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## Self-Determination Through Children's Rights: Resisting the Paradoxical Pretext of Parents' Rights Legislation

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# SELF-DETERMINATION THROUGH CHILDREN’S RIGHTS: RESISTING THE PARADOXICAL PRETEXT OF PARENTS’ RIGHTS LEGISLATION

Jeremiah Chin\*

*Abstract:* Washington state law balances the interests of parents and the state in education, healthcare, and the general wellbeing of children. Despite the fact that children are at the center of emerging controversies, children’s rights are rarely discussed in state legislation debating the obligations and relationships between the state of Washington and parents. In education, for example, RCW 28A.605.005 finds “[p]arents are the primary stakeholders in their children’s upbringing.” While this may be true relative to the state, it overlooks the fact that children are the primary actors, agents, and rights bearers in their own personhood. This Article therefore considers ongoing public debates and legislation over parental rights of notification and control in education and healthcare under Washington state law, reframing these issues through the rights of children. State law provides a key vehicle for codifying, protecting, and even constitutionalizing the rights of everyone within the state, and this Article considers how state law could embrace a children’s rights framework to ensure self-determination for all marginalized populations. In balancing the interests of the state and parents, children are the fulcrum—the center point of the balance in weighing the two interests. Strengthening the fulcrum ensures both that the state and parents’ interests can be adequately weighed and considered, and that children’s rights and self-determination are protected in our understandings of the law through legislation and judicial frameworks. Emphasizing the rights of children—recognizing both their power and precarity without exploitation or subordination—creates conditions for the protection of all persons in the present and for the future.

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“Do as I say, not as I do.”

Parental idiom

## INTRODUCTION

In 2024, Washington joined the chorus of states,<sup>1</sup> congresspersons,<sup>2</sup> and litigants<sup>3</sup> arguing for an expansion of adult control over children and education under the umbrella of “Parents’ Rights.”<sup>4</sup> While there are variations across legislation and localities, the unifying theme is requiring parental oversight of curriculum, student records, and even content within public schools, justified in Washington by assertions that parents<sup>5</sup> are “primary stakeholders in their children’s upbringing” and that increased “access to student information encourages greater parental involvement.”<sup>6</sup> However, observers like Professor Latoya Baldwin-Clark note that this movement towards parents’ rights “seeks to codify aggressive forms of

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1. See, e.g., Annelise Reinwald, *New Hampshire becomes 26th State to adopt Parents’ Bill of Rights*, BALLOTPEdia NEWS (June 16, 2025), <https://news.ballotpedia.org/2025/06/16/new-hampshire-becomes-26th-state-to-adopt-parents-bill-of-rights/> [<https://perma.cc/PT6N-GMFC>] (noting twenty-six states including Washington have adopted legislative measures labeled as “Parents’ Bill of Rights” that codify parental involvement in educational standards and notification requirements, with local variations).

2. See Parents Bill of Rights Act, H.R. 5, 118th Cong. (2023).

3. See, e.g., *Mahmoud v. Taylor*, 606 U.S. 522, 528–30 (2025) (parents of different religions challenging school policy as a violation of their religious freedom and parental rights).

4. See WASH. REV. CODE § 28A.605.005 (2025).

5. This Article uses the term parents broadly, following the definition used in other areas of Washington legislation as a person with a biological or legal relationship to a person younger than eighteen years of age. *Id.* § 28A.225.010(2). Interestingly, the bill, which emphasizes parental rights, contains no express definition of a parent, though adjacent statutes contain the broad definition. Compare *id.* § 28A.605.005 (outlining parental rights without defining parent), with *id.* § 28A.225.010(2) (defining parent “for the purpose of this chapter means a parent, guardian, or person having legal custody of a child” in the context of compulsory school attendance). Parenting in the broadest sense includes a complex set of personal and relational dynamics that may not have anything to do with biological connection, or even legal authority. See, e.g., PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 178–82 (10th anniversary ed., 2000) (explaining the different cultural contexts and definitions of parenting, particularly in the community and non-biological relationships of “othermothers” who serve a parental role, without a legal or biological relationship).

6. WASH. REV. CODE § 28A.605.005 (2025).

supposedly race-neutral school surveillance, transparency, and unprecedented access to classrooms and lessons.”<sup>7</sup> Parental involvement can be a critical part of student success, particularly in early childhood education, and makes for a compelling rhetorical argument for parental rights.<sup>8</sup> However, educational research indicates that it is the quality and type of parental involvement that matters most—positive reinforcement and participation play significant factors in student achievement.<sup>9</sup> Yet the educational literature does not identify or recommend the policy of surveillance, notice, and intervention prescribed by legislation like Washington’s Parents’ Bill of Rights.<sup>10</sup>

Parents’ rights laws balance parental and social concerns over future generations by regulating influences on children, recognizing that children sit at the center of this balancing act. Yet in weighing the interests of state, federal, and parental authorities, children’s rights are at best ignored or at worst flattened under the weight of authority and surveillance in struggles over culture and identity. Rather than craft legislation that gives parental or state veto power over changes in children’s lives, I argue that we need to reframe this legislation that centers the rights of children—embracing intergenerational change in the law—and thereby protect the marginalized communities that so-called parental rights legislation too often curtails. This Article is neither prescription for statutory interpretation nor proscriptive constraint on the rights of parents, but a normative push to reframe preexisting constitutional rights with the recognition that rights belong to all persons in society, not only adults or parents.

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7. Latoya Baldwin-Clark, *The Critical Racialization of Parents Rights*, 132 YALE L.J. 2139, 2146 (2023).

8. Educational literature identifies parental involvement as a significant factor in student success, gaining support in research and funding when codified in policy goals. Sungwon Kim, *Fifty years of parental involvement and achievement research: A second-order meta-analysis*, 37 EDUC. RSCH. REV., 1, 1, 9 (2022) (compiling and analyzing studies and meta-analyses of parental involvement over the past since 1964).

9. *Id.* at 12–13 (indicating that positive expectations, aspirations, and targeted interventions in parenting factored significantly in student success, with mixed results on homework help due to the fact that parents are more likely to help when children are already struggling).

10. This assertion is based on the second-order meta-analysis described in notes 8 and 9. An extensive literature review could yield a study demonstrating such results, but Sungwon Kim’s second-order meta-analysis compiles studies and research across the educational literature, testing the results of different studies, variables, and operationalizations against each other. *Id.* By contrast, RCW § 28A.605.005 proscribes measures for parental involvement in state administrative processes of education, not the type of parental involvement described in educational literature summarized by the above meta-analysis. WASH. REV. CODE § 28A.605.005 (2025).

Washington's Parents' Bill of Rights is a microcosm of national conflicts over the treatment of marginalized groups under the adult-centric models of rights<sup>11</sup>—focusing on delineating norms of sexual orientation and/or gender identity,<sup>12</sup> and race.<sup>13</sup> Parents' rights are invoked as rhetorical leverage against antidiscrimination laws that would protect marginalized groups, while state interests are paradoxically invoked to narrow the protections of marginalized youth, even against parents and children who are members of that marginalized community.<sup>14</sup> By centering the self-determination of youth—both in state and federal legislation and understandings of constitutional rights—legal protections can be enhanced without sacrificing the rights of marginalized parents or children.

This Article therefore proceeds in three parts: Part I provides background on the Washington's Parents' Bill of Rights, a close reading of the legislation as passed, the early litigation, and recent amendment. While the legislation is couched in the protection of children and involvement of parents, this Part considers the supervisory role of parents within the school and how that could impact the assertion of rights by children on those same topics. Part II considers the constructed tension between parents' and children's rights in Washington in the context of recent Supreme Court decisions on equal protection and fundamental rights, focusing on *Mahmoud v. Taylor*,<sup>15</sup> a Fourteenth Amendment due process challenge demanding parental supervision over curriculum, and *United States v. Skremetti*,<sup>16</sup> where the Court upheld legislation restricting gender affirming care over the objection of parents and trans<sup>17</sup> children.

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11. Catherine E. Smith, *The Adult Rights-Bearing Archetype and How It Stifles Young People's Equal Protection*, 19 DUKE J. CONST. L. & PUB. POL'Y 139, 142 (2024) ("From its founding, the U.S. Constitution centered the adult as the quintessential rights-holder, treating children more like property than rights-bearers.").

12. See, e.g., Nicholas Serafin, *BORN TO EQUALITY: Minor Children, Equal Protection, and State Laws Targeting LGBTQ+ Youth*, 75 U.C. L.J. 411, 416 (2024) (overviewing the wave of parents' rights legislation focused on LGBTQ+ youth and the pretextual invocation of parental rights to obfuscate anti-LGBTQ+ animus).

13. Baldwin-Clark, *supra* note 7, at 2146.

14. See *infra* Part II.

15. 606 U.S. 522 (2025).

16. 605 U.S. 495 (2025).

17. This Article uses the terms "trans" and "transgender" as shorthand for persons whose gender identity does not match the one assigned to them at birth. While this broad definition may fail in capturing the nuance of trans identity, it is designed to interrogate the systems of power which attempt to rigidly define gender and identity within legal constructs as a form of violence against peoples whose identity does not conform to dominant ideologies. This includes both physical acts of violence,

Even when parental and children's rights intersect, the Court's failure to acknowledge the anti-trans and anti-children's rights dimensions of legislation adopted with the rhetoric of the protection of children inevitably harms children and marginalized communities. Part III therefore explores how embracing the rights of children, particularly in their expressive and associational capacities as persons and full participants in schooling, enhances the constitutional rights of all communities.

## I. WASHINGTON'S PARENTS' BILL OF RIGHTS

Part I of this Article discusses the background and motivations for Washington's Parents' Bill of Rights, followed by a close reading of the parents' rights statutory language, and concludes with a short discussion of litigation and amendments following the Parents' Bill of Rights.

### A. *Initiative 2081: Motivated by "Unhappiness"*

Washington's Parents' Bill of Rights began as Initiative 2081 (I-2081) in 2023 as part of a bundle of six initiatives funded by conservative Washington millionaire Brian Heywood and his political action committee "Let's Go Washington."<sup>18</sup> Heywood attributes the legislation to broad and unsourced assertions that there is an ongoing "erosion of the

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*see generally* ERIC A. STANLEY, *ATMOSPHERES OF VIOLENCE: STRUCTURING ANTAGONISM AND THE TRANS/QUEER UNGOVERNABLE* (2021) (theorizing anti-trans violence holistically, recognizing the rise in physical and rhetorical hostilities to trans people of color just as nominal legal privileges like marriage equality are affirmed predominantly for white cisgender folks who otherwise comply with social norms), and administrative violence in neutral language that purposefully or inadvertently fails to consider the existence of trans peoples, *see generally* DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2015) (theorizing the violence against trans communities as rooted in purposeful absence, discussing the many hurdles and burdens trans people face in legal recognition or support of their identity). While terminology, like trans, which indicates noncompliance with assigned gender, or cis, which indicates persons whose assigned and performed gender identities match, is relatively new to mainstream conversations on sex and gender identity, trans persons and communities are in no way a new development. *See generally* C. RILEY SNORTON, *BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY* (2017) (detailing and theorizing the expansive history of Black trans life to note that, particularly for Black communities, trans-ness means embodying a movement and fluidity in performances of gender).

18. Jerry Cornfield, *WA initiative opponents target the millionaire behind the measures*, SEATTLE TIMES (July 6, 2024), <https://www.seattletimes.com/seattle-news/politics/wa-initiative-opponents-target-the-millionaire-behind-the-measures/> [<https://perma.cc/PZ4P-DEWD>]. Since it was registered in 2022, Let's Go Washington has raised over twenty-four million dollars in loans and contributions in the three years leading to I-2081, substantially from founder and sponsor Brian Heywood's personal wealth. *See Let's Go Washington (Sponsored by Brian Heywood)*, WASH. PUB. DISCLOSURE COMM'N, <https://www.pdc.wa.gov/political-disclosure-reporting-data/browse-search-data/committees/co-2025-30644> [<https://perma.cc/T8MX-2UF6>].

parents' rights to know what has been going on with their child medically" and "reports that parents are being forced to pay medical bills of their teenager, yet no one is permitted to tell the parents what the bill is for."<sup>19</sup> Chair of the Washington State Republican Party and State Representative Jim Walsh sponsored I-2081, arguing the initiative was "strongly motivate[ed]" by "unhappiness around 5599,"<sup>20</sup> a bill opponents framed as an interference with parental rights.<sup>21</sup> SB 5599 amended Washington's parental-reporting requirements for youth shelters, homeless youth programs, and host programs by expanding a list of "compelling reasons" to not contact a parent when a young person runs away from home and enters state services.<sup>22</sup> SB 5599 explicitly incorporated gender-affirming care and reproductive health services (including abortion) as potential circumstances when "notifying the parent or legal guardian will subject the minor to abuse or neglect."<sup>23</sup> Despite the specific findings in SB 5599 that such legislation was designed to "remove barriers to accessing temporary, licensed shelter accommodations" for unhoused trans youth, Rep. Walsh's invocation of SB 5599 helps to clarify the focus of I-2081's broad language.<sup>24</sup> It is evasive at best and ultimately misleading for Rep. Walsh to characterize I-2081 as "not against anything" and merely "a defense of an essential right—parental rights," despite previously describing the bill as a response to "unhappiness" with SB 5599.<sup>25</sup>

Washington's Parents' Bill of Rights is by no means an isolated event. No singular inciting incident occurred in Washington or elsewhere in the United States to create any kind of urgency around parental rights, but like many modern parental rights movements, uses parental rights as

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19. Brian Heywood discusses the 6 common-sense initiatives to reverse declining conditions in Washington State, SHIFWTA.ORG (Oct. 13, 2023), <https://shiftwa.org/brian-heywood-discusses-the-6-common-sense-initiatives-that-can-bring-sanity-to-washington-state/> [https://perma.cc/3BNB-SH4D].

