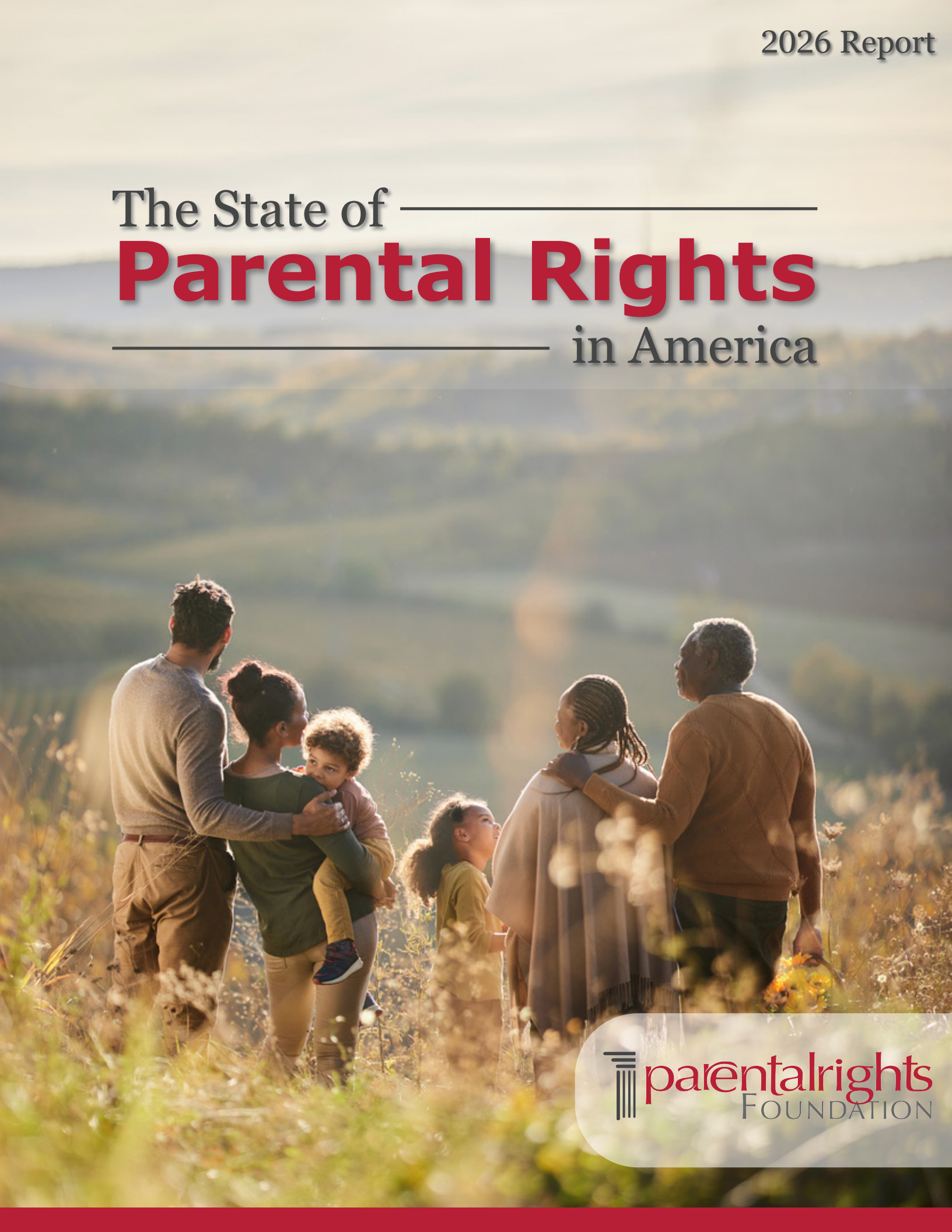
2026 Report

The State of Parental Rights in America



parentalrights FOUNDATION

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Introduction

The State of Parental Rights in America 2026 aims to capture a precise snapshot of the effort to defend parental rights across the nation at this exact moment in time.

There are data that offer some insight. The Adoption and Foster Care Analysis Reporting System (AFCARS) and the National Child Abuse and Neglect Data Systems (NCANDS) provide a year-over-year picture of how many children are taken into foster care, how many families are disrupted by government intrusion, often—but far from always—to protect children from harm. However, the numbers are incomplete; they cannot provide the whole picture.

So, we asked our Board of Advisors, including eminent scholars and long-tenured veterans of family defense efforts, for their view. What has happened in this space in the last year that is shaping the landscape (and, often, the battleground) for defending families' rights?

Then we gathered their thoughts into this publication.

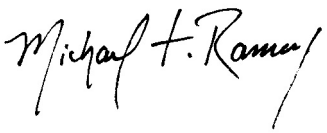
There's an old story of the blind men and the elephant, where each tries to describe the elephant to the others, and none can believe they're talking about the same thing. One feels its tail, whip thin and mobile, while one at the trunk agrees with the mobility but not so much the idea of "thin." Another is at a leg—solid, firm, unyielding—and thinks both of his companions have lost their minds. Yet, if they add together all their observations, they might begin to understand the totality of the elephant.

Likewise, the viewpoints of our authors vary, from legal scholars to family defense lawyers, from a college philosopher to an activist mom with lived experience in losing a child to the system unnecessarily.

The aim of this publication is to combine their observations into a multi-faceted view of "the elephant," to better understand the totality of parental rights and family preservation in America, right here in early 2026.

I hope you will find their work informative, challenging, and, above all, inspiring. Because there is still much work we all can do to preserve families. I hope this snapshot will encourage you to take part in it with us!

Michael T. Ramey



President
Parental Rights Foundation.

The Bipartisan Nature of Parental Rights

Michael Ramey, President of the Parental Rights Foundation

The publication before you today exemplifies the powerfully bipartisan reach of American parental rights. This is by design.

When I was appointed president of the Parental Rights Foundation in 2023, I had to ask myself what makes this Foundation necessary. Many conservative, pro-family institutions pre-date our 2007 beginnings. And, especially since 2020, many new parental rights organizations have arisen across the country to defend the parent's role from an overreaching bureaucracy in education and in medical decision-making.

So, what sets the Parental Rights Foundation apart?

The answer, I found, came down to this bipartisan cooperation, this all-inclusive narrative: that scholars and experts on both sides of the aisle want to see parents empowered to protect their own children.

That same year, I reached out to several partners in the family defense space, including the six featured in this publication, with the idea to start a Board of Advisors for the Parental Rights Foundation.

Now, it is crucial to understand that scholars on one side of the aisle don't completely agree in all things with scholars on the other side of the aisle. If we made our focus too narrow, we could not cross the aisle. And if we made it too broad, dabbling also in, say, abortion rights or government spending, we would likewise lose critical support.

What we came up with, then, was a Board of Advisors divided into two committees: The Committee on Child Welfare and The Committee on the Constitution. Involvement with one committee does not necessarily imply support of all the ideals of the other committee.

With this first publication of The State of Parental Rights in America, we present that same structure here—both the unity and the divide.

I hope what you will see in these pages is that, at the end of the day, we don't have to agree on everything to agree on the most important things. Like the idea that parents know and love their children best. That children fare better with their parents than in the "care" of the state. That separation is only necessary in cases of abuse or wanton neglect, which are rare. That the success and greatness of our society depend on building strong families and protecting them from the "good intentions" of an overreaching government—even those families that don't look like our own.

Even in these pages, the Committee on Child Welfare won't agree with some of the positions of the Committee on the Constitution, and vice-versa. But, just as in the pages of this publication, so in our efforts for families: We are all in this together.

By the Numbers

Government Involvement in Families

Reports and Investigations

4.3 Million referrals alleging maltreatment, *highest in five years*.

7.7 Million children involved in maltreatment referrals.

2.1 Million (47.5%) reports screened in for further review.

3.08 Million children involved in investigations or alternative response.

What Happens After a Report

Fewer than 16% of children received a substantiated or indicated finding.

11.8% of screened-in reports involved no alleged maltreatment.

7% of all referrals were made anonymously[1].

Foster Care Trends

328,963 children in foster care (Sept. 2024), *down from 437,000 in 2018*.

170,955 children entered foster care, *lowest level in six years*.

49,997 children whose parental rights had been terminated.

40,076 non-victims entered foster care in 2023[2].

Millions of families come into contact with the child welfare system each year, yet only a small share of cases are substantiated, raising important questions about the scope of intervention.

[1] National Child Abuse and Neglect Data System (NCANDS), Child Maltreatment 2023 (published January 2025).
[2] Adoption and Foster Care Analysis and Reporting System (AFCARS) Dashboard (accessed March 26, 2026).

Parental Rights in the Courts: Recent Developments

Parental rights continue to be shaped by ongoing litigation in federal courts. The following cases reflect recent developments and emerging legal questions that may influence the future of parental rights in the United States.

Mahmoud v. Taylor

Status: Decided June 2025

Focus: Whether public schools must respect parents' religious objections to certain curriculum content, particularly regarding their children's participation in instruction that conflicts with their beliefs.

Mirabelli v. Bonta

Status: 2026/Pending; the U.S. Supreme Court issued an emergency order on March 2, 2026 and the case is proceeding in the lower court.

Focus: Whether school policies that withhold information from parents about their child's gender identity violate parents' rights to direct the upbringing and care of their children.

Foote v. Ludlow School Committee

Status: Denied certiorari April 20, 2026

Focus: Whether schools can make decisions regarding a child's gender identity and social transition at school without informing or obtaining consent from parents.

Littlejohn v. School Board of Leon County, Florida

Status: Pending Review by the United States Supreme Court

Focus: Whether school officials can encourage a student's gender transition at school without parental knowledge, and how that impacts parents' rights to direct their child's upbringing.

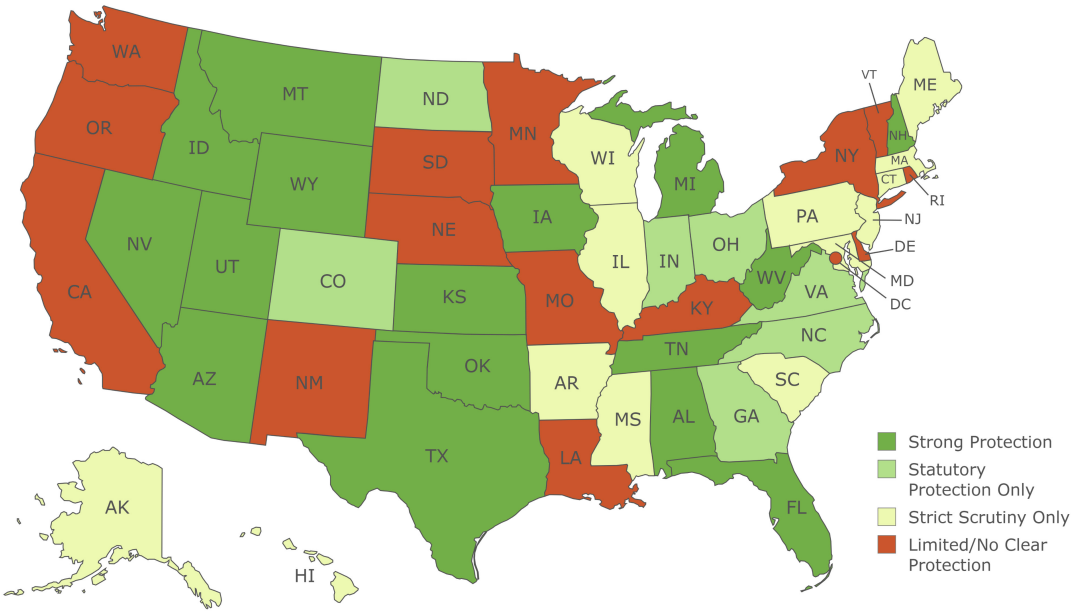
International Partners v. Ferguson

Status: Recent

Focus: Whether state policies affecting youth services and programs infringe on parents' ability to make decisions regarding their children's care and development.

State Status

Parental Rights Protections Across the U.S. (2026)



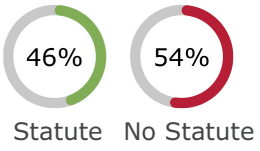
Strong Protection: States with both statutory protections and court recognition of parental rights under "strict scrutiny," the highest level of judicial review.

