ARTICLES

DEFENDING THE FUNDAMENTAL RIGHTS OF PARENTS: A RESPONSE TO RECENT ATTACKS

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ABSTRACT

This paper puts forth an original account of the nature and normative foundation of parental rights and defends those rights against recent attacks by legal scholars. Those attacks are fundamentally flawed because they fail to recognize that the rights of parents to direct the education and upbringing of their children are based on the pre-political authority of parents—authority which the state ought to recognize legally, but which does not derive from the state normatively. Part I outlines an account of parental rights as grounded in the pre-political authority of parents, offering a deeper philosophical foundation for parental rights than other accounts in the literature. Part II explains what this account implies regarding the scope and limits of parental rights vis a vis the state, especially in the educational arena. Part III defends that account against recent criticisms of parental rights, explaining how respecting parental rights is the best way to protect children's rights, and is fully compatible with the state's interest in preparing children for democratic citizenship.

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INTRODUCTION

In recent years, a number of prominent legal scholars have denied the existence of parental rights or argued for significant restrictions on these rights. Samantha Godwin, for instance, has argued that the very notion of parental rights should be abandoned because it is "incompatible with liberal and egalitarian commitments to the equality of persons."[1] Anne Dailey and Laura Rosenbury have proposed a total restructuring of law related to children, giving less deference to parents and broadly empowering the state to enforce decisions about what it takes to be in the child's best interests even when fit parents disagree.[2] Their view implies significant limitations on parental rights in all areas, including education, administration of discipline, medical decision-making, and non-parental visitation.[3] Attacks on parental rights have been particularly strong in the educational arena. For example, Elizabeth Bartholet has argued for a presumptive ban on homeschooling,[4] Martha Fineman and George Shepherd have proposed not only a homeschooling ban but a call for mandatory public education,[5] and Jeffrey Shulman has argued in general for severe restrictions on the right of parents to control their children's education, in line with his broader attack on the notion of parental rights as fundamental constitutional rights.[6]

These critiques of parental rights are generally based upon the desire to better protect and promote the well-being of children (as the authors understand it) and/or to ensure that children are prepared for citizenship in a pluralistic democratic society. Godwin believes, for example, that parents' power to raise their children in a particular faith can be harmful to children's autonomy.[7] Shulman expresses similar concerns, arguing that the state "must protect its children from being forced to adopt religious beliefs," in order to ensure that "free choice is not strangled at its source."[8] Fineman and Shepherd argue against homeschooling on the ground that it constitutes "a failure of the state to

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1. Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 5 (2015).

2. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018) [hereinafter *The New Law*]; Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75 (2021) [hereinafter *The New Parental*].

3. *The New Law*, *supra* note 2, at 1453–54; *The New Parental*, *supra* note 2, at 119.

4. Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1 (2020).

5. Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children's Interests*, 46 U. BALT. L. REV. 57, 103, 106 (2016).

6. JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD, 3 (2014), [hereinafter CONSTITUTIONAL PARENT]; Jeffrey Shulman, *Who Owns the Soul of the Child?: An Essay on Religious Parenting Rights and the Enfranchisement of the Child*, 6 CHARLESTON L. REV. 385 (2012) [hereinafter *Who Owns*]; Jeffrey Shulman, Meyer, Pierce, *and the History of the Entire Human Race: Barbarism, Social Progress, and (the Fall and Rise of) Parental Rights*, 43 HASTINGS CONST. L.Q. 337 (2016) [hereinafter *History of the Entire Human Race*]; Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290 (2010) [hereinafter *Educational Trustee*].

7. Godwin, *supra* note 1, at 21–22.

8. *Who Owns*, *supra* note 6, at 420.

be fully responsive to the need of the vulnerable subject in childhood for a strong educational foundation," and that "this failure presents the possibility of harm to both the child and society."[9] Bartholet expresses similar concerns, and also worries about cases in which the lack of state oversight with regard to homeschooling has at times allowed serious parental abuse or neglect to go undetected.[10] Dailey and Rosenbury's sweeping critique of current law related to children is based on their view that under the current framework the "outsized influence"[11] of parental rights has resulted in a failure to adequately protect children's interests in a number of areas, including children's interests in "nonparental relationships," "exposure to new ideas," "expressions of identity," "personal integrity and privacy," and "participation in civic life."[12]

Some of the concerns expressed by these scholars are legitimate. Most notably, it is unquestionably tragic when abusive or neglectful parents can hide their abuse by claiming that they are homeschooling their children. Yet banning homeschooling in order to prevent these rare cases of abuse would be analogous to closing schools because some children are bullied by their peers[13] or sexually abused by their teachers.[14] The Supreme Court's reasoning in *Parham v. J.R.* applies well here: "[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."[15]

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9. Fineman & Shepherd, *supra* note 5, at 62.

10. Bartholet, *supra* note 4, at 61.

11. *The New Law*, supra note 2, at 1472.

12. *Id.* at 1478.

13. NAT'L CTR. FOR EDUC. STAT.: BULLYING, https://nces.ed.gov/fastfacts/display.asp?id=719 (last visited Dec. 3, 2021) ("In 2019, about 22 percent of students ages 12–18 reported being bullied at school during the school year, which was lower than the percentage reported in 2009 (28 percent)."); *see also* NAT'L CTR. FOR EDUC. STAT.: DIGEST OF EDUC. STAT, https://nces.ed.gov/programs/digest/d20/tables/dt20_230.40.asp (last visited Dec. 3, 2021).

14 Moriah Balingit, Sexual Assault Reports Sharply Increased at K-12 Schools, Numbering Nearly 15,000, Education Department Data Shows, THE WASHINGTON POST (Oct. 20, 2020), https://www.washingtonpost.com/education/2020/10/15/sexual-assault-k-12-schools/ (last visited Dec. 3, 2021). While Bartholet cites claims indicating that the rate of child fatality in homeschooling families is higher than the overall child fatality rate, the difference is not statistically significant, *Some Preliminary Data on Homeschool Child Fatalities, Homeschooling's Invisible Children*, http://hsinvisiblechildren.org/commentary/some-preliminary-data-on-homeschool-child-fatalities/ (last visited Aug. 16, 2021), and the slightly higher rate may have other causes—for instance, children with disabilities or serious illnesses are slightly more likely to be homeschooled, *Homeschooling Rate for Students, Ages 5 through 17 with Grade Equivalent of Kindergarten through Grade 12, by Disability Status: 2011–12*, NAT'L CTR. FOR EDUC. STAT.: NAT'L HOUSEHOLD EDUC. SURVS. PROGRAM, https://nces.ed.gov/nhes/tables/homeschool_rate.asp (last visited Aug. 16, 2021). We also lack sufficient evidence to determine whether homeschooled children are more likely to be abused in general than children who attend public schools, as we lack reliable data on abuse rates in both settings. Bartholet's claims that homeschooled children suffer higher rates of abuse are based on a study carried out with a non-representative sample. Bartholet, *supra* note 4, at 18–19.

15. 442 U.S. 584, 603 (1979).

Other concerns—like claims that raising children in a particular religious faith is harmful to them—are based on highly controversial and contestable views about what is truly in the best interests of children.[16] Indeed, most loving and responsible parents would consider such views utterly implausible or even directly contrary to their own beliefs about what it means to be a good parent. Empowering the state to enforce its own controversial judgments about what constitutes the best interests of children against the conflicting judgments of fit parents is hardly a recipe for promoting children's well-being.[17] On the contrary, "states have a remarkably poor track record of safeguarding children's rights."[18] While even well-intentioned parents will inevitably make some mistakes, in general, "the most important way to protect children's individual interests is to maximize the authority of parents to make individualized decisions for and about them."[19] This is in part because parents' special knowledge of and affection for their children give them unique insight into what is truly best for them, and also provide strong motivation to promote their well-being.[20] Perhaps even more importantly, however, state intrusions into the

16. *Who Owns*, *supra* note 6, at 400–05; Godwin, *supra* note 1, at 22.

17. *See, e.g.*, Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 133–34 (2000) ("What reason is there for thinking that, in contested matters of education, values, and faith, a child's dignity is more respected, and her autonomy better served, when her 'best interests' in those matters are determined by the State, rather than by her family? *Pierce* promises children that decisions about their best interests will be made by those who, generally speaking, are most likely to work conscientiously, motivated by love and moral obligation, to advance their best interests."); *see also* Robert A. Burt, *Children as Victims*, *in* CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 37, 51 (Patricia A. Vardin & Ilene N. Brody eds., 1979) ("Children cannot be adequately or even sensibly protected by giving them rights that state officials will enforce against parents. Children can only be protected by giving them parents. The children's rights movement today is ignoring this simple homely truth, and thus disserving the best interests of children."); Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J. F. 942, 947 (2018) (criticizing Dailey and Rosenbury for their proposal to "shift ultimate decision-making authority from parents to judges," and noting that "there is insufficient correspondence between giving judges authority over children's lives and making good decisions for the individual children affected by the court order.").

18. Cheryl Bratt, *Top-Down or from the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 YALE L.J. F. 917, 933 (2018).

19. Guggenheim, *supra* note 17, at 943.

20. The law "historically . . . has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S., at 602*; see also, e.g.*, State *ex rel.* Sheibley v. Sch. Dist. No. 1, 48 N.W. 393, 395 (Neb. 1891) ("[W]ho is to determine what studies she shall pursue in school,—a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child?"); Emily Buss, *Adrift in the Middle: Parental Rights after* Troxel v. Granville, 2000 SUP. CT. REV. 279, 287 (2000) ("[C]hildren may be best served by a legal regime that bolsters their parents' rights and sharply restricts the state's authority to intervene on their behalf. Children are likely to benefit from such a system for two primary reasons, one straightforward counterintuitive. The first, already briefly acknowledged, is that parents are generally best situated to make good judgments their children's behalf. The second is that parents, good and bad, can be expected to perform better as parents if afforded near absolute control over the upbringing of their children. Taken together, these arguments suggest that children may be best

family sphere (or the constant threat of such intrusion) undermine the family intimacy and parent-child bonding that are so crucial for children's well-being,[21] and that also serve to enhance parents' competence.[22]

The more fundamental flaw that all of these critiques of parental rights have in common—and that has not already been substantially addressed by others—is a failure to recognize that the right of parents to direct the education and upbringing of their children is grounded in parents' *pre-political* authority—authority which the state ought to recognize legally, but which is not derived from the state. Instead, these critics of parental rights all (at least implicitly) conceive of parental rights as conferred by the state. Dailey and Rosenbury, for instance, claim that "the law's allocation of control to parents is a choice, not a natural state of affairs," and that "the state intervenes in the parent-child relationship not simply at the back-end when disputes arise, but also at the front-end when conferring parental rights and family privacy."[23] Likewise, Godwin refers to the state's "allocation of powers to parents"[24] and speaks frequently (and critically) about the state's "granting parents the power" to do things like direct their children's education, enforce certain standards of conduct or pass on religious beliefs to their children.[25] Shulman believes that "all parental power is a function delegated by the state" and "revocable by the state without a showing of parental misconduct," arguing that the common law tradition has always understood it as such.[26]

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served by limiting state intervention to those circumstances where parental incompetence is most serious and demonstrable.").

21. *See, e.g.*, MELISSA MOSCHELLA, TO WHOM DO CHILDREN BELONG: PARENTAL RIGHTS, CIVIC EDUCATION, AND CHILDREN'S AUTONOMY 38–45 (2014); JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT 1–12 (1988); Mary Dozier et al., *Lessons from the Longitudinal Studies of Attachment*, *in* ATTACHMENT FROM INFANCY TO ADULTHOOD 305 (Klaus E. Grossman et al. eds., 2005); Ross A. Thompson, *The Legacy of Early Attachments*, 71 CHILD DEV. 145 (2000).

22. *See* Buss, *supra* note 20, at 290–91 ("This connection between state interference and parental competence can be described in positive or negative terms. In positive terms, giving parents near absolute freedom to raise their children as they see fit may enhance their enjoyment of, and commitment to, the rearing task, thereby making them better parents. In negative terms, intruding on that freedom may undermine those parents' effectiveness, even where the intrusions are designed to help.").

23. Dailey & Rosenbury, *The New Parental Rights*, *supra* note 2, at 106; Dailey & Rosenbury, *The New Law of the Child*, *supra* note 2, at 1455.

24. Godwin, *supra* note 1, at 30.

25. *Id.* at 28.

26. SHULMAN, THE CONSTITUTIONAL PARENT, *supra* note 6, at 58. While my primary focus in this article will be to defend parental rights as a matter of principle, rather than as a matter of constitutional law, I believe that Shulman is wrong to deny that the common law tradition recognizes parental rights as fundamental and pre-political in nature. *See, e.g.*, J. Bohl, "*Those Privileges Long Recognized": Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L.J. 323, 328 (1994) (footnotes omitted) ("For Blackstone, writing in 1758, the family formed the 'first natural society,' a response to the mutual 'wants and fears' of individuals. This 'society' was separate from the State and predated the formation of civil government. Lord Coke, too, in his detailed breakdown of the 'divers laws within

In what follows, I will first (in Part I) outline my account of parental rights as grounded in the pre-political authority of parents—an account that offers a deeper philosophical foundation for parental rights than other accounts in the literature[27]—and (in Part II) explain what this account implies regarding the scope and limits of parental rights vis a vis the state especially in the educational arena. In Part III, I will defend that account against recent criticisms of parental rights. I will begin by addressing Godwin's general critique of parental rights and Dailey and Rosenbury's call for a "new law of the child" (along with their effectively equivalent, more recent proposal for a "new parental rights"). Then I will respond more specifically to calls for greater limitations on parental rights in education, particularly Bartholet and Fineman and Shepherd's attacks on homeschooling.