20. *Let's Go Washington turns in 420K+ signatures for parents' bill of rights initiative*, WASH. EXAM'R (Dec. 13, 2023), <https://www.washingtonexaminer.com/policy/education/2607202/lets-go-washington-turns-in-420k-signatures-for-parents-bill-of-rights-initiative/> [https://perma.cc/NH7A-TBW8] [hereinafter WASHINGTON EXAMINER].

21. John Braun, *Statement: Bill threatening rights of parents passes Senate* (Mar. 2, 2023), <https://johnbraun.src.wastateleg.org/bill-threatening-rights-parents-passes-senate/> [https://perma.cc/FS6L-HYXU].

22. S.B. 5599, 68th Leg., Reg. Sess. (Wash. 2023) (codified at WASH. REV. CODE § 13.32A.082(1)(b)(i) (2025)).

23. *Id.* (codified at WASH. REV. CODE § 13.32A.082(2)(c)(i) (2025)).

24. *Id.*

25. WASHINGTON EXAMINER, *supra* note 20.

a springboard for ideological opposition to content and conduct—like critical discussions of race, gender expression and questioning of identity, or even the increasing presence of trans folks in the public eye.<sup>26</sup> PEN America issued a 2023 report characterizing bills like I-2081 as “Educational Intimidation,” by enabling and emboldening groups opposed to any discussions of race and gender identity.<sup>27</sup> Rather than overtly proscribing a specific vision of race or gender that must be taught in schools, the laws use neutral language to “empower the use of intimidation tactics to cast a broad chilling effect over K-12 classrooms by mandating new and intrusive forms of inspection or monitoring of schools” even by persons “with no direct connection to the school[]” who simply oppose the subject matter or viewpoints presented in the classrooms.<sup>28</sup> Ideological struggles over schools and curricula are in no way new, isolated occurrences, or exclusive to the United States, as children and educational systems are often invoked at the center of moral panics that opine an imagined loss and target marginalized communities for exclusion.<sup>29</sup> The national scale and use of neutrally-worded legislation reflects a trend in retrenchment—claiming the gains of social movements seeking to remedy injustice are complete or have too substantially disrupted perceptions of the status quo and must be remedied.<sup>30</sup> Each

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26. See generally Baldwin-Clark, *supra* note 7 (analyzing laws targeting curriculum over moral panics around critical race theory); Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75 (2021) (describing the history and current state of parental rights to control children); Samantha R. Foran, *Parents' Rights or Parents' Wrongs?: The Political Weaponization of Parental Rights to Control Public Education*, 2022 WIS. L. REV. 1513 (2022) (arguing parents' rights laws are mostly “political grandstanding” and fearmongering to control children in public education, damaging public trust in schools and children); Mary Ziegler, Maxine Eichner & Naomi Cahn, *Retrenchment by Diversion: the New Politics of Parental Rights*, 123 MICH. L. REV. 669 (2025) (arguing parental rights are a pretextual ruse to reframe homophobia, transphobia, and racism as protection of children).

27. Jonathan Friedman, Samantha LaFrance & Kasey Meehan, *Educational Intimidation*, PENAMERICA (Aug. 23, 2023), <https://pen.org/report/educational-intimidation> [<https://perma.cc/33CY-223F>].

28. *Id.*

29. See, e.g., Kerry H. Robinson, *In the Name of 'Childhood Innocence': A Discursive Exploration of the Moral Panic Associated with Childhood and Sexuality*, 14 CULTURAL STUD. REV. 113 (2008) (analyzing how right-wing politicians instigate moral panics to mobilize sentiment against marginalized communities, using discursive analysis of Australian politics on sexual orientation and children in the early 2000s); Michael L. Smith, *Moral Panic and the First Amendment*, 72 BUFF. L. REV. 455 (2024) (applying the concept of moral panic—blaming social ills on an extrinsic group, ideology, or amorphous enemy—to First Amendment jurisprudence and the growth of parents' rights laws).

30. Retrenchment has taken many forms in response to movements for racial justice, even by critics who might support underlying goals of social justice, in the re-centering of whiteness and hierarchies of racial power. See Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and*

piece of parents' rights legislation might have some local narrative hook to try and domesticate the ideological shift.<sup>31</sup>

However, I-2081 never made it to the ballot in 2024. On March 4, the state legislature voted 82-15 in the House and 49-0 in the Senate to pass the initiative.<sup>32</sup> Though it passed with a supermajority of the legislative vote, Rep. Nicole Macri expressed concern in the floor debates, indicating she would vote no because of “the message [I-2081] sends in particular to our LGBTQ youth, [p]articularly our trans youth who have been under attack in this country and who we know [d]isproportionately struggle with mental health conditions like anxiety and depression.”<sup>33</sup> While many of the speeches in support of the bill emphasized how the legislation would strengthen the bonds between parents and children, or emphasized the importance of parents, Rep. Sharon Tomiko Santos emphasized in her speech that even though she would vote in favor of the initiative, it was because it “simply codifies all of these existing laws in one place, [s]o it doesn't do much to change the underlying laws.”<sup>34</sup> Rep. Santos's reasoning was echoed by a local analyst, reasoning that voting I-2081 into law was a reasonable and less harmful alternative because the initiative is a “mostly symbolic” measure and voting it into law before the initiative goes to the ballot “averts the need to run statewide campaigns against [I-

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*Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1362–63 (1988) (analyzing early critiques of affirmative action from scholars on both the political left and right as assuming racial progress when white supremacy is still central to power in the United States); Devon W. Carbado, *Critical What What*, 43 CONN. L. REV. 1593, 1607–08 (2011) (extending Crenshaw's analysis to capture the “reform/retrenchment dialectic” as a historical pattern of pushback to racial justice through linear narratives of racial progress to obfuscate the persistence of white supremacy and mass mobilization); David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. 1629, 1633 (connecting Carbado's reform/retrenchment dialectic to the reinforcement of white supremacy through focus on invocations of religious belief in opposition to racial justice).

31. Vivian McCall notes that I-2081 is “essentially a spruced-up copy” of a Louisiana statute. See Vivian McCall, *What Would Washington's Parents Rights Initiative Do?*, THE STRANGER (Jan. 30, 2024), <https://www.thestranger.com/news/2024/01/30/79364411/what-would-washingtons-parents-rights-initiative-do> [https://perma.cc/K8T9-ENA2]. There is significant parallel language in the Louisiana and Washington statutes; however, Washington's bill more extensively references existing Washington law, providing a further local application while simultaneously making the Washington parents' rights bill appear to be a redundant restatement of existing parental statutory rights. Compare LA. STAT. ANN. § 17:406.9 (2025), with WASH. REV. CODE § 28A.605.005 (2025). However, Louisiana and Washington are the only states thus far to adopt this model of parental-rights legislation that is rooted in “parental involvement.” *Id.*

32. Initiative 2081, 68th Leg., Reg. Sess. (Wash. 2024), <https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Initiatives/INITIATIVE%202081.SL.pdf> [https://perma.cc/6ZAL-ZSF9].

33. TVW, *House Floor Debate – March 4*, at 1:17:39 (TVW.org, streamed Mar. 4, 2024, at 15:10 PT), <https://tvw.org/video/house-floor-debate-march-4-2024031128/> [https://perma.cc/H5WK-GDQK] (on file with *Washington Law Review*).

34. *Id.* at 1:13:42. For a comparison of the laws, see *supra* section I.A.

2081], and it eliminates an organizing and mobilizing opportunity for the right wing in the coming presidential election.”<sup>35</sup> Accepting I-2081 into the statutes thus functions as a type of political gamesmanship—removing an inflammatory but largely symbolic piece of legislation from the ballot in a contested election year to try and neutralize the initiative’s power to draw voter turnout. The initiative’s symbolic invocation of parental rights to cloak ideological opposition to issues like gender-affirming care or abortion ironically highlights the exploitation of children as pawns in a political game. Children are not participants in this state legislative process but are invoked as the objects of legislation and the subject of restrictions.<sup>36</sup> Whether strategic, symbolic, or supportive, the legislative vote meant I-2081 went into effect on June 6, 2024.<sup>37</sup>

### B. *RCW § 28A.605.005: Parental Rights*

The general statements by proponents of Washington Parents’ Bill of Rights (WAPBR) described in the previous subpart mirror the breadth of the enacted statute. The law itself does not create any new, substantive rights for parents or children, but merely compiles and restates existing rights under state law. From the outset, the WAPBR, codified at RCW 28A.605.005, only vaguely addresses the parent-child relationship in broad findings by the legislature asserting that “parents are the primary stakeholders in their children’s upbringing,” “parental involvement is a significant factor in increasing student achievement,” and “access to student information encourages greater parental involvement.”<sup>38</sup> Each of these broad principles sounds agreeable but lacks any degree of specificity in understanding how Washington law defines the key terms of interest to the legislature. Why are parents the primary stakeholders, rather than the children themselves? What could the legislature mean by “parental involvement,” beyond a purely administrative right of notice and information?

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35. Andrew Villeneuve, *The case for enacting half of Brian Heywood and Jim Walsh’s six initiatives into law*, THE CASCADIA ADVOCATE (Mar. 2, 2024), <https://www.nwprogressive.org/weblog/2024/03/the-case-for-enacting-half-of-brian-heywood-and-jim-walshs-six-initiatives-into-law.html> [<https://perma.cc/2K6N-474D>].

36. See generally Jeremiah Chin, *The Next Generation*, 112 KY. L.J. 729 (2024) (discussing the importance of incorporating youth into participatory governance at a local level); Jonathan Todres, Charlene Choi & Joseph Wright, *A Rights-Based Assessment of Youth Participation in the United States*, 95 TEMP. L. REV. 411, 428 (2023) (describing different methods of incorporating youth into local governance, beyond token or symbolic representation and into a more participatory model).

37. See WASH. OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, *Implementation of I-2081, the Parents’ Bill of Rights*, <https://ospi.k12.wa.us/data-reporting/protecting-student-privacy/implementation-i-2081-parents-bill-rights> [<https://perma.cc/8SG2-RBDP>] (last visited Dec. 10, 2025).

38. WASH. REV. CODE § 28A.605.005(1) (2025).

Very little in the text of the WAPBR goes to addressing these concerns, yet the law is more straightforward in articulating parents' rights to administratively interrogate schools. The WAPBR allows parents to "examine the curriculum, textbook, instructional materials and supplemental material," but provides no clarity on what this right might mean for parents, schools, or children.<sup>39</sup> Without limits or guidance about what the WAPBR means by "examine," the statute creates an entitlement for parental micromanagement of schools—above and beyond the powers parents already have as voting adults to influence the election of public officials, participate in school board decision making, or choose which schools their children attend. Rather than existing regulatory channels, this entitlement provides a means of intimidating teachers and staff at schools by threatening action any time a book, discussion, or even curriculum does not match a parent's worldview. As the official guidance from the Superintendent of Public Instruction emphasizes, "[t]his provision does not create a new right or process for parents/guardians to challenge a district's use of certain textbooks, curriculum, or supplemental material."<sup>40</sup> School districts have been required to create procedures for policies of parental access and observation since 1979, "PROVIDED, That such observation shall not disrupt the classroom procedure or learning activity."<sup>41</sup> Parents already possess rights to inspect public school records under federal law;<sup>42</sup> however, Washington's parental rights law imposed a ten-day response timeline on schools, starting when a parent submits a written request.<sup>43</sup>

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39. *Id.* § 28A.605.005(2)(a).

40. OFF. OF LEGAL AFFAIRS, WASH. OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, CHRIS REYKDAL, SUPERINTENDENT OF PUB. INSTRUCTION, BULL. NO. 009-25, UPDATED GUIDANCE FOR IMPLEMENTATION OF INITIATIVE 2081 (2025), [https://ospi.k12.wa.us/sites/default/files/2025-02/bulletin\\_009-25\\_initiative-2081-supplemental-guidance\\_0.pdf](https://ospi.k12.wa.us/sites/default/files/2025-02/bulletin_009-25_initiative-2081-supplemental-guidance_0.pdf) [<https://perma.cc/E6EU-Z77L>].

41. WASH. REV. CODE § 28A.605.020 (2025) (effective June 15, 1979).

42. *See generally* Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (providing substantive and procedural privacy protections for educational materials); 34 C.F.R. pt. 99 (same); Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 (providing substantive and procedural guidelines to schools and parents in providing services to students identified as disabled); 32 C.F.R. pt. 57 (same).