Partial Protection: States that have either statutory protections or judicial protections, but not both.

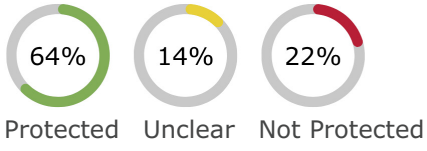
Limited Protection: States without clear statutory or judicial protections for parental rights.

Unclear: States where courts have recognized parental rights but have not consistently applied strict scrutiny, or where conflicting precedent exists.

What percentage of states have statutes protecting parental rights?



What percentage of states apply "strict scrutiny" to parental rights in courts?



For a detailed breakdown of each state's laws and court decisions, visit www.parentalrightsfoundation.org/states

Committee *on* Child Welfare

The Committee on Child Welfare works to bring meaningful reforms to the child welfare system at the state and federal level.

Martin Guggenheim, Esq.; Joyce McMillan; Josh Gupta-Kagan, Esq.

Say One Thing… Do Another

Martin Guggenheim, Esq.

There are so many things one could complain about with regards to how the United States addresses the safety and welfare of children, especially children living in poverty. For starters, we are unwilling – indeed righteous about our unwillingness – to take the steps of other wealthy western countries to ensure that families living in poverty are provided with various supports, including income and healthcare, to maximize the potential for all children to thrive, regardless of the circumstances of their birth.

I recognize that we are very far from achieving a consensus that our failure to do more to mitigate the conditions of poverty is unacceptable. In light of that, I will eschew any claim here that there are dozens of things we ought to be doing that fall outside of the formal child protection system which would significantly improve the lives of children and reduce the risk that children will die young or suffer life-long consequences from illness or disease. My sole focus instead is to highlight the deliberate failure of government to take steps entirely within their child protection programs that would dramatically reduce the risk of wrongfully or needlessly removing children from their families and of keeping them away from their families when there is no longer any reason to do so.

This state of affairs should be completely unacceptable to all Americans on all parts of the political spectrum. Sadly, this state of affairs characterizes this country's child welfare system today. Seven years ago, in a multi-year study in which I was a principal investigator, we published the results of a New York City study that compared the outcomes of child welfare cases in which parents were represented by multidisciplinary family defender offices with cases in which parents were represented by solo practitioners assigned from a rotating panel of lawyers.[1] The results were so dramatic that they led to an important change in federal law that offers states federal money to invest in interdisciplinary representation.

[1]Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 Child. & Youth Servs. Rev. 42 (2019), https://doi.org/10.1016/j.

Multidisciplinary family defender offices employ lawyers, social workers, and sometimes parent advocates (individuals who themselves experienced the child welfare system as a parent accused of neglecting their child). It is a different kind of legal representation that has been proven to avoid the needless separation of children from their families as well as the needless permanent severance of the parent/child relationship (an outcome that happens many thousands of times each year). And it does all of this with demonstrated results that children are not at any greater risk of harm. In short, this is a proven way of achieving what everyone who works in the child welfare system strives to achieve: to protect children from harm and to create conditions in which children can live safely with their families of origin.

It is not unusual for people to think of criminal defense lawyers as antagonistic to the goals of criminal prosecutors. The one wants to punish and convict; the other wants to avoid punishment, even when the defendant is guilty. But child welfare prosecutions are nothing of the kind. In all such cases, the state's principal interest is to ensure that children may be permitted to be raised by their family, provided that can happen without exposing the child to an unacceptable risk that they will be harmed in their home. The right kind of defense made available to parents fully supports this state goal. Indeed, it is the absence of such defense that undermines the state's goals.

The New York City multiyear study involved almost 10,000 families and more than 18,000 children over a four-year period comparing the outcome of cases based on whether parents were represented by panel lawyers or by one of the family defender offices. The study found that the kind of representation afforded to parents makes a dramatic difference in the length of time children spend in foster care. Giving parents the right kind of legal team results in families being reunited far sooner than would otherwise happen. The family defense offices were able to secure the safe return of children to their families 43 percent more often in their first year than panel attorneys, and 25 percent more often in the second year. Giving parents lawyers from family defense offices allowed children to be permanently released to relatives more than twice as often in the first year of a case and 67 percent more often in the second year.

These families may otherwise have been permanently dissolved or the children may have spent their childhood separated from their family. Of those children who could not be returned to their families, 40 percent more children ended up with a permanent disposition of guardianship when their parents had multidisciplinary representation than children whose parents were represented by panel lawyers.

Not only did the study demonstrate the extraordinary benefits to children and their families, it concluded that family defender office representation also saves an enormous amount of money that would otherwise have been spent on children remaining unnecessarily in foster care. The study found that full implementation of a multidisciplinary representation model in New York City would reduce the foster care population by 472,000 bed days per year and annually reduce foster care costs by $40 million as compared with exclusive reliance on panel lawyers.

Advance notice of the study's results were shared with two leading federal officials in the Trump Administration in 2018. The results were so persuasive to Jerry Milner, then the Associate Commissioner of the U.S. Children's Bureau and to David Kelly, his special assistant, that they amended federal law to offer federal dollars to any state that wishes to employ what the agency called "high-quality legal representation at all stages of dependency proceedings."[2]

Since 2018, states are allowed to use Title IV-E funds for up to half of the cost of providing legal services to parents and children who are in foster care or at risk of being removed from their homes, offering for the first time federal financial support to provide representation for parents. Previously, the funds only paid for lawyers representing local child welfare agencies.

But here's the rub, and what reveals something deeply sad about this country: Despite having proven that the proper legal representation for parents furthers entirely the government's goal of child well-being, (not to mention a significant savings to taxpayers), many states prefer to maintain the astonishingly uneven playing field they have enjoyed since the modern system began in the 1970s. Lawyers are always available to prosecute families, but there is no guarantee that even modestly paid lawyers are available for parents.

[2]Federal Child Welfare Policy Manual, § 8.1

According to a survey published in 2024 in *The Imprint*, the leading publication that covers the child welfare field in the United States, at least 19 states have refused even to bother to accept federal money that would ensure that parents are adequately represented in court. These states are Alabama, Connecticut, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Mississippi, Missouri, New Hampshire, New Jersey, North Dakota, Rhode Island, South Dakota, Tennessee, Vermont and Virginia.[3]

Many critics of our current child welfare system, including me, have long claimed that the state and local governments that run their programs have needlessly harmed children and families far too often over the past 50 years by wrongfully removing children from their homes and by permanently severing the ties between parents and children once the children have remained in foster care for one year. A claim of this nature is not easy to prove and there have always been defenders of the status quo who reject it and proudly defend our world-outlying practice of taking children from their families, severing the birth relationships of parent and child, and sending children to live in foster and adoptive homes.

But it seems to me that no one should take seriously the good faith of government officials who proclaim their commitment to justice and to ensuring that government never wrongfully intrudes in the lives of families once it is known that these very officials have no interest in receiving free federal money to ensure that families are represented not merely by competent lawyers but by law offices that have proven to advance the government's own claim that children be permitted to grow up in their own families so long as it is safe to do so.

We know how to advance that government claim. What's stopping us are the state and local officials who claim one thing and practice another. Shame on them. We need to continue pushing this issue until we win.

Every child deserves to have their parents represented by the kind of law office that research has shown can ensure that children are allowed to remain with their families when it is safe to do so and that they are returned to their families after they have been removed when it is safe to do so. That isn't very much to ask for. But for nearly half of the states in this country, it appears to be too much to expect.

[3] Sara Tiano, Most States Now Access Federal Funds for Family Court Lawyers, The Imprint (February 27, 2024).

Common Sense Guardrails for CPS

Joyce McMillan

The child welfare system, including Child Protective Services (CPS) or the Administration for Children's Services (ACS), is part of the carceral apparatus, not a social service system. As such, it should be subject to commonsense guardrails to direct its operation and protect families.

To help you understand what I'm saying, let's look at how actual helping professions are ethically oriented. If a doctor makes a diagnosis, they are generally expected to propose a treatment plan, refer a patient to another provider who will manage care, or explain why treatment is unnecessary. A licensed social worker is guided by the same ethical orientation. When social workers assess psychosocial needs (and, in some cases, make mental health diagnoses) their response is not punishment, but care: a service plan, a treatment plan, or a case-management strategy developed in collaboration with the client and the client's support system.

Across helping professions, this principle is foundational. It is unethical to identify a problem and then do nothing. Doctors, therapists, social workers, and the many professions under the helping professions umbrella all share this responsibility: when harm or need is identified, the response must be supportive and remedial, not punitive. An oncologist does not report a patient to an agency for being exposed to cancer-causing pollutants and developing cancer. The cruelty, the *absurdity*, of that kind of response is obvious.

But this absurdity is the exact way in which the child welfare system operates. CPS/ACS function as an investigative and prosecutorial agency, operating alongside police as part of the broader carceral apparatus of this country.

In this system, poverty is treated as neglect; it is not seen or treated as structural harm or *societal failure*. Poverty is individualized, and families are positioned to take accountability for falling under the weight of societal ills.

Again, CPS does not address the structural conditions that place families at risk. It does not sue landlords for being slumlords or for forcing families to live in dilapidated, unsafe housing. It does not hold employers accountable for poverty wages or policymakers accountable for the *undoing* of social safety nets.

Because CPS and the child welfare system are investigative and prosecutorial, commonsense guardrails must be in place to mitigate their power and the well-documented harm they cause families.

This past legislative session, the New York legislature passed the Anti-Harassment in Reporting Act to provide one such guardrail. Before its passing, anyone could make an anonymous report of child maltreatment. Maliciously intended callers could use this loophole to submit false reports to the child abuse hotline, which could trigger extensive investigations by CPS. Even clearly false or harassing reports could subject families to time-consuming and stressful investigations, with consequences that can include something as grave as permanent family separation. Now, with this law in place, all reporters must provide their name and contact information.[1] A caller's identity will, of course, remain confidential and will not be revealed to the subject of a report; however, the source of a report cannot be anonymous, in order to allow for verification.

This bill successfully passed both the House and the Assembly with overwhelming support. But it is only one part of a package of bills advanced through PLAN (Parent Legislative Action Network), the coalition of impacted parents and youth, advocates, attorneys, social workers, and academics that I founded. The package also includes Family Miranda Rights,[1] which, if passed, would require ACS workers to inform parents and caretakers of their rights at the start of an investigation. This legislation does not create new rights; it simply ensures that parents are aware of the rights already guaranteed by New York State and the Constitution.

Commonsense measures like these, which limit the reach of the CPS carceral apparatus and reduce its footprint of harm, are the least we can do to protect our most fragile families.

[1] **Editor's Note:** This legislation is similar to model state policies developed by the Parental Rights Foundation. See parentalrightsfoundation.org/tag/model-bills for additional information.

Parents in America's Hidden Foster Care System

Josh Gupta-Kagan, Esq.

The state child protective services (CPS) agency investigates an allegation that a parent has neglected or abused a child and is concerned that the child may be in such danger that the child must live elsewhere. Accordingly, the agency identifies kin who can temporarily take care of the child—the child's grandparent, aunt or uncle, or godparent. The agency then separates the parent and child and places the child with the kinship caregiver by coercing parents: the agency threatens (explicitly or implicitly) to bring the parent to court, where a judge might refuse to even place the child with kinship caregivers and, if the parent and child do not reunify within 15 months, terminate the parent-child relationship.[1] Without knowing if the agency is bluffing or if the agency has a strong or weak legal case, and without counsel to advise them, parents typically acquiesce to the agency's pressure. This is hidden foster care.

Hidden foster care takes multiple forms. CPS agencies use it during investigations —before they have even gathered complete evidence about an allegation—or after completing investigations. Hidden foster care separations last days, weeks, months, or years—and some even last indefinitely, long after a CPS agency closes a case. It can result in informal kinship care, or CPS agencies can pressure kinship caregivers to go to court to seek permanent custody or guardianship (and in the vast majority of states, custody and guardianship cases nominally filed by family members will skirt essential due process protections, as parents will not enjoy the right to counsel that has rightly become the norm in neglect and abuse cases filed by CPS agencies).

