

PASSIVELY VIRTUOUS PARENTAL RIGHTS

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In *Meyer v. Nebraska*,¹ a school teacher claimed that a statute that criminalized the teaching of primary school students in any language other than English violated his liberty right, under the Due Process Clause of the United States Constitution “to choose and pursue a given legitimate vocation.”² Two years later in *Pierce v. Society of Sisters*, two private schools claimed that an Oregon statute requiring all children to attend public school violated their similar liberty interest by depriving them of their customers.³ In ruling in these educators’ favor, the Supreme Court introduced another constitutionally protected liberty interest, the “liberty of parents and guardians to direct the upbringing and education of children under their control.”⁴ And so, out of the *Lochner* era’s economic-rights doctrine, the constitutional protection of parental rights was born.⁵ It is notable that this right came to be embraced through cases originally about something (and somebody) else. But more notable is the fact that this right has survived and flourished, even as the Court has abandoned the protection of the original claims and claimants and the details of the doctrine upon which the claims were based. And perhaps most notable of all, the parental rights protected in *Meyer* and *Pierce* appear to stand on firmer ground than a second, entirely distinct, set of “privacy” rights and related doctrine that grew out of these cases in the second half of the twentieth century

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

2 Brief and Argument for Plaintiff in Error at 7, *Meyer*, 262 U.S. 390 (No. 325).

3 *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530–31 (1925).

4 *Id.* at 534–35.

5 See *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

and that suffered a serious setback in the Court's recent decision in *Dobbs v. Jackson Women's Health Organization*.⁶

This Article tells the survival story of *Meyer* and *Pierce*. It suggests that the constitutional protection of parental rights has been well served by what is often perceived as judicial neglect but might be more charitably understood as the Court's successful exercise of the "passive virtues" championed by Alexander Bickel.⁷ These virtues, he counseled, serve as an important mechanism restraining the heavy hand of judicial review, leaving more room for the legitimizing force of democratic lawmaking.⁸ After describing the firm-but-light hand the Court has applied to its development of parental rights and contrasting it to the heavy-handed approach the Court has taken in its development of other rights under the substantive due process doctrine, the Article closes with a brief consideration of the recent onslaught of federal parental-rights litigation, and the threat this may pose to the value achieved through the Court's restrained approach to parental rights. The goal, on this 100th anniversary of *Pierce*, should be to continue the practice of granting certiorari only rarely, choosing wisely, and saying only what is necessary to preserve the broad outlines of the rights' protection.

I. THE ESTABLISHMENT OF CONSTITUTIONALLY PROTECTED PARENTAL RIGHTS IN *MEYER* AND *PIERCE*

The history leading up to *Meyer* and *Pierce* has been told often and well, and here I merely summarize these accounts, with an emphasis on the scope of the rights set out in those cases. As World War I came to a close, and newly arrived immigrants brought with them their own practices, language, and, in many cases, self-contained communities, many states, Nebraska and Oregon among them, adopted laws aimed at integrating these immigrant communities into mainstream, largely Protestant and English-speaking, American society. The positive account describes states' attempt to bring a single, peaceful society together.⁹ The negative account describes a postwar hostility to Germans and a growing, Ku Klux Klan-fueled, antagonism toward Catholics.¹⁰

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

7 ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98, 201 (2d ed. 1962).

8 *See id.* at 197–98.

9 *See, e.g., Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting) ("We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one.").

10 *See, e.g., Ira C. Lupu, The Centennial of Meyer and Pierce: Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. LEGAL ISSUES 147, 149–50 (2025);

Both accounts are surely part of the story leading to Nebraska's enactment of a law forbidding any instruction in any modern language other than English until students had completed the eighth grade and Oregon's enactment of a law requiring all students to attend public schools.

Building on the Court's recent decisions in *Lochner v. New York*¹¹ and its progeny, which held that the Due Process Clause of the Fourteenth Amendment protected individuals' freedom of contract, particularly in the business setting, a teacher in Nebraska, and then two schools in Oregon, brought suit, arguing that the laws interfered with their ability to pursue a vocation and run a business, respectively. In vindicating the teacher's right in *Meyer*, the Court offered a list of liberties protected, like the right to contract, by the Due Process Clause, despite their lack of mention in the Constitution:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹²

It was this passage that first put parental rights on the short list of liberties afforded substantive protection under the Due Process Clause. In just fifteen years, the Court began trimming down this list. But through all the subtractions and additions the Court has made from and to this list over the past 100 years, the right to "bring up children" has remained.

When, two years later, the Court considered the claim of the schools in *Pierce v. Society of Sisters*, it offered an explanation for the inclusion on the short list of what it expanded to describe as "the liberty of parents and guardians to direct the upbringing and education of children under their control" that tied these rights to our broader constitutional commitments, declaring that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children."¹³

Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

11 *Lochner v. New York*, 198 U.S. 45 (1905).

12 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

13 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). There is a third case, *Farington v. Tokushige*, 273 U.S. 284 (1927), decided just two years after *Pierce*, in which the

True to the *Lochner* doctrine of the era, the Court analyzed *Meyer* and *Pierce* using the language, but not the standard, of what we would call “rational basis review” today. “The established doctrine,” the Court in *Meyer* explained, “is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”¹⁴ And then the key phrase that captures the core of what Bickel called the countermajoritarian difficulty¹⁵ that has undermined the survival of these unenumerated liberties over the years: “Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.”¹⁶ *Pierce* repeated this standard, striking down the Oregon law because it bore “no reasonable relation to some purpose within the competency of the State.”¹⁷

As the decisions in *Meyer* and *Pierce* demonstrate, the “rational” review of their era had serious teeth. Even the prohibition of language teaching, while easy to conceive as ill-advised from a purely pedagogical standpoint, could be tied, as Justice Holmes stated in dissent,¹⁸ to the “lawful and proper” aim of ensuring that “all the citizens of the United States should speak a common tongue,” and at least in some circumstances “might . . . be regarded as a reasonable or even a necessary method of reaching the desired result.”¹⁹ And it is hard to make sense of the Court’s conclusion, reading with modern eyes, that a statute requiring all children to attend public school bears “no reasonable relation” to a “purpose within the competency of the State.”²⁰ As the substantive due process doctrine developed over the twentieth century

Court again found a state regulation (this one imposing serious constraints on after-hours language schools), *id.* at 296, infringed on the liberty of parents to direct the education of their children, *id.* at 299, but interestingly, the third in this trilogy has not preserved the same status as the other two. Although, in writing for a symposium on *Pierce*, it is impossible to avoid including *Meyer*, it seems appropriate to confine *Farrington* to a footnote. *Pierce* explicitly built on the “doctrine of *Meyer*,” *Pierce*, 268 U.S. at 534, and *Pierce* stands as the single most elaborated articulation of the conception of the right in the twentieth century. The fact that that “elaboration” is confined to a single paragraph of the opinion is emblematic of the minimal development that this right has undergone, as I will discuss later. *Farrington* was treated at the time, and continues to be thought of, as a mere application of what was set out in *Meyer* and further explicated in *Pierce*.

14 *Meyer*, 262 U.S. at 399–400.

15 BICKEL, *supra* note 7, at 16.

16 *Meyer*, 262 U.S. at 400.

17 *Pierce*, 268 U.S. at 535.

18 Justice Holmes’s dissent was noted in *Meyer*, and set out in a companion case, *Bartels v. Iowa*, 262 U.S. 404 (1923).

19 *Bartels*, 262 U.S. at 412 (Holmes, J., dissenting).

20 *Pierce*, 268 U.S. at 535.

and the “rational basis” standard came to be a largely deferential standard, the Court subjected legislation deemed to interfere with the short list of substantively protected liberties to more stringent standards of review, and particularly the strict scrutiny standard. My parental-rights survival story will note, however, that the Court has never expressly attached this heightened standard of review to parental rights, nor has it expressly declined to do so.

Meyer and *Pierce* do something big: they introduce a new constitutionally protected liberty interest, and in establishing parental rights, the Court could hardly be called restrained.²¹ But the cases do very little to define the right or its limits. Instead, they simply resolve the specific issues pressed in the cases, and in this sense these decisions represent the first cases that demonstrate the Court’s restraint that has persisted for a century. A decision determining that the state doesn’t have the power to forbid all teaching in a language other than English until the ninth grade, without offering more than a generic conclusion that it is “arbitrary,” qualifies as the ultimate “minimalist” opinion. And the language of *Meyer* speaks in sweeping terms both of the right, the right to “establish a home and bring up children,” and of the State’s countervailing power to “do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally.”²² A fair reading of *Meyer* is that it announced a right, acknowledged it was not without limits, and then did next to nothing to guide courts and litigants, going forward, in shaping the scope and limits of the right.

Meyer, importantly, set things up for *Pierce*, which went a bit further in defining the right, the state’s countervailing power, and the underlying rationale for the right. The opinion is still notably brief and the doctrine motivating the Court’s conclusion ill-defined. The progress made in defining the scope of parental rights comes not through more careful doctrinal analysis, but rather through the breadth of the control awarded to parents by the Court. In ceding to parents the right to choose a school for their children and to opt out of the state’s public educational system, the Court marks off considerable ground for the right. But at the same time, the Court sets out a broad swath of legitimate state regulation as well:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character

21 See James G. Dwyer, *Pierce’s Problems*, 100 NOTRE DAME L. REV. 1569, 1577 (2025) (describing *Meyer* and *Pierce* as “one of the clearest examples of judicial activism in the Court’s history”).

22 *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.²³

Again, we get a list, not an explanation of why things are on or off the list.

Pierce also offers a thumbnail sketch of a rationale for the strong protection of parental rights:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.²⁴

This statement, emphasizing the foundational role of parental rights in a pluralistic society, has been cited repeatedly throughout the century, reinforcing its importance even in the continuing absence of much detail.