43. The I-2081 version of RCW § 28A.605.005(2)(b)(i) read as "(b)(i) To inspect their child's public school records in accordance with RCW 28A.605.030, and to receive a copy of their child's records within 10 business days of submitting a written request, either electronically or on paper." Initiative 2081, <https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Initiatives/Initiatives/INITIATIVE%202081.pdf?q=20251030182923>. [<https://perma.cc/UV8X-L75K>] This provision was included in the partial preliminary injunction issued by the litigation discussed in the next section. Order Granting in Part and Denying in Part Motion for Preliminary Injunction at 3, *LCYC v. Washington*, No. 24-2-11540-4 SEA (Sup. Ct. King Cnty. June 24, 2024). The OSPI guidance notes this is "significantly shorter" than required by federal law. OFF. OF LEGAL AFFS., *supra* note 40. Current federal regulations require compliance "within a

The substantial narrowing of the student records response timeline provision is the only significant change from existing Washington code or federal law. Parents already have a right to “receive immediate notification” if a student is a victim of criminal action, abuse, or custodial interrogation by law enforcement.<sup>44</sup> Parental rights to not have their child removed from school grounds without their permission and to receive a nondiscriminatory public education are also protected, with express reference to existing Washington law that prohibits unauthorized removal or discrimination.<sup>45</sup> Interestingly, the articulation of nondiscrimination in the 2024 parental rights statute is underinclusive of the discrimination protected by Washington law: “homelessness,” “immigration or citizenship status,” and “neurodivergence” are prohibited forms of discrimination, but are the only forms of discrimination not included in this part of the code.<sup>46</sup> The remaining subsections follow a similar pattern of restating existing Washington law, with explicit reference to those respective codes.

For all the assertions of the rights of parents under the Parental Rights code passed by the legislature, subsection (4) makes a critical proviso: “nothing in this section creates a private right of action.”<sup>47</sup> If the entire

reasonable period of time, but not more than 45 days.” FERPA, 34 C.F.R. § 99.10 (2025). This timeline was brought back to meet the exact federal language in subsequent legislation discussed in the next session. RCW § 28A.605.005(2)(b)(i) now reads as:

To inspect and review their child’s education records and to request and receive a copy of their child’s education records within a reasonable period of time, but not more than 45 days, of submitting a request in accordance with the federal family educational rights and privacy act of 1974, Title 20 U.S.C. Sec. 1232g, as in effect on January 1, 2025, and RCW 28A.605.030.

WASH. REV. CODE § 28A.605.005(2)(b)(i) (2025).

44. WASH. REV. CODE § 28A.605.005(2)(c)–(e). Importantly, section (d) notes the immediate notification triggered by abuse is already required by RCW § 28A.320.160. *Id.* § (d).

45. *Id.* § 28A.605.005(2)(f)–(g); *see also id.* § 28A.605.010 (requiring school districts to provide procedures for authorized removal of students by parents or legal guardians); *id.* § 28A.642.010 (prohibiting discrimination against students “on the basis of race, ethnicity, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, homelessness, immigration or citizenship status, the presence of any sensory, mental, or physical disability, neurodivergence, or the use of a trained dog guide or service animal by a person with a disability”).

46. *Compare id.* § 28A.605.005(2)(g) (“To have their child receive a public education in a setting in which discrimination on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability is prohibited under chapters 28A.640 and 28A.642 RCW.”), *with id.* § 28A.642.010 (“Discrimination in Washington public schools on the basis of race, ethnicity, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, homelessness, immigration or citizenship status, the presence of any sensory, mental, or physical disability, neurodivergence, or the use of a trained dog guide or service animal by a person with a disability is prohibited.”).

47. *Id.* § 28A.605.005(4).

purpose of the law was to increase parental involvement, but the law merely restates existing administrative burdens on the state to provide information and notice to parents, and the law creates no private right of action for parents to enforce these rights—beyond any existing remedies under Washington law—what exactly does this law do? Legally, little, if anything. The Office of the Superintendent of Public Instruction noted as much in its initial guidance, urging schools not to “change or enact policies based on I-2081” until “comprehensive statewide guidance and additional clarity around the conflicting laws is provided.”<sup>48</sup> The Parents’ Bill of Rights does little in creating rights for parents and merely asserts generalized policy that is already in effect. This may provide clarity why the legislature provided such overwhelming support for I-2081 but does not provide clear answers why Brian Heywood and Let’s Go Washington would include it in a multi-million-dollar initiative campaign—other than the rhetorical and narrative weight of articulating parental rights and capitalizing on moral panics around trans youth.

*C. Aftermath: Litigation and HB 1296*

With the generality and existing questions surrounding I-2081 at its passage, the Legal Counsel for Youth and Children with a coalition of nonprofits and individuals filed a complaint in May of 2024, a month before the law was set to go into effect.<sup>49</sup> The lawsuit notes the vague and general language used in I-2081, emphasizing the many protections included in Washington state law that protect and support LGBTQ+ youth in the state, including a right to education and laws prohibiting discrimination.<sup>50</sup> However, the lawsuit only states a cause of action that the law is incomplete<sup>51</sup>—under the Washington Constitution, any amendments to state statutes may not be amended or revised by “mere

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48. OFF. OF LEGAL AFFAIRS, WASH. OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, CHRIS REYKDAL, SUPERINTENDENT OF PUB. INSTRUCTION, BULL. NO. 009-25, INITIAL GUIDANCE FOR IMPLEMENTATION OF INITIATIVE 2081 (2024), [https://ospi.k12.wa.us/sites/default/files/2024-06/bulletin\\_037-24.pdf](https://ospi.k12.wa.us/sites/default/files/2024-06/bulletin_037-24.pdf) [<https://perma.cc/NV5V-WT8W>].

49. See Complaint, *LCYC et al. v. Washington*, No. 24-2-11540-4 SEA (Sup. Ct. King Cnty. May 23, 2024). Named parties include the nonprofits Legal Counsel for Youth and Children, Lavender Rights Project, Momsrising, Oasis Youth Center, People of Color Against AIDS Network, Sexual Violence Law Center, and Southwest Washington Equity Coalition, with individual plaintiffs Kari Lombard, a Psychiatric-Mental Health Nurse Practitioner and former Seattle public school nurse; Jane Doe, a mother of two Seattle school students one of whom is trans, non-binary; and the South Whidbey School District in Whidbey Island, Washington. *Id.* at 1.

50. *Id.* at 15–18, 21.

51. *Id.* at 24.

reference” and must set forth the statute to be amended in full.<sup>52</sup> In June of 2024, plaintiffs successfully received a preliminary injunction in part, only as to the provisions changing the timeline for a records request to ten days, and “to the extent that [I-2081] requires disclosure of medical, health, and mental health records and/or information protected by” Washington’s Uniform Health Care Information Act.<sup>53</sup> Let’s Go Washington filed to intervene as a defendant and unsuccessfully opposed the preliminary injunction a few days before Judge Scott issued the partial preliminary injunction.<sup>54</sup> By December 13 of 2024, all parties filed cross-motions for summary judgment on the Article II, § 37 claim.<sup>55</sup> On January 27, 2025, the King County Superior Court granted the State’s motion for summary judgment and dismissed plaintiffs’ claims with prejudice, without issuing a detailed opinion.<sup>56</sup> Plaintiffs’ attorneys from the ACLU of Washington, Legal Voice, and Q Law issued a joint statement they were “disappointed” with the ruling, but promised to “continue advocating for student rights, whether through the courts or the legislature.”<sup>57</sup>

The Washington legislature was already in motion before the Superior Court’s dismissal, beginning consideration of House Bill 1296 and

52. WASH. CONST. art. II § 37. Courts apply a two-step framework in these challenges: “an enactment does not impermissibly revise or amend existing law if it (1) is a ‘complete act’ and (2) does not ‘render[] erroneous’ ‘a straightforward determination of the scope of rights or duties under the existing statutes.’” Wash. State Leg. v. Inslee, 198 Wash. 2d 561, 592, 498 P.3d 496, 514 (2021) (quoting Wash. Educ. Ass’n v. State, 93 Wash. 2d 37, 40–41, 604 P.2d 950, 952 (1980)).

53. Order Granting in Part and Denying in Part Motion for Preliminary Injunction at 3, LCYC v. Washington, No. 24-2-11540-4 SEA (Sup. Ct. King Cnty. June 24, 2024); *see also* WASH. REV. CODE § 70.02.020 (2025) (requiring written authorization from a patient for disclosure of health care information to persons other than the patient).

54. Proposed Intervenor’s Response to Motion for Preliminary Injunction, LCYC v. Washington, No. 24-2-11540-4 SEA (Sup. Ct. King Cnty. June 17, 2024).

55. *See* Order Granting in Part and Denying in Part Motion for Preliminary Injunction, LCYC v. Washington, No. 24-2-11540-4 SEA (Sup. Ct. King Cnty. June 24, 2024); Defendant State of Washington’s Motion for Summary Judgment, LCYC v. Washington, No. 24-2-11540-4 SEA (Sup. Ct. King Cnty. Sept. 18, 2024); Plaintiffs’ Motion for Summary Judgment and Response to State’s Cross-Motion for Summary Judgment LCYC v. Washington, No. 24-2-11540-4 SEA (Sup. Ct. King Cnty. Oct. 16, 2024); Plaintiffs’ Reply in Support of Plaintiffs’ Cross-Motion for Summary Judgment & Declaration of Adrien Leavitt in Reply in Support of Plaintiffs’ Cross Motion for Summary Judgment, LCYC v. Washington, No. 24-2-11540-4 SEA (Sup. Ct. King Cnty. Dec. 13, 2024).

56. Order on Cross-Motions for Summary Judgment, LCYC v. Washington, No. 24-2-11540-4 SEA (Sup. Ct. King Cnty. Jan. 27, 2025).

57. Press Release, ACLU of Washington, ACLU of Washington comment on ruling in Legal Counsel for Youth and Children v. State of Washington (Jan. 24, 2025), <https://www.aclu-wa.org/news/aclu-washington-comment-ruling-legal-counsel-youth-and-children-et-al-v-state-washington> [https://perma.cc/7EN7-C4AZ].

Senate Bill 5181 in January of 2025.<sup>58</sup> While SB 5181 would substantially revise RCW 28A.605.005, to match laws and timelines as proscribed prior to I-2081, it has not passed the House or Senate as of this writing.<sup>59</sup>

House Bill 1296, however, was signed into law by Governor Bob Ferguson on May 20, 2025.<sup>60</sup> More than simply amending I-2081, HB 1296 proposes a slate of student rights prioritizing “the protection of every student’s safety, access to an academic environment free of discrimination, access to the state’s statutory program of basic education as defined in RCW 28A.160.203, and privacy, to the fullest extent possible, except as required by state or federal law.”<sup>61</sup> The law also revises the parental rights section of Washington law to more accurately reflect the prohibitions on discrimination in Washington law and explicitly define gender expression, gender identity, and sexual orientation.<sup>62</sup>

Critically, HB 1296 goes a step further than simply amending the parental rights laws or restating other areas of Washington law to instead create a new section describing Students’ Rights. The opening section stresses education as “a cornerstone of a healthy, diverse, and productive society” and “foundational to our democracy.”<sup>63</sup> Therefore, the legislature must work with families and communities to create “respectful and engaged critical thinkers” and require schools to “develop student-focused educational and promotional materials” incorporating student rights.<sup>64</sup> HB 1296 names a number of specific student rights including: a right to “an amply funded program of basic education;” a learning environment

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58. H.B. 1296 was read in the House on January 14, 2025. WASH. STATE LEG., *HB 1296 – 2025–26*, <https://app.leg.wa.gov/bills/summary?BillNumber=1296&Year=2025> [https://perma.cc/L2PS-37JS]. S.B. 5181 was profiled in the Senate on January 8, 2025, and first read on January 13, 2025. WASH. STATE LEG., *SB 5181 – 2025–26 Bill Summary*, <https://app.leg.wa.gov/BillSummary/?BillNumber=5181&Year=2025> [https://perma.cc/784S-HZ6P].

59. See WASH. STATE LEG., *SB 5181 – 2025–26*, <https://app.leg.wa.gov/bills/summary?BillNumber=5181&Year=2025> [https://perma.cc/CV9K-TPRG].

60. *Id.*; see also Jacquely Jimenez Romero, *WA Governor signs parental ‘bill of rights’ rewrite*, WASH. STATE STANDARD (May 20, 2025), <https://washingtonstatestandard.com/2025/05/20/wa-governor-signs-parental-bill-of-rights-rewrite/> (last visited Nov. 24, 2025) (discussing the new Students’ Rights bill at the signing by the Governor and future plans for groups opposed to the law).

61. H.B. 1296, 69th Leg. Sess., Reg. Sess. § 101 (Wash. 2025) (adding a new section to RCW ch. 28A.320).

62. Compare *id.* § 102, 103, with WASH. REV. CODE § 28A.642.010 (2025) (noting homelessness, immigration or citizenship status, and neurodivergence were not included in I-2081’s original statement of nondiscrimination, despite being protected under Washington law).

63. H.B. 1296 § 201 (adding a new section to RCW ch. 28A.320).

64. *Id.*

free of discrimination and harassment; the right to exercise “constitutionally protected freedoms . . . including, but not limited to, the freedoms of speech, assembly, and exercise of religion;” rights to receive copies of school policies; a right to receive special education and related services; rights to education while incarcerated; and “the right to access academic courses and instructional materials with historically and scientifically accurate information that includes the histories, contributions, and perspectives of historically marginalized and underrepresented groups.”<sup>65</sup>

Like the parental rights statute, students’ rights described do not create a private right of action. Instead, the legislature mandates and outlines a new complaint process “for students, parents, and community members to address willful noncompliance with certain state laws that are necessary for protecting the health, safety, and civil rights of students.”<sup>66</sup> The mandated complaint process includes authority for the superintendent to hear complaints, take corrective actions and provide notice to school districts, craft a compliance plan with a school district, conduct investigations and public meetings with administrative appeals.<sup>67</sup> Parental rights summarized by I-2081 are expressly amended to focus on “education records” of students to facilitate student access to healthcare and mental health treatment without parental notification requirements.<sup>68</sup> HB 1296 effectively neutralizes many of the invasive notice requirements of I-2081 and makes students the center of the analysis in balancing the rights of parents, administrators, teachers, and students.