[1] This timeline comes from the Adoption and Safe Families' Act's directive that states file petitions to terminate parent-child relationships when children have been in foster care for 15 of the previous 22 months, codified at 42 U.S.C. § 675(5)(E).

This severe state action infringes on parents' and children's rights to live together without due process. State-induced parent-child separations must be reserved for extreme cases when no other solution can keep children safe, and they must be subject to vigorous due process checks to protect families. Yet hidden foster care happens far too frequently. While available data is limited, it suggests that CPS agencies separate families in this manner at least tens of thousands of times annually, and possibly as frequently as states do so through the formal foster care system, as I and others have estimated.[2]

These widespread state-induced family separations are hidden in two ways. First, in present practice, they are hidden from any meaningful due process checks on state authority. No court oversees CPS agencies' actions to ensure a family separation is justified or that children return home as soon as possible. Parents are not generally given lawyers to challenge CPS agencies or advise parents on their options. And the harms to children and parents of these separations is no less than when they are separated in the formal system. Second, these family separations are hidden from legislative or public oversight. Except in a few states, agencies are not generally required to track when they separate families via hidden foster care or report such separations to the public or to state or federal legislative or administrative oversight. CPS agencies can even use hidden foster care to make themselves look good, by suggesting that they are separating fewer families than they actually are.

The problems with hidden foster care should be plain: Without meaningful due process checks, CPS agencies make mistakes. They separate families that could stay safely together and will keep families separated that can safely reunite. CPS agencies will coerce parents to go along with their demands and, without a lawyer to advise them on their options, parents will frequently acquiesce. So will kinship caregivers. CPS agencies will have fiscal incentives to separate families in this way—largely because hidden foster care does not require them to support kinship caregivers financially. (Ironically, kinship caregivers are poorer in the aggregate than non-kinship foster parents. Yet hidden foster care lets CPS agencies avoid paying foster care subsidies to kinship caregivers while continuing to pay generous subsidies to strangers.)

[2] Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 Stan. L. Rev. 841, 855-60 (2020); Annie E. Casey Foundation, *New Insights on State Kinship Diversion Policies* 3 (2024).

Finally, in the rare cases when a parent really is an ongoing threat to a child, hidden foster care often does not take away parents' legal custody—meaning they can come pick up the child at any time.

What States Should do Instead: An Alternative to Formal Foster Care and to Hidden Foster Care

Despite hidden foster care's problems, informal kinship care comes with very real benefits. Families and not CPS agencies or family court judges maintain control over children's living arrangements. Some risks of formal foster care can be avoided. When some situation needs an adjustment that will not take long, families can reunify quickly and avoid the stress of court involvement. So, the answer is not to push all families currently in the hidden foster care system into the formal system. The answer is due process and coupled with government transparency and accountability.

First, states must provide due process checks to prevent unnecessary parent-child separations, and ensure that any separations are voluntary, and end quickly. Most importantly, states must provide parents with legal counsel. Parents' counsel can challenge CPS agencies about the necessity of a family separation, the conditions a parent needs to meet, and the timing of reunification. Counsel can level the playing field and help parents negotiate with CPS agencies. Counsel can advise parents about their options, and whether CPS agency threats are real or empty. Counsel (especially when part of a multidisciplinary legal office) can help connect parents with services and supports (and often do so more effectively than CPS agencies). And in many cases, counsel can help facilitate productive communication between agencies and families.

States should provide other essential due process checks on these family separations: a requirement of written notice of the grounds for agency concerns; short time limits on these separations; a legal standard that CPS agencies may not pressure parents to change a child's living arrangements unless the facts would justify a removal to the formal system; requirements that agencies work to prevent family separations and to reunify families, and avoid requiring parents to do anything more than is necessary to remove the threat requiring the initial separation; and some administrative process for parents to challenge a caseworker's action to keep their family separated.

These due process principles and others are now written into two key documents: The Coalition to End Hidden Foster Care's Statement of Principles and the Coalition's model state legislation.

Second, state and federal law should require CPS agencies to track and report when they use hidden foster care. The public deserves to know how often CPS agencies separate families, the demographics of families they separate, and what happens to families after they separate.[3] When a government agency separates a family, the very least it can do is report it so that the public and legislatures can provide oversight and democratic accountability.

The State of Hidden Foster Care

Hidden foster care continues to be widely used around the country. But there has been significant progress over the last 5 years. There is much more awareness in the field over hidden foster care, with important foundation reports and other leading voices demonstrating how widespread and concerning the practice is.[4] Multiple media outlets have given hidden foster care long-overdue attention.[5]

This increased attention has led to some positive changes. Texas enacted legislation that requires its agency to track hidden foster care cases, imposes time limits on hidden foster care separations (though not as short as the Coalition's model legislation would call for), and requires agencies to inform parents of their right to seek counsel (though not actually provide counsel).[6] Some states have begun small pilot programs to provide attorneys for parents pressured by CPS agencies to give up kids via hidden foster care.

[3] Key questions about what happens after an initial separation include: Do families reunify and, if so, how quickly? Do they remain separated indefinitely? Do CPS agencies ultimately file neglect petitions against the family?

[4] E.g. Annie E. Casey Foundation, *New Insights on State Kinship Diversion Policies* 3 (2024); Sharon McDaniel, *Increase Kinship Care, but not Through Diversion*, The Imprint, Oct. 21, 2024; Casey Family Programs, *How is the practice of hidden foster care inconsistent with federal policy and harmful to children and families?* (2023).

[5] E.g. Steve Volk, *Inside Philly's hidden foster care system, where parents 'voluntarily' give up their children*, The Philadelphia Inquirer, Apr. 10, 2025; Amanda Robert, *Shadow Foster Care: Children and caregivers in a 'hidden' system miss out on benefits and support*, ABA Journal, Aug. 1, 2023; Lizzie Presser, *"They Took Us Away From Each Other": Lost Inside America's Shadow Foster System*, N.Y. Times Magazine & Pro Publica, Dec. 1, 2021.

[6] Texas S.B. 614 (2023), codified at Tex. Fam. Code § 264.017; Texas H.B. 730 (2013), codified at Tex. Fam. Code §§ 264.901, 263.902, & 264.907.

Programs in Washington State and Maryland report significant success in preserving and quickly reunifying many such families—something that would not likely have happened without counsel.[7] Relatedly, widespread and growing investments in providing lawyers to parents subject to CPS investigations—known as early defense, preventive legal advocacy, and pre-petition representation—provides opportunities to expand parents' access to counsel at this crucial stage of CPS cases.[8]

When programs like this are the norm rather than the exception, when a full range of due process protections are applied, and when basic transparency exists for state actions that separate families, then these informal separations will be far less frequent, truly voluntary, and subject to meaningful oversight. They will be hidden no longer.

[7] Josh Gupta-Kagan, *Reforming Funding to Better Defend Families: Holistic Preventive Legal Advocacy that Checks CPS Agency Power*, _ Fam. L.Q. ___ (forthcoming 2026).
[8] Id.

Committee *on the* Constitution

The Committee on the Constitution aims to promote and secure a Parental Rights Amendment to the U.S. Constitution.

Emilie Kao, Esq.; Melissa Moschella, Ph.D.; Michael P. Farris, Esq.

Preserving Childhood: Dependency, Consent, and Parental Rights in Healthcare

Emilie Kao, Esq.

The parental right to direct a child's healthcare is rooted in the unique parent-child relationship and its corresponding duties.[1] Parental rights are recognized as perhaps the oldest of the fundamental rights that the U.S. Constitution protects.[2] They are "deeply rooted in this Nation's history and tradition" and implicit in the concept of "ordered liberty."[3]

However, the doctrine of "mature minors" is eroding the legal presumption that a fit parent is most well-suited to direct a child's healthcare.[4] The doctrine empowers a judge to declare that a minor is "mature" for the particular medical procedure that is sought, regardless of a parent's views. It transfers parental authority to the state and puts the child in the position of an adult who must make decisions and bear the consequences of them on her own. State legislatures are worsening the problem by enacting statutes that allow minors of any age to consent to medical procedures without parental involvement.

The history of children and consent in Anglo-American law illuminates the risks of treating children as adults. Over four centuries, the law codified parental rights to protect children from premature decision-making and harm by third parties. In contrast to the extensive history of parents' rights (and duties) to care for their children, there is no historical analog to the exclusion of fit parents from healthcare decisions.

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[1] *See* Melissa Moschella, *Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 402-03 (2025).
[2] *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests . . . .").
[3] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).
[4] See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.' Surely, this includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice.") (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925)).

The absence of history is significant because the U.S. Supreme Court has held that when modern law reallocates constitutional authority away from historically protected actors, the regulation must be justified by historical tradition.

Children need the guidance and affection of parents, especially during times of illness and crisis. Transferring decision-making authority from fit parents to a government official or doctor denies parents their fundamental right to direct their children's healthcare and prevents them from fulfilling their moral and constitutional duties. Congress and states are responding by introducing new legislation to protect parents' rights to make decisions that they believe are best for their children.[5] Courts should uphold these laws, reexamine the mature minor doctrine, and restore the parental presumption.

Historical Roots of the Parental Presumption

In *Parham v. J.R,* the Supreme Court articulated the "parental presumption," that a minor child lacks the "maturity, experience, and capacity for judgment required for making life's difficult decisions," and that "natural bonds of affection lead parents to act in the best interests of their children."[6] The presumption is the culmination of four centuries of legal developments surrounding children and consent. Successive generations of reformers recognized that children lack the rationality to consent for themselves and ensured that parents could speak for them.

Status-Based Consent in Feudal England

During the Late Middle Ages, the feudal legal system in England prioritized inherited status over age. [7] Feudal law enabled noble heirs to inherit land and titles, which in turn conferred political authority and governance roles. However, children without rank or wealth also bore the responsibilities and punishments of adults.

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[5] The U.S. Congress introduced S. 204/H.R.6934 - Families' Rights and Responsibilities Act, 119th Congress (2025) (To protect the right of parents to direct the upbringing of their children as a fundamental right, it requires courts to apply the strict scrutiny standard to federal policies that burden parental rights); S.B. 166, 2026 Leg., Reg. Sess. (Fla. 2025) (Parental Rights; proposing revisions to parental consent requirements for minor health care services); H.B. 173, 2026 Leg., Reg. Sess. (Fla. 2025) (Parental Rights; proposing parental consent requirements for treatment of certain diseases and revising exceptions and informed-consent provisions).

[6] *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *190

[7] *See Feudalism*, ENCYLOPEDIA BRITTANICA, https://www.britannica.com/topic/feudalism (last visited Jan. 28, 2026) (describing basic structures of feudal society).In feudal England, the monarch redistributed land to tenants-in-chief (barons/bishops/lords) in return for military and other services, creating the feudal hierarchy. It officially lasted until the Tenures Abolition Act in 1660 at the end of the Interregnum, although it waned in practice before then.

The law did not consistently differentiate between children and adults. Therefore, a boy or girl could become an apprentice at any age.[8] A seven-year-old child could be betrothed or even marry.[9] A twelve-year-old boy could take an oath, join a militia, or enter into "knight's service."[10] A twelve-year-old girl's purported "consent" could be invoked by an adult as a defense to sexual assault.[11] And an eight-year-old child could be tried and hanged for homicide.[12]

Feudal law did not consistently recognize childhood as a distinct period of dependency warranting special protection based on age and developmental vulnerability. And a child's nominal ability to consent did not confer genuine rights which they could exercise voluntarily. Because children lack the maturity, experience, and capacity of adults, they could be coerced into disadvantageous arrangements.[13]

Under feudal law, parents (especially those without means) had weak authority compared to ruling authorities and elites.[14] "The institution of "custody," so far as it existed, was primarily about the power of lords and masters."[15] The feudal system also empowered creditors and predatory suitors to profit at children's expense.[16] Children without parental protection faced danger and exploitation.[17]

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[8] HOLLY BREWER, BY BIRTH OR CONSENT, CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 243 (2005) ("In sixteenth century England, children were allowed to contract directly with a master in order to bind themselves into an apprenticeship. All contracts signed by apprentices, even under the age of seven, were declared valid and enforceable by law in 1563 'as amply and largely to every intent as if the same Apprentice were of full Age at the time of the making of such Indentures.'") (quoting The Statute of Artificers 1563, 5 Eliz. I, c.4, § 35).