II. THE REMARKABLE SURVIVAL STORY OF *MEYER* AND *PIERCE*

A. *From 1925 to 1944, Surviving the "First Death" of Substantive Due Process*

The first significant threat to *Meyer* and *Pierce*'s longevity came with the Court's abandonment of the due process protections of the unenumerated economic rights on which the Court had based its parental rights analysis. This began, in 1937, with *West Coast Hotel Co. v. Parrish*²⁵ and in short order, most of the cases on the long list cited in *Meyer* in support of the constitutional protection of parental rights were either expressly or implicitly reversed. It would have been sensible to conclude that the Court's retreat from judicial activism would sweep away the cases that rested on these precedents, but the Court soon revealed that *Meyer* and *Pierce* had survived.

²³ *Pierce*, 268 U.S. at 534.

²⁴ *Id.* at 535.

²⁵ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, the Court put the beginning of the demise of this line of cases even earlier. See *Lincoln Fed. Lab. Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949) ("This Court beginning at least as early as 1934, . . . has steadily rejected [its earlier] due process philosophy[, and i]n doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." (citing *Nebbia v. New York*, 291 U.S. 502, 523–24 (1934))).

Meyer and *Pierce* first manifested their resilience by showing up in support of somewhat surprising propositions. In 1937, in *Palko v. Connecticut*,²⁶ months after the decision in *West Coast Hotel*, the Court included *Pierce* on a list of *enumerated* rights, namely the “free exercise of religion,” that were afforded protection from state interference under the Fourteenth Amendment’s Due Process Clause.²⁷ *Pierce* made no mention of the Free Exercise Clause, so this was a stretch (perhaps justifying the “cf.” before the case in the string cite), though, for some parents, the desire to send their children to private school was clearly religiously motivated. And then, months later, *Pierce* and *Meyer* made an appearance in perhaps the single most influential Supreme Court footnote, footnote four of *Carolene Products*, as examples of cases affording protection to “discrete and insular minorities”: religious (*Pierce*) and “national” (*Meyer*).²⁸ The cases’ inclusion in footnote four is perhaps a bit more justified than its reference in *Palko*, as *Pierce*’s “anti-standardization” message can readily be understood as an interest in protecting minority parenting practices against the might of the majority’s parenting preferences. But in neither *Palko* nor *Carolene Products* did the Court do much more than suggest that the cases had survived the reversal of the precedents on which they were based.

Somewhat ironically, it was in a case in which the Court ruled *against* a claim of a parental right to control the upbringing of a child that the Court clearly signaled the ongoing survival of the Constitution’s protection of parental rights in this era. In 1944, in *Prince v. Massachusetts*, the Court ruled that Massachusetts could criminally penalize a guardian for allowing her ward to sell religious tracts on the street (under the guardian’s supervision), despite the fact that both the guardian and the ward believed it was their religious duty to engage in the proselytizing.²⁹ But in doing so, the Court declared:

Previously in *Pierce v. Society of Sisters*, this Court had sustained the parent’s authority to provide religious with secular schooling, and the child’s right to receive it, as against the state’s requirement of attendance at public schools. And in *Meyer v. Nebraska*, children’s rights to receive teaching in languages other than the nation’s common tongue were guarded against the state’s encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder. And it is in recognition of this that these decisions have

26 *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

27 *Id.* at 324.

28 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

29 *Prince v. Massachusetts*, 321 U.S. 158, 162 (1944).

respected the private realm of family life which the state cannot enter.³⁰

Prince went on to make an important contribution, also in extremely general terms, to the Court's account of the state's countervailing interests that could justify interfering with parental control:

But the family itself is not beyond regulation in the public interest And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control . . . [and its] authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . The state's authority over children's activities is broader than over like actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.³¹

It is hard to match this balancing of lofty concerns on both sides with the Court's determination that concerns for the child's well-being, and perhaps, also, the well-being of broader society, justified preventing nine-year-old Betty from standing on the street near her guardian offering to sell religious pamphlets to passersby. But, as with *Meyer*, the facts do little work in our ongoing understanding of *Prince*. It is a repeat of the basic ideas presented in *Meyer* and *Pierce*: parental rights are afforded broad but not infinite protection under the Constitution, and the State has important but ill-defined power to circumscribe those rights.

B. From 1965 to 1973, Kindling the Rebirth of Substantive Due Process

Decades after surviving the first dousing of the substantive due process doctrine, *Meyer* and *Pierce* provided the ember that reignited the doctrine in the name of "privacy rights." The first case in this line, *Griswold v. Connecticut*, made an odd start, describing "penumbras" of the Bill of Rights that were "formed by emanations from those guarantees that help give them life and substance."³² Especially odd was the Court's suggestion that the rulings in *Pierce* and *Meyer* were somehow derived from the "spirit of the First Amendment," particularly its prohibition on the state's power to "contract the spectrum of available knowledge."³³ In three different concurrences, however, five Justices took the position that the right to privacy should be protected as an

30 *Id.* at 166 (citations omitted).

31 *Id.* at 166, 168.

32 *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

33 *Id.* at 482.

unenumerated liberty under the Due Process Clause, and in two of those opinions their arguments expressly relied upon *Meyer* and *Pierce*.³⁴

By the time the Court applied its privacy analysis to abortion rights a decade later in *Roe v. Wade*,³⁵ *Pierce* and *Meyer* had clearly been returned to their due process origins:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in [various amendments] or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty” are included in this guarantee of personal privacy.³⁶

In the same decade in which the Court set out this privacy rights doctrine, it returned to a consideration of parental rights in *Wisconsin v. Yoder*.³⁷ In *Yoder*, unlike *Meyer* and *Pierce*, the focus of the Court’s analysis was on the religious nature of the Amish parents’ desire to remove their children from high school, and the *Yoder* Court was clear that the protection it afforded the parents was grounded primarily on the Free Exercise Clause. “A way of life, however virtuous and admirable,” the Court explained, “may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations.”³⁸ That said, the Court clearly tied the free exercise claim with a parental rights claim under the Fourteenth Amendment

34 *Id.* at 486 (Goldberg, J., concurring) (citing *Meyer*’s language stating that the liberty guaranteed in the Fourteenth Amendment includes the “right . . . to marry, establish a home and bring up children,” *id.* at 488 (omission in original) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923))), in support of the conclusion that “I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights,” *id.* at 486); *id.* at 502 (White, J., concurring) (“Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right ‘to marry, establish a home and bring up children,’ and ‘the liberty . . . to direct the upbringing and education of children.’” (omission in original) (citation omitted) (first quoting *Meyer*, 262 U.S. at 399; and then quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925))).

35 *Roe v. Wade*, 410 U.S. 113 (1973).

36 *Id.* at 152 (some citations omitted).

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

38 *Id.* at 215.

and in this way once again confirmed the existence of a protected liberty interest for parents while saying very little about its scope.³⁹

As in *Meyer* and *Pierce*, the Court, in ruling in favor of the Amish parents, made clear that there were weighty interests justifying considerable state intervention on the other side. And in *Yoder*, the Court went beyond *Meyer* and *Pierce*'s listing of some potential acceptable state actions to describe the important state interests that would justify these intrusions on parental control:

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. . . . The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.⁴⁰

Although *Yoder*, like *Prince*, contributed to the development of parental rights doctrine by setting out state interests that would justify limiting the reach of these rights, in *Yoder* these interests did not carry the day. In the end, the *Yoder* Court emphasized the narrowness of its decision to justify allowing the Amish parents the requested exemption from the compulsory schooling requirement: because the exemption only affected Amish children, a small group who were being raised to live a separate life, and because it only reduced their education by two years, the Court reasoned, affording Amish parents the exemption would not undermine these compelling interests of the State.⁴¹

39 *Id.* at 232–33 (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce v. Society of Sisters*, in which the Court [found that the Act in question], ‘[u]nder the doctrine of *Meyer v. Nebraska*, . . . unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.’” (first quoting *Pierce*, 268 U.S. at 534–35; and then citing *Meyer*, 262 U.S. 390)).

40 *Id.* at 221.

41 *Id.* at 222 (“However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents’ experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as

In an odd twist of constitutional fate, it was *Yoder*'s reliance on the substantive due process right set out in *Pierce* that saved *Yoder* from the scrap heap when the Court reversed course and eliminated neutral laws with disparate effects on religious groups from the Free Exercise Clause's protection.⁴² Recent developments in free exercise doctrine have put that doctrine again in flux,⁴³ further complicating any analysis that seeks to tease out from the language of *Yoder* distinctions between religiously motivated parental rights and the constitutional protection afforded to parental rights unmotivated by religion.

A half century after *Pierce*, parents' constitutional right to control the education and upbringing of their children, while repeatedly acknowledged, was still only vaguely defined: The Court was clear that the Constitution afforded parents considerable control, tied to their duty to raise children to lead successful lives of value as members of a pluralistic society, and that the state had considerable power to intervene to achieve its own obligation to perpetuate a healthy society capable of effective self-government. But with only four cases decided, the Court continued to provide little guidance, doctrinal or illustrative, about how to allocate authority between parent and state. No standard of review, no multipronged test, no context specific limitations. Nothing. In Part III, I will suggest that the lack of attention and development afforded to this right may, in fact, have helped preserve its value and ensure its survival. To make the case, I pick up where the Court left off in *Roe* and *Yoder* and take us to the present.

C. 1973–2022, *Substantive Due Process Restrained and Unrestrained*

1. Substantive Due Process Unrestrained

Although *Roe* built upon the substantive due process precedents of *Meyer* and *Pierce*, the Court took a very different approach to the development of the substantive due process doctrine in the abortion context. After noting a strong consensus among state and federal

the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith." (citing *Meyer*, 262 U.S. at 400)).

42 Emp. Div. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children." (citing *Yoder*, 406 U.S. 205)).

43 See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1926 (2021) (Alito, J., concurring in judgment) (calling for *Smith* to be overruled); *id.* at 1882 (Barrett, J., concurring) (criticizing *Smith* and asking what should replace it).

courts, if some disagreement on the detail, that the Constitution should be read to afford significant, but not unlimited, abortion rights,⁴⁴ the *Roe* Court went on to prescribe in some detail the scope and limits of the right.⁴⁵ These details—tied to the quickly outdated three trimesters of pregnancy—became their own target, a basis of ridicule for abortion opponents, and a problem to be corrected for the abortion rights advocates.⁴⁶ Paralleling these changes were struggles to establish a stable standard of review—beginning with a classic strict scrutiny test which the Court tied to the three-trimester framework in *Roe*,⁴⁷ and changing, twenty years later in *Planned Parenthood v. Casey*, to an “undue burden” inquiry that displaced the three-trimester framework and with it, apparently, the strict scrutiny standard.⁴⁸

Roe started an avalanche of Supreme Court decisions, over thirty between 1973 and 2022,⁴⁹ that sought to refine, and to some extent replace, the doctrine set out in *Roe* and to apply that evolving doctrine to an endless stream of specific facts and legal constraints. On several occasions, including in *Casey*, a certiorari grant was taken as a sign that

44 *Roe v. Wade*, 410 U.S. 113, 154–55 (1973) (“We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. . . . Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.”).