Challenges to the new student rights and the complaint procedures are assumably being crafted as of this writing. The Office of the Superintendent of Public Instruction has yet to author guidelines beyond the statutory text. The rapid development of parental and student rights in Washington law reflects a national discourse surrounding parents’ and students’ rights, which largely overlooks the existing constitutional rights of children—with notable exceptions like HB 1296.

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65. *Id.* § 202(2)(b) (adding a new section to RCW ch. 28A.230).

66. *Id.* § 301(3).

67. *Id.* §§ 303–06 (mandating a process for broad complaints by community members, students, or parents, and limited complaints by students or their parents that requires exhaustion of existing complaint procedures, and requiring that the rules provide due process).

68. *See id.* §§ 501(2)(b)(i), (3).

## II. PARENTAL RIGHTS AS PRETEXT FOR SOCIAL CONTROL

The vague and broad assertions of parental rights in Washington's statute are representative of ongoing legal attacks on marginalized groups: moral panics over CRT and trans communities and using children as pretext to regulate education and identity in covert ways that rely on assumptions of common sense. This Part provides some background for parental rights discourse in the law and highlights the paradox of parental rights crystallized by the Supreme Court in the 2025 decisions *Mahmoud v. Taylor* and *United States v. Skrmetti*.

### A. *Law and Parental Rights Rhetoric*

Parental rights are frequently invoked in broad common-sense assertions because of their long traditional roots in United States and European common law. As Professors Ann Daily and Laura Rosenbury explain, the legal status of children is still mostly under the regime of coverture, “represented (or covered) by their parents,” where the parent (usually the father following the patriarchal traditions of coverture in United States law) has near-exclusive authority.<sup>69</sup>

Child coverture continues to confer on parents broad control over children's emotional, intellectual, moral, spiritual, and everyday lives. Moreover, many common law parental prerogatives have now become constitutionalized. Parents control where children go to school, dictating public school, private school, or home school. Parents may prohibit their children from interacting with other adults or children, or force them to do so. Parents may force their children to attend church, or force or prevent them from engaging in other activities. Parents may require children to work within the home for free. If children work for wages outside of the home, parents may claim those wages for their own use. Parents even control many of the damages awarded in personal injury suits seeking redress for their children's own injuries.<sup>70</sup>

Even cases expanding constitutional rights in the name of children's education are largely done through the framework of parents and adults. The Supreme Court in *Meyer v. Nebraska*<sup>71</sup> held public schools violated liberty interests under the Fourteenth Amendment Due Process Clause by prohibiting the teaching of any language other than English.<sup>72</sup> Justice McReynolds explained the teacher's “right thus to teach and the

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69. Anne Daily & Laura Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 89, 93 (2021).

70. *Id.* at 92–93.

71. 262 U.S. 390 (1923).

72. *Id.* at 390–91.

right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.”<sup>73</sup> Even though the legislation targeted children’s learning and language education, the Court framed the case through the instructional rights of parents and teachers. The Court reminds us that “the individual has certain fundamental rights which must be respected” and “the protection of the Constitution extends to all” before expressly defining the boundaries on the state: “a desirable end cannot be promoted by prohibited means.”<sup>74</sup> Children’s learning and expression were the focus of debate, yet only the teachers’ and parents’ rights are expressly vindicated by the decision of the Court, ultimately concluding that foreign language instruction is “not injurious to the health, morals, or understanding of the ordinary child.”<sup>75</sup> Even when the wellbeing of children is at the center of conversation, even though as individuals their rights must be respected, children’s rights are set aside in favor of a parental rights framing. The Court does not discuss the importance of children’s learning—either individually or societally—or discovery of language, culture, and other ways of thinking and knowing through education. Children’s rights would put this principle of discovery at the center, rather than leaving it as an afterthought for the teachers and parents. The Court implemented a more discovery-centered standard decades later in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*<sup>76</sup> by limiting discretionary power of a school board to remove books from high school and junior high libraries, though without expressly addressing conflicting interests between parents, curriculum, and students’ interests.<sup>77</sup>

Similarly in *Pierce v. Society of Sisters*,<sup>78</sup> the Court relied on *Meyer* to find an Oregon statute compelling exclusive public-school attendance unconstitutional because it “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>79</sup> This parental role in “direct[ing] the upbringing” remains the throughline in parental rights decisions of the Supreme Court. Even though the First Amendment is plainly a restraint on the authority of governments, the Court places parental rights at the threshold of a

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73. *Id.* at 400.

74. *Id.* at 401.

75. *Id.* at 403.

76. 457 U.S. 853 (1978).

77. *Id.* at 868–69 (“In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”).

78. 268 U.S. 510 (1925).

79. *Id.* at 534–35.

constitutional violation. In *Wisconsin v. Yoder*,<sup>80</sup> the Court again affirmed the rights of religious parents to direct upbringing in education by disallowing application of mandatory school attendance for Amish students over sixteen years old, balancing the state's interest in education with parents' interest in the religious upbringing of their children.<sup>81</sup> Only Justice Douglas in dissent pointed out that "[i]t is the future of the student, not the future of the parents, that is imperiled by today's decision."<sup>82</sup> Locally to Washington, in *Troxel v. Granville*,<sup>83</sup> the Supreme Court reaffirmed "the fundamental right of parents to make decisions concerning the care, custody, and control of their children," invalidating a Washington nonparental visitation statute.<sup>84</sup>

Sometimes, the Court works in sweeping terms that include the rights of both parents and children without ascribing the right at issue to either group. In *West Virginia State Board of Education v. Barnette*,<sup>85</sup> the Court overturned a state law that would compel all students to salute the flag and recite the pledge of allegiance as contrary to the First Amendment, since the statutory pledge and salute would compel the child to go against their religious beliefs as a Jehovah's Witness.<sup>86</sup> In Justice Robert Jackson's poetic language: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>87</sup> Importantly in *Barnette*, both the rights of parents and children were squarely before the Court because students could be suspended and parents punished for missed student attendance for failing to say the pledge and salute the flag.<sup>88</sup> Instead of rooting the First Amendment violation exclusively in the rights of parents or students, the Court centered the violation of rights as a restriction on government: "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of

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80. 406 U.S. 205 (1972).

81. *Id.* at 205, 214.

82. *Id.* at 245 (Douglas, J., dissenting).

83. 530 U.S. 57 (2000).

84. *Id.* at 66, 73.

85. 319 U.S. 624 (1943).

86. *Id.* at 628–29.

87. *Id.* at 642 (overturning a state law compelling students to salute the flag and recite the pledge of allegiance in violation of a student's religious beliefs under the First Amendment because it would go against their beliefs as a Jehovah's Witness).

88. *Id.* at 629 ("Failure to conform is 'insubordination' dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is 'unlawfully absent' and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding \$50 and jail term not exceeding thirty days.").

intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”<sup>89</sup> This foundational understanding of modern interpretations of expression, association, and belief under the First Amendment is practically built on the rights of children *and* parents. Yet, in the years following *Barnette*, the rights of the children are rarely foregrounded, if included at all, in the analysis of the Court.

In the few cases where the Court expressly considers the rights of children on balance with parental rights and state interests, the Court has, at best, an inconsistent regard for the constitutional rights of children. The child plaintiff, Victoria, in *Michael H. v. Gerald D.*,<sup>90</sup> asserted a constitutional right to maintain legal recognition of her filial relationship to her biological father under the Due Process Clause, despite California’s statutory presumption of paternity.<sup>91</sup> Victoria was presumed to be the child of Gerald D. by California law because he was married to and cohabitating with Victoria’s mother when Victoria was born, but Michael H. was in fact the biological father of Victoria and had also previously cohabitated with Victoria and her mother.<sup>92</sup> After a lengthy discussion of the history and tradition of recognizing paternity based on marriage, the Court found no constitutional violation of Michael H.’s parental rights and dismissed Victoria’s due process challenge because “even assuming that such a right exists” California’s presumption of paternity “pursues a legitimate end by rational means.”<sup>93</sup>

Years later, in *Elk Grove Unified School District v. Newdow*,<sup>94</sup> the Court dismissed another California non-custodial parent’s claim for lack of standing.<sup>95</sup> The school district followed state law in requiring all students to recite the pledge of allegiance, with religious exemptions given *Barnette*, but Newdow’s claim was based on his objection that the words “under God” represented interference with his parental right to instruct his child in his atheistic beliefs.<sup>96</sup> The Court sidestepped the question of parental and children’s rights entirely, finding Newdow lacked standing because under the custody arrangement, the child’s mother, Banning, had ultimate legal control:

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89. *Id.*

90. 491 U.S. 110 (1989).

91. *Id.* at 113.

92. *Id.* at 113–16.

93. *Id.* at 130–31. For a fuller discussion of *Michael H. v. Gerald D.* in the context of children’s rights, see Jeremiah Chin, *Constitutional Futurisms*, 120 NW. U. L. REV. 39, 50–53 (2025).

94. 542 U.S. 1 (2004).

95. *Id.* at 5.

96. *Id.* at 6.

Nothing that either Banning or the School Board has done, however, impairs Newdow's right to instruct his daughter in his religious views . . . [t]here is a vast difference between Newdow's right to communicate with his child—which both California law and the First Amendment recognize—and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order.<sup>97</sup>

Unlike *Michael H.*, there was no asserted right by the child in *Newdow*, and it was more overtly a controversy between the father, mother, and state in balancing their interests in influencing the child. Yet both cases result in the same dismissive approach to what the child's rights and interests might be in the case. In *Newdow*, the Court entirely deferred to the state family law processes, while in *Michael H.*, most of the Court's analysis is focused on reinforcing the state's legitimate interest in limiting the parental rights of the biological father under the statutory presumption of paternity in favor of the marital father. Justice Antonin Scalia's majority opinion is, at best, dismissive of any recognition of the constitutional right of the child.<sup>98</sup>

*Brown v. Board of Education*<sup>99</sup> is one of the few cases to provide express relief to children because of the harm they experienced from segregation, making it exceptional in its broad power to overturn segregation writ large without relying solely on parental rights.<sup>100</sup> While parental oversight of education is at the center of analysis in *Meyer* and *Pierce*, the Court does not even mention the right of parents to direct the upbringing of their children in *Brown*.<sup>101</sup> Instead, the unanimous court in

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97. *Id.* at 16–17.

98. Justice Scalia addresses and overrides Victoria's claims to a relationship with her parent in just three short paragraphs. *Michael H.*, 491 U.S. at 130 (1989) (“We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, Victoria's claim must fail.”).

99. 347 U.S. 483 (1954).

100. *Id.* at 494 (“To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”). See generally Catherine Smith, *Brown's Children's Rights Jurisprudence and How It Was Lost*, 102 B.U. L. REV. 2297 (2022) (arguing the Court quietly abandoned the children's rights potential of *Brown* by focusing arguments mostly on school districts and the battles between state and local control, rather than on the rights of the affected youth).

101. *Brown*, 347 U.S. 483. In fact, the Court's opinion does not mention the parents at all. Consider the opening sentence: “In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis.” *Id.* at 487. The education, the schooling, and the claims are all accurately framed through the children seeking aid of the courts in pursuing education, rather than reimagining the case through the eyes of parents contesting the state's denial of parents' choice of where to send their children to school.

*Brown* rightly frames the entire case around the children's experiences in segregated educational systems:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>102</sup>

*Brown's* expansive view of children's rights and its radical, necessary intervention in equal protection jurisprudence against racial segregation and white supremacy quickly faced retrenchment through the rhetoric of parental rights.<sup>103</sup> Historian Elizabeth Gillespie McRae explains how for white women in particular, rhetoric of parental rights became the primary vehicle for pushback against *Brown*:

Schools were repositories of their efforts as mothers, educators, citizens, and cultural guardians. Faced with this new onslaught, white segregationist women made the family the center of political life and political ideology. To preserve families now threatened by a leviathan federal government that had overtaken public education, they offered a version of racialized family values. Opening up their political ranks to those women who were not political activists but who were wary about losing authority over their families, *Brown*, in part, had feminized massive resistance.<sup>104</sup>

Professors Mary Ziegler, Maxine Eichner, and Naomi Cahn explain parental rights decisions and policy are used as covers for ensuring status

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102. *Brown*, 347 U.S. at 493.

103. See ELIZABETH GILLESPIE MCRAE, *MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY* (Oxford Univ. Press 2018). McRae provides a historiography of white segregationists during Jim Crow and after *Brown v. Board* and describes the alignment of white supremacy, parental rights, and maternalism in twentieth-century social movements. *Id.* Though white supremacists are frequently gendered as male, McRae's work exposes massive resistance—the white supremacist movement against segregation—as a “long-lived, sophisticated political program” that is “part and parcel of the twentieth-century political mobilization of women.” *Id.* at 9.