[9] BREWER, *supra* note 8, at 297. (Gratian, the most influential canon lawyer, chronicled the medieval Church's practices and listed seven as the age of meaningful consent to marriage).

[10] BREWER, *supra* note 8, at 132.

[11] The Statute of Westminster (1275) made it a crime to "ravish" a "maiden within age" (interpreted as under 12, the marriageable age). Therefore, it was not presumptively unlawful for an adult to have sex with a girl twelve years of age or older.

[12] BREWER, supra note 8, at 184 (quoting MICHAEL DALTON, THE COUNTREY JUSTICE (1618) "Eight years of age, or above, may commit hom[i]cide and shall be hanged for it."

[13] BREWER, supra note 8, at 243. "Coercing the child's own consent to a labor contract was acceptable so long as a justice approved" (citing Elizabethan-era law that authorized imprisonment of a child under twenty-one until they "agreed" to be bound as an apprentice) 5 Eliz. I, c.4, § . 35).

[14] See BREWER, supra note 8, at 295–96, 316 (explaining that in the sixteenth and early seventeenth centuries, guardians could exercise greater authority than parents over a child's marriage, including fining wards who refused consent, and that the 1753 Marriage Act empowered parents to void marriages of children under twenty-one).

[15] Tenures Abolition Act of 1660, which abolished feudal tenures and replaced them with monetary obligations.

[16] In the 1813 novel, "Pride and Prejudice," by Jane Austen a predatory suitor, George Wickham, sought to pay for his profligate lifestyle through an advantageous marriage. The 28-year-old military officer, schemed to elope with Georgiana Darcy, a 15-year-old girl, with a dowry of 30,000 pounds. After Georgiana's brother and guardian (Mr. Darcy), thwarted the scheme, Wickham seduced Lydia Bennett, the 15-year-old sister of the novel's protagonist, Elizabeth Bennett.

Recognition of Children's Dependency

During the sixteenth and seventeenth centuries, religious, political, and social forces began to challenge inherited status in profound ways which cannot be discussed at length here.[18] These upheavals cast doubts on the ability of children to give meaningful consent. Public debates led to recognition of children's dependency and codification of parental rights (and duties) to protect, maintain, and educate children.

In the seventeenth and eighteenth centuries, three of England's leading jurists, Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone consciously sought to reform the law to reflect the realities of children's incapacity and dependence. In order to "rectify the mistakes of former ages," they tied criminal culpability to the age of discretion and "knowledge of good and evil."[19] Hale articulated (and helped systematize) common-law age thresholds for criminal capacity—often summarized as the "rule of sevens"—including a presumption of incapacity for children between roughly seven and fourteen which was rebuttable evidence that "he understood what he did."[20]

Coke sought to alter contract law to treat children's agreements as void rather than voidable.[21] In the eighteenth century, Blackstone codified "the infant's privilege," (including the right to disaffirm contracts) citing children's "lack of judgment."[22] Their reforms sought to raise the age of emancipation and political participation to twenty-one years old.[23] By making the age of consent correspond to children's limited ability to reason and comprehend the consequences of their actions, they curtailed the power of third parties—including masters, suitors and creditors.[24]

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[17] See BREWER, supra note 8, at 272-73, n.68 (citing Robert C. Johnson, The Transportation of Vagrant Children from London to Virginia, 1618-1622 in EARLY STUART STUDIES, Howard S. Reinmuth, ed. ESSAYS IN HONOR OF DAVID HARRIS WILSON (1970). Poor Laws (like the Statute of Artificers) allowed employers or masters to bypass parents and coerce children to enter into labor contracts. Between 1617 and 1622, the Privy Council authorized the Virginia Company to enter into labor contracts with poor children between the ages of eight and sixteen. The children were sent from London to the colony of Virginia by their "consent."

[18] See BREWER, supra note 8, at 50–58 (discussing how the Protestant Reformation challenged inherited religious authority and church membership, including disputes over infant baptism, and noting that Anabaptists, Puritans, and Quakers rejected infant baptism on the ground that children lack the capacity to make a public profession of faith); see also THOMAS AQUINAS, SUMMA THEOLOGIAE pt. III, q. 68, art. 5, ad 1–2; id. art. 3 (stating that infants lack the use of reason and cannot be suitably examined for faith).Oliver Cromwell challenged the "divine right of kings," inherited political authority, which led to the execution of Charles I in 1649.

[19] See BREWER, supra note 8, at 206-07. MATTHEW HALE, HISTORIA PLACITORUM CORONAE 16-29 (1736). (The law "received a greater perfection, not by a change of the Common Law, as some have thought, for that could not be, but by act of parliament: but men grew to greater learning, judgment and experience, and rectified the mistakes of former ages and judgments.").

Codification of Parental Rights

The establishment of clearer boundaries between children and adults coincided with a monumental change in parental rights. In 1660, the end of the feudal system reduced lordly controls over minors' persons and property, greatly strengthening the practical position of fathers.[25] This led to greater codification of parental duties, including the duty to arrange and pay for a child's medical care.[26]

Therefore, parents had a correlative right to make medical decisions for children.[27] An exception to the general rule that a child could not contract was the doctrine of necessaries. This type of agreement ensured that a child who needed medical care would receive it by guaranteeing payment to the provider.[28] However, the agreement bound parents (not the child) for payment. By the nineteenth-century, American jurist James Kent described the law's prohibition on contracts with children even for necessaries.[29]

Parental Consent at the American Founding

America's Founders imported English views of children and parents into the common law. Like Blackstone, they were deeply influenced by John Locke. During the Enlightenment, Locke described children as born free and rational, but recognized that their capacity develops gradually.[30] Until that capacity matures, a child exercises freedom "by his Father's Understanding."[31] Blackstone also pointed fathers to their duty to protect their children "from the snares of artful and designing persons."[32]

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[20] BREWER, supra note 8, at 206-07 (quoting HALE, supra note 18, 16-29, 34-35. ("It is necessary that very strong and pregnant evidence ought to be to convict one of that age, and to make it appear he understood what he did"). See also 4 BLACKSTONE, Commentaries, supra note 5, at 23. (explaining that a child under fourteen is presumed incapable of criminal intent unless it appears that the child could "discern between good and evil").
[21] See BREWER, supra note 8, at 248 (Coke's translation of an earlier treatise changed the legal presumption that an infant's contract was voidable to void, by stating that the infant "cannot bind." (quoting COKE, supra note 14, 171b, 172a, 172b).
[22] BLACKSTONE, supra note 5 at 465-66 ("An infant cannot be bound by contracts … for want of judgment."). Blackstone explains that the common law presumes minors lack the discretion necessary to assent meaningfully to binding legal obligations.
[23] See BREWER, supra note 8, at 247, 249 (citing COKE, supra note 14, 74b, 78a-79a; SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS (1644) (preventing infants under 21 from election as a "Knight, Citizen or Burgesse of Parliament.").
[24] See FRANCIS BACON, Maxims of the Law Maxim XXII (c. 1597), reprinted in The Works of Francis Bacon (London 1765)., (His Majesty's Law Printers, 3d ed. 1768) (speaking of "the Indulgence the Law has thought fit to give Infants, who are supposed to want Judgment and Discretion in their Contracts and Transactions with others, and the Care it [the Law] takes of them in preventing their being imposed upon or over-reached by Persons of more Years and Experience").
[25] See BREWER, supra note 8 at 250 (describing the Tenures Abolition Act as granting "fathers, and fathers alone…the right to designate who would be guardians of all their children, of both their lands and bodies, up to the age of twenty-one.")

Children were central to Locke's explanation of government by consent and rejection of inherited political power. Locke argued that because men can consent to the social contract, they do not need a king to govern them unlike children who cannot give meaningful consent and need to be governed by their fathers.[33] Founders, including Thomas Paine and John Adams, also cited children's lack of capacity to argue for democracy's legitimacy. [34]

By the time the U.S. Constitution was ratified, the legal reforms that Coke and Hale began, which Blackstone codified, made clear that children could not consent, whether to the social contract or to contracts for labor, marriage, or healthcare. The age of majority (twenty-one years old) became a boundary between childhood and adulthood. And America's Founders recognized parents as the natural and primary authorities empowered to act and speak on behalf of their minor children.[35]

America's Twentieth Century Shift to Policy-Driven Consent

Parental Authority to Direct Healthcare

Since the turn of the twentieth century, federal and state courts have recognized the rights of parents to make decisions for their children, including in healthcare.[36] As Eric A. DeGroff and Steven W. Fitschen write, courts have held that performing a non-emergency medical procedure on a child without parental consent is assault and battery, an unconstitutional violation of parents' fundamental rights, and subject to strict scrutiny.[37]

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[26] JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION § 1 (1693).(stressing the duty to provide "the necessities of life, the health of [the child's] body, and the information of his mind"); BLACKSTONE, supra note 5, at 435 (The duty of parents to provide for the maintenance of their children is a principle of natural law, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world. And thus the children have a perfect right of receiving maintenance from their parents.")

[27] See, e.g, WILLIAM FORSYTHE, A TREATISE ON THE LAW RELATING TO THE CUSTODY OF INFANTS 9 (London, William Benning & Co. 1850).

[28] See also BREWER, supra note 8, at 248 (quoting COKE, supra note 14,171b, 172a, 172b ("An infant may bind himself to pay for his necessary Meat, Drink, Apparel, necessary Physick, and such Necessaries, and likewise for his good Teaching or Instruction, whereby he may profit himself afterwards: But if he bind himself in an Obligation or other Writing, with a Penalty for the Payment of any of these, that Obligation shall not bind him.") See MATTHEW BACON, 3 A NEW ABRIDGMENT OF THE LAW 636–37 (3d ed. 1768) (even contracts for "necessaries" were subject to review for their reasonableness) .

[29] See BREWER, supra note 8, at 266 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, 196 (1826)) ("If the infant lives with his father or guardian and their care and protection are duly exercised, he cannot bind himself even for necessaries.").

[30] See BREWER, supra note 8, at 91, (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. II, §§ 55–58, at 304-305, 308 (Peter Laslett ed., (Cambridge Univ. Press 1988)) ("Thus we are born Free, as we are born Rational; not that we have actually the Exercise of either: Age that brings one, brings with it the other too. And thus we see how natural freedom and subjection of Parents may consist together and are both founded on the same Principle. A child is free.by his Father's Understanding, which is to govern him, till he hath it of his own. The freedom of a Man at years of discretion, and the Subjection of a child to his Parents, whilst yet short of that Age, are so consistent and so distinguishable.")

The *Parham* Court emphasized that the parent's authority to make healthcare decisions for a child is grounded in Western civilization's longstanding concepts of the family.[38] However, in the second half of the twentieth century, the mature minor doctrine became increasingly constitutionalized through court decisions, eroding traditional understandings of family authority. The doctrine selectively overlooks a child's lack of capacity when a parent does not agree with a particular treatment or procedure that aligns with narrow political interests. The mature minor doctrine threatens to erase the progress of centuries by transferring parental authority to the state and treating children like adults.