45 *Id.* at 164–65.

46 *See, e.g.*, Laurence H. Tribe, *The Supreme Court: 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 10–11 (1973) (criticizing the trimester framework as unrelated to the question presented in *Roe*).

47 *Roe*, 410 U.S. at 155 (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest.’”).

48 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion) (“We reject the trimester framework . . .”); *id.* at 876 (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”); *id.* at 954 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (“*Roe* decided that abortion regulations were to be subjected to ‘strict scrutiny’ and could be justified only in light of ‘compelling state interests.’ The joint opinion rejects that view.”); *cf. id.* at 934 (Blackmun, J., concurring) (“*Roe*’s requirement of strict scrutiny as implemented through a trimester framework should not be disturbed. No other approach has gained a majority, and no other is more protective of the woman’s fundamental right.”).

49 This number is derived from a Westlaw search of the Supreme Court’s decisions citing *Roe* during these years, and a review of this list to identify those that addressed abortion in a merits decision.

the Court was considering overturning *Roe*,⁵⁰ and when the right was preserved, the shifting analyses and alignments among the Justices proliferated.⁵¹ When the end came with *Dobbs*, the Court's earlier struggles to craft and hold a consensus offered their own fuel for the Court's contemptuous fire.⁵²

In the midst of the heavy volume of abortion cases between *Roe* and *Dobbs* came *Washington v. Glucksberg*, in which the Court unanimously refused to find that the substantive due process doctrine prevented a state from banning physician-assisted suicide.⁵³ The *Glucksberg* Court clearly intended to send a message that the substantive due process doctrine was to be applied narrowly and that the Court should "exercise the utmost care" in identifying implied fundamental rights "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of . . . this Court."⁵⁴ To avoid this risk, the Court directed, the recognition of liberty interests under the Due Process Clause should be limited to liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁵⁵

Eighteen years later, in *Obergefell v. Hodges*, a bare majority of the Court held that the substantive due process doctrine protected the

50 See *Casey*, 505 U.S. at 844–45 ("[Nineteen] years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, that definition of liberty is still questioned. . . . [T]he United States [has argued in six] cases in the last decade . . . to overrule *Roe*. . . . The Chief Justice admits that he would overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality.").

51 *Id.* at 950 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) ("And, when confronted with state regulations of this type in past years, the Court has become increasingly more divided: The three most recent abortion cases have not commanded a Court opinion.").

52 See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2272 (2022) ("*Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.").

53 See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

54 *Id.* at 720 (first quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); and then citing *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)). This message has been voiced by the Court in other cases considering substantive due process claims, and its intention to avoid what are perceived as the hazards manifested in the *Lochner* era. See, e.g., *Collins*, 503 U.S. at 125 (calling for "judicial self-restraint" to avoid relying on the doctrine to convert personal preferences into constitutional mandates).

55 *Glucksberg*, 521 U.S. at 721 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *abrogated by* *Malloy v. Hogan*, 378 U.S. 1 (1964)).

right of individuals of the same sex to marry.⁵⁶ It was a happy outcome, to be sure, but one that may have come at a serious and unnecessary cost. I have written elsewhere that the Court would have done better to let the protection of marriage equality continue its rapid and remarkably unpartisan development in lower federal and state courts and in state legislatures, rather than to take over and decide the case five to four in a vote best accounted for by the perceived political views of the Justices.⁵⁷ Moreover, in my view, in deciding the case, the five Justices did additional harm to perceptions of the Court's legitimacy and, related to this, the future stability of substantive due process doctrine, by grounding their ruling on substantive due process rather than equal protection analysis.⁵⁸

In dissent, Chief Justice Roberts repeated the call for "restraint in administering the strong medicine of substantive due process,"⁵⁹ and lamented the majority's "jettison[ing of] the 'careful' approach to implied fundamental rights taken by this Court in *Glucksberg*."⁶⁰ The Chief Justice went on to say:

It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach. . . . Ultimately, only one precedent offers any support for the majority's methodology: *Lochner v. New York*.⁶¹

It seems likely, if impossible to prove, that the *Obergefell* majority's perceived "careless" and partisan approach to its application of the substantive due process doctrine sharpened the evolving Court's eagerness to revisit *Roe* and surely whetted its appetite to deal a harsh blow to the doctrine. Although the Chief Justice's dissenting opinion in *Obergefell* reminds us that "[r]ejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so,"⁶² his scorching attack on the quality of the majority's reasoning set us up for the even more blistering, derisive attack that Justice Alito launched at *Roe* in *Dobbs*.

56 *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015).

57 See Emily Buss, *The Divisive Supreme Court*, 2016 SUP. CT. REV. 25.

58 See *id.* at 29–30. The *Obergefell* Court suggested that it grounded the right in both substantive due process and equal protection analysis, *Obergefell*, 576 U.S. at 675, but, as Chief Justice Roberts aptly stated, "The majority does not seriously engage with this claim," *id.* at 706 (Roberts, C.J., dissenting).

59 *Obergefell*, 576 U.S. at 695 (Roberts, C.J., dissenting).

60 *Id.* at 702.

61 *Id.* at 702–03.

62 *Id.* at 697.

Notably added, in the *Dobbs* majority opinion, to its invocation of *Glucksberg*'s "history and tradition" to argue broadly against the recognition of a substantive due process right to abortion, was a criticism of *Roe*'s details:

The weaknesses in *Roe*'s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. Dividing pregnancy into three trimesters, the Court imposed special rules for each. . . . This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed. Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based. We have already discussed *Roe*'s treatment of constitutional text, and the opinion failed to show that history, precedent, or any other cited source supported its scheme.⁶³

Thus, *Dobbs* criticized *Roe* and the cases that followed for a double failure of judicial restraint—the first failure was the recognition of an unenumerated right absent, in the Court's view, the required support in history and tradition, and the second failure was the articulation of legislation-style details. Whether the Court affords constitutional protection to an interest not rooted in our history or takes from the democratic process control over the more detailed work entailed in hashing out the "metes and bounds"⁶⁴ of even our deeply rooted liberties, *Dobbs* suggests, the Court commits an antidemocratic offense. In the next Section, I will suggest that the Court's development of parental rights under the substantive due process doctrine has avoided both forms of offense. That parents' rights are "deeply rooted in our history and traditions"⁶⁵ is well supported and broadly recognized. But as important, perhaps, for the ongoing value and stability of parental rights is the Court's continuing avoidance of any articulation of the sort of "legislative detail" that the *Dobbs* Court saw as its own threat to democratic decisionmaking.

63 *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2266–67 (2022) (citations omitted).

64 *Id.* at 2314 (Roberts, C.J., concurring in judgment).

65 *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

2. Substantive Due Process Restrained

In *Glucksberg*, a unanimous Court made clear that parental rights were on the short list of unenumerated rights entitled to protection under the Due Process Clause.⁶⁶ Despite this acknowledgement, the Court's involvement in defining the scope of parents' constitutionally protected authority has continued to be sharply restrained. In the same fifty-year period in which the Supreme Court decided over thirty cases addressing the scope of the right to abortion, the Court took only a small number of cases that considered constitutional protections of parental status⁶⁷ and only one case, *Troxel v. Granville*,⁶⁸ that directly addressed the scope of the constitutional protection afforded to parents' control of their children's upbringing against state intervention.⁶⁹ And in that single case, the Court firmly reinforced the Constitution's protection of parental rights under the substantive due process doctrine, but said only enough to set out a few general principles and to resolve the case before it.⁷⁰

66 See *id.* at 720.

67 See Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 655 (2002). These parental status cases include cases addressing constitutional rights of parental identity, and cases addressing procedures to which parents are constitutionally entitled before they lose parental status. *Id.* at 657, 677–78. My discussion here focuses on the different parental rights issue addressed in *Pierce* and *Meyer*, namely the right of those whose parental status is unquestioned to be free from state intervention in their exercise of control over their children's upbringing. See *id.* at 650–54 (discussing the difference between parents' constitutional identity and authority rights).

68 *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion).

69 Early in this period, the Court decided two cases, *Norwood v. Harrison*, 413 U.S. 455 (1973), and *Runyon v. McCrary*, 427 U.S. 160 (1976), that considered, and rejected, parental rights claims offered as a defense against equal protection challenges brought by other parents to state law and policy that supported private schools that discriminated against Black children. See *Norwood*, 413 U.S. at 457, 461–62; *Runyon*, 427 U.S. at 163–64, 176–77. Although, in both cases, the Court expressly engaged the meaning and scope of *Meyer* and *Pierce*, the focus of the opinions was the constraint, imposed on the state, by the Equal Protection Clause. See *Norwood*, 413 U.S. at 461–63; *Runyon*, 427 U.S. at 176–177. This clause, the Court concluded, prohibited the expenditure of state funds in support of racially segregated schools, *Norwood*, 413 U.S. at 463–65, and protected Black parents' right to contract with any private school, even one that supported racial segregation, *Runyon*, 427 U.S. at 168–73. Other cases during this fifty-year period considered, to different degrees, the relevance of parental rights to an analysis of the state's interest, but none of these cases considered, directly, the scope and limits of parents' constitutional authority. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (recognizing the responsibility assigned to parents in assisting their children in important decisionmaking, but rejecting the state's authority to delegate to parents control over minors' abortion decisions that the state could not exercise itself); *Parham v. J.R.*, 442 U.S. 584 (1979) (relying in part on parents' authority over medical decisionmaking to conclude that children do not have a due process right to an independent hearing before they are institutionalized with their parents' consent).