104. *Id.* at 167.

quo ideological control over public education.<sup>105</sup> Framings of parental rights are monolithic and have not historically respected “parental pluralism and carving out space for a variety of parental decisions, [instead,] the politics of parental rights establish state or federal policies binding all parents.”<sup>106</sup> The implications extend beyond schools in any area where children’s autonomy is completely subsumed by parental decision-making. In healthcare, for example, Professor Allison Whelan explains how genetic testing and vaccinations have emerged as areas where parental rights are presumed in the best interests of the child, but children and adults may disagree over the benefits of a vaccination or what to do with the information gained from genetic testing: “the minor—the person to whom that information truly belongs—is left out of the discussion and decision.”<sup>107</sup> Centering medical decision-making for parents may make sense both for child and parent in many cases because the parent is presumed to have a greater understanding of the risks and benefits of any medical procedure, and is generally entrusted with, and responsible for, the care and wellbeing of their child. Minors lack recognized legal capacity to “prevent the disclosure of their genetic information and lack any avenue for recourse when it occurs.”<sup>108</sup> Whelan points out the unique problems of genetic testing for diseases that will not manifest until adulthood implicating “the right to *future* privacy, withholding from disclosure information that need not, and traditionally would not, be learned until adulthood and thus controlled by the individual to whom that information belonged.”<sup>109</sup> Though much of law relating to parents and children theoretically focuses on the “best interests of the child,” total vesting of decision-making power in parents and courts creates unique struggles for children that exacerbate “the failure of law and policy to keep pace with changing technology and medical innovations.”<sup>110</sup>

Parental rights can become legally and rhetorically totalizing—using parental rights as a pretext for legislation that would seek to restore policies that favor social norms at the expense of marginalized communities, limiting access to schooling for racialized minorities, eliminating abortion rights, limiting antidiscrimination law’s application to LGBTQ+ folks, or most recently “undercut[ting] efforts to teach about

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105. Ziegler et al., *supra* note 26, at 674.

106. *Id.* at 677.

107. Allison M. Whelan, *Poked, Prodded, and Privacy: Parents, Children, and Pediatric Genetic Testing*, 109 IOWA L. REV. 1219, 1251 (2024).

108. *Id.* at 1252.

109. *Id.* at 1284 (emphasis in original).

110. *Id.* at 1285.

race in American history or move towards further acceptance of diverse sexual identities.”<sup>111</sup> Ziegler, Eichner, and Cahn explain this is “retrenchment by diversion,” indicated by laws deploying parental rights to disallow individualized parental decision-making and require the “standardization of children” that would limit children’s potential and future decision making.<sup>112</sup> Just as Ziegler, Eichner, and Cahn observe the monolithic framing of parental rights, that version of parental rights presumes that all children are the same, or that there is a standard parent-child relationship rather than the large spectrum of relationality that exists despite the legal recognition of hierarchical parental authority.<sup>113</sup> Even laws which pass this threshold may still be pretext for retrenchment when they (1) burden traditionally disadvantaged groups; (2) form a pattern of burden or harm to disadvantaged groups; or (3) vest total decision making power in parents.<sup>114</sup> Ziegler, Eichner, and Cahn point to laws like Idaho’s “abortion trafficking” statute that criminalizes adults who assist minors to “procure” or “obtain” abortions or “an abortion-inducing drug” unless they can prove parental consent.<sup>115</sup> The requirement of parental consent seems to individualize the decision-making power of the parent and child because it does not totally eliminate the ability of minors to seek and receive abortions—parental consent is available. But the structure of the law reveals the retrenchment by diversion:

Rather than provide that lack of consent is an element of the crime, the legislation makes consent only an affirmative defense. Doing so puts the burden of showing consent on those charged, rather than the state. This suggests that the legislation seeks to chill the activity of those seeking to aid pregnant teens, regardless of parental consent.<sup>116</sup>

Parental rights are therefore not so broad and inclusive as the label might sound. Parental rights rhetoric “allows politicians to effectively code switch, toggling between conversations with base voters on the one hand and independents and moderates on the other.”<sup>117</sup> A discriminatory policy that may be unpalatable or politically inopportune to the general public becomes shielded under the common-sense assumption that parents

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111. Ziegler et al., *supra* note 26, at 693.

112. *Id.* at 709.

113. *Id.* at 707.

114. *Id.* at 710.

115. *Id.* at 705–07; IDAHO CODE § 18-623 (2025).

116. Ziegler et al., *supra* note 26, at 716.

117. *Id.* at 693.

should have influence or at least transparency in overseeing public institutions—when parents already possess those rights.<sup>118</sup>

Yet these expansive invocations of parental rights are not available to all parents. In the family regulatory system (child protective services, foster care, etc.), the rhetorics of the protection of children are invoked to intervene in families and sever parental rights, particularly for low-income families and families of color. Professor Cynthia Godsoe explains the doctrines of parental rights do not emerge on the ground: “[t]he right to ‘care, custody, and control’ of one’s children is virtually nonexistent for the millions of parents ensnared in the family policing system, who are nearly all low-income and disproportionately families of color.”<sup>119</sup> Professor S. Lisa Washington astutely calls out the “pathology logics” of the family regulatory system in reframing structural conditions like poverty or racism as individualized deficits, creating a “cycle in which impoverished people experience heightened surveillance, which culminates in even more government intrusion through coercive services that ostensibly ‘correct deficient behavior’ but instead perpetuate gendered, racialized, and ableist marginalization.”<sup>120</sup> Systemic regulation of marginalized families shifts parental rights so forcefully it warps time—as Washington explains, “the construction of time in the system fixes parents in time, devalues time as a resource, reproduces social stratification, and privileges the state while disadvantaging families.”<sup>121</sup> Parents are evaluated for the time they spend with children, time they spend working, and the time they are required to spend in court—which may impose unrealistic expectations that parents are in many places at the same time, or at least have the means to provide resources that provide for all of these needs simultaneously. Parental rights are therefore malleable and shifting, deployed in service of existing arrangements of power that can render parental rights as all-encompassing for some parents and completely inert for others.

Particularly in schooling, Professor Latoya Baldwin-Clark points out how parental rights are invoked to attack teaching of race and history in classrooms in order to mobilize white supremacy under the nominally colorblind parental rights label:

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118. See Foran, *supra* note 26, at 1527.

119. Cynthia Godsoe, *Racing and Erasing Parental Rights*, 104 B.U. L. REV. 2061, 2078 (2025).

120. S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1531 (2023). See generally KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (Stanford Univ. Press 2017) (discussing the history of privacy rights in the United States and how these rights are invisible or eliminated for marginalized populations through supervision and regulation like the family regulatory system, intrusions into reproductive healthcare decision-making, and encouraging development of a police state).

121. S. Lisa Washington, *Time & Punishment*, 134 YALE L.J. 536, 543 (2024).

Many parents' rights guidebooks specifically justify the aggressive mobilization of parents' rights in response to fears of losing Whiteness . . . Rather than claiming that race does not matter, the anti-CRT and parents' rights movements recognize race's significance, the benefits attached to those categories, and the subsequent positioning in the racial hierarchy.<sup>122</sup>

Parental rights are presented as an absolute assertion when defeating state interest in progressive remedies but are not available to marginalized parents—parents of color, parents of LGBTQ+ students, and certainly not LGBTQ+ parents of color.<sup>123</sup> Baldwin-Clark explains that “[t]he anti-CRT and parents' rights movements covertly deny racism in schools by blaming Black children's deficits—rather than White children's advantages—as the cause of racial disparities in student outcomes.”<sup>124</sup>

Thus, parents' rights bills like Washington's that overtly link “parental involvement” and student success,<sup>125</sup> without defining any kind of relational interest, responsibility, or state support, make a rhetorical move that now schools or “bad” parents are to blame for any student failures. This obfuscates systemic or institutional challenges, ideological hostility, or simply absolution for parents whose own hostility or self-centered political viewpoint might lead to conflicts with their children.<sup>126</sup> Parental rights are a shield for adults, but only those whose ideological and political leanings comport with United States traditions like white supremacy, heteronormativity, or transphobia. Look no further than that same history and tradition in the United States that still affects our present. Parental rights have such a long and absolutist rhetoric, yet the policies of removal of Indigenous children from families, or the racially discriminatory application of abuse, foster care, and removal standards in Black and Brown communities, reveal that “parents” is often invoked as a pretextual signal for a particular mode of thought, a particular vision of the future, and society that continues the normative assumptions of white supremacy, colonization, heteronormativity, or transphobia.<sup>127</sup>

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122. Baldwin-Clark, *supra* note 7, at 2192–93.

123. *See id.* at 2201–02.

124. *Id.* at 2196.

125. *See* WASH. REV. CODE § 28A.605.005 (2025).

126. *See, e.g.,* Baldwin-Clark, *supra* note 7, at 2201 (arguing the rhetoric of parental rights bills “privileges the needs and prerogatives of White parents over the needs and desires of other parents and their children”); Marissa Jackson Sow, *Whiteness as Guilt: Attacking Critical Race Theory to Redeem the Racial Contract*, 69 UCLA L. REV. DISC. 20, 23–24 (2022) (emphasizing that the rhetoric of innocent white children, and families, is at the center of anti-CRT rhetoric, attempting to remove any kind of recognition of systemic benefit for white families and placing blame on students of color).

127. *See generally* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (Basic Books

B. *Paradox of Parental Rights*

Two recent cases highlight the pretext and paradox of parental rights in constitutional law. In June 2025, the Court decided *United States v. Skrmetti*,<sup>128</sup> upholding a Tennessee law banning gender-affirming care for transgender children over a Fourteenth Amendment equal protection challenge brought by three trans youth, their parents, and their doctor.<sup>129</sup> Days later in *Mahmoud v. Taylor*,<sup>130</sup> the Court found parents were entitled to a preliminary injunction in their First Amendment claim against a Maryland school district that declined to provide notice and opt-out to religious parents who objected to story books featuring LGBTQ characters.<sup>131</sup> Both cases featured an assertion of parental rights challenging state regulations through preliminary injunctions.<sup>132</sup> Both cases featured policies that fail to accommodate individualized parenting decisions in raising children. Both cases were decided against a backdrop of rising public anti-LGBTQ animus manifesting in local laws across the United States.<sup>133</sup> Yet the Court only affirmed the religious rights of anti-LGBTQ parents<sup>134</sup> and ignored the interests of parents seeking and supporting gender-affirming care for their children.<sup>135</sup>

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2022) (analyzing decades of research on the child welfare system in regulating and policing Black families, linking back to systems of racialized enslavement in the United States); SABINA E. VAUGHT, BRYAN MCKINLEY JONES BRAYBOY & JEREMIAH CHIN, THE SCHOOL-PRISON TRUST (Univ. of Minn. Press 2021) (connecting the regulation of Indigenous youth, parents, and white supremacy under colonization, and how removal of Indigenous peoples to boarding schools to “train” them in whiteness and anti-Indian sentiment are hostile to both children and Indigenous parents); Neoshia R. Roemer, *Equity for American Indian Families*, 109 MINN. L. REV. 1713 (2025) (describing the history of assimilationist policies that dismantled Indigenous families with disregard for parental rights of Indigenous parents by forcibly removing Indigenous youth and placing them in white homes); Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755 (2022) (exposing structural issues in general child welfare law that rely on systemic racist assumptions about the fitness of American Indian parents and families, undermining parental rights of Indigenous families).

128. 605 U.S. 495, 518–19 (2025).

129. *Id.*

130. 606 U.S. 522, 522–24 (2025).

131. *Id.*

132. *Id.*; *Skrmetti*, 605 U.S. at 507.

133. See generally Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965 (2024) (documenting the growing number of laws targeting LGBTQ, especially trans, people in the United States). Skinner-Thompson extensively “maps the breadth and depth of anti-transgender legislation up through 2023 and shows how the legislation simultaneously overreaches and underregulates in its efforts to achieve its pretextual nondiscriminatory goals . . . demonstrat[ing] that the laws are motivated by animus or a bare desire to harm.” *Id.* at 983.

134. *Mahmoud*, 606 U.S. at 560–70.

135. *Skrmetti*, 605 U.S. at 525–26.

### I. United States v. Skrmetti

Given the history of deference for parental rights, parents supporting their transgender youth in receiving gender-affirming care should have been a clear legal issue of state interference with the rights of children and parents. Yet in *Skrmetti*, Chief Justice John Roberts's opinion for the Court declined to apply heightened scrutiny to SB1, affirming Tennessee's ban on gender-affirming care.<sup>136</sup> However, SB1 does not prohibit *all* gender-affirming care, but only puberty blockers and hormones as administered to youth whose gender identity does not match their sex assigned at birth,<sup>137</sup> which the Court refers to as "biological sex."<sup>138</sup> Both the Court and Tennessee use the rhetorical guise of scientific evidence to obfuscate the social construction of gender identity by referring to biology, "immutable characteristics of the reproductive system that define the individual as male or female, as determined by anatomy and genetics existing at birth."<sup>139</sup> As historian of science Sarah Richardson explains, this goes against "[d]ecades of research across scientific disciplines [which] have built an understanding of human sex as a multidimensional trait with biological and social components that can vary over the life course."<sup>140</sup> The Court and Tennessee invoke rhetorics of protection for minors "'from physical and emotional harm' by 'encouraging minors to appreciate,' rather than 'become disdainful of,' their sex."<sup>141</sup> The text of the statutory prohibition on gender-affirming care plainly targets trans persons under eighteen years old—an identity based on the sex assigned at birth and the age of the individual—yet the Court declines to find any unconstitutional discrimination on the basis of age or sex.<sup>142</sup>

Chief Justice Roberts reasons rational basis review is the proper standard for SB1 because it "'neither burdens a fundamental right nor

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136. *Id.*

137. This Article uses the phrase "sex assigned at birth" rather than biological sex, following the work of trans persons, advocates, and scholars, like Jessica A. Clarke, who explains that the phrase disrupts "common-sense intuitions about the obviousness of sex as a simple, constant, and binary characteristic that can serve as an unproblematic basis for regulation." Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1870 (2022).