I. PARENTAL RIGHTS AS GROUNDED IN PRE-POLITICAL PARENTAL AUTHORITY

Parental rights are essentially a recognition of parents' authority to make decisions on behalf of or affecting their children, even when others (including state authorities) may disagree with those decisions.[28] This authority is pre-political because it flows from the very nature of the parent-child relationship, which exists as a biological and moral reality that is normatively prior to and independent of political authority and positive law. Note that I do not use the term "pre-political" to suggest that the parent-child relationship is *temporally* prior to the existence of the political community or that there ever was a "state of nature" in which human beings lived together without being part of a larger authoritative community beyond the nuclear family. My claim, rather, is that the authority of parents is *normatively* prior to and independent of political

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the realm of England' described familial relationships as arising by virtue of 'lex naturae' . . . . Even Sir Matthew Hale . . . echoed Blackstone's conception of the family as an ancient and autonomous little 'society,' categorizing familial matters as part of the 'unwritten law' already in existence before time of memory."). In addition, recognizing the natural rights of parents (particularly fathers) to govern the internal affairs of the family was the basis of numerous court decisions protecting parental rights prior to the Supreme Court's explicit recognition of parental rights as protected by the United States Constitution in *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See* Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert *after 20 Years*, 38 J.L. & EDUC. 83, 108–24 (2009).

27. Stephen Gilles, for instance, offers a powerful and important defense of parental rights, but he presents an insufficient philosophical grounding for those rights. Gilles relies on the work of Charles Fried, who argues that parental rights are akin to property rights, based on the parents' ownership of their own bodies and of the fruits of their reproductive labors. Though Gilles does not want to suggest that children are literally parents' property or that they lack rights of their own, his reliance on Fried's property-based argument for parental rights is problematic. Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 961 (1996) (citing CHARLES FRIED, RIGHT AND WRONG 153 (1978). For a critique of the view that the Lockean theory of ownership can be applied to the relationship between parents and children, see NORVIN RICHARDS, THE ETHICS OF PARENTHOOD 19–22 (2010).

28. Melissa Moschella, *Natural Law, Parental Rights and Education Policy* 59 AM. J. JURIS. 197, 199–201 (2014); MOSCHELLA, *supra* note 21, at 62.

authority and positive law, by which I mean that parental authority over children is both *original*—not derived in any way from political authority or positive law—and *primary* (while state authority over children is secondary and subsidiary to that of parents).[29] The basis of parental authority is that, as I will explain below in greater detail, the parent-child relationship generates weighty special obligations – obligations which are in some respects non-transferable—for parents to provide for the overall well-being of their children. Because children lack the maturity necessary to make reasonable decisions about what is in their own best interests, fulfilling the obligation to promote children's well-being requires making decisions on their behalf. In other words, parental authority flows from parents' pre-political moral obligation to care for their children by, among other things, making decisions about how best to promote the flourishing of their children (and of the family community as a whole, the flourishing of which both includes and redounds to the flourishing of the children).

A. The Distinction Between Parental Authority and Political Authority

Parental authority is distinct from political authority in its nature and purpose. By contrast with political authority, which aims not directly at the *proper* good of the individual but at the *common* good of society as a whole, parental authority is paternalistic, aiming directly at the proper good of the child.[30] Second, political authority is justified *not* because the governed (including both individuals and smaller communities) are unable to make decisions about their own proper good, but rather because political authority is

29. MOSCHELLA, *supra* note 21, at 147–148.

30. *See* YVES R. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 7–9 (Univ. of Notre Dame Press 1993) (1951) (drawing distinctions between paternalistic and political authority). In making these distinctions, Simon is speaking about paternalistic authority in general, of which the authority of parents over their children is the most common exemplar. These distinctions are, however, normative rather than descriptive – in other words, they seek to explain the focal case of each type of authority, not to make descriptive generalizations about how political or paternalistic authority in fact function. In practice, the two types of authority often overlap, sometimes reasonably and sometimes not. At times, for instance, political authorities may act paternalistically when an individual or group within the political community demonstrates serious decision-making incapacity. In those cases, however, political authorities should recall that this exercise of paternalistic authority is temporary and pedagogical. There are also certain respects in which the authority of parents over their children is political rather than paternalistic in nature, such as when parents set family mealtimes or decide on the family budget, acting not primarily qua parents but qua heads of the family community coordinating action for the common good of the family. This political aspect of parents' authority continues to exist as long as the children are dependent on them, even if they are mature enough to make decisions for themselves. (Note that, from a normative perspective, what matters is not whether the children have reached the age of legal maturity, but whether or not the children are actually mature enough to make sound decisions for themselves. While for legal purposes establishing a clear line is necessary, from a moral perspective the paternalistic authority of parents gradually declines as the decision-making capacity of children develops.)

necessary to resolve coordination problems for the common good.[31] By contrast, the paternalistic authority of parents is substitutional—i.e. it substitutes for the judgment of someone whose decision-making capacity is deficient. Third, because it is justified primarily by children's immature decision-making capacity, the paternalistic authority of parents is temporary and largely pedagogical. While political authority is required for the enduring function of settling on a unified course of action in the face of otherwise intractable disagreements about how best to promote the common good, parental authority ultimately aims to render itself unnecessary by helping children to develop into mature adults who can make sound decisions for themselves.

Parental authority is also distinct from political authority in its origin. Determining who rightfully holds political authority is a matter of convention, usually established legally or through custom.[32] In some instances, political authorities are chosen by popular elections. In other instances, authorities are appointed by other authorities. In hereditary monarchies, authority is passed down through the royal bloodline. In pure democracies, authority is exercised via direct majority rule. While arguments can certainly be made that some forms of government or procedures for establishing authority are more conducive to the common good than others, there are a wide variety of practically reasonable ways of establishing and organizing political authority. By contrast, parental authority is not conventional but natural—i.e. pre-political, in the sense explained above – in its origin and structure (at least in the focal case of biological parenthood)[33] precisely because parenthood itself is natural, originating in the biological relationship between parents and children that is itself the source of the child's existence, as I explain in the next section.

B. The Foundations of Parental Authority

Understanding the importance of the biological parent-child relationship is crucial for understanding the pre-political origins of parental rights and responsibilities. The biological parent-child relationship is, in itself, a genuine personal relationship that is uniquely intimate and enduring, especially from the child's perspective. For it is the only human relationship that literally defines one's identity at a biological level. And while one's identity as a human person is not reducible to one's biological identity, one's biological identity as a specific human organism is arguably the basis of one's overall ontological identity both at any one time and over time.[34] While many aspects of a person's

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31. For an account of political authority as justified primarily because it is necessary to resolve coordination problems, see *id.*, and YVES R. SIMON, A GENERAL THEORY OF AUTHORITY (1991), as well as JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 248 (2d. ed. 2011) ("[T]he need for authority is, precisely, to substitute for unanimity in determining the solution of practical co-ordination problems which involve or concern everyone in the community.").

32. *See* FINNIS, *supra* note 31, at 231–59.

33. I will discuss the case of adoptive parenthood in I.B.

34. *See, e.g*, ERIC T. OLSON, THE HUMAN ANIMAL: PERSONAL IDENTITY WITHOUT PSYCHOLOGY (1997) (defending the view that our identity as human beings is grounded on our biological identity as human organisms, rather than on any psychological features); PATRICK LEE

identity may change without changing who that person is fundamentally—aspects such as beliefs, qualities of character, commitments, external appearance, etc.—a change in one's identity as a human organism is an essential ontological change. And there are only two ways (at least in nature) to change one's identity as an organism—to die (in which case one's life as an organism ceases)[35] or to be conceived by a different egg or sperm.[36] Strictly speaking of course, neither of these are *changes* to one's biological identity, for to change requires that one both pre-exist and survive the change. Rather, these "changes" are actually either the cessation of one's identity as a human organism (in the case of death), or one's never coming into existence in the first place. Thus, no other relationship affects one's identity in a way that is as ontologically profound and permanent as a child's relationship to his or her biological parents.[37]

At least initially, therefore, a child's closest human relationship is her relationship to her biological parents. This point is important for understanding why the authority of parents over their children is natural because it is the basis for the claim that biological parents are, by nature, the ones with the strongest and most direct obligation to care for their children (at least initially). Having started the task of bringing a new human person into the world, the biological parents are also the ones naturally charged with the responsibility for bringing that task to completion by raising that child to maturity (a maturity which is not just biological, but also psychological, social, spiritual, moral and intellectual).

Here I am presuming the common-sense view that the nature, weight and content of our obligations to others depend in large part on the nature of our relationship with them—i.e., how intimate and comprehensive that relationship is across the various dimensions (biological, emotional, intellectual, volitional) of the human person, the extent to which one person in the relationship is uniquely dependent on the other for the fulfillment of specific needs, the importance of the needs in question, etc.[38] This common-sense view explains, for instance, why we assume that it is right to use a much greater proportion of

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& ROBERT P. GEORGE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS 48 (2008) ("In sum, there is strong evidence that human beings are animals. The actions of sensing and perceiving, the strong connections that human rationality and self-consciousness have to sensation and perception, show that human beings are bodily, organic beings.").

35. Olson, *supra* note 34, at 135.

36. Joseph Sartorelli, *Biological Process, Essential Origin and Identity* 173 PHIL. STUD. 1603, 1616 (2016), (defending the metaphysical claim that, in general, "that very sperm and egg are required for the identity of that person").

37. By biological parents I specifically mean genetic parents. While gestational parenthood does influence a child's identity in important ways and create a bond between parent and child, the child's relationship with a gestational parent does not define his or her identity in the way that the relationship with genetic parents does. If I had been gestated by a different woman, I would still be essentially the same organism, but if I had been conceived with another woman's egg, I would not be. For more on the distinction between gestational and genetic parenthood, *see* Melissa Moschella, *Gestation Does Not Necessarily Imply Parenthood*, 92 AMER. CATH. PHIL. Q. 1, 21–48 (2018).

38. For a more detailed explanation and defense of this view, see Moschella, TO WHOM DO CHILDREN BELONG, *supra* note 21, at 29–34.

our time, energy and resources to benefit those who are near and dear to us than to benefit strangers, yet why we nonetheless understand that the dire need of a stranger may at times have a greater claim on us than the minor need of a family member. Everyone would agree, for instance, that if you see a child drowning in a fountain while on your way to watch your son's piano recital, you should stop to save the child even if it means missing the recital and disappointing your son. At the same time, someone like Mrs. Jellyby in Charles Dickens' *Bleak House*—whose obsession with helping the poor in Africa leads her to neglect the needs of her own children—is unlikely to win anyone's moral approbation. This common-sense view also explains why we think that some of our obligations to others must be fulfilled *personally*—such as the obligation to listen sympathetically to a friend in distress—while others—like a teacher's obligation to grade a set of multiple-choice exams—may be delegated to any competent third party or even to a machine. In general, an obligation is non-transferable—i.e., it must be fulfilled *personally*—when one party in the relationship is personally dependent on the other for the fulfillment of specific needs.[39]

How does this apply to the relationship between parents and children? While many of a child's needs could certainly be fulfilled by people other than the child's biological parents, there is one need that *only* the biological parents can fulfill, and that is the need for *their* parental love, understood not primarily as an emotion but as a high-priority commitment to the well-being of one's child.[40] By contrast, as already argued, a child *does* have a relationship to her biological parents—even to biological parents she has never seen—a relationship that makes the absence of adequate love on the part of her biological parents harmful, even if she is well-loved by others, and even if (as may often be the case with adoption, which I will discuss further below) others love her better than her biological parents would have.[41]

Given the weight of biological parents' natural obligation to provide for their children's needs, and the extreme dependence of the child upon his parents at all levels, usually the only way for biological parents to fulfill their strictly non-transferable obligation to love their child is for them to raise that child themselves. The only exception is when strong child-centered reasons tell in favor of allowing others to raise the child—reasons of the sort that would later

39. *See* MOSCHELLA, *supra* note 21, at 29–34.

40. *See id.* While my argument for this claim is philosophical, it is also supported by psychological evidence, particularly the work of attachment theorists. *See* Lenore McWey, Alan Acock and Breanne Porter, *The Impact of Continued Contact with Biological Parents upon the Mental Health of Children in Foster Care*, 32 CHILD YOUTH SERV. REV. 1338, 1339 (2010) (citations omitted) ("Children form attachments with their biological parents and depending on the quality of the parent-child relationship, different attachment styles develop. Bowlby defined attachment as "the propensity of human beings to make strong bonds to particular others and of explaining the many forms of emotional distress and personality disturbance, including anxiety, anger, depression, and emotional detachment, to which unwilling separation and loss give rise." … Bowlby asserted that children who experience the loss of an attachment figure will exhibit distress even if the attachment figure is replaced with a capable caretaker.").