70 *Troxel*, 530 U.S. 57 (2000).

Of all the cases the Court could have taken to address the scope of parental rights in the past fifty-plus years, why *Troxel*? If the aim of the Court was to safeguard a basic protection but avoid developing the right beyond the broadest of strokes, this may have been the ideal case. Moreover, the blend of bold statements about the right, and tepid and ambiguous engagement with the particulars reflected across the Justices' six opinions, while widely criticized by scholars (including me), has served the doctrine well.

In *Troxel*, a mother challenged the constitutionality of Washington's "third party visitation" statute,⁷¹ a statute that existed, in some form, in every state, though the details differed.⁷² Washington's statute was particularly capacious, providing that "[a]ny person" could "petition the court for visitation rights at any time," and that the court had the authority "to order visitation rights for any person when visitation may serve the best interest of the child."⁷³ In the case in question, paternal grandparents, whose son had committed suicide, sought more visitation with their grandchildren than the mother wished to allow.⁷⁴ The grandparents sued under the Washington statute and won at trial.⁷⁵

The mother's constitutional challenge made its way through the Washington state courts, culminating in a Washington Supreme Court determination that the statute, on its face, violated parents' substantive due process right to control the upbringing of their children under the federal Constitution.⁷⁶ The Washington court cited to the particulars of *Meyer*, *Pierce*, and *Yoder* to draw the conclusion that the Constitution prohibits state intervention in parenting decisions absent a demonstration of harm to the child,⁷⁷ but for broader analytic support

71 See *id.* at 60.

72 See *id.* at 64.

73 *Id.* at 61 (quoting Wash. Rev. Code § 26.10.160(3) (repealed 2021)).

74 *Id.* at 60–61.

75 See *id.* at 61. The court ordered more visitation than the mother had agreed to, and less than the grandparents sought. *Id.* For purposes of the parental rights challenge, any order that exceeded that which a parent agreed to qualified as a constitutionally problematic victory for the third party seeking visitation.

76 *Id.* at 63.

77 *In re Custody of Smith*, 969 P.2d 21, 29 (Wash. 1998) ("In *Yoder*, for example, the Court deemed significant the fact that Amish children would not be harmed by receiving an Amish education rather than a public education. Likewise, in *Pierce*, the Court found that parents' decisions to send their children to private schools were 'not inherently harmful,' as there was 'nothing in the . . . records to indicate that [the private schools] have failed to discharge their obligations to patrons, students or the state.' In *Meyer*, a case in which a teacher had been convicted of teaching a child German, the Court found that 'proficiency in a foreign language . . . is not injurious to the health, morals or understanding of the ordinary child,' and thus the state's desire 'to foster a homogeneous people with American ideals' was insufficient justification for forbidding foreign language instruction."

of this conclusion, it looked beyond the thinly developed doctrine of the parental rights cases to the abortion context, in which the Court had attended, if not entirely clearly or consistently, to standards of review.⁷⁸ Citing *Roe*, the Washington court concluded that “[w]here a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.”⁷⁹ Applying strict scrutiny to Washington’s third-party visitation statute, the Washington court found two fatal flaws in the statute—the first was that the statute opened the courthouse doors too broadly to “any person” at “any time,” and the second was that it failed to require harm to the child to justify a visitation order.⁸⁰

The Washington Supreme Court’s opinion was well reasoned, and it reached a sensible result. But the U.S. Supreme Court granted certiorari, perhaps because it saw the proliferation of litigation in state courts across the country challenging these third-party statutes on parental rights grounds coming to inconsistent results.⁸¹ But in deciding the case, the Court pulled back from the doctrinal progress made by the Washington court, neither endorsing nor rejecting the standard of review that court adopted nor the harm test it concluded the standard required.

Across the plurality opinion and three other opinions, one in concurrence, two in dissent, the *Troxel* Court clearly embraced the ongoing validity of parental rights’ substantive due process pedigree. In the words of Justice O’Connor’s plurality opinion,

We have long recognized that the [Fourteenth] Amendment’s Due Process Clause . . . includes a substantive component The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.⁸²

Justice Souter, concurring in the judgment, agreed that “[w]e have long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally

(alterations in original) (first citing *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); then quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925); and then quoting *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923))), *aff’d sub nom. Troxel*, 530 U.S. 57.

78 See *supra* notes 44–48 and accompanying text.

79 *Smith*, 969 P.2d at 28 (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973)).

80 See *id.* at 29–30.

81 See, e.g., Randall E. Doyle, *Grandparent Visitation Legislation: The Controversy Didn’t Begin or End with Troxel v. Granville*, 4 ELDER’S ADVISOR 33, 34 (2002).

82 *Troxel*, 530 U.S. at 65 (plurality opinion).

protected by the Due Process Clause,”⁸³ as did Justices Stevens and Kennedy in separate dissents.⁸⁴ Even Justices Thomas and Scalia, who each flagged his interest in reconsidering the entire substantive due process doctrine,⁸⁵ conceded that, at the time *Troxel* was decided, the doctrine applied to parental rights.⁸⁶

Although the Court did not hesitate to clearly embrace parental rights under the Due Process Clause, it managed, over a total of six opinions, to say very little about the right. Justice O’Connor engaged in the minimalist approach she was generally understood to favor,⁸⁷ insisting, along with three other Justices, on limiting the reach of the decision to the constitutionality of the statute *as applied* in this case.⁸⁸ Justice Souter, concurring in the judgment, would have affirmed the Washington Supreme Court’s judgment that the statute was unconstitutional on its face, but *only* on one of two grounds offered by that court. It was enough, Justice Souter said, to affirm the Washington court’s conclusion that a statute that authorized “‘any person’ at ‘any time’ to petition for and to receive visitation rights subject only to a

83 *Id.* at 77 (Souter, J., concurring in judgment) (first citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); then citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); then citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); then citing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); then citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); then citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979); then citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); and then citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

84 *Id.* at 87 (Stevens, J., dissenting) (“Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children . . .”); *id.* at 95 (Kennedy, J., dissenting) (“As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child . . . [which] stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment.” (first citing *Meyer*, 262 U.S. at 399, 401; then citing *Pierce*, 268 U.S. at 534–35; then citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); then citing *Stanley*, 405 U.S. at 651–52; then citing *Yoder*, 406 U.S. at 232–33; and then citing *Santosky*, 455 U.S. at 753–54)).

85 *See id.* at 80 (Thomas, J., concurring in judgment) (noting that the parties had not asked the court to reconsider the validity of the substantive due process doctrine and stating that “[a]s a result, . . . I understand the plurality as well to leave the resolution of that issue for another day”); *see id.* at 92 (Scalia, J., dissenting) (noting his general disagreement with protecting unenumerated rights under substantive due process, but noting that he would “not now overrule those earlier cases (that has not been urged)”).

86 *Id.* at 80 (Thomas, J., concurring in judgment) (“I agree with the plurality that this Court’s recognition of a fundamental right of parents to direct the upbringing of their children resolves this case.”); *id.* at 92 (Scalia, J., dissenting) (conceding that the cases *Meyer*, *Pierce*, and *Yoder* “rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children”).

87 *See, e.g.*, Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1901–02 (2006) (“Because of her general commitment to particularized consideration, Justice O’Connor has stood as the Court’s most prominent minimalist, asking for narrow rulings rather than broad ones.”).

88 *See Troxel*, 530 U.S. at 67 (plurality opinion).

free-ranging best-interests-of-the-child standard”⁸⁹ violated parents’ rights under the Fourteenth Amendment, and therefore the Court did not need to take up the Washington court’s holding about the proper standard of review or the requirement of a finding of harm.⁹⁰ Importantly to Justice Souter, declining to scrutinize the particular application of the state statute by the trial court allowed the Court to avoid “turning any fresh furrows in the ‘treacherous field’ of substantive due process.”⁹¹

Justice Stevens would have denied certiorari in the case,⁹² and his comments on this point are noteworthy. In his view, the trial court’s decision in this case was “problematic,” and the Washington statute “unique[.]”⁹³ Allowing the Washington Supreme Court’s decision to stand would have avoided making any new federal constitutional law and would have “merely require[d] the state legislature to draft a better statute.”⁹⁴ And Justice Kennedy, in recognizing the substantive due process doctrine underlying parental rights, expressly invoked the obligation, in applying and interpreting those rights, to exercise restraint.

The principle [that parents have a right under substantive due process to the custody, care and nurture of the child, free from state intervention] exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.⁹⁵

In its as-applied analysis, the *Troxel* plurality took considerable pains to avoid going any further than absolutely necessary in “giv[ing] further and more precise definition to the right.”⁹⁶ Justice O’Connor criticized the trial court’s decision for failing to give *any* “special weight”⁹⁷ or *any* deference or “presumption of validity”⁹⁸ to the parent’s views, without explaining what sufficient deference would entail or how a presumption should operate. She offered a list of other states’ statutes that afforded some deference to parental decisionmaking, whether by including an express parent-favoring presumption, or

89 *Id.* at 76 (Souter, J., concurring in judgment) (quoting *In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998), *aff’d sub nom. Troxel*, 530 U.S. 57).

90 *Id.* at 77 (“Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent’s right or its necessary protections.”).

91 *Id.* at 76, 75–76 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)).

92 *See id.* at 80 (Stevens, J., dissenting).

93 *Id.*

94 *Id.* at 81.

95 *Id.* at 95–96 (Kennedy, J., dissenting).

96 *Id.* at 96.

97 *Id.* at 69 (plurality opinion).

98 *Id.* at 67.

by raising the standard of proof required to justify visits, or by requiring an express finding that visits would not adversely interfere with the parent-child relationship, but did no more than point to them (“cf.”) as at least somewhat of an improvement on Washington’s scheme.⁹⁹ Similarly, Souter’s concurrence conceded that “[o]ur cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child,” but went on to conclude that “*Meyer’s* repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by ‘any party’ at ‘any time’ a judge believed he ‘could make a “better” decision.’”¹⁰⁰

It is also notable that only Justice Thomas took up the question of the proper standard of review to apply despite calling out his fellow Justices for failing to do so.¹⁰¹ Standards of review have played a central role in the Court’s consideration of other substantive due process claims,¹⁰² and the lack of consistency and coherence in lower courts’ application of standards of review in the parental rights context has inspired considerable scholarly criticism.¹⁰³ The Washington Supreme Court expressly embraced the strict scrutiny standard, and the briefs before the Court in *Troxel* pressed for two different standards.¹⁰⁴ The Court’s intention to avoid addressing the standard was clear.