The Mature Minor Doctrine

The Supreme Court began authorizing minors to access contraception or undergo an abortion without parental consent in the 1970s.[39] *Bellotti v. Baird* introduced a constitutionally required maturity-based judicial bypass for minors to obtain abortions.[40] The *Bellotti* Court invalidated a Massachusetts statute's requirement that one parent consent to a girl's abortion. It then created a judicial bypass procedure allowing a judge to deem a minor mature and well-informed enough to decide to have an abortion with her doctor and without her parents.[41] The Court also authorized an alternative, a judicial declaration that an abortion was in the girl's best interests.[42] The Court reasoned that due to "the unique nature and consequences" of abortion, the government could not give a girl's parents a "veto" over the decision of a doctor and their daughter.[43]

New York University Prof. Martin Guggenheim describes this reasoning as "astonishing" because of how it misconceives the nature of parental authority.[44] "Parents have always had the authority to approve all nonemergency medical procedures for their children."[45] Blackstone codified the long-held understanding that parental rights are pre-political, because they are grounded in "the most universal relation in nature."[46]

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[31] Id.
[32] See 1 BLACKSTONE, *441 (reflecting the common law's presumption that minors lack the judgment to protect their own interests).
[33] See BREWER, supra note 8, at 91, (discussing Locke's distinction between rational adults capable of consent and children who lack such capacity); see also JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, §§ 55–60 (Peter Laslett ed., Cambridge Univ. Press 1988).
[34] See BREWER, supra note 8, at 29, 122 (quoting THOMAS PAINE, RIGHTS OF MAN 6 (1791–1792) (condemning hereditary government "because it puts children over men and the conceits of nonage over wisdom and experience"), and John Adams to James Sullivan (May 26, 1776), in 4 THE PAPERS OF JOHN ADAMS 208–13 (Robert J. Taylor et al. eds., Belknap Press 1979) ("It is certain in theory, that the only moral foundation of government is the consent of the people … [c]hildren have not judgment or will of their own")).
[35] See THOMAS JEFFERSON, Letter to Samuel Kercheval (July 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 42 (Andrew A. Lipscomb ed., 1904); JOHN ADAMS to James Sullivan (May 26, 1776), in 4 THE PAPERS OF JOHN ADAMS 208–13 (Robert J. Taylor et al. eds., 1979).

The government cannot give parents something which they already possess. As American jurist James Kent recognized "The wants and weaknesses of children,... render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person." The *Bellotti* Court broke with centuries of common law and constitutional precedent which require the state to respect the rights of parents to speak for their minor children.

Since the Supreme Court overturned *Roe v. Wade* in 2022, the original constitutional justification for *Bellotti*—the recognition of abortion as a constitutional right—no longer exists. Even at the time, the Court acknowledged that minors' age and immaturity justify limits on the exercise of constitutional rights, including voting and marriage.

The Court has also cited minors' immaturity and incapacity for decision-making to shield them from capital punishment. Supporters of the mature minor doctrine argue that the state has an interest in protecting a minor's right to privacy (from her parents) due to increasing agency and autonomy. While some organizations oppose parental involvement in selective healthcare decisions involving minors, this advocacy does not extend to routine medical treatments, like tonsillectomies, for which parental consent remains the norm. Contemporary advocacy for minor autonomy is largely confined to healthcare decision-making. By contrast, there is no corresponding movement advocating for the recognition of adult capacity of minors in criminal responsibility, contract law, employment, marriage, or political participation.

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[36] See Eric A. DeGroff & Steven W. Fitschen, The Not-so-Silent Epidemic of Secret Gender-affirming Policies in the Nation's Schools: Parental Rights and the Promise of *Pierce v. Society of Sisters*, NOTRE DAME L.R. (forthcoming 2026) at 116. ("From the turn of the twentieth century to the present, both federal and state courts have construed broadly the right of parents to direct their children's medical care. The rationale for those decisions typically has been as follows: (1) children lack the legal capacity to consent to medical treatment; (2) non-consensual medical treatment constitutes an assault and/or battery by the provider; therefore, (3) the provision of medical treatment requires the consent of a parent or guardian with legal authority to act on the child's behalf.")

[37] Id. (citing *Moss v. Rishworth*, 222 S.W. 225 (Tex. Comm'n App. 1920)) (adult sister's consent to 11-year-old girl's non-emergency tonsillectomy was insufficient; the surgery was non-consensual without parents' consent). *Zoski v. Gaines*, 260 N.W. 99 (Sup. Ct. Mich. 1935) (non-emergency tonsillectomy without parental consent was assault and/or battery); *Kennedy v. Sch. Dist. Of Lebanon* 2011 U.S. Dist. LEXIS 157416 (M.D. Pa. Dec. 21, 2011) (school-administered medical exam of child without parental permission violated the Fourteenth Amendment); *Bonner v. Moran*, 126 F. 2d at 121 (D.C. Cir. 1941) (skin graft of fifteen year-old boy without mother's consent was unlawful, child's consent was insufficient); *Dubbs v. Head Start, Inc.* 336 F. 3d 1194 (10th Cir. 2003) (school's physical exams of preschool children without parental consent was a plausible violation of the Fourteenth Amendment); *Kanuszewski v. Mich. HHH*, 927 F. 3d 396 (6th Cir. 2019) (Michigan Department of Health's taking of blood samples from newborns without parental consent was subject to strict scrutiny). See also *Deanda v. Becerra*, 96 F.4th 750, 756–57 (5th Cir. 2024) (holding that a father had Article III standing to challenge Title X regulations authorizing the provision of contraceptives to minors without parental consent, where the alleged infringement of state-recognized parental rights constituted a concrete injury).

Bypassing the Parental Presumption

The mature minor doctrine bypasses *Parham's* parental presumption without finding a parent unfit. However, the Court in *Troxel v. Granville* disapproved of the state second-guessing parents. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision."[54] Similarly, the *Parham* Court held that "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition."[55] And in *Pierce v. Society of Sisters*, the Court warned that unwarranted intrusion into parental decision-making threatens "the fundamental theory of liberty upon which the nation rests."[56]

The Historical Test for Regulations of Constitutional Rights

When the government burdens a fundamental right, it has taken different approaches to evaluate that burden. In the Second Amendment context, for example, the Court asks whether the regulation and burden are consistent with our history and tradition and whether the government can identify a comparable regulatory analogue in our history and tradition.[57] Minor consent statutes function as a regulation on the constitutional right of parents to direct the healthcare decisions of their unemancipated minor children. There is no historical analogue for categorical exclusion of fit parents from children's medical decision-making based on a child's asserted autonomy. Nevertheless, advocacy seeks to expand the variety of treatments which minors can obtain without parental involvement.

Expansion of Minor Consent

In addition to the Supreme Court's decisions, legislatures have enacted a range of statutes authorizing minors to consent independently to specified categories of healthcare, including abortion, contraception, diagnosis and treatment of sexually transmitted diseases (including HIV/AIDS), mental health services, vaccinations, and sexual-assault examinations, often on asserted public-health grounds and children's autonomy.[58]

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[38] *Parham v. J.R.,* 442 U.S. petitions for writs of certiorari 584, 602 (1979) (internal citations omitted) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.' Surely, this includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

Some statutes have no age limit (e.g., Georgia, Louisiana, Tennessee) on when a child can consent to healthcare within particular statutory exceptions.[59] Therefore, even very young or demonstrably "immature" minors can consent to treatment without parental involvement. By design, such statutes displace the traditional presumption that parents serve as the primary decision-makers responsible for their children's medical care, and they authorize clinicians—such as physicians, counselors, and psychologists—to advise and treat minors independently of parents. However, children need parents to interact with adult medical professionals and to make important decisions for them which they are not yet mature enough to make.[60] Legislators in some states have restored authority to parents so that they can fulfill their high duties to their children.[61]

Parental Involvement in Treatment of Pediatric Gender Dysphoria

Parents with a child who is confused about his or her sex face new challenges to their authority from public schools. Some children are distressed to clinical levels. They experience gender dysphoria, a sense of incongruence between an internal sense of gender and the reality of the sexed body. A high percentage of these minors also have other health issues, including depression, anxiety, and autism.[62] Public schools, in some cases, are treating these students without notifying their parents or seeking their consent. They are requiring teachers to "socially transition" students by addressing them with biologically incorrect pronouns and different names and allowing them to use bathrooms and lockers rooms for the opposite sex. These policies include actively deceiving parents by keeping the school's actions secret in files, correspondence, and conversations.[63]

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[39] *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (states may not prohibit minors from accessing contraception, and parental involvement requirements are unconstitutional when they amount to a blanket restriction on the constitutional right to privacy under the Fourteenth Amendment). *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (overturning a statutory provision requiring that one parent consent to an abortion for a minor).
[40] 443 U.S. 622, 643–44 (1979) (holding that where a state requires parental consent for a minor's abortion, it must provide a judicial bypass allowing authorization upon a finding that the minor is mature and well enough informed or that the abortion is in her best interests).
[41] Id.at 643-44
[42] Id. at 647-48.
[43] Id. at 643.
[44] See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 227 (2005) (describing the Danforth Court's conclusion that Missouri could not delegate veto power over abortion to parents as "astonishing," because the state itself lacks such power).
[45] Id.
[46] BLACKSTONE, *supra* note 5, at 434.
[47] GUGGENHEIM, *supra* note 43, at 227.
[48] KENT, *supra* note 5. Commentaries on American Law,

The U.S. Supreme Court ruled for parents who challenged California's policy of socially transitioning students and withholding that information from parents. The Court in *Mirabelli v. Bonta* held that California's policy is likely unconstitutional and violates parental rights to religious free exercise and substantive due process.[64] Citing *Parham*, the *Mirabelli* Court stated: "The right protected by these precedents includes the right not to be shut out of participation in decisions regarding their children's mental health."[65] *Mirabelli* was an emergency appeal and the Court did not rule on the full merits. But it can do so by hearing petitions from parents in Massachusetts and Florida.[66]

The dangers of these policies cannot fully be understood without recognizing that transgender advocates recommend that social transition is the first of four steps to be followed by puberty blockers, cross-sex hormones, and surgeries.[67] There is strong evidence that the vast majority of children become comfortable with their bodies if they proceed through puberty without psycho-social interventions.[68] Schools that treat minors according to their internal sense of gender rather than sex reinforce the sense of discordance between body and mind. This can hasten the minor towards hormonal and surgical transition.[69] The strongest evidence from Europe and America has shown that treating a minor according to self-perceived gender, socially and then medically, can lead to irreversible harms. These include systemic and irreversible damage to a child's cardiovascular, skeletal, and reproductive health, including sterility.[70]

Excluding parents deprives children of three types of medical benefits. First, parents have the most complete picture of a child's medical and mental health history. [71] Excluding parents from the child's healthcare at the earliest signs of distress prevents both the child and the healthcare provider from having full information to determine the best course of treatment for the child.[72]

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[49] See *Parham v. J.R.*, 442 U.S. 584, 621 (Stewart, J., concurring) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) ("For centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it.").

[50] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). See also *Doe v. Uthmeier*, 407 So. 3d 1281 (Fla. Dist. Ct. App. 2025) (holding that state's judicial bypass violates parents' rights to raise their children under the U.S. Constitution).

[51] *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part) ("Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent.").

[52] *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). See also *Jones v. Mississippi*, 593 U.S. 98, 125 n.2 (2021) (Thomas, J., concurring in judgment) ("When addressing juvenile murderers, this Court has stated that children are different and that courts must consider a child's lesser culpability. And yet, when assessing the Court-created right of an individual of the same age to seek an abortion, Members of this Court take pains to emphasize a young woman's right to choose. It is curious how the Court's view of the maturity of minors ebbs and flows depending on the issue.") (citation modified).