41. *See supra* note 21; *infra*, notes 40 and 42, and I.C.

enable the child to understand that his biological parents' decision not to raise him themselves did not reflect a lack of love, but was actually an expression of their love. Indeed, studies have shown that one of the benefits of open adoption is that it often enables children to learn that their biological parents' decision to place them for adoption was not an act of abandonment but rather a loving, sacrificial act to give them the opportunity for a better life.[42]

The argument thus far can be summarized as follows. Given that (1) special obligations for others' well-being flow from the nature and closeness of our relationships with others and on the extent to which others are personally dependent upon us for the fulfillment of their needs, (2) parents are by nature the ones with whom children initially have the closest relationship, and (3) children are personally dependent on their parents to meet important needs, it follows that parents are the ones with the strongest and most direct obligation to promote the well-being of their children in all respects, an obligation which in some respects is non-transferable. Concretely, this means that parents have an absolute and non-transferable obligation to love their children (i.e., to have a high-priority commitment to the well-being of their children), which translates into a strong prima facie obligation to raise their children, because this is the only way for parents to appropriately love their children absent strong child-centered countervailing reasons. Thus, given that (1) parents (unless they are incompetent) can only fulfill their obligation to their children by raising those children themselves, and (2) promoting the well-being of children requires making decisions on their behalf, it follows that parents by nature have the authority to direct the education and upbringing of their children, which includes the authority to make controversial child-rearing decisions.[43] While

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42. Deborah H. Siegel & Susan Livingston Smith, *Openness in Adoption: From Secrecy and Stigma to Knowledge and Connections* (March 2012), https://go.usa.gov/xPSR3*; see id.* at 5 (citations omitted) ("The primary benefit of openness is access by adopted persons—as children and continuing later in life—to birth relatives, as well as to their own medical, genealogical and family histories. Adolescents with ongoing contact are more satisfied with the level of openness in their own adoptions than are those without such contact, and they identify the following benefits: coming to terms with the reasons for their adoption, physical touchstones to identify where personal traits came from, information that aids in identity formation, positive feelings toward birthmother, and others.").

43. In a recent article in which he addresses my previous work in defense of parental rights, James Dwyer acknowledges the plausibility of my claim that biological parents have non-transferable special obligations to their children, but questions whether this claim about parental duties can actually ground parental *rights.* James G. Dwyer, *Deflating Parental Rights*, 40 L. & PHIL. 387 (2021). Dwyer fails to understand the broader structure of my argument, in which the establishment of parental duties and the recognition that fulfilling those duties means making decisions on behalf of the child, is meant to show that parental authority is pre-political, and thus that the state has an obligation to respect that authority. MOSCHELLA, *supra* note 21, at 21–48 and Moschella, *supra* note 28. What Dwyer fails to understand, in other words, is the core principle of limited government that the state's power is limited not merely by convention, but (among other things) by the existence of pre-political forms of authority—like the authority that individuals have to make decisions about their own lives, the authority of churches or voluntary associations over their members, and the authority of parents over the family—that the state has an obligation to respect. *See infra* Sections C and D for more on this point.

parents may of course enlist the help of third parties—family, friends, teachers, doctors, pastors, etc.—to carry out their responsibilities, the task of *directing* their child's upbringing is their personal responsibility which cannot rightly be entirely delegated to others (except in cases of incompetence, as already discussed).

What about adoptive parenthood? Once parents have adopted a child,[44] they have the same responsibilities and authority as biological parents, and of course adoptive parents eventually form enduring psychological bonds with their children, and profoundly shape their children's identity.[45] Nothing that I say here should be taken to denigrate adoptive parenthood or imply that it is not "true" parenthood. My reason for emphasizing biological parenthood is that, as the focal case of parenthood (without which there would be no children to parent), it enables us to understand the essential moral features of the parent-child relationship and to establish that the origin of parental authority is natural and pre-political. For, as already explained, I understand parental authority as grounded on parents' special obligations to care for their children, and I understand special obligations as flowing from the nature, depth, and comprehensiveness of our relationships. Thus, in order to show why parental authority is natural, it is necessary to explain why, at least initially (i.e., when the child begins to exist) the biological parents are the ones with whom the child has the most intimate and comprehensive relationship—a relationship that is the biological cause of the child's very existence and identity.

By contrast with biological parenthood, adoptive parenthood originates by convention, through the formal commitment of the adoptive parents to take on the responsibilities that biological parents have by nature—a commitment that is distinct from that of temporary caregivers because, like the natural responsibilities of biological parents, it is in principle permanent and unconditional. This commitment is, at least initially, the source of the adoptive parents' obligations. (With time, the bond formed between adoptive parents and their children will itself also generate special obligations.) Thus, in the case of adoption the commitment and resulting obligations generally *precede* the development of a relationship with the child, whereas in the case of biological parenthood, it is the existence of the biological relationship that generates the obligation and calls for the further development of the already-existing relationship.

Also, by contrast with biological parenthood, the process of adoption is generally (and reasonably) regulated by the political community, which vets prospective adoptive parents to ensure their competence and grants them the legal rights of parents. Thus, the exception in a sense proves the rule. Precisely because the authority of biological parents is not in any way derived from the

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44. Here, I presume for the sake of simplicity that once the adoption process is complete, the adoption is irreversible, even though in practice this is not always the case.

45. Environmental factors can even lead to differences in gene expression among identical twins raised apart. *See* Erika Hayasaki, *Identical Twins Hint at How Environments Change Gene Expression*, THE ATLANTIC (May 15, 2018), https://www.theatlantic.com/science/archive/2018/05/twin-epigenetics/560189/.

authority of the state, the vast majority of people would reasonably recoil at the prospect of parent-licensing schemes which would effectively treat all parents like adoptive parents.[46] While the state (via state-licensed adoption agencies) reasonably steps in to ensure that children have someone suitable to care for them when biological parents cannot or will not fulfill their responsibility, in the normal case, the state simply recognizes and respects the natural childrearing responsibilities and corresponding authority of biological parents that flow form the already-existing relationship between parent and child.

C. The Family as a Natural Authoritative Community

Thus far, I have conceptualized the rights of parents as grounded in the natural authority of parents to make decisions about what is in the best interests of their children and of the family community as a whole. On this view, the family community is a natural authoritative community—i.e., a natural community with authority to direct its own internal affairs, including, centrally, the education and upbringing of children—relatively free from the coercive interference of the larger political community. Thomas Aquinas presents a helpful metaphor for understanding the family as a natural community with its own pre-political sphere of authority. Aquinas argues that it is just as natural for a child to be raised to maturity within the "spiritual womb" of her biological family as it is for a child to be gestated in the physical womb of her biological mother.[47] And my argument above, showing how being raised within the "spiritual womb" of one's biological family corresponds to children's deep psychological need to know that they are loved by those who brought them into existence, explains in part why this is the case.

Others have also argued persuasively that being raised by one's biological parents is important for helping children to understand their own identity. David Velleman, for instance, draws on psychological data and phenomenological reflection to argue that biological parents are irreplaceable in helping a child construct a mature personality out of similar "raw materials."[48] While recognizing that it is certainly possible to develop a mature personality in the absence of relationships with one's kin, Velleman argues persuasively that being reared by one's own parents, together with one's biological siblings, offers significant and unique advantages, because one can learn from the experiences of others who are similarly situated biologically.[49] To illustrate his point, Velleman asks his readers to consider the following scenario:

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46. *See* Hugh LaFollette, *Licensing Parents Revisited*, 27 J. APPLIED PHIL. 327 (2010); Andrew Jason Cohen, *The Harm Principle and Parental Licensing*, 43 SOC. THEORY & PRACT. 825 (2017).

47. THOMAS AQUINAS, SUMMA THEOLOGIAE II–II Q. 10 art. 12 (Fathers of the Eng. Dominican Province trans., 2d rev. ed. 1920) (c. 1270), https://www.newadvent.org/summa/; *see also id*. at Q. 57 art. 3 (mentioning that "a parent is commensurate with the offspring to nourish it").

48. J. David Velleman, *The Gift of Life*, 36 PHIL. & PUB. AFFS. 245, 257 (2008).

49. Id.

> Let us consider the daughter of a sperm donor, so that we can rely on pronomial gender to keep the parties straight. If the mother is like other recipients of donated sperm, she may insist that the girl has no use for her biological father, because he is "nobody to her." This statement is demonstrably false. *The daughter* may be nobody to *him*, because he can think of her only under the description "my possible children," never knowing whether he is referring to anyone at all. But to her he is a real person, locatable in thought, no matter how elusive he may be in time and space. Like every human child, she knows that with the word 'father', she can reach down a causal chain to address a single other human who is partly responsible for her existence.
>
> In trying to cope with the predicament entailed by her existence, the daughter can want to be helped, not just by some paternal figure or other, but by the particular father who introduced her into that predicament; who links her to humanity, the realm of life, the causal order; who is her prototype and precursor in personal development; and who could give her a hint of how psyche and soma might be reconciled in her case. Out of those needs, the child can establish a mental representation capable of sustaining an emotional attachment to her father, and she can then frame a demand addressed directly to him, whether or not she knows his earthly address. So personal a demand, so obviously justified, deserves to be answered in person.[50]

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50. *Id.* at 264–65. An extensive study on donor-conceived persons likewise reveals that they seek to know (or at least to receive information about) their biological father in order to gain insight into their own identity. Sixty-five percent of those surveyed agree that "my sperm donor is half of who I am." Consider also the following individual testimonies:

> "A young woman in Pennsylvania says she wants to meet her donor because she wants to know 'what half of me is, where half of me comes from.' Another in Britain says, 'I want to meet the donor because I want to know the other half of where I'm from.' Lindsay Greenawalt in Ohio is seeking any information she can find about her sperm donor. She says, 'I feel my right to know who I am and where I come from has been taken away from me.' Olivia Pratten, a Canadian donor offspring who recently launched a class-action law suit in British Columbia, has said in interviews: 'I think of myself as a puzzle; the only picture I have ever known is half-complete.' . . . Danielle Heath of Australia found out when she was 19 years old that she was donor conceived. She reflected: 'I felt like there was a piece missing. It would complete me to know who I am like.' Tom Ellis of Britain told a reporter how he felt after submitting a cheek swab with his DNA to the UK Donor Link registry: 'It was a huge decision for me to make because it meant admitting that the stranger who helped bring me into the world – and who may never want to meet or know me – is important to me. But he is a part of me and without him, I will never feel completely whole.'"

ELIZABETH MARQUARDT ET AL., INSTITUTE FOR AMERICAN VALUES, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 21 (2010) (footnotes omitted).

Thus, Velleman's reflections about the importance of being raised by one's biological parents for the development of a mature sense of personal identity further strengthen my argument for seeing the biological family as a natural, pre-political community, a "spiritual womb" that offers a uniquely suitable environment for the development of children to full human maturity.

While children are members not only of their families but also of the larger political community, their membership in the larger political community is indirect, mediated through their membership in the family. Analogously, while as a citizen of the United States I am a member not only of the nation but also of the larger global community (of which the United Nations serves as a quasi-government), my membership in the global community is mediated through my United States citizenship, and the dictates or recommendations of the United Nations generally affect me only indirectly, through their influence on United States law and policy (influence which usually is and ought to be non-coercive). The relationship between the family and the state is in some respects analogous to the relationship between the state and the international community. Because the state has the authority to direct its own internal affairs, it is a widely agreed-upon principle of international relations that the international community ought not to coercively interfere with the internal affairs of a sovereign state, even if the international community reasonably judges that the state could better serve the interests of its citizens by enacting different policies.[51] The exceptions to this are cases in which a government is engaging in egregious human rights abuses or acting in ways that seriously and directly threaten the peace and safety of other nations. Similarly, the state ought to respect parents' authority to direct the internal affairs of the family—including parents' childrearing decisions—unless parents are guilty of genuine abuse or neglect, non-ideologically defined.[52]

D. Limited Government and Respect for the Family as a Mediating Institution

Recognizing and respecting that the family (as well as other communities such as churches, civic associations, etc.) is an authoritative community with the right to direct its own internal affairs is an essential and crucial feature of limited government.[53] Indeed, as Hannah Arendt famously pointed out in her seminal work, *The Origins of Totalitarianism*, a hallmark of totalitarianism is the effective elimination of all mediating institutions between the individual and

51. *See, e.g.*, MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (3d ed. 2000).

52. While there may be debates at the margins about what precisely counts as abuse or neglect, it seems clear that it should not include any parenting practice that a significant portion of the population considers to be acceptable, or that would only be construed as abusive or neglectful by those who hold a highly controversial view of child well-being.