The *Troxel* Court’s avoidance of doctrinal detail should not be equated with a lack of any development of the parental rights doctrine. In fact, *Troxel* did advance our understanding of the parental rights doctrine in several important respects. The *Troxel* Court expressly

99 *Id.* at 70.

100 *Id.* at 78 (Souter, J., concurring in judgment) (quoting *In re Custody of Smith*, 969 P.2d 21, 31 (Wash. 1998), *aff’d sub nom. Troxel*, 530 U.S. 57).

101 *Id.* at 80 (Thomas, J., concurring in judgment) (“The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review.”).

102 See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (describing the strict scrutiny standard that applies when the “fundamental liberty interests” protected by the Fourteenth Amendment are implicated); see also *supra* text accompanying notes 47–48 (discussing the instability of the standard of review applied in the abortion context).

103 See, e.g., Margaret Rynzar, *A Curious Parental Right*, 71 SMU L. REV. 127 (2018) (noting that scholars have called on the Court to articulate a standard of review for parental rights challenges and proposing distinct standards for different issues to address the difficulty of identifying a single appropriate standard).

104 See Brief for Petitioners at 27, *Troxel*, 530 U.S. 57 (No. 99-138), 1999 WL 1079965, at *27 (not expressly considering the classic list of possible standards of review, but rather arguing that the standard that should apply in assessing the constitutionality of the state’s involvement in visitation decisions should be lower than the standard it applies when removal or termination of parental rights is at issue); Brief for Respondents at 39, *Troxel*, 530 U.S. 57 (No. 99-138), 1999 WL 1146868, at *39 (arguing for application of the strict scrutiny standard).

stated that fit parents are presumed to act in their children's interests.¹⁰⁵ In making this important assertion, it cited to a case that only indirectly addressed parental rights, making its declaration in *Troxel* more significant.¹⁰⁶ The *Troxel* Court left unaddressed the details of how and under what circumstances this presumption should operate, but the validation of this presumption is important for further legal developments, in a wide variety of contexts, both in legislatures and courts. *Troxel* also answered two important questions about the scope of parental rights by implication: in ruling in favor of the parental rights claim in the case, it made clear not only that these rights applied to secular as well as religiously motivated parenting decisions (a question left uncertain after *Yoder*) but also that these rights reached beyond parents' control of children's education (the singular focus of parental rights in *Meyer*, *Pierce*, and *Yoder*). The Court could not have made these points more quietly, but it is impossible to read the decision, indeed, even the opinions of Justices Kennedy and Stevens in dissent and Justice Thomas in somewhat reluctant concurrence, in any other way. Only Justice Scalia's opinion, in dissent, sought to draw the line at cases concerning education.¹⁰⁷ No other Justice joined him in that view.

I was among the scholars who were extremely critical of *Troxel* when it was decided.¹⁰⁸ I faulted Justice O'Connor's choice to approach the case as an as-applied challenge, as I thought it was clear that the law should be found, on its face, to violate parents' due process rights.¹⁰⁹ I agreed with the Washington court (and with Justice Thomas in his concurrence in the judgment) that the proper standard to apply was strict scrutiny and that the application of that standard should lead to a conclusion that third-party visitation should only be ordered against a parent's wishes if the court concluded that a child would be harmed in the absence of the visits. I worried that the Court's approach left parental rights "adrift in the middle" and that this would generate another round of litigation, imposing its own harm on children and families.¹¹⁰

105 *Troxel*, 530 U.S. at 68 (plurality opinion).

106 *See id.* at 68 (citing *Parham v. J.R.*, 442 U.S. 584, 604 (1979)). In other cases, the Court discusses the related, but distinct, presumption that parents are, absent counterproof, in fact fit to care for their children. *See Stanley v. Illinois*, 405 U.S. 645, 649 (1972); *Santosky v. Kramer*, 455 U.S. 745, 767 (1982).

107 *See Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) ("While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.").

108 *See Emily Buss, Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279.

109 *Id.* at 315–16.

110 *Id.* at 312, 308–12.

That second wave of litigation did, indeed, come to pass and demonstrated the range of solutions courts still thought were lawful after *Troxel*. For the families involved, this litigation surely imposed hardship. But I am less sure today that, overall, the *Troxel* Court's approach was wrong. In saying some things (fit parents are presumed to act in their children's interest) and implying others (parental rights reach parenting decisions unrelated to education—even when not motivated by religion), the Court made meaningful, broad-brush contributions to the constitutional protection of the right. And in avoiding any greater detail, it left the more subtle development of the details of the constitutional protection to lower courts, mostly state courts, and to legislatures, while cutting back significantly on the permissible scope of third-party visitation claims in individual cases.

After *Troxel* was decided, states shifted to a more parent-protective approach to third-party visitation, but in different ways, and to differing degrees. Some state courts struck down their state's third-party visitation statutes, finding that they inadequately protected parental rights,¹¹¹ and in Washington's case, reimposing the harm requirement, despite the fact that the Court had gone out of its way to avoid that issue.¹¹² In other states, courts interpreted and applied existing state statutes more narrowly to conform to their reading of *Troxel*, whether reading in a parent-favoring presumption¹¹³ or a harm requirement,¹¹⁴ or otherwise giving the parent's decisions some special weight. In some states, legislatures enacted new laws, expressly requiring a parent-

111 See, e.g., *Belair v. Drew*, 776 So.2d 1105, 1107 (Fla. Dist. Ct. App. 2001); *Wickham v. Byrne*, 769 N.E.2d 1, 8 (Ill. 2002) (holding that a visitation statute authorizing award of visitation to a grandparent, great-grandparent, or sibling if it would serve the child's best interest was unconstitutional on its face because it contravenes the presumption that fit parents act in their children's best interests); *Santi v. Santi*, 633 N.W.2d 312, 321 (Iowa 2001) (finding that Iowa's third-party visitation law was facially invalid "because it [did] not require a threshold finding of parental unfitness before proceeding to the best interest analysis"); *In re Parentage of C.A.M.A.*, 109 P.3d 405, 414 (Wash. 2005).

112 See *Parentage of C.A.M.A.*, 109 P.3d at 414.

113 See, e.g., *McGovern v. McGovern*, 33 P.3d 506, 513–14 (Ariz. Ct. App. 2001) (remanding for an evidentiary hearing in which a grandparent seeking visitation must rebut the presumption that the mother's decision to deny visitation was in the child's best interests); *Seagrave v. Price*, 79 S.W.3d 339, 345 (Ark. 2002) ("Because the [trial] court failed to apply any presumption in favor of the custodial parent's decision regarding visitation, we hold that the [grandparent visitation statute] was unconstitutionally applied . . ."); *Linder v. Linder*, 72 S.W.3d 841, 856–57 (Ark. 2002) (holding that a grandparent visitation statute is unconstitutional as applied because "[r]ather than giving the parent's decision presumptive or special weight . . . as *Troxel* requires," *id.* at 856, it places the burden of proof on the parent); *State, Dep't of Soc. & Rehab. Servs. v. Paillet*, 16 P.3d 962, 970 (Kan. 2001) (holding that a visitation statute was unconstitutional as applied because the "trial court made no presumption, as required by *Troxel*, that a fit parent will act in the best interests of his or her child").

114 *Crockett v. Pastore*, 789 A.2d 453, 455 (Conn. 2002).

favoring presumption,¹¹⁵ or requiring a finding that visitation would not adversely interfere with the parent-child relationship,¹¹⁶ or imposing a heightened, clear-and-convincing-evidence standard,¹¹⁷ or requiring a third party to prove that a denial of visits would cause the child harm.¹¹⁸ These new statutes have subsequently been tested in their state courts.¹¹⁹ Many of the post-*Troxel* cases ended up at the Supreme Court's door, as petitions for certiorari, in which litigants asked the Court to finish the work left incomplete in *Troxel*.¹²⁰ But the Supreme Court took none of them—nor, up through *Pierce*'s 100th birthday, any other cases addressing the scope of parents' constitutionally protected authority—apparently content to tolerate considerable variation in constitutional detail across the fifty states.

III. PARENTAL RIGHTS AFTER *DOBBS*

In *Dobbs*, the majority's rejection of substantive due process analysis in the abortion context has raised concerns that other rights protected under the doctrine are at risk.¹²¹ The majority downplayed such

115 See Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 Fam. L.Q. 1, 5 (2013) (listing thirteen states that, as of the article's publication, had added a presumption to their legislation after *Troxel*).

116 *Id.* (listing nine states that had added a consideration of parent-child relationship interference to their statutes).

117 *Id.* (listing eleven states that raised the standard of review to clear and convincing).

118 750 ILL. COMP. STAT. ANN. 5/607(a–5) (3) (repealed 2016).

119 See, e.g., *Flynn v. Henkel*, 880 N.E.2d 166, 171 (Ill. 2007) (interpreting the Illinois statute's harm requirement, added to the statute in response to *Troxel*).

120 See, e.g., *Petition for Writ of Certiorari at i, E.R.G. v. E.H.G.*, 565 U.S. 1196 (2012) (No. 11-311) (seeking the Court's review of *Ex Parte* E.R.G., 73 So.3d. 634 (Ala. 2011), to resolve the reserved “‘primary constitutional question,’ presented in that case [*Troxel*],” namely whether a grandparent “who seek[s] court-ordered visitation with their grandchildren over the parents’ objection invariably must prove that some ‘compelling’ circumstance—such as parental unfitness or prevention of actual harm to the children—necessitates visitation”); *Petition for a Writ of Certiorari at i, Fausey v. Hiller*, 549 U.S. 1304 (2007) (No. 06-863) (seeking review of *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006), to determine whether the court below violated parental rights in ordering grandparent visitation “over a fit parent’s objection, where the grandparent has not proved by clear and convincing evidence that such an order is necessary to prevent harm or potential harm to the child”); *Petition for Writ of Certiorari at i, Blixt v. Blixt*, 537 U.S. 1189 (2003) (No. 02-847) (seeking review of *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass 2002), to resolve a conflict between Massachusetts and three other states over whether it violates the Equal Protection Clause to allow court-ordered grandparent visitation if the parents are separated, but not if they share a household).