This is particularly important for children with gender dysphoria because parents know about other underlying mental health conditions.[73] Second, the child is deprived of a parent's experience and knowledge in choosing an ethical and competent healthcare provider and treatment.[74] Third, parents who do not know that a child is undergoing psychosocial or medical treatment do not have the necessary information to provide care for the child during the treatment and afterward.[75]

Advocates for medicalizing pediatric gender dysphoria seek to codify the exclusion of parents. They urge legislatures and judges to bypass the parental presumption so that minors can obtain puberty blockers, cross-sex hormones, and even surgeries without parental involvement.[76] These efforts to expand the mature minor doctrine demonstrate its lack of a limiting principle.[77]

Opponents of parental involvement base their arguments on the claim that gender-distressed minors are more likely to commit suicide if they do not receive hormonal or surgical interventions. However, the best evidence contradicts this claim.[78] And real-life examples show that gender-distressed minors who are separated from their parents are in greater danger of self-harm and exploitation by third parties.[79]

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[53] See Anne C. Dailey & Laura A. Rosenbury, The New Parental Rights, 71 DUKE L.J. 75, 135-36 (2021) (asserting that children's independent interests and agency justify transferring decision-making authority to the stat and doctors, including for children to access puberty blockers, cross-sex hormones, and surgeries and reducing the level of scrutiny for governmental action that intrudes upon parental authority).
[54] 530 U.S. 57, 63 (2000).
[55] 442 U.S. 584, 603 (1979).
[56] 268 U.S. 510, 535 (1925).
[57] See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022) (requiring regulations of firearms to be consistent with nation's history and tradition of firearm regulations); *United States v. Rahimi*, 602 U.S. 680, 692 (2024) (requiring historical analogues, not an exact "historical twin," to justify modern gun regulations under Bruen's "history and tradition" test for the Second Amendment.)
[58] Mabel Felix, et al. "Minors' Ability to Consent to Contraception and Abortion Services," KFF (Aug 7, 2025), https://www.kff.org/womens-health-policy/minors-ability-to-consent-to-contraception-and-abortion-services/ (Minors can consent to abortion in 13 states and D.C. and contraception in 24 states and D.C. without parental involvement). Marianne Sharko et al., State-by-State Variability in Adolescent Privacy Laws, 149 PEDIATRICS e2021053458 (2022), https://doi.org/10.1542/peds.2021-053458. (documenting state laws restricting parental rights regarding politically sensitive conditions that also include mental healthcare, contraception, immunization, sexually transmitted disease treatment, HIV/AIDS testing and treatment, dental care, and sexual assault evaluation). Wasserman & Wolfish, "The Implications of Minor's Consent Legislation for Adolescent Health," 54 Pediatrics 481, 481–85 (1974) (asserting children's autonomy).
[59] Georgia Code § 31-17-7 (minors of any age can independently consent to treatment of a sexually transmitted disease; Louisiana R.S. 40:1079.1 (minors of any age can independently consent to surgical or medical procedures); Tennessee's "Family Planning Act of 1971 (§ 68-34-101 et seq.), which provides that "contraceptive procedures, supplies, and information"—including "permanent sterilization"—shall be available to any person regardless of age.
[60] See Mary Hasson, "Youth Rights And The Shrinking Power Of Parents," Ethics & Pub. Pol'y Ctr., The Family In America (Fall 2013), https://eppc.org/publication/youth-rights-and-the-shrinking-power-of-parents/.

Some parents have challenged restrictions on medical interventions for treatment of gender dysphoria. They sought to invalidate a Tennessee law banning certain experimental procedures for minors. The U.S. Court of Appeals for the Sixth Circuit denied these attempts to expand parental rights. In *L. W. v. Skrmetti*, the court held that no "Supreme Court case extends to a general right to receive new medical or experimental drug treatments."[80] The U.S. Supreme Court declined to consider the parental rights claim and affirmed the Sixth Circuit's conclusion that the state has a legitimate interest in protecting children's health and safety.[81] No history, tradition, or precedent supports parents overriding the state's decisions to outlaw medical procedures that it reasonably determines pose undue risks to children.[82]

Physician-Assisted Suicide and Minor Autonomy Arguments

Comparative examples from abroad further illustrate the implications of autonomy-based arguments for minor consent. In several foreign jurisdictions, arguments supporting physician-assisted suicide for minors rely on autonomy concepts to justify limiting or bypassing parental consent.[83] The Netherlands allows children aged twelve and up to request euthanasia if their parents agree. If a sixteen or seventeen year-old requests euthanasia, the law requires only parental involvement, not parental consent.[84] Though these legal regimes are distinct from the United States, these developments demonstrate how legal claims of minor autonomy may render parental authority void even in decisions involving the termination of a child's life. This comparative experience underscores the importance of protecting children's welfare by clearly defining the scope of parental authority in healthcare.

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[61] See Idaho Code § 32-1015 (2025) (Parents' Rights in Medical Decision-Making Act) (requiring parental consent before furnishing health care services to unemancipated minors, affirming parents' fundamental rights and duties to make health limited exceptions for emergency care and court orders); Texas added an amendment to the state constitution. Reflecting "truths that are deeply rooted in this nation's history and traditions," the amendment affirms that parents have both a "responsibility to nurture and protect" their children and a correlative "fundamental right to exercise care, custody, and control" over them, Tex. Const., art. I, §37. Texas Constitution and Statutes; Fla. Stat. Ann. §§ 1014.04(1)(e), 1014.06 (recognizing parental rights over minor health care and generally requiring written parental consent for health care services for minor children, with statutory exceptions).

[62] See Expert Affidavit of Dr. Stephen B. Levine, MD at 68, *B.F. v. Kettle Moraine Sch. Dist*., No. 21-CV-1650 (Waukesha Cnty Cir. Ct. Feb. 3, 2023), https://will-law.org/wp-content/uploads/2023/02/Expert-Affidavit-Stephen-Levine-2023.02.0333.pdf (parents are aware of other "'normal' behavioral problems in their child" such as "learning disability, social anxiety, autism … depression" and a child's "announcement of a new identity" may require a psychiatric evaluation).

[63] See, e.g., Verified Complaint at 2, *Mead v Rockford Pub. Sch. Dist*., 800 F. Supp. 3d 836 (W.D. Mich. 2025) (No. 1:23-cv-1313) (after school district began altering school records, parents only discovered the school's use of a masculine name and male pronouns for their daughter by accident).

[64] 146 S. Ct. 797 (2026). The ruling partially vacated an order by the Ninth Circuit Court of Appeals to stay a lower court's permanent injunction against the school policies.

[65] Id. at 803 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

Preserving Childhood

As the *Parham* Court recognized, "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."[85] The mature minor doctrine and minor consent statutes carve out exceptions to parental rights that threaten to swallow the rule.

Over four centuries, England and America rectified the mistakes of earlier ages to account for children's dependency. Both common law and the U.S. Constitution raised ages of consent and enshrined respect for the plenary decision-making power of parents. Modern law should not regress by overestimating a minor's maturity and bypassing her parents. This exposes her to greater harm from herself and third parties. To preserve childhood, courts and legislatures should reexamine and reject the mature minor doctrine and restore the parental presumption.

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[66] See Petition for Writ of Certiorari, *Littlejohn v. Sch. Bd. of Leon Cnty.*, No. 25-259 (U.S. Sept. 3, 2025) (petitioning the Supreme Court to review federal appellate decisions involving parental-rights challenges to school social transition policies).
[67] See World Professional Association for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People, Version 8, 23 INT'L J. TRANSGENDER HEALTH S1 (2022).
[68] SEGM, Early Social Gender Transition in Children is Associated with High Rates of Transgender Identity in Early Adolescence (May 6, 2022), https://segm.org/early-social-gender-transition-persistence ("Historically, 61%-98% of gender incongruent children desisted from their trans identification before reaching adulthood.")
[69] Id. ("The current study suggests that 98% of early-socially-transitioned children persist in their wish to undergo gender transition/").
[70] See Hilary Cass, Independent Review of Gender Identity Services for Children and Young People (2024), https://cass.independent-review.uk/home/publications/final-report/ (noting the lack of solid evidence that puberty blockers provide psychological benefit or effectively relieve gender dysphoria and potential harms such as impacts on bone health; recommending "extreme caution" when considering cross-sex hormones for those under 18). See also U.S. Department of Health & Human Services, Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices (Nov. 19, 2025), https://opa.hhs.gov/sites/default/files/2025-11/gender-dysphoria-report.pdf (finding existing research base for puberty blockers and cross-sex hormones in minors is limited and methodologically weak, with significant gaps in long-term safety and efficacy data
[71] See Teresa Stanton Collett, Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision, 52 BAYLOR L.REV. 513, 571-74 (2000). (describing medical benefits of parental involvement in a minor's abortion decision).
[72] Id.
[73] See Levine, *supra* note 62.
[74] See Collett, *supra* note 71.
[75] Id.
[76] See Anne C. Dailey & Laura A. Rosenbury, The New Parental Rights, 71 DUKE L.J. 75, 135-36 (2021) (asserting that children's independent interests and agency justify transferring decision-making authority to the state and doctors, including for children to access puberty blockers, cross sex-hormones, and surgeries and reducing the level of scrutiny for governmental action that intrudes upon parental authority); Joanna L. Grossman, Who Decides? The Role of Parental Rights in Abortion and Gender-Affirming-Care Decisions for Minors, YALE L.J.F. (Dec. 3, 2025); Federica Vergani, Comment, Why Transgender Children Should Have the Right to Block Their Own Puberty with Court Authorization, 13 F.I.U. L. REV. 904, 922 (2019); Emily Ikuta, Note, Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine. 25 S. CAL. INTERDIS. L.J. 179, 203 (2016)

("The mature minor doctrine is a way the legal system can recognize the increasing capacities of minors as they move through adolescence, and transgender rights proponents should invoke it to secure legal autonomy for transgender adolescents seeking treatment despite parental opposition.")

[77] In Belgium and other countries, supporters of physician-assisted suicide cite child autonomy to exclude parents from preventing the deaths of their children. See, e.g., Belgium Act on Euthanasia of May 28, 2002, amended 2014. Sydney Campbell, et al., Exploring Assisted Dying Policies for Mature Minors: A Cross Jurisdiction Comparison of the Netherlands, Belgium & Canada, 149 HEALTH POL'Y 105172 (Nov. 2024),https://www.sciencedirect.com/science/article/pii/S0168851024001829; American College of Pediatricians, Assisted Suicide and Euthanasia in Pediatrics (Apr. 2023), https://acpeds.org/assisted-suicide-and-euthanasia-in-pediatrics/ (citing a Canadian article claiming that minors should not be deprived of the opportunity to request to be killed).

[78] See David Smolin, Suicide, Suicidality, and Pediatric Medical Transition in *United States v. Skrmetti* and Beyond, HARV. J.L. & PUB. POL'Y: PER CURIAM (Apr. 4, 2025), https://journals.law.harvard.edu/jlpp/suicide-suicidality-and-pediatric-medical-transition-in-united-states-v-skrmetti-and-beyond/.

[79] See Brief of Amicus Curiae Abigail Martinez, *Vitsaxaki v. Skaneateles Cent. Sch. Dist.*, No. 25-952 (2d Cir. June 12, 2025), https://adflegal.org/wp-content/uploads/2025/06/vitsaxaki-v-skaneateles-central-school-district-2025-06-12-amicus-brief-abigail-martinez.pdf (In spite of parental concerns, California school pressured high-school girl to socially transition. After she was placed in state custody, Yaeli Martinez began testosterone treatments and died by suicide.); *Blair v. Appomattox Cnty. Sch. Bd.*, No. 24-1682 (4th Cir. 2025) (A Virginia school secretly socially transitioned a 16-year old girl, Sage Blair, who was then lured by online predators away from her home and sex trafficked to multiple states. A Maryland judge placed her in a residential setting with males where she was sexually assaulted). One set of parents in *Mirabelli* only discovered that the school was secretly socially transitioning their daughter after a suicide attempt.

[80] 73 F.4th 408, 417 (6th Cir. 2023).

[81] *United States v. Skrmetti*, 605 U.S. 495, 523 (2025). Tennessee's legislature found that minors lack the maturity to fully understand the life-long consequences of the procedures, which can include damage to cardiovascular and skeletal systems as well as infertility and sterility.

[82] See *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (terminally ill patients do not have a constitutional right to access unapproved, experimental drugs).

[83]See, e.g., Belgium Act on Euthanasia of May 28, 2002, as amended by Act of Feb. 28, 2014, Moniteur Belge, Mar. 12, 2014 (extending eligibility for euthanasia to minors under specified conditions); Sydney Campbell et al., Exploring Assisted Dying Policies for Mature Minors: A Cross-Jurisdiction Comparison of the Netherlands, Belgium & Canada, 149 HEALTH POL'Y 105172 (2024), https://doi.org/10.1016/j.healthpol.2024.105172 (analyzing legal frameworks that emphasize decisional capacity and autonomy in pediatric assisted-dying regimes); AM. COLL. OF PEDIATRICIANS, Assisted Suicide and Euthanasia in Pediatrics (Apr. 2023), https://acpeds.org/assisted-suicide-and-euthanasia-in-pediatrics/ (discussing academic arguments that minors should be permitted to request assisted death notwithstanding parental objection).

[84] Gov't of the Neth., Is Euthanasia Legal in the Netherlands? (Mar. 30, 2026), https://www.government.nl/topics/euthanasia; Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding [Termination of Life on Request and Assisted Suicide (Assessment) Act] arts. 2.2–2.4 (Neth.) (Dutch).