53. *See* John Finnis, *Limited Government* in HUMAN RIGHTS AND THE COMMON GOOD: COLLECTED ESSAYS Vol III 83 (2011).

the state.[54] The family is arguably the original and most crucial of these mediating institutions.[55] In *Meyer v. Nebraska*,[56] the Supreme Court clearly recognizes the essential connection between the protection of parental rights and core principles of limited government. Referencing Plato's famous proposal in *The Republic* for the abolition of the family and direct state control over children, as well as Sparta's removal of males from their families at age seven to be raised and trained by official guardians, the Court notes: "Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution."[57] Clearly, the Nebraska law at issue, which prohibited the teaching of foreign languages up through the eighth grade, hardly even approaches the level of restriction on parental educational control envisioned in Plato's *Republic* or practiced in ancient Sparta. Yet the Court makes these seemingly extreme comparisons because the fundamental principle at stake is the same: the law at issue in the case, just like Plato's proposal or Sparta's educational practices, was inimical

54. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 474–75 (Harcourt Brace Jovanovich 1973) (1951) ("It has frequently been observed that terror can rule absolutely only over men who are isolated against each other and that, therefore, one of the primary concerns of all tyrannical government is to bring this isolation about. Isolation may be the beginning of terror; it certainly is its most fertile ground; it always is its result. This isolation is, as it were, pretotalitarian; its hallmark is impotence insofar as power always comes from men acting together, 'acting in concert' (Burke); isolated men are powerless by definition. Isolation and impotence, that is the fundamental inability to act at all, have always been characteristic of tyrannies. Political contacts between men are severed in tyrannical government and the human capacities for action and power are frustrated. But not all contacts between men are broken and not all human capacities destroyed. . . . Totalitarian government, like all tyrannies, certainly could not exist without destroying the public realm of life, that is, without destroying, by isolating men, their political capacities. But totalitarian domination as a form of government is new in that it is not content with this isolation and destroys private life as well.").

55. Garnett, *supra* note 17, at 144–45 (alterations in original) (footnotes omitted) ("I wonder, though, if *Pierce* is unavoidably anomalous in an intellectual and legal culture that views families more as contractual arrangements between autonomous individuals, or as dangerous seedbeds of oppression, inequality, and patriarchy - as 'school[s] of despotism' - instead of as the 'first and vital cell[s] of society.' Perhaps *Pierce* and the cluster of values and maxims for which it is thought to stand are best defended not in terms of parents' individual 'rights' against government, and certainly not in terms of ownership and property, but instead in terms of subsidiarity. Maybe we should think of the family, as it appears in *Pierce* and in contemporary debates about civic education, parental authority, and religious freedom, as the original 'mediating institution.' On this view, the State properly refrains from second-guessing families on matters of education and the transmission of religious tradition not only out of respect for the religious freedom and parental authority of the individuals situated within those families, but also out of wise regard for those families' integrity and health, precisely because the integrity and freedom of these 'vital cells' is important to the common good.").

56. 262 U.S. 390 (1923).

57. *Id.* at 402.

to the principles of limited government because it usurped the pre-political authority of parents to direct the internal affairs of the family—particularly the education and upbringing of children—without sufficient justification (i.e. abuse, neglect or serious threat to the public order).

It is true (as *Meyer* also clearly notes) that the state does have a direct and serious interest in the education of future citizens as required for the survival of the social and political order—a key part of what John Rawls refers to as the "ordered reproduction of society over time"[58]—and therefore that it has the authority to establish reasonable educational regulations for that purpose. However, such regulations are not (or at least ought not to be) a denial of the primacy of parental educational authority. On the contrary, as the Court in *Meyer* explicitly states, compulsory education laws are simply enforcing and supporting "the natural duty of the parent to give children education suitable to their station in life."[59] Thus such laws do not call into question but presuppose the natural authority of parents to direct their children's education. This is why the means chosen by the state to promote the legitimate goal of ensuring that children receive an education that will enable them to be law-abiding, productive and responsible citizens must be respectful of parents' rights to direct their children's education.[60]

E. State Educational Authority vs. Parental Educational Authority

Here, it is important to clarify that the educational authority of state is not on the same plane as the educational authority of parents; nor is it aimed directly at the same ends. As already argued, parents' educational authority is primary because parents are the ones with the strongest and most direct obligation to promote the well-being of their children in all respects. Accordingly, parental authority is aimed at the child's well-being—i.e., at the *proper good* of the child. By contrast, the state's authority over education in most respects is indirect and subsidiary to that of parents, because the state's authority is aimed not directly at the *proper good* of individuals or smaller communities, but at the *common good* of the political community as a whole. The state may therefore *assist* parents in fulfilling *their* educational task, but not usurp that task as if it belonged primarily to the state (except when parents, through abuse or neglect, clearly demonstrate themselves unfit to perform that task, or when parents are educating their children in a way that gravely threatens the rights of others or the public order more generally). This is analogous to the commonly-held view

58. JOHN RAWLS, POLITICAL LIBERALISM 243, n.32 (1st ed. 1993).

59. 262 U.S. at 400.

60. I make this claim primarily as a matter of moral principle, not as a matter of constitutional interpretation, but I believe that it is also supported by the Constitution, in continuity with the tradition of respect for parental rights in common law. In *Meyer*, for instance, the Court explicitly recognizes that parental rights limit the means that the state may use to pursue the goal of educating future citizens: "The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. . . . But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error." 262 U.S. at 402.

that that the international community may assist other governments in promoting the common good of their own nations—by, for instance, offering aid in times of crisis or advising fledgling regimes about effective and just practices of governance—but ought not to intervene coercively or usurp the authority of a legitimate government unless that government is engaging in practices that seriously threaten the international order or gravely violate the basic human rights of its citizens (and even then, coercion ought to be used only as a last resort).

Note, however, that it is only "in most respects" that the state's educational authority is indirect and subsidiary to that of parents. For when it comes to the specifically *civic*[61] (rather than child-centered) aims of education—i.e., when it comes to promoting the ordered reproduction of society over time through the education of children for the sake of the *common* good, not the *proper* good of the child—the state is the one with the strongest and most direct obligation, and therefore does have direct authority.[62] Nonetheless, when seeking to promote this important aspect of the common good, the state should (when possible) choose means that are respectful of parents' pre-political authority and corresponding rights—which means that any regulations need to be narrowly tailored to the compelling state interest at stake.[63] Thus, the state should be generous in granting exemptions and accommodations to even reasonable educational regulations in order avoid violating parental rights, as long as this is compatible with the state's compelling interest in the ordered reproduction of society over time, as it did in *Wisconsin v. Yoder*. In *Yoder*, the Supreme Court granted the Amish an exemption from an otherwise reasonable compulsory education law because it interfered with the Amish parents' right to educate their children in line with their religious beliefs.[64] In this case, the Court

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61. It's important to clarify here that I use the word "civic" here in a broad way to describe interests related to the common good of society as a whole, not to refer to the explicit teaching of "civics" courses in school.

62. While the state may have broader interests in civic education, the truly compelling aspects of the state's educational interests come down to what is necessary for the ordered reproduction of society over time, which *Wisconsin v. Yoder*, 406 U.S. 205, 221–26 (1972), specifies as providing basic education and preparing children to be self-sufficient as adults. Some scholars argue that the state would be justified in mandating much more robust (and ideologically controversial) civic educational programs even when this would undermine parents' ability to pass on their values to their children, *e.g.*, Fineman & Shepherd, *supra* note 5; EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY (1997); AMY GUTMANN, DEMOCRATIC EDUCATION (rev. ed. 1999); STEPHEN MACEDO, DIVERSITY AND DISTRUST (2d ed. 2003). Elsewhere, I argue that such programs are unjust and unnecessary, both in principle and given the empirical evidence that private schools (including homeschools) generally perform at least as well as public schools with regard to civic educational outcomes. MOSCHELLA, TO WHOM DO CHILDREN BELONG, *supra* note 21, at 74–118; *see infra* notes 72–75, 103–05, 162–63, 165, 167–72 and corresponding text.

63. While I argue for this standard as a matter of justice, what I propose corresponds to the strict scrutiny standard in constitutional law. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (summarizing the origins and rise of strict scrutiny analysis in constitutional law).

64. 406 U.S. at 234–36.

rightfully recognized that exempting the Amish from the compulsory education law would not undermine the state interests at stake (i.e. ensuring that the children were literate and capable of supporting themselves as adults, with a view toward the ordered reproduction of society over time) because the Amish had long shown themselves to be a peaceful, law-abiding and self-supporting community.[65] On the other hand, my view would imply that the government could rightfully shut down a school in which children are taught that acts of terrorism against Americans are a heroic service to God, and in which children are instructed in techniques for carrying out terrorist plots or encouraged to join terrorist organizations, because such an education is a serious threat to the fundamental rights of others and to the public order.[66]

Another interesting and currently relevant issue that tests the limits of state educational authority vis a vis parental educational authority regards the state interest in overcoming racial disparities in education and avoiding the de facto segregation of many public schools. In a conference presentation, Erwin Chemerinsky suggested that *Milliken v. Bradley*[67] should be overruled to combine urban and suburban school districts in order to desegregate the public schools, and that *Pierce v. Society of Sisters*[68] should be overruled in order to force all children to attend public schools.[69] Chemerinsky's rationale seems to be that only if affluent whites are required to send their children to public schools will there be enough political pressure to improve the public schools and thus improve educational opportunity for minorities.[70] While the compelling state interest in racial equality did indeed justify ending de jure segregation of public schools even against parental objections,[71] Chemerinsky's proposal goes too far. It sacrifices both parental rights and the well-being of

65. *Id.* at 212–13.

66. I do not use this example to imply that any Muslim schools in the United States actually engage in such educational practices or anything even approaching them. Rather, I use the example only because it is the type of case about which I am frequently asked when giving presentations on this topic. Research on Muslim schools in the United States and Canada shows that these schools – far from being a breeding ground for terrorists—actually foster civic engagement and interfaith dialogue. *See, e.g.*, Louis Cristillo, *The Case for the Muslim School as a Civil Society Actor*, *in* EDUCATING THE MUSLIMS OF AMERICA 67–84 (Yvonne Haddad et al. eds., 2009).

67. Milliken v. Bradley, 418 U.S. 717, 717 (1974) (holding that, unless it could be found that school districts had adopted explicit segregation policies, combining urban and suburban school districts in order to end merely de facto racial segregation of schools was not constitutionally required).

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

69. Marc DeGirolami, *Chemerinsky Urges Compulsory Public Schooling and the Elimination (and Unconstitutionality?) of Private Schooling*, MIRROR OF JUST. BLOG (Jan. 6, 2013), https://mirrorofjustice.blogs.com/mirrorofjustice/2013/01/chemerinsky-urges-compulsory-public-schooling-and-the-eimination-and-unconstitutionality-of-private-.html.

70. *Id.*

71. I believe that this is the case as a matter of justice, in line with the principles I have been defending in this article. This conclusion is also, however, supported as a matter of constitutional law by the holding in *Brown v. Board of Education*, 347 U.S. 483, 495 (1953), and *Milliken*, 418 U.S. at 745–47.

many children (for whom a large public school may be an unsuitable educational environment, for reasons that have nothing to do with the presence of racially diverse students) in the name of achieving greater racial integration in the schools. This is clearly not the least restrictive means to achieving the compelling state interest at issue.

The ultimate goal of Chemerinksy's suggestion seems to be to improve educational opportunities for minorities. Yet it seems perverse to pursue that goal by violating parental rights and forcing more privileged children to attend sub-par public schools (even if the hope is that these measures will eventually lead the schools to improve), rather than by enhancing school choice opportunities for all and providing less privileged children with the ability to attend better schools through some form of voucher program.[72] Studies have found that the positive impacts on academic achievement of school voucher programs are especially high for African American students.[73] Further, voucher programs have been found to promote desegregation by enabling African American students to attend predominantly-white private schools.[74] Studies have also shown that the increased competition public schools face as a result of voucher programs leads to improvements in the quality of the public schools.[75] Given that there are ways to promote racial integration and equality of educational opportunity that respect the rights of parents and actually enable

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72. Joseph P. Viteritti, *A Way Out*, BROOKINGS REV., Fall 1999, at 38 ("Although channeling public dollars into private schools raised the ire of many on the political left, voucher programs enabled poor people to enter an education market that until recently was the prerogative of the middle class."); Melissa Moschella, *School Choice: Protecting Parental Rights, Resolving Curriculum Wars, and Reducing Inequality*, PUBLIC DISCOURSE, March 23, 2022, https://www.thepublicdiscourse.com/2022/03/79893/ ("Surprisingly—at least for those who unreasonably treat school choice as a partisan issue—critical race theorist Derrick Bell also supported vouchers, charter schools, and other initiatives that would expand educational choice. In his book *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*, he proposes these school choice measures as a way to provide effective education for students in failing inner-city school districts, which are disproportionately populated by black students. Indeed, private and charter schools often significantly outperform public schools, particularly in the most underprivileged neighborhoods. This is especially true when considering not only standardized test scores (which do not predict long-term educational or professional attainment), but also factors like improved grades and increased student motivation. Research indicates that these latter measures are much more important for long-term outcomes like high school graduation, college attendance, and future earnings.").