121 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2319 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (“And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation.”).

concerns, stating that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion,”¹²² and Justice Kavanaugh, in concurrence, underscored this point.¹²³

But Justice Thomas, in concurrence, expressed another view: “[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents.”¹²⁴

Notably absent, even from Justice Thomas’s list of “all” substantive due process protections, are parental rights. This may hint at a view that these rights are worthy of constitutional protection, if not under what he calls the “oxymoron” of substantive due process analysis,¹²⁵ perhaps under the Privileges and Immunities Clause.¹²⁶ Parental rights are also left off of Justice Alito and Justice Kavanaugh’s lists of substantive due process rights identified as potentially vulnerable after *Dobbs*, presumably because parental rights’ deep roots in history and tradition make their ongoing validity under *Glucksberg* more straightforward. Many scholars who have considered the ongoing survival of parental rights have taken this view, and the view is well supported.¹²⁷

Reinforcing Justice Alito’s and Justice Thomas’s ongoing commitment to the constitutional protection of parental rights is Justice Alito’s

122 *Id.* at 2277–78 (majority opinion).

123 *Id.* at 2309 (Kavanaugh, J., concurring) (“First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut*; *Eisenstadt v. Baird*; *Loving v. Virginia*; and *Obergefell v. Hodges*. I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.” (first citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); then citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); then citing *Loving v. Virginia*, 388 U.S. 1 (1967); and then citing *Obergefell v. Hodges*, 576 U.S. 644 (2015))).

124 *Id.* at 2301 (Thomas, J., concurring) (first quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring in judgment); and then quoting *Gamble v. United States* 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring)).

125 *Id.* (“As I have previously explained, ‘substantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution.’” (alteration in original) (quoting *Johnson v. United States*, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring in judgment))).

126 *Id.* at 2301–02 (“After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court’s substantive due process cases are ‘privileges or immunities of citizens of the United States’ protected by the Fourteenth Amendment.” (first quoting U.S. CONST. amend. XIV, § 1; and then citing *McDonald v. City of Chicago*, 561 U.S. 743, 806 (2010) (Thomas, J., concurring in part and concurring in judgment))).

127 See, e.g., Chris Gottlieb, *The Enduring Vitality of Meyer and Pierce Post-Dobbs*, 100 NOTRE DAME L. REV. 1645, 1649 (2025) (arguing that parental rights are both deeply rooted in our history and traditions and “essential to our Nation’s scheme of ordered liberty”).

dissent from the denial of certiorari in *Parents Protecting Our Children, UA v. Eau Claire Area School District*, joined by Justice Thomas, in which he cited to *Troxel* and decried the Court's failure to take a case addressing "a question of great and growing national importance [concerning parents'] 'fundamental constitutional right to make decisions concerning the rearing of' their children."¹²⁸ And most recently, in a per curiam opinion for a divided court vacating a Ninth Circuit stay of a district court's injunction barring implementation of California's schools' social transitioning policies, the Court stated "[u]nder long-established precedent, parents—not the State—have primary authority with respect to 'the upbringing and education of children.'"¹²⁹

On the assumption that parental rights continue to be constitutionally protected, what does that mean? I have suggested that the Court has done just enough to keep the right recognized and broadly protected, leaving many issues unresolved or, put more accurately, resolved differently in courts and legislatures across the country. But in recent years, there has been an explosion of parental rights litigation, and, unlike the litigation in *Troxel*, or *Yoder* a quarter-century before it, the claims for and against parental rights are politically charged and highly divisive. The speed at which litigation reaches the Court has also been supercharged by litigation pressing preliminary injunctions.¹³⁰ It will take a serious exercise of restraint for the Court to resist the pummeling of these cases that is just beginning to gain force.

In fact, there is already some evidence of the breakdown of this restraint. In *Mahmoud v. Taylor*,¹³¹ the Supreme Court granted certiorari to review the Fourth Circuit's denial of a preliminary injunction sought by parents challenging a school district's mandatory "LGBTQ inclusive" reading curriculum in elementary school, despite the fact that the Fourth Circuit had found that the breadth of the parents' free exercise claims and the thinness of the record were insufficient to support an injunction and that, over the course of litigation, "[a] more developed record or tailored argument might shift the analysis."¹³²

128 *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14 (2024) (mem.) (Alito, J., dissenting from denial of certiorari) (quoting *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality opinion)).

129 *Mirabelli v. Bonta*, 607 U.S. ____ (2026) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923)).

130 See Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809 (2025) (arguing that the purpose of the preliminary injunction is to "hold in place" litigation until a full merits review can occur but has been increasingly employed in recent years to accelerate merits decisions, potentially on an inadequately developed record).

¹³¹ 606 U.S. 522 (2025).

¹³² *Mahmoud v. McKnight*, 102 F.4th 191, 213 (4th Cir. 2024) (concluding that the evidence presented in support of the preliminary injunction was insufficient to support a finding that plaintiffs were likely to prevail on the merits but noting that "[a] more

Unwilling to wait, the Supreme Court took the case and ruled 6-3 along political lines that the parents were likely to prevail on the merits of their claim. The Court made clear that it was reading *Yoder's* Free Exercise analysis broadly,¹³³ while expressly eschewing any consideration of parents' substantive due process right to control the upbringing of their children, also recognized in *Yoder*.¹³⁴ The Court's eagerness to take up *Mahmoud* may well have been driven by the Court's far less restrained approach, particularly of late, to cases pressing claims of religious liberty,¹³⁵ but in the Court's effort to set out the special protections it favors affording these religious claims, it risked compromising the constitutional protections afforded to secularly motivated parenting choices. The *Mahmoud* Court's misleading characterization of *Pierce* as a case about parents' religious liberty¹³⁶ might be taken as evidence of the harm that can be done, whether inadvertently or with intent, by an unrestrained approach.

There are other issues that have inspired parental rights challenges in court, and in some of these cases petitions for certiorari have been filed. But thus far none has been taken up by the Court. Chief among them are two hotly contested issues: bans on gender-affirming care and gender identity support programs in schools. I consider both topics to explore whether a case addressing either of them could serve as the very occasional decision that advances the Court's development of parental rights in broad terms while avoiding the detail that threatens to aggravate political controversy and wrest too much control from the democratic process.

developed record or tailored argument might shift the analysis, as is true in many free exercise cases. Much will depend on how the record develops.”).

¹³³ 606 U.S. at 558–59 (“*Yoder* ... embodies a principle of general applicability, and that principle provides more robust protection for religious liberty than the alarmingly narrow rule that the dissent proposes.”)

¹³⁴ 606 U.S. at 565 n.14 (“In *Smith*, the Court speculated that the general rule was not applied in *Yoder* because it ‘involved not the Free Exercise Clause alone, but the Free exercise Clause in conjunction with other constitutional protections’ ... We need not consider whether the case before us qualifies as such a ‘hybrid rights’ case. ... Rather, it is sufficient to note that the burden imposed here is of the exact same character as that in *Yoder*.”)

¹³⁵ Steven K. Green, *How the Supreme Court Found Its Faith and Put “Religious Liberty” on a Winning Streak*. The Conversation (April 13, 2021) <https://theconversation.com/how-the-supreme-court-found-its-faith-and-put-religious-liberty-on-a-winning-streak-158509> (reporting on study finding that, since Justice Roberts was appointed Chief Judge in 2005, the Court has ruled in favor of religious claimants 81% of the time, compared with a 50% win rate over the course of the 20th Century).

¹³⁶ 606 U.S. at 547.

1. Parents' Right to Make Medical Decisions for their Children

In a large number of states, legislatures have enacted bans that prevent doctors from providing puberty blockers and cross-sex hormone treatment to transgender minors, even with parental consent.¹³⁷ These bans have been challenged in a number of cases as a violation of both the Equal Protection Clause's prohibition against sex discrimination and the Due Process Clause's protection of parents' right to control the upbringing of their children. In one such case, *Brandt v. Rutledge*,¹³⁸ the United States district court held an eight-day bench trial—during which comprehensive fact and expert evidence was presented by both the plaintiffs and the state defendants—before entering a permanent injunction blocking implementation of the ban.¹³⁹ In several others, district courts entered preliminary injunctions in favor of the plaintiffs, finding that they were likely to succeed on the merits.¹⁴⁰ Two courts of appeals subsequently reversed their district courts, ruling that plaintiffs were unlikely to prevail on either the sex discrimination or parental rights claim.¹⁴¹ The Supreme Court has since affirmed the Circuit Court's Equal Protection ruling in *United States v. Skrametti*,¹⁴² leaving the parental rights claim unaddressed.

At oral argument in *Skrametti*, Justice Barrett asked lawyers on both sides of the case to confirm that the parental rights issue would survive an unfavorable ruling on the Equal Protection claim, and they both agreed.¹⁴³ And after the Court resolved the Equal Protection issue, it denied the petitions for certiorari pressing the parental right claims, which had been pending for months. It is thus clear that the parents' claim that they have a constitutional right to make critical and difficult medical decisions on behalf of their children, and that this right extends to decisions about the doctor-recommended use of hormones in

137 See, e.g., *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN (Dec. 4, 2024), <https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map> [<https://perma.cc/RPZ6-WVNU>].

138 *Brandt v. Rutledge*, 677 F. Supp. 3d 877 (E.D. Ark. 2023).

139 *Id.* at 886, 925.