138. *Skrmetti*, 605 U.S. at 505.

139. TENN. CODE ANN. § 68-33-102(9) (West 2025).

140. Sarah Richardson, *Transphobia, Cloaked in Science*, L.A. REV. BOOKS (Nov. 7, 2018), <https://blog.lareviewofbooks.org/essays/transphobia-cloaked-science/> [<https://perma.cc/HXQ2-WZHV>] (responding to a memo issued by the Department of Health and Human Services in 2018 under the first Trump administration and concluding that "no scholar of human sexuality, not even the urologist or geneticist enraptured by their object of study, would have the hubris to suggest that genitals and chromosomes exhaust the definition of sex as a human trait").

141. *Skrmetti*, 605 U.S. at 506 (quoting TENN. CODE ANN. § 68-33-101(m) (2025)).

142. *Id.*

targets a suspect class[.]’ . . . Rather, SB1 prohibits healthcare providers from administering puberty blockers and hormones to *minors* for certain *medical uses*, regardless of a minor’s sex.”<sup>143</sup> Applying this minimal standard, the Court accepts all of Tennessee’s asserted justifications at face value:

Tennessee determined that “minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors.” At the same time, Tennessee noted evidence that discordance between sex and gender “can be resolved by less invasive approaches that are likely to result in better outcomes for the minor.” SB1’s age- and diagnosis-based classifications are plainly rationally related to these findings and the State’s objective of protecting minors’ health and welfare.<sup>144</sup>

The Court uncritically affirms Tennessee’s law targeting trans youth as somehow protecting their health and welfare, but protecting trans youth from what exactly?

SB1 broadly gestures at potential harm from gender-affirming care: “[t]hese procedures can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences.”<sup>145</sup> But in the next sentence, SB1 quickly hedges its assumption of harms, “find[ing] it likely that not all harmful effects associated with these types of medical procedures when performed on a minor are not yet fully known, as many of these procedures, when performed on a minor for such purposes, are experimental in nature and not supported by high-quality, long-term medical studies.”<sup>146</sup> If these harms are “not yet fully known” and lack “high-quality, long-term medical studies,” how can the legislature reasonably rely on these assumptions?

Professor Scott Skinner-Thompson points out the asserted “safety concern is pretextual” because the bans on gender-affirming care “are grossly underinclusive and often specifically permit medical interventions to make people with ambiguous or nonbinary physical compositions rigidly conform to binary anatomical norms.”<sup>147</sup> Prescribing puberty

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143. *Id.* at 511 (quoting *Romer v. Evans*, 527 U.S. 620, 631 (1996)) (emphasis in original).

144. *Id.* at 523 (internal citations omitted).

145. TENN. CODE ANN. § 68-33-101(b) (2025).

146. *Id.*

147. Skinner-Thompson, *supra* note 133, at 991.

blockers and hormones for children is not done lightly,<sup>148</sup> requires parental consent for both the procedure and use of health insurance, and has been approved by “broader professional medical authorities like the American Academy of Pediatrics.”<sup>149</sup> The Court and the Tennessee legislature treat gender-affirming care like it can be casually bought at any retail store, rather than acknowledge it is a considered medical process that assists youth in properly and fully expressing their gender identity.

Importantly, the Court sidesteps the involvement of parents throughout *Skrmetti*. Other than a casual mention that the plaintiffs include the parents of trans youth, the opinion of the Court makes no reference to the effects of SB1 on parental rights. Justice Sonia Sotomayor’s dissent points out that parents and doctors are being excluded entirely from the balance of interests “with no regard for the severity of the minor’s mental health conditions or the extent to which the treatment is medically necessary for an individual child.”<sup>150</sup> Of the four opinions justifying SB1’s ban on gender-affirming care, only Justice Clarence Thomas’s concurrence acknowledges the requirement of parental consent.<sup>151</sup> But rather than consider the rights of parents of trans youth to support their children, Justice Thomas reframes the high rates of suicide for trans youth who do not receive gender affirming care as a justification for *invalidating* parental consent—quoting an editorial calling it “emotional blackmail” for doctors to notify parents.<sup>152</sup> Justice Thomas’s opinion does not use this as a reason for concern or care for the children who might, at minimum, experience a mental health crisis, but instead to reaffirm the idea that “minors lack the maturity to fully

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148. Prior to any gender-affirming care like puberty blockers or hormones, national standards require children to complete a number of mental health assessments. See Diana M. Tordoff, Gina M. Sequeira, Alic G. Shook, Florence Williams, Lara Hayden, Ash Kasenic, David Inwards-Breland & Kym Ahrens, *Factors Associated with Time to Receiving Gender-Affirming Hormones and Puberty Blockers at a Pediatric Clinic Serving Transgender and Nonbinary Youth*, 8 TRANSGENDER HEALTH 420 (2023). A pediatric gender-affirming care clinic in Seattle, Washington required a diagnosis, referral, and a one-hour telephone intake with a licensed clinical social worker prior to any medical appointment. *Id.* at 421. Additional mental health assessments are then required prior to intake, and even patients who already have completed mental health assessments were required to provide a questionnaire completed by a psychiatrist. *Id.* The median time between contact with the clinic and initiating gender affirming care in the Seattle study was 307 days. *Id.* at 423. The Seattle Study concluded that factors like “[l]ower caregiver income, Medicaid insurance, and lack of family support were the primary factors associated with longer times to a first medical appointment. After youth made contact with the clinic, the only factor associated with delays in initiating gender-affirming medication was the timing of [mental health assessments].” *Id.* at 425.

149. Skinner-Thompson, *supra* note 133, at 991.

150. United States v. Skrmetti, 605 U.S. 495, 583 (2025) (Sotomayor, J., dissenting).

151. *Id.* at 540–42 (Thomas, J., concurring).

152. *Id.* at 541 n.6 (Thomas, J., concurring) (quoting Pamela Paul, *Gender Dysphoric Kids Deserve Better Care*, N.Y. TIMES (Feb. 4, 2024), <https://www.nytimes.com/2024/02/02/opinion/transgender-children-gender-dysphoria.html> [<https://perma.cc/T6NQ-Y9TS>]).

understand and appreciate the life-altering consequences of the treatment.”<sup>153</sup> Paradoxically, bans on gender-affirming care are justified because “minors lack the maturity” to understand the consequences of their actions, while parents and doctors who understand suicide is a potential consequence of denying children gender-affirming care cannot validly consent to gender-affirming care “consistent with ethical principles” because there are unknown risks.<sup>154</sup> Parental rights to direct the care and upbringing of their children is therefore invalidated when listening to children, parents, pediatricians, therapists, and social workers, because it does not reflect the majority’s preferred ideological and religious views. A state’s interest in the ephemeral idea of “protecting children” takes precedence—apparently even when that protection involves denying children healthcare that would prevent mental health consequences, including suicide.

## 2. Mahmoud v. Taylor

Nine days after ignoring trans children and their supportive parents in *Skrmetti*, the Supreme Court gave profound deference to parental rights in *Mahmoud v. Taylor*. There, the Court found a state unconstitutionally “burdens the religious exercise of parents when it requires them to submit their children to instruction that poses ‘a very real threat of undermining’ the religious beliefs and practices that the parents wish to instill.”<sup>155</sup> In *Mahmoud v. Taylor*, the Montgomery County Public Schools (MCPS) incorporated five books featuring LGBTQ characters into the kindergarten to fifth grade curriculum.<sup>156</sup> After parents were notified of the curriculum including these five books, parents began contacting teachers, staff, and administrators in MCPS schools “asking that their children be excused from classroom instruction” related only to these five books.<sup>157</sup> After MCPS declined to provide excused absences for students removed from the classroom when these stories were read, a coalition of religious parents of Muslim, Catholic, Ukrainian Orthodox faiths, along with Kids First, an unincorporated association of parents and teachers who

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153. *Id.* at 541 (quoting TENN. CODE. ANN. § 68-33-101(h)).

154. *Id.*

155. *Mahmoud v. Taylor*, 606 U.S. 522, 530 (2025).

156. *Id.* at 4–6. The books at issue are CHELSEA JOHNSON, LA TOYA COUNCIL & CAROLYN CHOI, *INTERSECTION ALLIES: WE MAKE ROOM FOR ALL* (Dottir Press 2019); DANIEL HAACK, PRINCE & KNIGHT (Little Bee Books 2018); CHARLOTTE SULLIVAN WILD, LOVE, VIOLET (Farrar, Straus & Giroux 2022); JODIE PATTERSON, BORN READY: THE TRUE STORY OF A BOY NAMED PENELOPE (Crown Books for Young Readers 2021); and SARAH S. BRANNEN, UNCLE BOBBY’S WEDDING (Little Bee Books 2020).

157. *Mahmoud*, 606 U.S. at 537.

object to LGBTQ books, filed suit.<sup>158</sup> The common thread of the varied faith traditions of the parents is a shared belief that the inclusion of these books would be “immoral” and cause children to question parents’ religious instruction.<sup>159</sup>

Justice Alito’s majority opinion places parental rights at the center of the First Amendment’s Free Exercise Clause:

“[W]e have long recognized the rights of parents to direct the ‘religious upbringing’ of their children.” And we have held that those rights are violated by government policies that “substantially interfer[e] with the religious development” of children. Such interference, we have observed, “carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.”<sup>160</sup>

In this inverted framing of the First Amendment, Justice Alito reasons that the Free Exercise Clause is not only a restraint on government to “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,”<sup>161</sup> but an affirmative right that parents may invoke against public schools.

This reframing extends into a rereading of doctrinal cornerstones like *West Virginia Board of Education v. Barnette*, which Justice Alito brands as “an especially egregious kind of direct coercion: a requirement that students make an affirmation contrary to their parents’ religious beliefs.”<sup>162</sup> Though *Barnette* emphasized the religious beliefs of parents

158. *Id.* at 538–43. Importantly, the unincorporated association, Kids First, includes a broad and undefined body of parents and teachers, but only one is identified as having a student who was previously enrolled at MCPS—though when the child was enrolled and for how long are unstated in the opinion. *Id.* at 542. Instead, the Court focuses on the daughter’s disability as part of the injury, since the allegation from the parent is mostly an unproven fear that the daughter’s understandings or beliefs might contradict the parents’ traditionalist Catholic beliefs:

Morrison’s daughter also received special services from the school, such as speech and occupational therapy. Morrison and her husband are Catholics who believe that “marriage is the lifelong union of one man and one woman” and that gender is “interwoven” with sex. Due to their daughter’s learning challenges, they fear that she “doesn’t understand or differentiate instructions from her teachers and parents” and that they “won’t be able to contradict what she hears from teachers.” Because of the services provided to her disabled daughter in public school, Morrison faced enormous “pressure” to keep her daughter enrolled.

*Id.* at 542 (internal citations omitted). The parent felt “compelled” to withdraw their child from the school and now will have to spend on private tutors and services. *Id.* at 541. In a policy sense, this is a huge spotlight on how important funding of special education, speech, and occupational therapy are in public schools. This amorphous group of parents mirrors the parental rights movement described in the above section.

159. *Id.* at 540–41.

160. *Id.* at 547 (quoting *Espinoza v. Mont. Dept. of Revenue*, 591 U.S. 464, 486 (2020); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972)).

161. U.S. CONST. amend. I.

162. *Mahmoud*, 606 U.S. at 548.

and children, in *Mahmoud* Justice Alito recasts *Barnette* as the Court deferring to the religious instruction of parents<sup>163</sup>—a sentiment only raised by the *Barnette* dissent as a justification for requiring parents to send their children to private school to ensure religious beliefs are maintained, the exact antithesis of Justice Alito’s sweeping opinion.<sup>164</sup>

Instead, Justice Alito jumps to *Yoder* as justification for the “fact-intensive” inquiry as to whether a law substantially interferes with a parent’s free exercise right to direct the religious upbringing of their children.<sup>165</sup> But again, Justice Alito follows his preferred conclusion from *Yoder* without engaging the original facts where the state law required compulsory school attendance in direct contradiction to Amish beliefs and even an existential threat to the Old Order Amish Church.<sup>166</sup> *Yoder* also involved a dispute over a content-neutral state statute because the Amish objected to *any* instruction, not a particular book, course, content, subject matter, or viewpoint expressed in a school.<sup>167</sup> Justice Alito says the central contextual question in *Mahmoud* derives from *Yoder*: “[a]re [the instruction or materials at issue] presented in a neutral manner, or are they presented in a manner that is ‘hostile’ to religious viewpoints and designed to impose upon students a ‘pressure to conform’?”<sup>168</sup>

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163. *See id.*

164. In *Barnette*, the injury the Court addressed was the religious beliefs of children and parents, and the resulting suspensions that could arise from failure to join in the compulsory flag salute which the children and parents believed violated their religious tenets as Jehovah’s Witnesses because saluting a flag would be equivalent to worshiping a false idol or graven image. 319 U.S. 624, 630 (1943). “Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.” *Id.* Importantly, the injury recognized in *Barnette* is to both parents and children, emphasizing the punitive consequences to both parties. *Barnette* is not exclusively dealing with the parental right to direct the upbringing of their children or abstract ideological disagreement.