73. *See, e.g.*, Patrick J. Wolf, *School Voucher Programs: What the Research Says About Parental School Choice*, 2008 BYU L. REV. 415 (2008).

74. See, e.g., Deborah E. Beck, Jenkins v. Missouri: *School Choice as a Method for Desegregating an Inner-City School District*, 81 CALIF. L. REV. 1029 (1993).

75. Cassandra M. D. Hart & David Figlio, *Does Competition Improve Public Schools? New Evidence from the Florida Tax-Credit Scholarship Program*, 11 EDUC. NEXT, Winter 2011, at 74, https://www.educationnext.org/does-competition-improve-public-schools/; Caroline M. Hoxby, *Rising Tide: New Evidence on Competition and the Public Schools*, 1 EDUC. NEXT, Winter 2001, at 68, https://www.educationnext.org/rising-tide/; Clive R. Belfield & Henry M. Levin, *The Effects of Competition Between Schools on Educational Outcomes: A Review for the United States*, 72 REV. EDUC. RSCH. 279 (2002).

more parents to choose the most suitable educational environment for their children, Chemerinsky's radical proposal is both unnecessary and unjust.

F. A Brief Note on Parental Rights as Fundamental Constitutional Rights

While my argument here has presented parental rights primarily as fundamental *moral* rights that the state has the obligation to respect as a matter of basic justice rather than as a matter of positive law, I also believe that the Constitution, interpreted in light of the common law tradition, recognizes parental rights as fundamental rights. While not explicitly enumerated in the text of the Constitution, the right of parents to direct the education and upbringing of their children is clearly among those rights that the framers of the Constitution would have understood to be "of the very essence of a scheme of ordered liberty,"[76] rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[77] because they "lie at the base of all our civil and political institutions . . . ."[78] The right is clearly also "deeply rooted in [the] Nation's history and tradition,"[79] having been affirmed countless times in our history on the basis of common law[80] prior to being articulated explicitly as a constitutional right in *Meyer v. Nebraska*[81] and *Pierce v. Society of Sisters*.[82] While *Meyer* and *Pierce* do not explicitly apply strict scrutiny,[83] these decisions

76. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

77. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

78. Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

79. Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

80. *See* DeGroff, *supra* note 26, at 106–07 ("[T]o be afforded heightened judicial scrutiny, a right not specifically enumerated in the Constitution must: (1) be deeply grounded in the Nation's history and legal tradition, in that it has traditionally been protected by our society and reflects our society's basic values; and (2) must be implicit in the concept of ordered liberty to the extent that neither liberty nor justice would exist without it. This test establishes an appropriately high threshold and provides an identifiable standard for determining whether a right is fundamental."). DeGroff offers substantial evidence showing that right of parents to direct their children's education and upbringing clearly meets both of these criteria*.; see also* Todd DeMitchell & Joseph Onosko, *A Parent's Child and the State's Future Citizen: Judicial and Legislative Responses to the Tension Over the Right to Direct an Education*, 22 S. CAL. INTERDISC. L. J. 591, 602 (2013) (discussing the Illinois Supreme Court's presumption in favor of parents which stated that the parents' decision would be upheld if it did not "affect the government of the school or incommode the other students or the teachers.") (quoting Trs. of Schs. v. People *ex rel.* Van Allen, 87 Ill. 303, 309 (1877)).

81. 262 U.S. 390, 390 (1923).

82. 268 U.S. 510, 510 (1925).

83. *Meyer* claims to be using a rational basis standard. 262 U.S. 390 at 403 ("We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."). Yet this conclusion that the statute lacks a rational basis is effectively grounded on a strict scrutiny analysis, based on the argument that, given the importance of the rights at stake, the state interest is not compelling enough to justify their violation. *Id.* ("No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed."). *Pierce* likewise uses the language of the rational basis standard, but once again seems to raise the bar for what counts as a rational basis due to the fundamental nature of the liberty interest at stake. *Pierce* held that the Oregon Law requiring children to attend public school

were made prior to the development of the strict scrutiny framework and its accompanying jargon.[84] Further, the fact that *Meyer* and *Pierce* declared the laws in question unconstitutional,[85] despite recognizing their rational relationship to a legitimate state interest,[86] indicates that they were, in fact, treating parental rights as fundamental[87] and effectively employing strict scrutiny rather than more deferential "rational basis" standard of review.

II. REQUIREMENTS OF RESPECT FOR PARENTAL AUTHORITY: EDUCATIONAL POLICY IMPLICATIONS

In this section, I briefly discuss some of the concrete policy implications of my view of parental educational authority as primary and pre-political, and of parental rights as protecting that authority. Note that I present these policy implications primarily as requirements of justice, rather than as requirements of any existing positive law, constitutional or statutory. These requirements should therefore be taken into account first and foremost by legislators, school officials and other policy-makers in order to ensure that they craft policies that are respectful of parental rights. Nonetheless, as noted above, I also believe that a strong case can be made for the recognition of parental rights as fundamental constitutional rights, and if that is correct, then my arguments are also directly relevant to judicial decisions.

A. Strict Scrutiny, Exemptions, and Accommodations

Most generally, what respect for parental rights requires as a matter of justice is effectively captured by the strict scrutiny standard. Laws regulating education, even when aimed at the legitimate state interest of preparing children

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"unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. 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." *Pierce*, 268 U.S. at 534–35.

84. *See* Fallon, Jr., *supra* note 63 (summarizing the origins and rise of strict scrutiny analysis in constitutional law).

85. *See supra* note 83.

86. *Meyer*, 262 U.S. at 398 ("The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state."). *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the state reasonably to regulate all schools . . . .").

87. In *Meyer*, the Court explicitly states that the right of parents to engage a German teacher for their children is "within the liberty of the [Fourteenth] [A]mendment." *Meyer*, 262 U.S. at 400. Also, setting forth the limits on the rights of the state to promote "civic development," the Court notes that, while "the state may do much, go very far, indeed, in order to improve the quality of its citizens . . . the individual has certain fundamental rights which must be respected." *Id.* at 401. *Pierce* argued that violations of parental rights are contrary to "[t]he fundamental theory of liberty upon which all governments in this Union repose." *Pierce*, 268 U.S. at 535. *See supra* note 83.

for responsible citizenship, should avoid interfering with parents' authority to direct their children's education to the extent possible. Where reasonable regulations in pursuit of a compelling state interest (such as reasonable compulsory education laws seeking to facilitate the ordered reproduction of society over time) do conflict with parents' educational authority, parental rights may only be overridden when there is no less restrictive means by which the state can achieve its goal. For example, as already noted above, in *Yoder* a less restrictive means *was* available—i.e., the law could exempt the Amish given the uniqueness of their situation—and therefore the state had an obligation to grant the exemption in order to avoid violating the Amish parents' rights.[88]

My account of parental rights also implies that public schools in general ought to avoid promoting controversial viewpoints particularly on sensitive moral and religious issues (such as, for instance, issues related to sexuality and gender) in order to respect the primacy of parental educational authority and make it less likely that the school will be undermining the values parents are trying to teach at home. Given that value-neutral education is impossible,[89] however, exemptions and accommodations should be granted to the extent possible when educational regulations or content prevent parents from raising and educating their children as they think best. *Wisconsin v. Yoder,* discussed above, is one example of this.[90]

Another frequently discussed case in this regard is *Mozert v. Hawkins*.[91] In *Mozert*, the Sixth Circuit court denied the parents' request that their children be exempted from a public school reading curriculum that they believed undermined the religious faith that they wanted to pass on to their children.[92] The parents complained, among other things, that the readers were biased and unbalanced, completely lacking positive portrayals of Protestant Christianity, while sympathetically presenting relativistic and non-Christian viewpoints and lifestyles.[93] The school district did not dispute that the readers were offensive

88. Wisconsin v. Yoder, 406 U.S. 205, 206 (1972). *See supra* notes 64–65 and corresponding text.

89. *See infra* note 96.

90. *Yoder*, 406 U.S. at 205.

91. Mozert v. Hawkins, 827 F.2d 1058, 1058 (6th Cir. 1987).

92. *Id.* at 1070.

93. *Id.* at 1060. *See* DeGroff, *supra* note 26, at 83 n.2 ("Paul Vitz, a professor of psychology at New York University and an expert in textbook analysis, reviewed the readers for the parents and later testified at trial. Professor Vitz found the materials practically devoid of references to God or any positive reference to Judeo-Christian belief or traditional family roles, but replete with favorable references to American Indian religions, Buddhism, Eastern mysticism, and the occult, and containing numerous references to role models reflecting non-traditional family structures."); *see also* ROSEMARY C. SALOMONE, VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION 122 (2000) ("Vitz [a New York University psychology professor] testified at trial that the Holt series either disparaged Christianity or ignored it. Of the approximately six hundred poems and stories in the series, Vitz found that not one depicted biblical Protestantism, life in the Bible Belt, or families or individuals who pray to God. In contrast, non-Christian religions and particularly Eastern and Native American religions received adequate attention. . . . The thrust

to the families' beliefs but argued that the children should be forced to read them anyway. The Sixth Circuit ultimately held that "mere exposure" to diverse viewpoints did not violate the students' or parents' free exercise rights.[94] My view would imply that the parents' request for an exemption should have been granted, in line with the decision of the Tennessee District Court[95] (whose ruling was reversed by the Sixth Circuit). The District Court rightly judged that failing to provide the accommodation would violate the parents' rights, because the parents believed that the content of the textbooks could harm their children by undermining their religious faith, and therefore that without an accommodation they would not be able to fulfill their responsibility to protect the spiritual well-being of their children without foregoing the benefit of free public education.[96] Further, as the District Court noted, although the state has a compelling interest in educating children to be responsible citizens, that interest could be served without requiring every student to use the same textbook, and allowing the children in the case to use an alternative textbook would be practically feasible.[97]

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of Vitz's argument 'was not about the evils of reflection on diversity but the alleged failure to initiate such reflection in a context where the way of life which the parents and their children shared was given due respect and recognition.'").

94. *Mozert*, 827 F.2d at 1058. For an insightful critique of the claim that "mere exposure" cannot violate free exercise rights, see Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 612–13 (1993); ("To the *Mozert* plaintiffs, the neutral face of exposure was a mask that disguised a mechanism of cultural reproduction. . . . In their eyes, the standpoint of neutrality estranged the children from their parents' tradition by turning religious absolutes into matters of personal opinion. The schools' seemingly objective appeal to individual reason plainly inculcated the values of individual choice, toleration, and reason - values that, rather than transcending culture, derive from and reproduce a liberal, pluralist society."); *see also* discussion *infra* Section II.B (arguing for the importance of genuine school choice given the impossibility of genuine value-neutrality in education).

95. Mozert v. Hawkins Cnty. Pub. Schs., 647 F.Supp. 1194, 1202 (E.D. Tenn. 1986).

96. *Id.* at 1200.

97. *Id.* at 1203. Some argue that generous accommodation or exemption policies would lead to a flood of requests and be practically unworkable. However, there is no evidence to support this claim. Indeed, prior to *Mozert*, parental requests for accommodations or exemptions were often successful, yet requests for such exemptions were relatively infrequent, and granting the exemptions did not prove unworkable. As DeGroff notes, "before and during the early 1980s parents experienced a measure of success in obtaining exemptions for their children, particularly when their objections were based upon religious conviction. Thus, for example, students of faith were granted exemptions from requirements to participate in ROTC, were excused from taking part in coeducational physical education classes, and were, in some instances, excused from classes altogether on religious holidays. State and federal courts were generally more responsive to claims that the exercise of religion had been burdened by the schools' curricular demands and more exacting in their requirement that school boards justify the denial of exemptions." DeGroff, *supra* note 26, at 89. *See, e.g.*, Valent v. New Jersey State Bd. of Educ., 274 A.2d 832, 840 (N.J. Super. Ct. Ch. Div. 1971) (holding that "[o]nce it is shown that the state intrudes upon one's religious belief, the state . . . has the burden of showing an overriding need and that it has no other way to satisfy that need.").

B. School Choice

Of course, at times parents' objections to the public-school curriculum may not be limited to a discrete text, program or event, but may involve concerns with the overall atmosphere or pedagogical approach of the school, or with viewpoints conveyed to students across the curriculum (as was the case in *Yoder*). In cases like these, the only way that parents can fulfill their obligation to direct their children's education (and exercise their corresponding right) is to send their children to a different school or homeschool them.[98] Yet, for parents with limited means, these are often not real options.[99] And even for those who can afford these options, the cost is a significant burden.

This problem points to the fundamental injustice of a system in which government-run schools have a monopoly on public educational funding. Given that there is no such thing as a neutral education, the public schools' monopoly on public educational funding means that the default is for children to be taught the viewpoints favored by the government, using the pedagogical methods favored by the government.[100] On the contrary, if we take the primacy of parental educational authority seriously, the default should be for children to be

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98. In 2016, 47.3 million children were enrolled in public school, while 5.8 million students were enrolled in private school, 3 million were enrolled in a charter school, and 1.7 million were homeschooled. *School Choice in the United States: 2019*, NAT'L CTR. FOR EDUC. STAT. (last visited on Dec. 3, 2021), https://nces.ed.gov/programs/schoolchoice/summary.asp.