140 *Doe 1 v. Thornbury*, 679 F. Supp. 3d 576, 587 (W.D. Ky. 2023), *rev'd sub nom.* L.W. *ex rel.* Williams v. Skrametti, 83 F.4th 460 (6th Cir. 2023); L.W. *ex rel.* Williams v. Skrametti, 679 F. Supp. 3d 668, 712, 718 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023); *Doe v. Ladapo*, 676 F. Supp. 3d 1205, 1226 (N.D. Fla. 2023), *appeal dismissed sub nom.* *Doe v. Surgeon Gen., Fla.*, No. 23-12159, 2024 WL 5274658 (11th Cir. July 8, 2024); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1144, 1151 (M.D. Ala. 2022), *vacated sub nom.* *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205 (11th Cir. 2023).

141 See *Eknes-Tucker*, 80 F.4th 1205; *Skrametti*, 83 F.4th 460, *cert. granted sub nom.* *United States v. Skrametti*, 144 S. Ct. 2679 (2024).

¹⁴² 605 U.S. 495 (2025)

¹⁴³ See Transcript of Oral Argument, *United States v. Skrametti* at 64, 142 (December 4, 2024).

response to their children's diagnosis of gender dysphoria, has not yet been resolved.

Of the two appellate decisions addressing the issue, *Skrmetti* is far more comprehensive, though both cover similar ground. In rejecting the parental rights claim, the Eleventh Circuit in *Eknes-Tucker v. Governor of Alabama* emphasized that the parental rights cases “recognize, at a high level of generality, that there is a fundamental right to make decisions concerning the ‘upbringing’ and ‘care, custody, and control,’ of one’s children” but do not establish “a fundamental right to ‘treat [one’s] children with transitioning medications subject to medically accepted standards.’”¹⁴⁴ The Sixth Circuit’s approach in *Skrmetti* was more nuanced, focusing on the different and changing views about the treatment’s efficacy and the legitimacy of the legislature’s role in regulating the practice of medicine to protect children from harm.¹⁴⁵ Both tangle with a level-of-generality problem: if grounding parental rights in history and tradition requires a finding that the precise choice the parent wishes to make has that historical pedigree, parental rights will be limited by the educational and medical standards of the increasingly distant past.

Writing for the *Skrmetti* majority, Chief Judge Sutton is clearly correct in concluding that parental rights do not allow parents to avoid all restrictions on the practice of medicine, or psychology, imposed by legislatures through the democratic process.¹⁴⁶ But a recognition that there are some limits to the reach of parents’ right to exercise control over their children’s health care is hardly the same as suggesting that parental rights have no reach over this important aspect of childrearing at all. And with *Meyer*, *Pierce*, *Yoder*, and *Troxel* in view, it is jarring to read Chief Judge Sutton’s statement that “becoming a parent does not create a right to reject democratically enacted laws.”¹⁴⁷ Surely it does, in some cases. The challenge, here, as it always is where parental rights are asserted, is to determine how far the right extends.

Parents, as a general matter, have long had the duty to look after their children’s health,¹⁴⁸ and with that duty of “maintenance,” as Blackstone explained, came the power to make the decisions required

144 *Eknes-Tucker*, 80 F.4th at 1224 (alteration in original) (first quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925); then quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000); and then quoting *Eknes-Tucker*, 603 F. Supp. 3d at 1144).

145 *Skrmetti*, 83 F.4th at 466–68.

146 *Id.* at 475.

147 *Id.*

148 See RESTATEMENT OF THE L., CHILD. & THE L. § 2.30 (AM. L. INST., Tentative Draft No. 1, 2018).

to meet that duty.¹⁴⁹ Making choices, sometimes very difficult choices, about whether to consent to a risky but potentially lifesaving surgery for a child, or to a cancer treatment that might keep the cancer at bay at the price of a child's fertility, or to a psychiatric hospitalization that might address a child's serious depression or make it worse, is surely one of the core aspects of parents' upbringing of their children. In *Parham v. J.R.*, the Court, citing *Meyer*, *Pierce*, *Prince*, and *Yoder*, endorsed this conclusion,¹⁵⁰ but the Court has never expressly held that parental rights include a right of medical decisionmaking control. This is likely not because the scope of parents' authority in this area was uncertain, but rather because it was so clearly understood and supported that democratic lawmaking created no obstacle to the rights' exercise.¹⁵¹ In contrast, legislatures, particularly at the turn of the twentieth century, were highly motivated to constrain parental choices in education to achieve children's assimilation in mainstream American culture.¹⁵² Hence Nebraska's and Oregon's laws and, in response, the Court's recognition of parents' right to resist them.

As with parents' educational choices, the legislature has some power to intervene in parents' medical decisions to protect children and society from harm. Where there is a strong medical consensus against the use of a specific treatment, "becoming a parent," in Chief Judge Sutton's words, does not "create a right to reject" laws enacted to prohibit that treatment to protect children from harm.¹⁵³ Where there is strong medical consensus *in favor* of the treatment, however, we would not expect the legislature to oppose its use, but if it did, parents should be able to argue that the law interferes with their right, tied with their duty, to exercise the control necessary to ensure the health and well-being of their children. Plaintiffs in *Skrmetti* see the facts of the case this way, but Judge Sutton does not. Rather, he reads the evidence of the relative risks and benefits of providing hormone treatment to minors with gender dysphoria as thin and conflicting, and it is the lack of consensus that, in his view, argues for leaving the

149 1 WILLIAM BLACKSTONE, COMMENTARIES *434–35, *440 (listing the three duties of parents as maintenance, protection, and education and explaining that "[t]he power of parents over their children is derived from the former consideration, their duty," *id.* at *440).

150 *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. . . . Surely, this includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice.").

151 See, e.g., Lupu, *supra* note 10, at 176–96.

152 See *id.* at 149–50 (explaining the postwar motivations for the enactment of the laws the Court ruled unconstitutional in *Meyer* and *Pierce*).

153 L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 475 (6th Cir. 2023).

decision of how and whether to regulate the treatment to the democratic process.¹⁵⁴

In many contexts where a medical or psychological condition is serious and the treatment options uncertain and controversial, legislatures are happy to leave the difficult weighing of risks and benefits to medical professionals and their patients and their parents. Where the cost of the wrong choice is grave and the chance of making the wrong choice considerable, leaving those difficult choices to those who will bear the consequences, with guidance from the relevant experts, is generally wise. The legislature's unwillingness to take this approach to gender-affirming care, despite the endorsement of the treatment by a broad range of respected medical organizations, including the American Academy of Pediatrics, may simply reflect excessive confidence in one reading of limited evidence.¹⁵⁵ But it may also reflect an antagonism to some parents' support for their children's transgender identity that extends beyond (or reveals the pretextual nature of)¹⁵⁶ the legislature's stated concern for medical harm. The danger in the Sixth Circuit's opinion is that it could allow a constitutionally impermissible intention to "standardize . . . children"¹⁵⁷ to hide behind a constitutionally permissible concern for the medical risks.

There is evidence, beyond the aberrational nature of a complete prohibition of treatments that have been widely endorsed by professional medical organizations and routinely and legally prescribed for adolescents with other conditions, that hostility to certain parents' viewpoints about how to raise children who identify as transgender is the true motivation for these gender-affirming bans.¹⁵⁸ And although supporters of the bans rely heavily on recent movements in some European countries to limit the use of the hormones in question, none of these countries have implemented a categorical ban like those

154 *Id.* at 476.

155 Alyson Sulaski Wyckoff, *AAP Reaffirms Gender-Affirming Care Policy, Authorizes Systematic Review of Evidence to Guide Update*, AM. ACAD. OF PEDIATRICS (Aug. 4, 2023), <https://publications.aap.org/aapnews/news/25340/AAP-reaffirms-gender-affirming-care-policy> [<https://perma.cc/SNE5-N8HJ>].

156 I note that the use of the term "pretext" is complicated here, as an intent to deny the reality of transgender identity would necessarily align with a conclusion that providing treatment to affirm that identity would be harmful. There is an important difference, however, between legislation motivated by a rejection of the morality of parental support for their children's transitioning and legislation motivated by concerns that parents, protected in their support of their children's transgender identity, may be consenting to treatment that may do their children harm.

157 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

158 *E.g.*, Katherine L. Kraschel, Alexander Chen, Jack L. Turban & I. Glenn Cohen, *Legislation Restricting Gender-Affirming Care for Transgender Youth: Politics Eclipse Healthcare*, 3 CELL REPS. MED. art. no. 100719 (2022).

introduced in the states, instead endorsing standards that impose conditions on the use of hormones.¹⁵⁹ The lack of similar efforts in the state legislatures to limit the treatment to conform with the evidence on which they rely is noteworthy.¹⁶⁰

Perhaps most telling of all are statements included among the legislative findings set out in these statutes making it clear that the legislatures are seeking to impose their worldview about sex and gender on parents who take a different view. Tennessee's statute includes among its "findings" that "[t]his state has a legitimate, substantial, and compelling interest in encouraging minors to appreciate their sex, particularly as they undergo puberty."¹⁶¹ Even West Virginia's statute, which is now being held up as the unusual statute that establishes a narrow exception to the ban for youth at serious risk of suicide,¹⁶² includes in its findings statements that "humans are necessarily subject to the natural order established by our Creator, including biological realities" and "[t]he objective reality of biological sex is self-evident and incontrovertible, leaving no need or place for sexual or gender identity counseling."¹⁶³ If the Sixth Circuit's *Skremetti* decision is read as that court's final ruling on the parental rights challenge, it affords a disturbing degree of protection to legislatures whose aim is, in the words of *Pierce*, to "standardize its children."¹⁶⁴

But it should not be the final word. The Sixth Circuit addressed *Skremetti* on appeal from the district court's order granting a

159 The European Academy of Paediatrics offered the following summary:

There is an ongoing, increasingly polarised and vituperative debate about how our current diverse society should treat transgender individuals (especially children) and how their rights should be respected. Increasing numbers of children and adolescents identifying as transgender have led to increased referrals to Gender Identity Development Services (GIDS) or their equivalents, with several European countries, including the U.K., Sweden, Norway, and Finland, having reviewed/are reviewing these services. Some, consequently, have adopted a more cautious approach to paediatric gender-affirming treatments by restricting some treatments or limiting them to the research environment, though none have yet followed some US states in legislating against use in minors.