[85] *Parham v. J.R.*, 442 U.S. 584, 603.

Mahmoud v. Taylor: A Landmark Victory with One Major Shortcoming

Melissa Moschella, Ph.D.

Do the rights of parents to direct their children's education extend beyond the schoolhouse door? In *Mahmoud v. Taylor*, decided this past June, the Supreme Court ruled that the answer to that question is "yes," at least in some circumstances. The Court indicated that the First Amendment right to the free exercise of religion includes the right to opt one's elementary school children out of controversial public-school lessons on sexuality and gender that are contrary to the religious beliefs parents seek to instill in their children.[1]

Although the ruling has its shortcomings—more on that later—this is truly a landmark victory for parental rights, for several reasons.

First, over the past half century, there have been numerous cases in which parents have similarly sought to opt their children out of aspects of public school lessons or activities to which they objected on moral or religious grounds. In almost all such cases, federal circuit courts denied that parents had a constitutional right to such opt-outs, and the Supreme Court declined to review the rulings. *Parker v. Hurley*, for instance, involved a dispute in which parents had religious objections to the school's exposure of their children to books celebrating same-sex marriage—a dispute quite similar to the one in *Mahmoud*.[2] But in Parker the First Circuit held that the parents had no constitutional right to opt their children out of such instruction.[3]

[1] 145 S. Ct. 2332, 2353 (2025).
[2] *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008).
[3] Id. at 102.

Parental rights claims were similarly denied in various earlier cases such as *Mozert v. Hawkins* (involving Christian parents seeking to opt their children out of a diversity-oriented reading curriculum at odds with their beliefs), *Brown v. Hot, Sexy & Safer* (involving parents who objected to their children's participation in a sexually-explicit assembly), and *Fields v. Palmdale* (involving parental complaints about the school's administration of a student survey containing questions related to sexual matters).[4] *Mahmoud* thus finally puts an end to this troubling pattern of federal courts effectively holding that parental rights do not extend beyond the schoolhouse door.

Second, the *Mahmoud* ruling resurrects *Wisconsin v. Yoder* as an applicable precedent in cases regarding the right of parents to direct their children's religious education.[5] This, too, is effectively a reversal of the arguments made by federal circuit courts in Parker and similar cases. In *Yoder*, Amish parents sought an exemption from Wisconsin's compulsory education law so that they could educate their children at home in the Amish way of life after eighth grade and preserve them from the worldly influences of the public high school that they believed would undermine the Amish values they sought to pass along to their children. The Supreme Court granted the exemption, arguing that the law substantially burdened the parents' free exercise rights, and that this burden was unconstitutional because it did not meet the requirements of strict scrutiny—i.e. it was not narrowly tailored to a compelling state interest, because enforcing this law against the Amish was not necessary to achieve the state's interest in facilitating that children grow up to be law-abiding, self-sufficient adults. The Court's argument in this regard was based partially on the relatively isolated nature of the Amish community, and on the community's long history of law-abidingness and self-sufficiency. Federal circuit courts in Parker and similar cases latched on to this aspect of the Supreme Court's argument in *Yoder* to claim that the case was sui generis due to the unique situation of the Amish, and thus was not applicable as a precedent in other contexts.[6]

[4] *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Brown v. Hot, Sexy & Safer Prods., Inc.,* 68 F.3d 525 (1st Cir. 1995); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005). See also *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001); *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005)*; Cal. Parents for the Equalization of Educ. Mats. v. Torlakson*, 973 F.3d 1010 (9th Cir. 2020); *Jones v. Boulder Valley Sch. Dist.* RE-2, 2021 WL 5264188 (D. Colo. Oct. 4, 2021). One of the few exceptions to this trend of federal courts' dismissive attitude toward parental rights claims is *Gruenke v. Seip*, 225 F.3d 290, 305 (3d Cir. 2000) (arguing that when parents' fundamental rights are in conflict with public school policies, "the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest").
[5] 406 U.S. 205 (1972).
[6] See, e.g. *Mozert*, 827 F.2d at 1067.

The *Mahmoud* opinion, however, explicitly criticizes and rejects the trend (reflected also in the dissent) of dismissing *Yoder* as irrelevant.[7] Instead, the opinion clarifies that the unique circumstances of the Amish were crucial only for supporting their claim that they had a right to exempt their children from all conventional schooling after eighth grade. And the Justices emphasize that the general principle embodied in Yoder—that parents have a fundamental right to direct the religious education of their children—is indeed relevant to other cases. This resurrection of *Yoder* as a generally-applicable precedent—along with the precedent set by *Mahmoud* itself—prepares the ground for further parental rights' victories in the future.

Third, *Mahmoud* explicitly acknowledges the coercive nature of public schooling, noting that, as a practical matter, sending children to public school is the only feasible way for many parents to comply with compulsory education laws.[8] This is important because it will make it more difficult in the future for courts to argue—as they have in the past—that the option to send one's child to a private school (at one's own expense) is the only aspect of parental rights in education that the constitution protects.

Fourth, *Mahmoud* also explicitly states that "public education is a public benefit."[9] This may seem obvious, but it's a claim that has been disputed, and it matters because there is a line of precedents indicating that it is a violation of religious free exercise to condition the availability of a public benefit on a person's "willingness to accept a burden on their religious exercise."[10] Applying these precedents to this case, and noting the "hefty price" of private schooling and homeschooling, the *Mahmoud* opinion boldly asserts: "It is both insulting and legally unsound to tell parents that they must abstain from public education in order to raise their children in their religious faiths, when alternatives can be prohibitively expensive and they already contribute to financing the public schools."[11] This is important not only in itself—for it adds another nail to the coffin of the now-dead claim that parental rights end at the schoolhouse door—but also because I believe that the logic of this argument can be extended to make a compelling case that it is unconstitutional for the state-run schools to enjoy a monopoly on public educational funding.

[7] 145 S. Ct. 2357-2358.
[8] *Id.* at 2351, 2357.
[9] *Id.* at 2359.
[10] *Id.*
[11] *Id.* at 2360.

In other words, this argument could be extended to make a constitutional case for some form of universal school choice program, given that many parents believe the public-school environment as a whole will undermine their ability to raise their children in their faith.[12]

For all of these reasons, *Mahmoud* is a great victory for parental rights—and a constitutionally sound one—that deserves to be celebrated. Nonetheless, the decision does have one major shortcoming: it fails to provide any direct protection for parental rights that is independent of religious freedom. Although it is true that in practice many parental rights claims can be captured under the aegis of religious free exercise because many parents view their parental obligations as religious obligations, it is also true that not all parents are religious and that not all parental rights claims are religiously grounded. Further, as a matter of principle, parental rights are not reducible to religious exercise rights, because they have an independent moral and constitutional grounding—i.e. that the state has an obligation to respect parental authority, because parental authority exists by nature and is both prior to and independent of the authority of the state.[13] This truth was recognized in common law[14] and declared to be part of the liberty protected by the Fourteenth Amendment in *Meyer v. Nebraska*[15] and *Pierce v. Society of Sisters*.[16]

[12] See Melissa Moschella, *Carson v. Makin, Free Exercise, and the Selective Funding of State-Run Schools*, J. RELIGION, CULTURE & DEMOCRACY, 1, 7 (Mar. 3, 2025) https://jrcd.scholasticahq.com/article/129427-_carson-v-makin_-free-exercise-and-the-selective-funding-of-state-run-schools [https://perma.cc/B947-QX6Y] (arguing that selective government funding of only state-run schools unconstitutionally conditions the free exercise of religion by forcing many religious parents to choose between forgoing a significant state benefit or forgoing "the ability to exercise their religion by providing their children with an education that aligns with their faith"). See also Nicole Stelle Garnett & John A. Meiser, *Preserving the Exit Option: State Public Education Mandates and Parental Rights in Education,* 100 NOTRE DAME L. REV. (forthcoming 2026); Richard F. Duncan, *Why School Choice is Necessary for Religious Liberty and Freedom of Belief*, 73 CASE W. RESV. L. REV. 1055 (2023); Philip Hamburger, *Education Is Speech: Parental Free Speech in Education,* 101 TEX. L. REV. 415 (2022).

[13] See MELISSA MOSCHELLA, *TO WHOM DO CHILDREN BELONG? PARENTAL RIGHTS, CIVIC EDUCATION, AND CHILDREN'S AUTONOMY* (2016); Melissa Moschella*, Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397 (2023); Melissa Moschella, *Natural Law, Parental Rights, and Education Policy*, 59 AM. J. JURIS. 197 (2014).

[14] See, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* *435 ("The duty of parents . . . is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world."); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 159, 169 (O. Halsted ed. 1827) (claiming that the natural duties of parents to their children "consist in maintaining and educating them," and indicating that "[t]he wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person.") For additional sources, see Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozert After 20 Years,* 38 J.L. & EDUC. 83, 108–24 (2009); Melissa Moschella, *Strict Scrutiny as the Appropriate Standard of Review for Parental Rights Cases: A Historical Argument*, 28 TEX. REV. L. & POL. 771 (2024); Christine Gottlieb, *The Enduring Vitality of Meyer and Pierce Post-Dobbs*, 100 NOTRE DAME L. REV. (forthcoming 2026)

[15] 262 U.S. 390 (1923).

[16] 268 U.S. 510 (1925). For more detailed arguments on this point, see Melissa Moschella, *Clarifying the True Breadth and Strength of Parental Rights Under Pierce*, 49 Harv. J.L. & Pub. Pol'y 95 (2026); and Melissa Moschella, *Do Parental Rights Extend Beyond the Schoolhouse Door?*, 100 NOTRE DAME L. REV. (forthcoming 2026).

[17] See Elizabeth R. Kirk, *Parental Rights: In Search of Coherence*, 27 TEX. REV. L. & POL. 729 (2023); Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127 (2018).

Unfortunately, however, many subsequent rulings (such as the federal circuit rulings mentioned above) have given an unduly narrow and weak reading of these cases, arguing that Pierce merely forbids the state from requiring all children to attend public schools, and declining to apply strict scrutiny to parental rights claims. This has led to confusion, incoherence, and inaccuracy in much recent parental rights jurisprudence, with the result that parental rights claims are all too often given short shrift in court. *Mahmoud* is therefore disappointing insofar as the Court could have used this opportunity—the first case on parental rights in education that the Court has taken in half a century—to clarify the true scope and strength of parents' constitutional rights under Pierce, thus ensuring that the constitutional rights of all parents are protected.

With *Mahmoud*, the Court has taken a giant step forward in shoring up the constitutional rights of parents to direct their children's education, but there are still a few more steps to go before reaching the finish line.

Mahmoud v. Taylor: My Personal Joy in Seeing *Mozert* Reversed

Michael P. Farris, Esq.

In 1948, the Supreme Court ruled that an Illinois program of religious instruction in the public schools violated the Establishment Clause. In so doing, the Court promised parents and the public that this was required to ensure neutrality of the public schools on the matter of religion. The Court's prose was lofty and designed to comfort those who believed they were losing their religious heritage.

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. 'The great American principle of eternal separation'—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.[1]

Subsequent cases contained even more explicit promises that the principle of neutrality cut both ways, neither advancing nor disparaging religion. When the Court held that Arkansas could not forbid the teaching of evolution in the public schools, it promised religious parents who supported the law that: "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[2] Moreover, the Court said that public schools "may not be hostile to any religion."[3]

And when the Court held that Bible reading and recitation of the Lord's Prayer must be removed from the public schools of Pennsylvania and Maryland, the Court promised religious parents: "The government is neutral, and, while protecting all, it prefers none, and it disparages none."[4]

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[1] *People of State of Ill.* ex rel. *McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty.*, Ill., 333 U.S. 203, 231 (1948).
[2] *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968).
[3] *Id.*
[4] *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 215 (1963).

I started my parental rights career litigating cases for parents in the public schools in the early 1980s. Having learned of increasing hostility to religion—especially Christianity—it seemed like the time had arrived to get the Supreme Court to live up to its promise of two-way neutrality. I quickly became cynical about our judicial system after comparing its treatment of religious parents to that of atheistic parents in public school clashes.