99. *See* Richard J. Murnane, et al., *Who Goes to Private School?* 18 EDUC. NEXT 4 (Fall 2021) (noting that "the share of middle-income students attending private schools has declined by almost half, while the private-school enrollment rate of wealthy children has remained steady" – a decline the authors attribute in large part to the closure of many Catholic schools, which tend to be more affordable and offer more discounts to low-income students.); *see also* Melanie Hanson, *Average Cost of Private School*, EDUC. DATA INITIATIVE https://educationdata.org/average-cost-of-private-school (last updated Dec. 27, 2021), (reporting that "the average cost of private school attendance from kindergarten through 4 years of postsecondary study is $291,404 in 2021 currency values," and that "$12,350 is the average annual tuition among the nation's 22,400 private K-12 schools.").

100. *See* SALOMONE, *supra* note 93, at 206 (footnote omitted) ("The conventional wisdom tells us that public schools teach children to think critically in the sense of reaching independent conclusions. But that wisdom again is based on the mistaken belief that schooling is neutral, while the evidence indicates that education is inherently indoctrinative. What John Coons refers to as the 'neutrality legend' of the common school, he says, 'borrows heavily from the idiom of liberty for the sound political reason that in this culture liberty is a rich source of value energy.' Yet looking back at the history of common schooling, one sees that the legend itself was borne out of 'nativist folklore' in an attempt to free immigrant children from the shackles of their culture and religion. School officials may believe—or at least want to believe—that they develop in students critical thinking skills that will lead them to form their own opinions. But the curriculum in fact leads students to certain school/teacher-directed opinions."); *see also id.* at 38 ("Schooling . . . involves indoctrination that goes beyond the direct teaching of values . . . . Ethical or value considerations permeate the entire educational process. As George Counts laid bare before the progressives decades ago, to believe that the school is impartial is an untenable position and plainly fallacious. . . . Schools normalize a dominant ideological perspective whose 'regulating power' affects both consciousness and behavior. As socializing agents, schools 'classify, transmit, evaluate, and make coherent a partisan version of what knowledge is of most worth.'").

educated in line with the views and methods favored by their parents, particularly on controversial matters. Because the education of future citizens is crucial for the common good, providing public funding to facilitate this goal is reasonable, especially given that without it some parents would lack the resources to provide their children with a solid education.[101] Yet, respect for the primacy of parental educational authority would indicate that public educational funding should be channeled through parental choice to schools of parents' choosing[102] (or to subsidize the cost of homeschooling), as long as the education being provided meets certain minimal standards—i.e., as long as the basic public purpose of education is being served. Private schools, homeschools and charter schools sometimes significantly outperform public schools particularly in the most underprivileged neighborhoods,[103] not only with regard

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101. It is worth noting, however, that James Tooley's groundbreaking research on low-cost private schools in the developing world calls into question the need for general government involvement in education, aside from perhaps providing supplementary educational funds for the poorest of the poor. *See* JAMES TOOLEY, REALLY GOOD SCHOOLS: GLOBAL LESSONS FOR HIGH-CALIBER, LOW-COST EDUCATION 299 (2021). Tooley found that in some of the poorest areas of countries as diverse as Liberia, Nigeria, India, Pakistan, and China, the majority of children were being educated in low-cost private schools rather than in the free government schools. *Id*. Tooley explains that the superiority of education provided by the private schools, and the fact that they are accountable to the parents, leads poor parents to choose to send their children there despite the cost. *Id*. Tooley also recounts extensive studies showing that universal or near-universal schooling was achieved in the United Kingdom and the United States in the early 19th century, prior to the passage of compulsory education laws, and with only limited government subsidies. *Id.* In New York, for instance, "universal schooling of the five-to-sixteen-year-old age group appeared without this schooling being free (although it was subsidized) and without compulsion." *Id*. Seventy-six percent of children were being educated in purely private schools. *Id*.

102. *See* Christopher Ruszkowski, *American Families Strongly Support School Choice. Educators Should Listen to Them*, USA TODAY (Feb. 24, 2020, 6:00 AM), https://www.usatoday.com/story/opinion/2020/02/24/voters-strongly-support-school-choice-educators-should-listen-column/4831964002/ ("A recent EdChoice public opinion survey found that 78% of Democrats agreed with 78% of Republicans and 77% of independents in favoring education savings accounts, which let families access money usually funneled to school districts to spend on education-related expenses for their child. Current school parents were 85% in favor of ESAs, as were 78% of African Americans and 79% of Hispanic respondents."); *see also* KE WANG ET AL., NAT'L CTR. FOR EDUC. STAT., SCHOOL CHOICE IN THE UNITED STATES: 2019 50 (2019), https://nces.ed.gov/pubs2019/2019106.pdf (indicating that parental satisfaction with a school tends to be significantly higher if parents are able to send their children to the school of their choice).

103. *See* EDWARD CREMATA ET AL., CTR. FOR RSCH. ON EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY 2013 (2013), https://credo.stanford.edu/wp-content/uploads/2021/08/ncss_2013_final_draft.pdf. Margaret Brinig and Nicole Garnett also make the case that Catholic schools – to which voucher recipients of all faiths often choose to send their children – have positive effects not only on educational and personal outcomes for their students, but also on the community as a whole, leading to increased social capital and a reduction in violent crime. *See* MARGARET F. BRINIG & NICOLE STELLE GARNETT, LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA (2014). Many of these schools – which generally operate at a fraction of the cost of public schools – are being forced to close for financial reasons, to the great detriment of the communities in which they operate. *Id.*

to academic learning[104] but also with regard civic educational goals,[105] thus fulfilling the public purpose of education more effectively than many public

Vouchers would indirectly help to keep these schools open by making it financially feasible for poor families to enroll their children.

104. It is true that the studies on the academic effects of voucher programs or charter school programs show mixed results, and some have even shown negative results. Mark Dynarski, *On Negative Effects of Vouchers*, 1 EVIDENCE SPEAKS REPS. May 26, 2016, at 1, https://www.brookings.edu/wp-content/uploads/2016/07/vouchers-and-test-scores.pdf ("Recent research on statewide voucher programs in Louisiana and Indiana has found that public school students that received vouchers to attend private schools subsequently scored lower on reading and math tests compared to similar students that remained in public schools."). However, some scholars have argued that many studies on school choice programs tend to make the mistake of measuring learning solely with reference to test scores, whereas other factors, such as improved grades and increased student motivation, may be more important. *See* Thomas Stewart & Patrick J. Wolf, AM. ENTER. INST., THE SCHOOL CHOICE JOURNEY: PARENTS EXPERIENCING MORE THAN IMPROVED TEST SCORES, (2015) https://edreform.com/wp-content/uploads/2015/02/AEI-School-Choice-Journey-2015.pdf; *see also* Blog Post by Frederick M. Hess, *How Much Do Test Scores Tell Us About School Choice?*, AM. ENTER. INST., AEIDEAS (Mar. 20, 2018), https://www.aei.org/education/how-much-do-test-scores-tell-us-about-school-choice/ (indicating that improvements in test scores are almost entirely uncorrelated with "long-term outcomes like high school graduation rates, college attendance, and future earnings," and thus that focusing on test scores is not a good way to determine the success of school choice programs); Wolf, *supra* note 73, at 416 ("The high-quality studies on school voucher programs generally reach positive conclusions about vouchers. The many evaluations of targeted school voucher initiatives confirm that these programs serve highly disadvantaged populations of students. Of the ten separate analyses of data from 'gold standard' experimental studies of voucher programs, nine conclude that some or all of the participants benefited academically from using a voucher to attend a private school."). For a defense of school choice program against common critiques, *see* CATO INST., SCHOOL CHOICE MYTHS: SETTING THE RECORD STRAIGHT ON EDUCATION FREEDOM (Corey A. DeAngelis & Neal P. McCluskey eds., 2020). For an argument that, far from harming public schools, school choice programs introduce healthy competition that leads to improved public-school performance, *see* Hoxby, *supra* note 75; *see also* Belfield & Levin, *supra* note 75.

105. *See, e.g.*, Patrick J. Wolf, *Civics Exam: Schools of Choice Boost Civic Values*, 7 EDUC. NEXT (May 11, 2007), https://www.educationnext.org/civics-exam/ ("[T]he 59 findings from existing studies suggest that the effect of private schooling or school choice on civic values is most often neutral or positive. Among the group of more-rigorous studies, 12 findings indicate statistically significant positive effects of school choice or private schooling on civic values and 10 suggest neutral results. Only one finding from the rigorous evaluations indicates that traditional public schooling arrangements enhance a civic value.") (internal references omitted); *see also* David E. Campbell, *The Civic Side of School Choice: An Empirical Analysis of Civic Education in Public and Private Schools*, 2008 BYU L. REV. 487, 510 (2008) ("A survey of students currently enrolled in private schools demonstrates that when compared to public school students, they are more likely to engage in community service, develop civic skills in school, express confidence in being able to use those skills, exhibit greater political knowledge, and express a greater degree of political tolerance. Based on these findings, it would appear that when compared to their publicly educated peers, students in private schools generally perform better on multiple indicators of their civic education."); BRINIG & GARNETT, *supra* note 103 at 132; Patrick J. Wolf et al., *Private Schooling and Political Tolerance*, *in* CHARTERS, VOUCHERS, AND PUBLIC EDUCATION 268, 281 (Paul E. Peterson & David E. Campbell eds., 2001); Jay P. Greene, *Civic Values in Public and Private Schools*, *in* LEARNING FROM SCHOOL CHOICE 83, 100–02 (Paul E. Peterson & Bryan C. Hassel eds.,

schools. Therefore, limiting public educational funding to government-run schools makes no sense, and sends the false message that the formal education of children is primarily the responsibility of the state rather than parents. However, even if private schools, home schools or charter schools do not outperform public schools academically, that does not mean that school choice programs are a failure. For ensuring that all parents have genuine choices about how and where to educate their children is independently valuable, as it respects the primacy of parental educational authority—making school accountable to parents, rather than the government[106]—and enabling parents to choose schools in which the social and moral environment are more in line with the values that they want to pass on to their children.

As Brown argues:

> Because parental involvement is vital to the health of a liberal republic, and because children's flourishing is inextricably related to parental involvement, public schools cannot unilaterally usurp the parental role. When parents object to discrete programs and events, they are entitled to notice and an opportunity to exempt their child. Without this right, a parent's "choice" to send his child to public school is meaningless. But this remedy has limitations and cannot offer a satisfactory resolution to the infinite hypothetical conflicts that may arise between parents and schools.
>
> At its core, the inevitable conflict between parents and schools favors school choice. If parents were able to take their money with them, then their right to leave public schools would be significantly more meaningful. This is a job for state legislatures and school districts. If parents can exercise greater choice, then administrative concerns will dissipate as parents freely select the educational environment most consonant with their values and preferences, largely eliminating the need for accommodation through exemptions. School choice is a truly liberal solution to the goals of publicly funded liberal education. It respects every viewpoint by actually enabling parents to direct their children's education and upbringing

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1998); Terry M. Moe, *The Two Democratic Purposes of Education*, *in* REDISCOVERING THE DEMOCRATIC PURPOSES OF EDUCATION 127 (Lorraine M. McDonnell et al. eds. 2000); JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES 60–79 (1987).

106. James Tooley notes that the desire to ensure that their children's school is accountable to *them* is one of the main reasons – in addition to the superior educational quality – why many poor parents in the developing world choose to pay to send their children to private schools, even though they could send their children to a government-run school for free. Tooley recounts a striking anecdote in this regard. While visiting a low-cost private school in the slums of Hyderabad, India, a mother came in who owed several months of school fees. Instinctively, Tooley offered the woman the money she needed (a very small sum by our standards), but she refused to take it. The school's owner explained that her refusal wasn't just about the woman's desire for independence: "Independence, self-help, for sure. But she wants the school to be accountable to *her*, not to you. By paying her own fees, in small amounts each month to cover her arrears, she knows that she keeps me on my toes. Don't ruin it by stepping in between us." TOOLEY, *supra* note 101, at 6.