Joe Brierley, Vic Larcher, Adamos A. Hadjipanayis & Zach Grossman, *European Academy of Paediatrics Statement on the Clinical Management of Children and Adolescents with Gender Dysphoria*, FRONTIERS IN PEDIATRICS (February 5, 2024) (citations omitted).

160 Supporters of the bans rely heavily on the Cass Report, which counsels caution in the use of gender-affirming hormones, but acknowledges that, for some children, this may be clinically indicated. HILARY CASS, INDEPENDENT REVIEW OF GENDER IDENTITY SERVICES FOR CHILDREN AND YOUNG PEOPLE: FINAL REPORT at 148, 193–96 (2024).

161 TENN. CODE. ANN. § 68-33-101 (2024).

162 Transcript of Oral Argument at 39–40, *United States v. Skremetti*, 145 S. Ct. 1816 (2025) (No. 23-477).

163 H.B. 3183, 86th Leg., Reg. Sess. (W. Va. 2023).

164 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

preliminary injunction, concluding that plaintiffs had failed to establish that they were “likely to prevail” on either their sex discrimination or parental rights claims.¹⁶⁵ In so doing, the Sixth Circuit noted the constraint imposed by the procedural posture of the case:

[W]hile the challengers do invoke constitutional precedents of the Supreme Court and our Court in bringing this lawsuit, not one of them resolves these claims. In each instance, they seek to extend the constitutional guarantees to new territory. There is nothing wrong with that, to be certain. But this reality does suggest that the key premise of a preliminary injunction—a showing of a likelihood of success on the merits—is missing. Constitutionalizing new areas of American life is not something federal courts should do lightly, particularly when “the States are currently engaged in serious, thoughtful” debates about the issue.¹⁶⁶

Although this characterization of the parental rights claim as an attempt to “constitutionalize new areas of American life” confuses the recognition of a new substantive due process right with the application of a long recognized right to an issue not yet addressed by the Court, its message of special caution in resolving new issues on the incomplete record and at the hasty pace of preliminary injunction review is sound. Taken at its word, the Sixth Circuit’s decision reflects not a rejection of the constitutional claim, but an unwillingness to endorse its merits without a more complete review. That more complete review might take the form of a comprehensive hearing, like the hearing conducted in *Brandt*,¹⁶⁷ on the relevant science—a hearing offered by the district court in *Skrmetti* prior to its entry of the preliminary injunction but declined by the state.¹⁶⁸ That hearing should also consider evidence supporting the claim of pretext, or more precisely, the claim that the true aim of the bans is to impose, on all parents, the political majority’s views about sex and gender, an intent clearly proscribed by *Meyer* and *Pierce*.

There was room in *Skrmetti* for a *Troxel*-like decision, a restrained decision that could offer some important broad-brush development of parental rights without getting mired in the detail. The Court could have taken the case to make clear that medical decision making, the overseeing of a child’s mental and physical health, is a core aspect of

165 L.W. *ex. rel. Williams v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023), *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

166 *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)).

167 *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 886 (E.D. Ark. 2023).

168 See L.W. *ex. rel. Williams v. Skrmetti*, 679 F. Supp. 3d 668, 699 (M.D. Tenn. 2023), *rev’d*, 83 F.4th 460 (6th Cir. 2023), *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Transcript of Proceedings, Telephonic Status Conference at 26, *Skrmetti*, 679 F. Supp. 3d 668 (No. 23-cv-00376).

child-rearing, long recognized in our history and traditions, and protected by our Constitution. It could have further clarified the distinction between a legislature's valid role of regulating the medical and mental health professions, including protecting children from harmful treatments, and the invalid, that is, unconstitutional, role of imposing on parents majority views, philosophical, spiritual, or cultural, about how best to raise a child who identifies as transgender. With such framing, the Court could have sent the case back to the district court for a full trial focused on whether the scientific evidence sufficiently supported a ban, in this context, on parents' medical decision making that would ordinarily be entitled to constitutional protection.

On the other hand, the intense political disagreement surrounding the issue of gender-affirming care, only further enflamed by the Trump administration's executive orders and related actions,¹⁶⁹ likely made the case an unsuitable vehicle through which to set out the parents' broad right to exercise control of their children's medical care. Perhaps we should read the Court's avoidance of the issue on certiorari, even as it took up and resolved the Equal Protection challenge, as an especially important, parental-rights-preserving exercise of restraint in light of the sharp political divide that exists over transgender issues. The Court's denial of certiorari has left this issue open for development in the lower courts, allowing for multiple opportunities for fact finding and constitutional analysis in an at least somewhat less politicized context.¹⁷⁰ And it has shielded parents' broader right to exercise control over their children's medical care from a context-specific ruling that threatened to compromise that right.

2. Parents' Right to be Involved in a School's Response to a Child's Choice to Socially Transition

The case against the Court's taking up a parental rights challenge to school policies governing children's social transitioning, at least for a while, is at least as compelling. There are hundreds of school district policies, both facilitating and constraining parental involvement in schools' responses to children's social transitioning choices¹⁷¹ which

169 See, e.g., *Protecting Children from Chemical and Surgical Mutilation*, 90 Fed. Reg. 8771 (Feb. 3, 2025).

170 See, Emily Buss, *The Divisive Supreme Court*, 2016 SUP. CT. REV. 25 (arguing that, in granting certiorari in *Obergefell*, the Supreme Court transformed a growing apolitical judicial consensus on the constitutional right to same sex marriage into a divisive victory won in a highly politicized Court).

171 For a list of school policies imposing some constraint on parental knowledge and/or control, see *List of School District Transgender–Gender Nonconforming Student Policies*, DEFENDING EDUC. (Apr. 21, 2025), <https://defendinged.org/investigations/list-of-school-district-transgender-gender-nonconforming-student-policies/> [<https://perma.cc/Q7QL->

raise a host of complicated and interrelated constitutional issues. Do parental rights extend to the right to get information about one's child?¹⁷² If so, about what, for what reasons, in what form, and from whom? How do knowledge rights relate to liberty rights? Might parents have the right to be informed about the school's response, but not to control it? (These two issues—the right to information and the right to control—have, thus far, been blurred in the litigation, but they are clearly distinct.) Is a child's choice to socially transition in school, in whole or in part, a form of personal expression protected by the First Amendment?¹⁷³ And, if so, could that right be overridden by a parent's claimed right to reject that choice?¹⁷⁴ What conditions does a child's choice impose on the speech of other students and of teachers?¹⁷⁵ Does the school have an obligation to validate the student's choice, and would this validation (whether required or allowed) introduce an element of school-sponsored or government speech to the analysis? Although litigation has proliferated,¹⁷⁶ the very diversity of these policies, and the complicated and interrelated constitutional issues they raise, counsel restraint to protect the Court from getting deeply mired in the detail that they have so successfully avoided in protecting parental rights. The Court cannot get involved in these cases today without deciding too much, too fast. In the absence of a Supreme Court ruling, state courts, lower federal courts, state legislatures, local school boards,

VFQA]. For a list of states requiring parental notice and/or consent before students can socially transition in schools, see Eesha Pendharkar, *Pronouns for Trans, Nonbinary Students: The States with Laws That Restrict Them in Schools*, EDUC. WK. (June 14, 2023), <https://www.ed-week.org/leadership/pronouns-for-trans-nonbinary-students-the-states-with-laws-that-restrict-them-in-schools/2023/06> [<https://perma.cc/NQ8B-JZAF>].

172 See, e.g., *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336, 352–56 (1st Cir. 2025) (per curiam).

173 See Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV. 657, 696–702 (2022) (arguing that gender expression should be understood as a form of expression protected by the First Amendment in public schools); Dara E. Purvis, *Gender Stereotypes and Gender Identity in Public Schools*, 54 U. RICH. L. REV. 927 (2020) (favoring a First Amendment approach to a Title IX approach to the protection of students' gender expression); Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 119–28 (2015) (arguing that students' gender expression is protected by the First Amendment).

174 See Emily Buss, *The Three-Body Problem*, UCLA L. REV. (forthcoming 2026) (on file with author) (considering whether parental rights give parents the authority to prevent their children from exercising their First Amendment rights in school).

175 See, e.g., Philip Seaver-Hall, *School Pronoun Rules and the Compelled-Speech Objection*, 75 MERCER L. REV. 579 (2024).

176 In the cert petition in *Parents Protecting Our Children, UA v. Eau Claire Area School District*, petitioners list twenty-eight cases that have challenged these policies. Petition for Writ of Certiorari at 13 n.12, *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14 (2024) (mem.) (No. 23-1280).

even individual schools and their community of families will continue to develop the law, and learn from their experience.

It is striking that Justice Alito, and joining him, Justice Thomas, dissented from a denial of certiorari in one of these cases, *Parents Protecting Our Children, UA v. Eau Claire Area School District*,¹⁷⁷ and lamented that a ruling on standing had prevented the lower court from addressing “a question of great and growing national importance: whether a public school district violates parents’ ‘fundamental constitutional right to make decisions concerning the rearing of’ their children.”¹⁷⁸ Striking and alarming. When the two Justices who have been the most eager to pull tightly on the reins of substantive due process announce an eagerness to gallop toward this case, we might well worry that the passive virtue of our parental rights doctrine is under threat.

CONCLUSION

As academics, we focus our attention on unresolved issues in the law. We aim for doctrine to be coherent and complete, and when we see gaps, we press for legal developments to fill them. Scholarly articles addressing parental rights are full of calls for such developments, including the articulation of a standard (or standards) of review and a more exhaustive account of the rights’ scope. But in considering the fate of parental rights, first recognized in *Meyer* and *Pierce* one hundred years ago, against the backdrop of other substantive due process developments over the century, we see a right that has thrived on the Supreme Court’s neglect. It has thrived in a manner well in keeping with Bickel’s vision of passive virtue: the Court has done the minimum to recognize a right with some force and left the detail to the democratic process. In celebrating the 100th anniversary of *Meyer* and *Pierce*, we should applaud both the strong and lasting presence of parental rights, and the role the Supreme Court’s benign neglect has played in shaping and preserving them.

177 *Parents Protecting Our Child., UA*, 145 S. Ct. at 14 (Alito, J., dissenting from denial of certiorari).

178 *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality opinion)).