165. *Mahmoud*, 606 U.S. at 550, 555 (“Here, the Board requires teachers to instruct young children using storybooks that explicitly contradict their parents’ religious views, and it encourages the teachers to correct the children and accuse them of being ‘hurtful’ when they express a degree of religious confusion.”).

166. *Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972) (finding that under the plaintiff’s belief system *any* education beyond the eighth grade leads to “influences that alienate man from God” and, according to expert witnesses on education and the Old Order Amish Church at issue, “would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today.”). Justice Alito cites to no authorities on the impact of the presence of LGBTQ characters in books, but only that the parents (and Justice Alito) believe the books contradict their beliefs, and that is sufficient for the Court to intervene. *Mahmoud*, 606 U.S. at 554–56.

167. *Yoder*, 406 U.S. at 211 (“Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.”).

168. *Mahmoud*, 606 U.S. 522 at 524 (quoting *Yoder*, 406 U.S. at 211).

Justice Alito extracts the key phrases from *Yoder*'s description of the facts to present a conclusion of law, decontextualizing the *Yoder* Court's description of the unique conflict between the Old Amish Church and the principle of high school education, and transmuted descriptive text into a legal principle to determine how to analyze context.

From this framework, the Court concludes that the books at issue in *Mahmoud* are "unmistakably normative" and "clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected."<sup>169</sup> Because books like *Prince & Knight* present same-sex marriage as something to be celebrated by "not just family members and close friends, but the entire kingdom . . . such celebration is liable to be processed as having moral connotations."<sup>170</sup> Justice Alito therefore questions the celebration:

If this same-sex marriage makes everyone happy and leads to joyous celebration by all, doesn't that mean it is in every respect a good thing? High school students may understand that widespread approval of a practice does not necessarily mean that everyone should accept it, but very young children are most unlikely to appreciate that fine point.<sup>171</sup>

With "all the tender sweetness of a seasick crocodile,"<sup>172</sup> Justice Alito concludes the positive discussion of same-sex marriage, sexual orientation, and gender identity in the children's books "carr[ies] with [it] a 'very real threat of undermining' the religious beliefs that the parents wish to instill in their children."<sup>173</sup> Therefore, even though the policy

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169. *Id.* at 550.

170. *Id.* at 551.

171. *Id.*

172. THURL RAVENSCROFT, *You're a Mean One Mr. Grinch*, on DR. SEUSS' HOW THE GRINCH STOLE CHRISTMAS (Mercury Records 1966).

173. *Mahmoud*, 606 U.S. at 553 (quoting *Yoder*, 406 U.S. at 218). A separate article could, and likely should, be written about Justice Alito's questionable selective quotation of *Yoder* throughout *Mahmoud*. To initiate the conversation for anyone willing to take up the issue, the quoted text from *Yoder* is presented in full:

It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

406 U.S. at 218. Justice Alito conveniently sidesteps the fact that compulsory education in *Yoder* presents an existential threat to the practice of the Amish faith. Youth are compelled to participate in education regardless of their beliefs, but even under Amish beliefs children are not compelled to join the Old World Amish Church. See Steven V. Mazie, *Consenting Adults? Amish Rumspringa and the Quandary of Exit in Liberalism*, 3 PERSP. ON POL. 745 (2005) (discussing the role of choice and faith in the Amish belief system, where all Amish youth must choose at age sixteen to join the faith completely or join the outside world never to return again). The presentation of a storybook describing

denying notice and opt-out to parents is neutral and generally applicable, the asserted burden on parents' religious beliefs requires the Court to apply strict scrutiny.<sup>174</sup>

When weighing parental right to religious beliefs with conflicting state interests in inclusive public education, "a government must demonstrate that its policy 'advances "interests of the highest order" and is narrowly tailored to achieve those interests.'"<sup>175</sup> Although MCPS administrators and the dissent claimed the notice and opt-out policy would "impose impossible administrative burdens on schools," the Court concludes this claim is disproven by broad opt-out policies in other school districts and MCPS's prior guidelines "gave parents a broad right to have their children excused from specific aspects of the school curriculum."<sup>176</sup> Therefore, the storybooks with LGBTQ characters without a parental notice and opt-out policy "place[] an unconstitutional burden on the parents' rights to the free exercise of their religion."<sup>177</sup>

### C. *When Parental Rights Matter and the Silences of the Court*

Both *Mahmoud* and *Skrmetti* spend significant time talking about the potential harms to children without ever including the rights or perspectives of the children at issue. Instead, the preferences of the parents in *Mahmoud* and preferences of the state in *Skrmetti* are paramount. Justice Alito's concluding sentiment in *Mahmoud* quoted in the above paragraph highlights the burden before the court "on the parents' rights to the free exercise of their religion"—though the entire opinion focuses on how children could theoretically receive and interpret the messages

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celebration to children does not compel participation, viewpoints, or attitudes. There is no comparable existential threat to the Catholic church, the Ukrainian Orthodox church, or the faith of the Muslim parents whose denomination or organizational affiliation is never specified. At best, in Justice Alito's own framing, it presents a message that contradicts messages at home. The selective quotation also ignores the fact that the *Yoder* Court highlights the *intolerance* of the Old World Amish, while Justice Alito's opinion attempts to sanitize the intolerance of LGBTQ persons and practices in *Mahmoud* through false equivocation of inclusive storybooks and exclusionary practices.

174. *Mahmoud*, 606 U.S. at 564–65.

175. *Id.* at 565 (quoting *Fulton v. Philadelphia*, 593 U.S. 522, 541 (2021)). In another episode of Justice Alito's suspiciously selective quotations, *Lukumi* applied strict scrutiny to a city policy that targeted specific religious beliefs by carving out significant exceptions for other religious faiths. 508 U.S. at 536–37 ("Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others . . . A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander."). In *Mahmoud*, no such targeting or exceptions are alleged, and the plurality of religious traditions represented by plaintiffs contradicts any claims of targeting, other than targeting intolerance towards LGBTQ persons. See *Mahmoud*, 606 U.S. 522.

176. *Mahmoud*, 606 U.S. at 569 (quoting Sotomayor, J., dissenting).

177. *Id.*

from the schools or parents, only the parents' rights are considered by the Court.<sup>178</sup>

But they are considered only when convenient. Parental rights to free exercise include the right to control their children's religious beliefs to the exclusion of state policy, but parental rights to aid children in receiving gender-affirming care from licensed medical providers are subject to total regulation by the state. In both *Mahmoud* and *Skrmetti*, the Court invokes hyperbolic harms that children could theoretically suffer—yet the harm of suicide that children may suffer from *failing* to receive gender-affirming care is a reason for invalidating parental rights in *Skrmetti*.

These two opinions, particularly given their proximity in issuing the decisions, provide a paradoxical pretext to use parental rights to obfuscate ideological leanings of groups opposed to LGBTQ issues, LGBTQ persons, and particularly LGBTQ children. While the prior sections focus on what was said in the majority opinions of *Mahmoud* and *Skrmetti*, the silences and missing analyses in these cases can illuminate the production of power. As Anthropologist Michel-Rolph Trouillot explains, “[t]he ultimate mark of power may be its invisibility; the ultimate challenge, the exposition of its roots.”<sup>179</sup> Exposing the roots of power in the law can seem deceptively simple; when we dig into the citations and opinions deployed by the Court in legitimizing its opinion we get a sense of how it may have reached a decision. Reading *Skrmetti* and *Mahmoud* together raises substantial questions about consistency and jurisprudence but provides insight about the operation of power in the opinions.

Where *Mahmoud* loudly proclaims parental rights as a broad assertion of control and power over children to require individualized treatment under state policy, *Skrmetti* is conspicuously silent about how the ban on gender-affirming care targets a relatively small number of parents and children. Chief Justice Roberts begins *Skrmetti* by framing the case with the statistic that “[a]n estimated 1.6 million Americans over the age of 13 identify as transgender,” but this obfuscates the proportionality of this population since most persons “over the age of thirteen” are adults.<sup>180</sup> The same data that identifies the 1.6 million persons over thirteen who identify as trans notes this means about 0.6% of the population, though about 1.4%

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178. *Id.*

179. MICHEL-ROLPH TROUILLOT, *SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY* xxiii (Beacon Press 1995). For a more robust analysis of Trouillot's conceptualization of history, power, and silence and application to legal analysis, see Chin, *supra* note 93 (building on Trouillot's analysis and Afrofuturist legal scholarship to outline a theory of constitutional futurism).

180. *United States v. Skrmetti*, 605 U.S. 495, 501 (2025).

of youth (about 300,000) identify as transgender.<sup>181</sup> Why might the Court avoid highlighting what a small minority of the population are trans, especially since only about .74% (about 3,100) youth in Tennessee identify as trans and are therefore subject to SB1?<sup>182</sup>

Justice Amy Coney Barrett’s concurrence provides some insight: the test for suspect classification to apply heightened scrutiny under equal protection derives from footnote 4 of *United States v. Carolene Products*.<sup>183</sup> In *Carolene Products*, the Court noted that rational basis was to be the general standard for equal protection analysis, but “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry.”<sup>184</sup> Interestingly, note 4 of *Carolene Products* cites to *Pierce v. Society of Sisters*<sup>185</sup> and *Meyer v. Nebraska*,<sup>186</sup> two major cases that include the rights of parents and children and discuss discrimination on the basis of religion and national origin under the Equal Protection Clause.<sup>187</sup> Though none of these three cases appear in the discussion of parental rights and discrimination against trans or LGBTQ youth in *Skrmetti* or *Mahmoud*—without ever addressing or providing a standard for anti-trans discrimination beyond rational basis.

Critically ignored, however, is the underlying question of *Carolene Products*: whether prejudice against a minority has “curtail[ed] the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>188</sup> For the trans youth and their parents in *Skrmetti*, the political process has certainly failed to protect their rights as evidenced by legislation targeting *only* their access to gender-affirming care. This is

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181. Jody L. Herman, Andrew R. Flores & Kathryn K. O’Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA SCH. L. WILLIAMS INST. 1 (June 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf> [<https://perma.cc/WE4X-8MTZ>].

182. *Id.* at 10.

183. *Skrmetti*, 605 U.S. at 549 (Barrett, J., concurring) (citing *United States v. Carolene Products Co.*, 304 U. S. 144, 152–53, n.4 (1938)).

184. *Carolene Products*, 304 U.S. at 153 n.4.

185. 268 U.S. 510, 534–35 (1925) (finding an Oregon law requiring all students to attend public school “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”).

186. 262 U.S. 390, 401 (1923). The Court found that a Nebraska law prohibiting instruction in any language other than English violated the constitution: “Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.” *Id.*

187. *Id.*

188. *Id.*

not a broad policy recommendation against the physiological effects of hormones, because those same hormones are approved for a child who might want less facial hair for reasons that match the sex they were assigned at birth. Trans persons, and trans youth in particular, lack substantial access to the political process and thus facially merit a heightened scrutiny under the standard of *Carolene Products*, but as Justice Barrett points out in her concurrence, “we have *never* embraced a new suspect class under this test,” paradoxically reasoning that “the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”<sup>189</sup> This creates a perpetual feedback loop of rights, where courts should apply heightened scrutiny to groups who lack meaningful access to the democratic process, yet the Court has not recognized any groups deserving of heightened scrutiny beyond race and sex because the Constitution presumes the democratic process will fix it.<sup>190</sup>

This loop of political participation for trans persons reflects the paradox of parental rights for trans children and children generally. Parental interests in control that match normative conceptions, like religious traditions in *Mahmoud* or gender binaries in *Skrmetti*, are affirmed and unyielding. Parental interests in affirmation of children’s decisions, like discussions of religious belief in light of storybooks in *Mahmoud* or gender-affirming care in *Skrmetti*, are outside the law. Parental rights are absolute, so long as they match normative hierarchies of power. What does this mean for children, and especially trans children, who are excluded from the political process *de facto* numerically and *de jure* because the right to vote is not guaranteed until the age of eighteen? Exclusion, marginalization, and subordination—at least until they become adults, because the archetypal exercise of rights and political power is all wielded by adults.<sup>191</sup>

Even decisions like *Barnette*, which contemplate the religious beliefs of the children as part of the analysis of the Court, become misconstrued

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189. *Skrmetti*, 605 U.S. at 550 (Barrett, J., concurring) (emphasis in original) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

190. Unfortunately, Justice Barrett concludes this section of her opinion there before providing some explanatory help in making this loop make sense, and she instead spends the remainder of her concurrence dismissing the recognition of trans persons as a discrete group because they are diverse and so excluded by *de facto* normative conceptions of a gender binary and that there has been no need for explicit *de jure* discrimination against trans persons until recent years. *See id.* at 550-57.

