to control education but a regulatory power, not unlike the operation of an administrative institution. The exercise of such power could be contested on the grounds of competency or adequate representation of the interests of children.

[41] *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215 (2022); *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024).

[42] Especially if the Court will use the hybrid rights doctrine in cases when the parental right can be coupled with the parents' First Amendment rights.

[43] Jeffrey A. Parness, *Dobbs and Unenumerated Parental Custody Rights and Interests*, 14 CONLAWNOW 117, 130 (2022).

education beyond its already low levels in many states, and impose further restrictions over the public-school curriculum.

Triggering strict scrutiny for claims of infringement of parental rights would make it harder for the state to protect children's interests against parental choices even when it desires to do so. This high threshold would discourage the state from elaborating upon what children's interests are and lead to the state implicitly accepting that they will be determined by parents. This power is not meant to be granted to parents by virtue of their parental rights, as rights only allow to balance their holder's claims against the interests of others, so that effectively, strict scrutiny would place parental choice in the child's "corner" without a democratic debate or clear constitutional authorization.

In my view, such astounding power must not be vested in parents without state supervision or at least judicial review of their choices. Reimagining parental power as a regulatory prerogative rather than a fundamental right could facilitate the shift in its scope and level of protection. Parents should be allowed to withdraw their children from public schools and choose their curriculum if the state (and the court by means of judicial review of the parents' regulatory discretion) deems them competent to decide what education is needed for children. Unlike the institutions of the state, parents are competent to make educational decisions only for their individual child. But in this capacity, they act not as individuals but as regulatory stakeholders.

Like any other administrative public institution, parents may be granted more or less power to regulate the education of their children and may be provided with more or fewer means to that end. The crucial point is that the scope of parental power should be dependent not on the parents' individual-rights claims against the government or the child, but on the constitutional perception of "good education" in a given time. Recognizing the difference between the rights and institutional approaches to parenthood is crucial to a better understanding of education and to galvanizing a change in the scope of parental authority. Further analysis of the institution of parenthood and its relationship to state institutions and place in the separation of educational powers will help courts and researchers: 1) reimagine parents as a professional agency entrusted with the education of their child instead of individuals who holds right claims as against the child, 2) move away from the triangular scheme of balancing individual rights and state interests toward a discussion about the parental share of the determination of the content of the child's right to education, and 3) focus the constitutional discourse on the place of education in the national identity and project instead of on debates about the proper rationales of the parental rights.