> according to their individual values and beliefs. This is a sharp contrast to the current system, which gives lip service to parental rights while silencing any attempt to exercise them.[107]

Brown makes the important point that genuine school choice is not only a matter of protecting parental rights, but also of promoting children's well-being by avoiding the confusion and stress that result from conflicts between the values taught at school and at home,[108] and of offering a truly liberal solution to the public goal of ensuring that all children have access to an education while respecting diversity and preventing the state from imposing a single ideology on all children. Indeed, John Stuart Mill was strongly opposed to state provision of education or even state direction of education, arguing that "[a] general State education is a mere contrivance for moulding people to be exactly like one another . . . ."[109] Mill believes that, at most, state-controlled education should be "one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence."[110]

C. Minimal Regulations on Private Schools and Homeschooling

Finally, it is already clear from the foregoing discussion that my account of parental rights also implies a right to send one's children to private school or to homeschool them. It is important to add, however, that state regulations on private schooling and homeschooling ought to be minimal—narrowly tailored to the compelling state interest of facilitating the ordered reproduction of society over time by ensuring that children receive an education that will enable them to be law-abiding, productive, and responsible citizens. It could be acceptable, for instance, for the state to require that children demonstrate age-appropriate progress toward competence in core academic subjects such as math, reading, and writing, as well as basic knowledge about how our government works and about the rights and responsibilities of citizens. This could be done in relatively non-intrusive ways, such as through periodic examinations. Note that my point here is not to suggest that states *should* adopt such regulations, only that they *could* be justified if necessary. For there are many reasons to think that such regulations may not be necessary and may actually do more harm than good. Tooley argues that state examinations and state-imposed curricula often distort the educational process by, among other things, testing skills and knowledge that are not actually useful for future work, and by making education boring (leading many students to lose motivation and even drop out).[111] Evidence also

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107. Emily J. Brown, *When Insiders Become Outsiders: Parental Objections to Public School Sex Education Programs*, 59 DUKE L. J. 109, 144 (2009) (emphasis omitted).

108. For arguments about the importance of coherence between the values taught at school and at home for the healthy moral and psychological development of children, *see* MOSCHELLA, TO WHOM DO CHILDREN BELONG?, *supra* note 21 at 12944.

109. JOHN STUART MILL, ON LIBERTY 97 (1859).

110. *Id.*

111. TOOLEY, *supra* note 101, at 166–67 ("In the United States, one study reports that two-thirds of high-school students are 'bored in class *every day*,' and nearly a fifth are bored 'in *every*

indicates that private schools and homeschools generally perform at least as well on all measures (include civic educational measures) as public schools, and often significantly outperform public schools especially in disadvantaged communities.[112] Further, even seemingly minimal government regulations may be overly burdensome in practice,[113] wasting resources or interfering with schools' ability to fulfill their educational mission. Nonetheless, some regulations—such as basic academic requirements, or a basic civics requirement—*could* be justifiable *if* they were a necessary and effective means to ensure that children receive an education that at least minimally prepares them for responsible citizenship. As long as the state only requires a demonstration of basic academic progress in core subjects, or basic knowledge of our nation's history and government, such regulations are, at least in principle, unlikely to violate parents' right to educate their children as they think best, except in relatively rare cases like that of the Amish. And in such cases, as already argued, exemptions should be granted as long as it would not seriously undermine the compelling state interest at stake.

III. OBJECTIONS AND RESPONSES

In this section, I present and respond to several recent critiques of parental rights. I begin by considering the arguments against parental rights in general made by Godwin as well as Dailey and Rosenbury. Then I address the work of Bartholet and Fineman and Shepherd, who argue more specifically for restrictions on parental rights in education, especially the right to homeschool. In doing so, I show how my account of parental rights both illustrates the flaws in these perspectives and withstands their criticisms.

A. General Critiques of Parental Rights: Godwin and Dailey and Rosenbury

Godwin argues that the very notion of parental rights is contrary to the equal dignity of children because it objectifies children, treating them as the

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class *every* day.' . . . And boredom is the number one reason for dropping out of high school.") Note that Tooley is not opposed to curricular standards and testing, but argues that when the government is in charge of setting the standards for curricula and testing, political factors distort the outcomes and stymie efforts at improvements and updating. Instead, Tooley argues that private organizations like the International Baccalaureate program could do a better job of providing curricular standards and assessments. There could be a variety of such programs that would compete with each other, thus driving continued efforts at improvement. *Id.* at 177–84.

112. *See supra* notes 72–75, 103–06 and *infra* notes 162–63, 165, 167–172 and corresponding text.

113. *See, e.g.*, E. Vance Randall, *Private Schools and State Regulation*, 24 URB. LAW. 341, 351 (1992) (discussing the burdensomeness of regulations "such as teacher certification, class size, and specific textbooks," which "have not been empirically substantiated as essential and closely linked with explicit state education goals, or proven capable of achieving their intended objective").

property of their parents.[114] According to Godwin, parental rights are often justified from a "protectionist" perspective, which "holds that children lack the required rationality and practical maturity to make adult decisions competently."[115] While Godwin herself criticizes this protectionist framework "for undervaluing the interests that children, like adults, have in liberty, dignity, and freedom from coercion,"[116] she argues that "the powers delegated to parents over their children are vastly more extensive than those that could be defended on protectionist grounds."[117] The main problem, on Godwin's account, is that "[p]arents' legal rights cannot provide an effective means of providing for children's best interests when they may be independently weighed against a child's best interest where the two conflict."[118] More specifically, Godwin argues that "a child protectionist conception of children's rights cannot tell us why parents ought to be empowered by the state as a matter of law to impose their non-neutral and often idiosyncratic or even demonstrably harmful values on their children."[119] Godwin views parental authority to raise a child in a particular religious faith as a "prime example" of a practice that cannot be justified by a protectionist account of parental rights.[120] More broadly, Godwin thinks that when parents choose what she calls "desire-contingent goods" for their children in ways that close off other "harmless choices," they are unjustly imposing their own preferences on their children.[121] Examples of such illegitimate exercises of parental power include, on Godwin's view,

> choice of school among different adequate schools, the choice of religious attendance, management of a child's affect and manners among the diversity of legally permissible manners, choice of extra-curricular activities, and choice of what ideas and people a child is exposed to even if alternative ideas and people are harmless.[122]

Ultimately, Godwin proposes a radically different arrangement for childcare in which "parents could be limited in what they can do to their children in the same way that teachers are extensively limited in what they can do to the

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114. Godwin, *supra* note 1, at 30 ("[T]he the implied logic of parental rights suggests a type of ownership or quasi-property interest in children. . . . The idea that parents can impose on their child what others cannot, because that child is *their* child and *belongs* to them, and not to others, amounts to a belief that parents are functionally related to their children as car owners are to their cars.").

115. *Id.* at 7.

116. *Id.* at 8.

117. *Id.*

118. *Id.* at 17.

119. *Id.* at 21.

120. Godwin, *supra* note 1, at 21.

121. *Id.* at 42.

122. *Id.* (footnotes omitted). Godwin's argument that parents have no genuine right to choose desire-contingent goods on behalf of their children also implies that minors should be allowed to make abortion decisions without parental notification and consent, because "[t]he choice to have a child or to terminate a pregnancy is a clear case of a choice between two mutually exclusive desire-contingent goods." *Id.* at 44.

children they supervise."[123] Concretely, Godwin suggests measures like "abolishing the category of legal custody as distinct from physical custody," and "eliminating parental rights to coercively impose their values on children."[124]

Dailey and Rosenbury likewise propose a radical restructuring of family law in which the "law's existing deference to parental rights in both statutes and legal decisions would give way to a more child-centered analysis that elevates children's broader interests over parents' individual liberty claims."[125] Like Godwin, they are suspicious of the very notion of parental rights, because they believe that "[p]arental rights construct children predominantly as objects of control, rather than as people with values and interests of their own."[126] Dailey and Rosenbury also agree with Godwin that we should "eliminate parental freedom to inflict corporal punishment on children,"[127] and also limit parent's ability to determine the child's access to relationships with other adults.[128] Dailey and Rosenbury's other recommendations include proposals to

> limit parents' rights to homeschool their children in most circumstances, requiring more intensive state oversight of homeschooling for children in the early years and prohibiting it altogether for most children past the primary grades, based primarily on children's interest in exposure to ideas.[129]

They also seek to strengthen children's privacy rights particularly in relation to gender identity and sexual orientation as well as with regard to healthcare access (such as access to mental health services, drug counseling, abortion and medical treatments for gender transition).[130]

There are several fundamental flaws with the critiques of parental rights offered by Godwin and Dailey and Rosenbury. First, they presume parental rights are about protecting the interests of parents, with parents' interests conceived of as inherently in conflict with—or, at best, independent of—the interests of their children.[131] Thus, they see the very notion of parental rights as morally suspect, inimical to a recognition of the dignity and rights of children. Thus, they see the very notion of parental rights as morally suspect, inimical to a recognition of the dignity and rights of children. Second, they conceive of

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123. *Id.* at 81.

124. *Id.* at 82 (seeking specifically to eliminate parental rights to engage in any form of corporal punishment).

125. *The New Law*, *supra* note 2, at 1452.

126. *Id.* at 1471.

127. *Id.* at 1453.

128. *Id.* at 1485–87.

129. *Id.* at 1453; *see The New Parental*, *supra* note 2, at 128.

130. *The New Law*, *supra* note 2, at 1502 ("[C]hildren's chosen gender identities or sexual orientations might be known at school but not at home, and children have an interest in keeping it this way."); *The New Parental*, *supra* note 2, at 136 ("Should transgender children, both pre- and post-puberty, be able to access certain gender-affirming treatments without parental consent but with the guidance of adults other than their parents? Yes.").

131. *See infra* notes 141–43 and corresponding text.

parental authority over children as derivative of the state's authority, and thus believe that the state has the right to limit the scope of parental authority at will.[132] Third, they (particularly Dailey and Rosenbury) seem to forget that *someone* needs to make decisions on behalf of children who lack the maturity necessary to identify what is truly in their best interests. In practice, therefore, the new framework they propose would not really liberate children from adult control but would simply replace parental control over children with state control over children (either directly or through the empowerment of other non-parental actors such as doctors, counselors and teachers). Further, they relatedly presume (despite overwhelming evidence to the contrary)[133] that state officials (who are strangers to the child) or other non-parental authorities (like doctors and school officials) are somehow magically endowed with near-infallible knowledge of what is truly in the child's best interests and perfectly altruistic in their motives, while parents (who have greater knowledge of and love for the child) are extremely poor judges of their child's best interests or are simply making decisions for self-interested reasons that have nothing to do with the child's well-being.[134]

This last set of presumptions is evidently absurd, and I have presented evidence against it;[135] I will therefore focus here on addressing the first two presumptions. The first presumption – that parental rights protect parents' interests, conceived of as inherently in conflict with or independent of children's interests—clearly distorts the reality of how parents go about making childrearing decisions. Contrary to this presumption, the vast majority of parents see their own interests as inextricably bound up with the well-being of their children and routinely make considerable sacrifices for their children's sake.[136] This presumption also fails to accurately reflect any account of parental rights that I have seen (except accounts given by other parental rights critics), and certainly does not accurately reflect my own account of parental rights, which grounds those rights on the natural childrearing authority that parents have by virtue of being the ones with the strongest and most direct obligation to promote their children's well-being. In order to fulfill their parenting responsibilities conscientiously, parents need to be able to make decisions—even controversial decisions—about what is in their child's best interests.

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132. *See supra* notes 23–25.

133. *See supra* notes 17–20.

134. *See infra* notes 141–43 and corresponding text. These same flaws can be found in the work of James Dwyer, one of the most prominent and longstanding critics of parental rights, who argues that "the very notion of parental rights is illegitimate" because children's well-being is the only relevant consideration. JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 63 (1998). I do not deal directly with Dwyer's work here because my focus is on more recent critiques of parental rights, and because I have already offered a critique of Dwyer's view in MOSCHELLA, *supra* note 21, at 69–71.

135. See *supra* notes 17–20 and accompanying text for arguments that the state is much less likely than parents to know what is actually in a child's best interests and to be motivated to act for the child's well-being. For evidence of the immaturity of children's decision-making capacity even in adolescence, see *infra* notes 160–61 and MOSCHELLA, *supra* note 21, at 13536.

136. *See supra* notes 17 and 20.

Given that close relationships with parents are crucial for children's well-being, and that parents' love and intimate knowledge of their children uniquely facilitate their ability to make decisions in the best interests of their children, strong legal protections for parental rights also promote the well-being of children.[137] Indeed, as a systemic matter, strong protections for parental rights are arguably the most effective means of protecting children's rights. For such protections ensure that family life and relationships remain undisturbed by government intrusion or the threat of such intrusion. Strong protections for parental rights also ensure that child-rearing decisions will be made by those who, in the vast majority of cases, have the best knowledge of their children's unique needs and the strongest motivation to promote their children's well-being.[138] Godwin's and Dailey and Rosenbury's frequent portrayal of parental rights as fundamentally in conflict with children's interests is therefore inaccurate.