On behalf of my first set of religious parent clients, Carolyn Grove, Warren Riddle, and Sylvia Riddle, I was unsuccessful in getting the Ninth Circuit to hold that use of a novel, The Learning Tree, in a public school's curriculum violated the Establishment Clause. Among many other anti-Christian comments in the book, one character declares that he would "blow the a** off of Jesus Christ that long-legged white son-of-a-*****." Another calls Jesus a "poor white trash God."[5]

Yet Illinois atheist parents were successful in getting the Seventh Circuit to stop a kindergarten teacher from leading her class in the following recitation:

> *We thank you for the flowers so sweet; We thank you for the food we eat; We thank you for the birds that sing; We thank you for everything*.[6]

There was no mention of God in the verse, but the court found it to be a prayer, nonetheless. The Seventh Circuit claimed to be following the Supreme Court admonishment "to observe strict neutrality with respect to religion in public schools."[7]

The "flowers so sweet" prayer was about as innocuous as they come. Yet, it was removed. The vulgar attack on Jesus in my case was, from any reasonable perspective, pretty intemperate. It was upheld. I began to moan that the Establishment Clause protected the most sensitive atheists while doing nothing for Christians no matter how egregious the provocation.

The lack of actual neutrality was painfully clear in the case that probably garnered the most publicity of any in my career.

[5] *Grove v. Mead Sch. Dist*. No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985).
[6] *DeSpain v. DeKalb Cnty. Cmty. Sch. Dist*. 428, 384 F.2d 836, 837 (7th Cir. 1967).
[7] *Id*. at 839.

In *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), I represented a group of parents whose children had been expelled from the public schools for refusing to read textbooks that violated their religious beliefs.[8] There was no request to remove the books from the curriculum; the parents simply asked for an alternative reader—which was actually the text used by the school district the prior year.

The Sixth Circuit found no "burden" on the Free Exercise rights of the plaintiff-parents in that case, on the basis that the children were not coerced to believe the materials that they were required to read. Even though the children in that case were suspended from school for refusing to read the offensive texts[9], and even though the school district stipulated that the materials were in fact offensive to the sincere beliefs of the plaintiffs[10], the lack of any pressure to actually believe the material was fatal to their case.[11]

However, the Superintendent of Hawkins County Schools was more realistic in his assessment on the goal for this kind of coercion. Superintendent Bill Snodgrass, "said it was better for children to be forced to read materials to which they objected, than to give them an alternative book, because 'after a while, they would quit kicking and screaming.' Superintendent Snodgrass said he believed that forcing children to read material that violated their religious beliefs would build character and develop self-discipline."[12]

It has been hard to stomach not only the obvious breach of the promise of true neutrality, but that my own *Mozert* case has been one of the leading authorities cited by dozens of judges ruling against religious parents who complained that their children were being treated unequally in the public schools. This included both the district court and the Fourth Circuit Court of Appeals in the legal clash between religious parents and the Montgomery County (MD) school district over coerced use of LGBT books.[13]

I hope you can imagine my overwhelming joy when the United States Supreme Court reversed the anti-parent, anti-religion decision of the Fourth Circuit in *Mahmoud v. Taylor* this past summer.[14]

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[8] *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987)
[9] *Id*. at 1060.
[10] *Id*. at 1061.
[11] *Id*. at 1064.
[12] *Mozert v. Hawkins County Public Schools*, U.S. Supreme Court No. 87-1100, Cert. Pet. at 8. (1987), cert denied 484 U.S. 1066 (1988).
[13] *Mahmoud v. McKnight*, 102 F.4th 191, 210 (4th Cir. 2024).
[14] *Mahmoud v. Taylor*, 606 U.S. 522, 614 (2025).

Justice Alito's majority opinion in *Mahmoud* is the first time since 1948 that religious neutrality has been used to protect religious children from material they and their parents found objectionable. Like *Mozert*, the parents in *Mahmoud* only asked to be allowed to opt their children out of a program of obvious indoctrination.

Maryland's Montgomery County Public Schools adopted a group of "LGBTQ-Inclusive Books [Storybooks] as part of the English Language Arts Curriculum"[15] for elementary students. While some latitude is granted to teachers in how they employ the books in their classroom, teachers "cannot, however, elect not to use the Storybooks at all."[16]

Initially, the District allowed parents to opt their children out of the use of the Storybooks.[17] However, the materials were offensive to so many parents, that the District cited "high student absenteeism" as one of the reasons for terminating the opt-out program.[18]

The single most important set of facts in the record was the training of the School District's teachers to answer common objections and problems. The Fourth Circuit gave this summary of the training:

> For example, if a student says "Being ____ (gay, lesbian, queer, etc.) is wrong and not allowed in my religion," teachers "can respond," "I understand that is what you believe, but not everyone believes that. We don't have to understand or support a person's identity to treat them with respect and kindness." The guidance also counsels that if a student says that "a girl … can only like boys because she's a girl," the teacher can "[d]isrupt the either/or thinking by saying something like: actually, people of any gender can like whoever they like.... How do you think it would make __ feel to hear you say that? Do you think it's fair for people to decide for us who we can and can't like?" (emphasis added). If a student asks what it means to be transgender, the teacher could explain, "When we're born, people make a guess about our gender and label us 'boy' or 'girl' based on our body parts. Sometimes they're right and sometimes they're wrong.... Our body parts do not decide our gender. Our gender comes from our inside[.][19]

[15] *Mahmoud v. McKnight,* 102 F.4th 191, 197 (4th Cir. 2024).
[16] *Id*. at 198.
[17] *Id*. at 199.
[18] *Id*. at 200.
[19] *Id*. at 198–99.

There can be no doubt that the theme of this training is that teachers are to mold the mind of the child to align with the values preferred by the School District rather than the values taught by their parents and religious leaders.

- Children who express a religious view about LGBTQ issues are to be told that other people think differently about it. Teachers are not told to tell children who affirm the Storybooks that other people think differently about it.

- Children who express a religious viewpoint are told that they may not understand people who identify as LGBTQ. This has the undoubted effect of undermining a child's viewpoint when his or her teacher tells the student that he or she doesn't understand. Teachers are communicating to impressionable young children that their viewpoint is unenlightened.

- Children who express the viewpoint that opposite sex attraction is the correct view are to be disrupted by teachers. This intentional disruption, which can mean nothing other than the teacher is seeking to change the views of the child, is accomplished by stating as a fact: "People of any gender can like whoever they like." The District not only says that the children's expressed religious views are wrong, but that the teacher should endeavor to change those views.

- Children whose religious beliefs teach them that moral principles come from God, are universal, and are not a matter of individual choice are to be directly undermined by being questioned by their teachers "Do you think it's fair for people to decide for us who we can and can't like?" This directly and intentionally contradicts the idea that moral standards come from God.

- Children who believe that there are only two genders given by God and that this is evidenced by biological reality are to be directly contradicted by the teacher saying that gender is merely a "guess" at birth based on body parts. Children are also told that body parts do not decide gender. "Gender comes from the inside." Once again, children are being told that their view that gender is an objective reality stemming from God's creation is plainly wrong.

Any book could be used to teach language arts. The instructions given to the teachers reveal beyond any doubt that the District's purpose for selecting these particular books is to indoctrinate children in a worldview that conflicts with the faith of a considerable number of the families within the school system.

I have long contended that when government schools attempt to change the religious beliefs of students, they are intruding upon the sole right that the Supreme Court has declared to be absolute.

The Supreme Court has described the Free Exercise Clause as containing an "absolute prohibition of infringements on the 'freedom to believe.'"[20]

In *Braunfeld*, this Court relied on an oft-quoted passage from Thomas Jefferson that is fully applicable here:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. 8 Works of Thomas Jefferson 113. [21]

By seeking to change the religious views held by students, the school district acts in a manner that is illegitimate for any level of government in this nation. Without question, schools may seek to control behavior. In this context, a prohibition against bullying another student based on sexual orientation or gender identity would fall within the school's clear and constitutional authority. But the District is absolutely forbidden by the First Amendment to do what it sought to do in Montgomery County: to change the religious views of students.

Parents may not expect public schools to affirmatively reinforce the beliefs they teach to their children.[22] Nor is the absolute right to believe involved when schools present academic information that conflicts with the views of students or parents, such as teaching the theory of Darwinian evolution.[23]

[20] *McDaniel v. Paty*, 435 U.S. 618, 627 (1978). See also, *Braunfeld v. Brown*, 366 U.S. 599, 603 ("The freedom to hold religious beliefs and opinions is absolute.")
[21] *Braunfeld v. Brown*, 366 U.S. 599, 603.
[22] *Bowen v. Roy*, 476 U.S. 693, 699 (1986).
[23] *Edwards v. Aguillard*, 482 U.S. 578 (1987).

However, the right to believe could properly be invoked if the teaching of scientific evidence concerning Darwinian evolution were accompanied by explicit efforts to undermine the religious faith of children who believed otherwise. For example, if biology teachers were instructed to go beyond the presentation of scientific information and to attempt to ensure that all students understood that views of God as creator were wrong, the right to believe might indeed be violated.

Montgomery County was not seeking to impart scientific or historical information through the Storybooks. As the teacher training makes incredibly clear, the School District was seeking to indoctrinate children in a worldview that is designed to supplant the worldview that children learn from their parents and religious leaders. No level of American government has the authority to do any such thing. It is per se unconstitutional.

The Court's basic holding in *Mahmoud* is a sea change for parental rights in public schools.

> A government 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. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). And a government cannot condition the benefit of free public education on parents' acceptance of such instruction. Based on these principles, we conclude that the parents are likely to succeed in their challenge to the Board's policies. [24]

I took a bit of ironic pleasure seeing *Mozert* cited, hopefully for the last time, in Justice Sotomayer's dissent in *Mahmoud*. *Mozert* was the first case she cited (and egregiously twisted the facts in her citation) to demonstrate that cases like this have been decided to the contrary in the past.

Even though I rejoice greatly that a good start has been made in vindicating parental rights in public education—a principle I have never stopped believing—as a practical matter I would still urge parents to look elsewhere for education if at all possible.

The program of progressive indoctrination is pandemic and entrenched. It is going to take a whole lot more than one Supreme Court decision to make public schools truly neutral.

[24] *Mahmoud v. Taylor*, 606 U.S. 522, 530 (2025).

About the Authors

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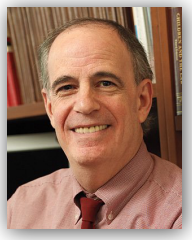

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Founded in 2014, the Foundation equips policymakers and the public with research, legal analysis, and educational resources that strengthen and protect parental rights nationwide.

The Foundation works to advance policies that respect the family as the primary institution responsible for children and to address the growing tension between government authority and the role of parents.

"We believe that parents should be free to raise their children without undue government interference, and that strong families are essential to a free and flourishing society."

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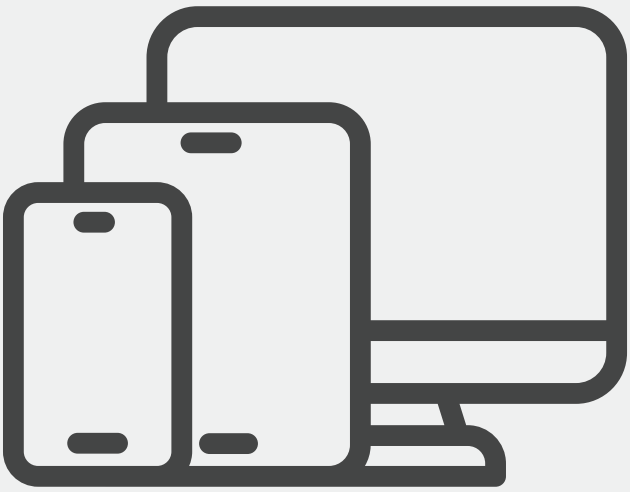
- **Research and Policy Analysis** - Producing data-driven research and publications that inform policy and strengthen protections for parental rights
- **Coalition Building** - Partnering with policymakers, organizations, and advocates who share a commitment to protecting families
- **Advocacy** - Promoting solutions and policy reforms that uphold parental rights, even in complex or contested areas
- **Legal Engagement** - Providing legal analysis, supporting litigation efforts, and contributing to key cases through amicus briefs



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