191. *See* Smith, *supra* note 11, at 141 (describing a series of analytical traps created by centering adults in equal protection analysis, which miss the important and distinctive qualities of children that constitutional interpretation should apply to contextually and flexibly). Smith argues that “discrimination against children merits a framework on its own terms and that closer scrutiny is warranted when laws treat children unequally in service to the constitutionally impermissible aims.” *Id.*

in Justice Alito's unironic invocation as a foundation for parental control in *Mahmoud*. While "no official, high or petty, can prescribe what shall be orthodox" in *Barnette*, for Justice Alito in *Mahmoud* perhaps it would be better paraphrased: "if there is any fixed star in our constitutional constellation, it is that [only parents] can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force [children] to confess by word or act their faith therein."<sup>192</sup>

Just as children should not be used as a proxy for ideological struggles between adults, parental rights should not be proxy for denying the rights of youth and marginalized communities. In the next Part, I explore how decentering parental rights and emphasizing the self-determination of youth supports the rights of all.

### III. STRENGTHEN THE FULCRUM: SELF-DETERMINATION AND CHILDREN'S RIGHTS

If legislation is balancing state and parental interests in children's education, constitutional protection of children's rights must be given enhanced strength and support to avoid being crushed under the multiplying interest of government and parental assertions of control. *Skrmetti* and *Mahmoud* make clear that parental rights are inadequate to protect the interests of all children, precisely for the reasons articulated in *Carolene Products*: political processes cannot be assumed to provide for children's interests because children are expressly excluded from political processes. This does not necessarily mean that expanding voting rights to younger age groups would guarantee equality because younger persons would still be a numerical minority.<sup>193</sup> As Professor Susannah W. Pollvogt astutely argues, equal protection jurisprudence should forgo a suspect classification analysis assessing the characteristics of social groups, and instead focus on "assessing the attributes of the laws, not the groups against which they discriminate."<sup>194</sup>

If we understand the primary motivations for equal protection to be ensuring self-determination and social mobility for all persons, Pollvogt explains the analysis should be as follows: "[w]here a law or other government action relies on a facial classification of persons, the burden

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192. 319 U.S. 624, 642 (1943).

193. Current Census data estimates about seventy-three million persons under age eighteen, and about 205 million between ages eighteen and sixty-four, or about 21.5% and 60.5% respectively. U.S. CENSUS BUREAU, *National Population by Characteristics: 2020–2024* (June 2025), <https://www.census.gov/data/tables/time-series/demo/popest/2020s-national-detail.html> [<https://perma.cc/SU88-D6HW>].

194. Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 796 (2014).

is on the government to prove an affirmative connection between the trait that defines the targeted group and the governmental and individual interests being regulated.”<sup>195</sup>

Applying this model from equal protection to cases involving the rights of children generally requires only slight modification: assumptions of parental control or presumptions of children's capacity cannot serve as proof of governmental interests. Legislation and judicial decision-making must take into account the unique social and familial relationships of power that children are situated in, without a generalized assumption that parents are always correct, or children should have no say. The traditional “suspect classification” test is too rigid, as Justice Thurgood Marshall so clearly articulated in his dissent in *San Antonio Independent School District v. Rodriguez*:<sup>196</sup>

A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.<sup>197</sup>

Parental rights and the protection of children should therefore no longer serve as a cure-all to legislation that would burden the exercise of constitutional rights by children. To echo Catherine Smith, instead of falling into the trap of an existing “rights-bearing archetype that prioritizes adults” we should strive for laws that “accommodate[] young people’s qualities, characteristics, and needs while providing them equal protections of the laws.”<sup>198</sup> This requires an understanding of the relationships of power, both in the familial relationships of children, but also in social understanding of children as present participants in society *and* their future possibilities as they learn and grow.<sup>199</sup> This more flexible spectrum that deprioritizes the adult-centric model of rights would require

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195. *Id.* at 801 (drawing on *City of Cleburne*, 473 U.S. 432 (1985), and *Plyler v. Doe*, 457 U.S. 202 (1982)).

196. 411 U.S. 1 (1973).

197. *Id.* at 98–99 (Marshall, J., dissenting). The majority in *Rodriguez* found that because economic inequality was not a suspect classification subject to *de jure* discrimination in the same ways as racial segregation, rational basis was the correct test. *Id.* at 55.

198. See Smith, *supra* note 11, at 196.

199. See *id.*; Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018) (arguing children's interests are subjugated to adult authority under the premise that children will serve the same role as adults or their rights are only validated upon becoming adults, Dailey and Rosenbury offer a new framework of rights, responsibilities, and relationships that serve children's needs in the present).

more searching contextual analysis of the power dynamics in the circumstances of each case *and* the inclusion of children’s perspectives, rather than simple assumptions that adults always know and follow the best interests of children.

This would require the Court in *Skrmetti* to scrutinize this infringement on children’s rights, and the State would need to present strong evidence for the law, rather than the absence of evidence with a generalized fear that gender-affirming care could harm children. Justice Roberts’s majority relies heavily on fears that children may make a decision they regret with lasting consequences, but this is an important part of the learning process that even the Court embraces—at times beneficially like *Brown v. Board* overturning *Plessy*,<sup>200</sup> and at times harmfully and regretfully in my eyes like *Dobbs v. Jackson Women’s Health Organization*<sup>201</sup> overturning *Roe v. Wade*.<sup>202</sup> This would also mean that parental rights cannot be a pretext for state control. Governments should not allow a parent’s priorities or beliefs to stand in as adequate substitutes for their children’s.

*Mahmoud* fails to recognize that children have thoughts, beliefs, and expressions of their own. Though Justice Alito cites to *Tinker v. Des Moines* for the recognition that constitutional rights are not “shed . . . at the schoolhouse gate,” he inverts the logic by extending an argument for *children’s* protection under the First Amendment to *parental* control.<sup>203</sup> Taking a case that was fundamentally about the expressive rights of children in a school to extend parental control *over* children’s First Amendment rights reveals the reinforcement of existing norms of religious and parental subordination. *Mahmoud* prioritizes avoiding offending parents’ religious beliefs above all expressive and associational rights—the children’s, the teachers’, and other community members’. This ruling essentially allows parents to wield state power—with a constitutionally protected right to notice and opt out when curriculum offends their religious sensibilities—without any of the constraints of content or viewpoint discrimination imposed by the First Amendment.<sup>204</sup>

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200. 163 U.S. 537 (1896).

201. 597 U.S. 215 (2022).

202. 410 U.S. 113 (1973).

203. *Mahmoud v. Taylor*, 606 U.S. 522, 545 (2025) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07 (1969)).

204. See Tanya Washington, Jeremiah Chin, Sarah Medina Camiscoli, Travis F. Chance, Amalia Y. Sax-Bolder & Catherine E. Smith, Brief of Amici Curiae Scholars for the Advancement of Children’s Constitutional Rights and Students Engaged in Advancing Texas in Support of Respondents at 10–15, *Mahmoud v. Taylor*, 606 U.S. 522 (arguing the parental opt-out permits viewpoint discrimination by only considering the views of parents, not the views or religious beliefs of the students (quoting Justice Alito’s majority in *Matal v. Tam*, 582 U.S. 218, 220 (2017), “[g]iving offense is a viewpoint”)).

This is not to say we need to hold all parenting decisions as subject to state authority and control—parental rights have valid purchase in constitutional analysis. My argument is that we must also include children's rights in tandem. This would require courts to include the thoughts and perspectives of children whose interests are at stake when parents sue the state over control and value the perspectives of those who would be marginalized by law and policy. Including voices of outsiders is by no means a new step of legal analysis, but unfortunately a step that courts fail to take.<sup>205</sup>

Particularly for trans children in *Skrmetti* and *Mahmoud*, a principle of self-determination connects an analysis that would support both the rights of marginalized parties and marginalized groups writ large. Children are engaging in expressive and associational rights in asserting their identities as trans persons or even in learning about trans children and LGBTQ communities in storybooks. Children are not compelled to adopt a particular point of view on the issues, but children should have some self-determination in how and why their views and beliefs are expressed. Even children who might follow in the footsteps of parents opposed to LGBTQ identities are given the opportunity to critically interrogate beliefs, but in an environment that respects the humanity and validity of others. *Mahmoud* fundamentally denies the agency of children and frames them entirely as objects for parental control. *Skrmetti* sweeps parents in for denials of rights if they are supportive of their children's expression or association.

These opinions and the Washington debates over parental rights and students' rights reveal how children's rights are a threshold for both protection and denial of rights. Rather than rely on a pure dignitary interest in protecting the rights of children, emphasizing self-determination and the unique status of children as children ensures broader guarantees of rights and protections for all marginalized communities. Children suffer from the presumption that their choices are misguided, ill-informed, or subject to external influence. And they surely can be, but so can the choices of adults, and the assumptions about children cannot alone justify restricting their rights without eroding constitutional protections for everyone.

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205. See generally Chin, *supra* note 93; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing critical legal studies must include the lived experiences of marginalized peoples to better interrogate the normative perspectives of law); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (Basic Books, 1992) (beginning from the recognition that racism is an integral, endemic part of legal and social life in the United States replaces the inevitability of racial progress and recenters the need for struggle and constant reevaluation of the status quo).

Even though I fully endorse Smith and Pollvogt’s reframings of equal protection, I also do not want to fully abandon the political process model of *Carolene Products*. Political participation can take many forms, particularly at the level of state and local government.<sup>206</sup> Washington’s reframing of parental rights under I-2081 through the Students’ Bill of Rights in HB 1296 presents a practical example of how parental rights and children’s rights can be mutually reinforcing. Under HB 1296, parents can allege that schools have violated students’ rights and bring claims accordingly.<sup>207</sup> Though the rights being vindicated are students’, it protects the rights of parents to control the upbringing of their children to the exclusion of the state, rather than to the exclusion of the child.

Children are futures, which is why they play such a key role in rhetorical and social struggles for equality and rights. Enabling their self-determination is therefore critical in ensuring that all future generations are able to embrace change—new ways of thinking, being, and knowing that have not yet emerged in the mainstream—rather than exclusively fixate on remediating problems created by previous generations. Centering children’s self-determination is part of what I have called elsewhere a jurisprudence of “constitutional futurism” that looks to history and tradition as the Court has done but expands the framework to include the stories of persons who might be excluded or marginalized by conventional accounts, to consider the present implications of decisions on children, and to expand our consideration of the future by incorporating children as active participants.<sup>208</sup>

## CONCLUSION

Professor K. Tsianina Lomawaima makes a brilliant argument to increase Tribal sovereignty and self-determination in education of Indigenous youth based on the historical relationship between Tribal governments and the United States: “The history of American Indian

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206. See Jeremiah Chin, *The Next Generation*, 112 KY. L.J. 729, 743–48 (2024) (providing examples of participatory local governance by youth through children’s cabinets, youth councils, and youth congresses); Sarah Medina Camiscoli, *Youth Movement Law: The Case for Interpreting the Constitution with Mobilized Youth*, 26 U. PA. J. CONST. L. 1558, 1565–66 (2024) (arguing for the inclusion of “mobilized and marginalized youth as key interpreters of the Constitution, its limits, and its possibilities”).

207. H.B. 1296, 69th Leg. Sess., Reg. Sess. §§ 301-306 (Wash. 2025) (providing a complaint process for parents, students, and community members).

208. See Chin, *supra* note 93, at 71 (“Centering constitutional interpretation on the rights of children, imagining *with* rather than *for* youth, provides a direct knowledge transfer between past, present, and future, minimizing harmful speculation, while dreaming together of something we *all* want to live in and for.”).

education can be summarized in three simple words: battle for power.”<sup>209</sup> Indigenous communities exemplify the struggles for recognition of their inherent sovereignty and the importance of self-determination for operationalizing the inherent power of community.<sup>210</sup> Just as the battle for power over Indigenous nations has been waged over Indigenous youth in boarding schools, land, and tribal governance,<sup>211</sup> the battle for the future of constitutional rights is being waged over children. Unfortunately for children and marginalized communities, children have been exploited under the pretext of parental rights. In Washington, this manifests in laws like I-2081 that attempt to codify parental authority, control, and surveillance—even when they threaten the wellbeing of children who might not be supported by their parents in their decision to seek gender-affirming care. At the Supreme Court, the battle for power is currently being won by normative assumptions around education and gender, imposing on children surveillance and restraint similarly under the pretext of parental rights.

This Article argues that by leaning into concepts of self-determination and applying these principles to the rights of children generally, we can expand the framework of protection for everyone, ensuring the battle for power does not cause collateral damage to the rights of marginalized communities.

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209. K. Tsianina Lomawaima, *Tribal Sovereigns: Reframing Research in American Indian Education*, 70 HARV. EDUC. REV. 1, 2 (2000) (internal citation omitted).

210. See Bryan McKinley Jones Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 URB. REV. 425, 434 (2005) (“Self-determination is the ability to define what happens with autonomy, how, why, and to what ends, rather than being forced to ask permission from the United States.”); Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy*, JOINT OCCASIONAL PAPERS ON NATIVE AFFS. 1, 17 (2010) (“The policy of self-determination, by extension, entails explicit federal promotion of government-to-government relations between tribes and the other governments in the U.S. system. It also entails minimization of the historically pervasive presence of the federal government and its trustee agents in the institutions of tribal governance, the provision of public services to Native Americans, and the selection, design and implementation of economic and community development plans and projects.”).

211. See generally VAUGHT ET AL., *supra* note 127 (discussing the use of Indigenous children in assimilationist projects destructive to Indigenous communities, sovereignty, and futures); Fletcher & Singel, *supra* note 127 (analyzing programs of education and social services and their negative impacts on Indigenous communities in denying self-determination, particularly in taking and exploiting Indigenous children).