Godwin would object that "parents' legal rights cannot provide an effective means of providing for children's best interests when they may be independently weighed against a child's best interest where the two conflict."[139] She believes that in cases like *Troxel v. Granville*,[140] courts should interfere whenever judges think that the child's best interests would be served by interfering, regardless of what the parents want.[141] Similarly, Dailey and Rosenbury argue that, "[a]lthough parental rights may indirectly further children's interests, they are a circuitous and unreliable means of doing so" because attention to parental rights prevents courts from directly imposing their view of what is in the child's best interests.[142] They likewise point to *Troxel* as an example of this problem, claiming it was wrong that "the mother's rights [to limit how frequently the children could visit their paternal grandparents] prevailed over any consideration of the children's interests in maintaining closer contact with their grandparents."[143]

But these analyses are flawed, because they presume that the parents in *Troxel* and similar cases are not seeking their child's best interests. While judges may disagree with parents about what a child's best interests are, that does not mean that the parents' decision failed to take the child's best interests into account. Godwin, along with Dailey and Rosenbury, portray cases like *Troxel* as ones in which the state is looking after the best interests of the children, while parents are pursuing selfish ends at the children's expense. Instead, it is more accurate to see such cases as about parents having a different view of what constitutes the child's best interests. Godwin, as well as Dailey and Rosenbury, tend to presume that the state is in a privileged position to know

137. *See supra* notes 17–22.

138. *Id.*

139. Godwin, *supra* note 1, at 17.

140. Troxel v. Granville, 530 U.S. 57, 57 (2000).

141. Godwin, *supra* note 1, 15–16.

142. *The New Law*, *supra* note 2, at 1471.

143. *Id.*

what is actually "in a child's best interest in some independent sense."[144] Yet, as already noted, this presumption is contrary to common sense: why would we think that strangers are in a better position than parents to judge what is best for a child? Finally, and crucially, these analyses fail to recognize that, even if in some individual cases parents may be acting selfishly or the state (or a doctor or teacher) may be a better judge of a child's best interests than the parents, empowering the state (or other non-parental authorities) to intervene every time it disagrees with parents over how best to raise a child would undermine family intimacy, stability and trust throughout society in ways that would be disastrous for child well-being overall. In other words, particularly given children's important interest in being raised by their own biological parents in a stable household, lack of respect for parental rights is, from a systemic perspective, on balance, likely to undermine the interests and rights of children, rather than protect them.

My account of parental rights likewise shows why these authors' second presumption—that the state grants parental rights and can therefore limit them at will—is also wrong. For on my view, parental rights protect the pre-political authority that parents have over their children by virtue of their childrearing responsibilities, responsibilities which are not conferred by the state, but which flow from the very nature of the parent-child relationship. Thus, the state lacks the authority to limit or deny the rights of parents, except in cases where parents have clearly shown themselves to be unfit—i.e., cases of genuine abuse or neglect—or cases in which the state has no other way to protect its compelling interest in the ordered reproduction of society over time.

Dailey and Rosenbury would question my claim that parental authority is pre-political. Indeed, they explicitly criticize the existing "authorities framework" of family law for "posit[ing] the parent-child relationship and parental authority as natural and preexisting, with law entering the relationship only when courts or government agencies explicitly intervene."[145] They argue instead that:

> both the recognition of the parent-child relationship and the grant of parental rights are state decisions. Parental authority also flows from laws specifying that children lack the legal capacity to make most decisions on their own. Parental rights and family privacy are therefore always already "constituted and regulated by law, even if what is constituted includes a domain of autonomous judgment that can come into conflict with law."[146]

What Dailey and Rosenbury fail to understand, however, is that family law involves recognizing and regulating the pre-existing institution of the family, not creating that institution. As Garnett pithily explains (in response to

144. Godwin, *supra* note 1, at 24.

145. *The New Law*, *supra* note 2, at 1474.

146. *Id.* (footnotes omitted).

Dwyer's claim that "the law creates the family"[147]): "The law no more 'creates' the family than the Rule Against Perpetuities 'creates' dirt."[148] And I would add that the law no more creates parental authority than birth certificates create children.

B. Attacks on Homeschooling and Private Schooling: Fineman and Shepherd and Bartholet

In recent articles, Martha Fineman and George Shepherd as well as Elizabeth Bartholet have challenged the claim that parents have a right to homeschool their children and have argued for a ban on homeschooling. Fineman and Shepherd believe that we should rethink our historical practice of dealing with "childhood dependency by relegating the burden of caretaking to the family and consider[ing] it beyond the scope of state concern, absent extraordinary family failures, such as abuse."[149] They question whether "the state should allow parents such complete control over their children," a practice which they consider tantamount to "privilege[ing] parents' interests over those of the child and society."[150] They argue, in particular, that "homeschooling should be understood to be a failure of the state to be fully responsive to the need of vulnerable subject in childhood for a strong educational foundation," and that "[t]his failure presents the possibility of harm to both the child and society."[151] According to Fineman and Shepherd, these harms include failing to prepare children "to be productive participants in a diverse, modern economy or to participate responsibly in the democratic process," due to "incomplete or misleading information in areas of knowledge essential for future academic and career success."[152] They also worry that homeschooled children will be "isolated, shielded from diversity, and, perhaps, conditioned to carry bias and discrimination into their future dealings as adult members of society."[153] In response to these concerns, Fineman and Shepherd not only call for a ban on homeschooling, but ultimately seek to eradicate all private schooling and make public schooling mandatory for all.[154] Bartholet makes a slightly narrower argument against homeschooling that echoes Fineman and Shepherd's concerns. Bartholet proposes a presumptive ban on homeschooling, arguing that recognizing a legal right to homeschool is inconsistent with respect for the child's future autonomy, with the child's right to education and protection

147. James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 167 (2000).

148. Garnett, *supra* note 17, at 114 n.29.

149. Fineman & Shepherd, *supra* note 5, at 62.

150. *Id.*

151. *Id.* at 63.

152. *Id.*

153. *Id.* at 70.

154. *Id.* at 106 ("[B]oth the rights of children and economic analysis support mandatory public education.").

against abuse, and with the state's interest in preparing children for citizenship.[155]

Although Bartholet, Fineman and Shepherd do raise some legitimate concerns, their arguments ultimately fail to stand up to scrutiny. First, consider Bartholet's worry (shared by Fineman and Shepherd[156]) that homeschooling violates the child's autonomy, or what some theorists refer to as the child's right to an "open future"—i.e., "the right to exposure to alternative views and experiences essential for children to grow up to exercise meaningful choices about their own future views, religions, lifestyles and work."[157] In this regard, Bartholet is worried especially about children in conservative Christian families whose parents choose to homeschool them in part because they want to shelter them from competing worldviews that may undermine their faith.[158] In support of this claim, Bartholet quotes the unpublished work of Robin West, who writes:

> Unregulated homeschooling, therefore, badly compromises the development of capacities for autonomy in the children subjected to it . . . . [T]he children in some of these homes are being schooled quite intentionally for lives of submission to authority, not for autonomy . . . . They are discouraged from developing either the will or the skills to break those bonds.[159]

Even if this caricature of homeschool education accurately reflected the reality of homeschooling in most conservative Christian families, such practices hardly rise to the level of abuse or neglect, unless we define abuse or neglect to include any parenting practice that departs from the highly contested

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155. Bartholet, *supra* note 4, at 6.

156. Fineman & Shepherd, *supra* note 5, at 98 ("A prohibition of homeschooling and other means of intellectual isolation of children will appropriately balance the interests of parents with the responsibility of the state to ensure access to resilience-building institutions. Such a prohibition allows parents the opportunity to be a primary influence on their children's development, while also permitting children modest exposure to alternate views, particularly democratic values of tolerance and inclusion. This exposure helps provide children with the ability as adults to assess and eventually choose for themselves among competing values."); *see also* Shulman, *Who Owns the Soul of the Child?*, *supra* note 6, at 421 (Shulman calls for "a schooling that gives children the tools they will need to think for themselves by making public, as it were, a common intellectual and cultural capital; a schooling that takes seriously the idea that both autonomy and tolerance require children to know other sources of meaning and value than those they bring from home. This effort may well divide child from parent."); Shulman, *The Parent as (Mere) Educational Trustee*, *supra* note 6, at 298 (footnotes omitted) ("The full capacity for individual choice is the presupposition of First Amendment freedoms. It is for this reason that the state has a strong obligation to see that free choice is not strangled at its source. The state may not sponsor particular religious or political beliefs, but that is not enough; it must protect children from being forced to adopt particular religious or political beliefs. The state must work to protect the moral and intellectual autonomy of all children.").

157. Bartholet, *supra* note 4, at 6*; see also, e.g.*, BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124–53 (William Aiken & Hugh LaFollette eds., 1980); DWYER, *supra* note 147; CALLAN, *supra* note 62.

158. Bartholet, *supra* note 4, at 10–11.

159. *Id.* at 11 (alterations in original).

childrearing philosophy of progressive elites (in which case most parents would probably count as abusive or neglectful). It would therefore be wrong to use the coercive power of the state to prevent parents from engaging in such practices.

Moreover, it could be argued that the kind of exposure to diverse worldviews that Bartholet and other theorists want all children to have—especially exposure from authoritative figures like teachers—could end up on balance being more harmful than helpful to children. Rather than promoting genuine autonomy, if schools encourage children to think critically about the values they are being taught at home and teach them about competing values, this may simply cause confusion and make it more difficult for children to develop a stable sense of personal identity and to build crucial habits of self-mastery on the basis of a coherent set of moral values. Even some liberal scholars like Ian MacMullen and Eamonn Callan recognize these dangers. MacMullen, for instance, actually recommends that primary schools *reinforce* the values children are taught at home, in order to provide them with a "secure grounding in a coherent primary culture," both for the sake of developing a stable sense of identity, and also to teach children "the nature and value of personal commitment" so that they do not fall into "the kind of listlessness that can all too easily inhibit autonomy just as much as lack of critical reflection."[160] While MacMullen believes that children should be exposed to diverse viewpoints beginning in middle school, which is when children begin to be able to engage in formal abstract thought, he fails to recognize that even if adolescents have the cognitive capacity for critical thinking, they nonetheless lack the moral maturity necessary to evaluate diverse viewpoints primarily on the basis of *reason*, rather than on the basis of what is most appealing to their sub-rational desires. Indeed, psychological and neurobiological studies indicate what any parent with teenage children knows—that while intellectually adolescents demonstrate a sophisticated capacity for rational reflection, their decision-making is marred by short-sightedness and a much higher tendency to impulsivity and immediate gratification than adults.[161] Studies also indicate that adolescents lack insight into what really matters, and thus will give undue

160. IAN MACMULLEN, FAITH IN SCHOOLS? AUTONOMY, CITIZENSHIP, AND RELIGIOUS EDUCATION IN THE LIBERAL STATE 187 (2007); *see also* Eamonn Callan, *Autonomy, Childrearing, and Good Lives*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 118 (David Archard & Colin M. MacLeod eds., 2002). Callan argues that autonomy requires not only the ability to revise one's conception of the good when appropriate, but also to make and keep commitments, avoiding the temptation to irrationally change one's views or life plan. Callan notes that teaching children the steadfastness necessary for adherence to a conception of the good may require, among other things, "shielding children from experiences one believes would confuse or corrupt them, engaging them in activities whose presuppositions they do not yet grasp, instilling beliefs whose grounds remain for some time unexamined." *Id.* at 134. This is precisely what many of the homeschooling parents criticized by Bartholet are seeking to do.

161. Brian C. Partridge, *The Mature Minor: Some Critical Psychological Reflections on the Empirical Bases*, 38 J. MED. & PHIL. 292 (2013); Evan A. Wilhelms & Valerie F. Reyna, *Fuzzy Trace Theory and Medical Decisions by Minors: Differences in Reasoning Between Adolescents and Adults*, 38 J. MED. & PHIL. 268, 271 (2013).

weight in their deliberations to trivial considerations while discounting important ones.[162] Exposing children to viewpoints that undermine the values their parents are teaching them may also weaken the moral authority of parents. This is a result that Bartholet and Fineman and Shepherd might celebrate in many cases, but that would likely be harmful for children, given what sociological, psychological, and neurobiological studies have shown about the need children have for clear, consistent authoritative guidance from parents even during adolescence.[163]

Bartholet's concerns about homeschooling as inimical to a child's future autonomy and healthy psychological development are also based on a caricatured portrayal of homeschooling that distorts the reality of how homeschooling works in the vast majority of families, including conservative Christian families. One of the few studies on homeschooling that is based on a large representative sample found that those who were homeschooled "are no more or less likely than public schoolers to say that they like new and exciting experiences even if they have to break the rules"—hardly an indicator that homeschooling crushes children's spirit or inculcates habits of blind submission to authority.[164]

Evidence also belies the claim that homeschoolers are isolated from the larger community or lack exposure to diversity. A recent analysis using data from the 2016 National Household Education Survey (NHES), which included a random sample of 552 homeschooled children, found that "homeschooling families have the highest levels of community involvement of all school sectors."[165] Regarding homeschoolers' exposure to diversity—which seems to be of particular concern to Fineman and Shepherd[166]—the 2018 Cardus

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162. Wilhelms & Reyna, *supra* note 161, at 271.

163. Diana Baumrind, *Rearing Competent Children*, *in* CHILD DEVELOPMENT TODAY AND TOMORROW 353–54 (William Damon ed., 1989); L.J. Crockett & R. Hayes, *Parenting Practices and Styles*, *in* 2 ENCYCLOPEDIA OF ADOLESCENCE 241 (B. Bradford Brown & Mitchell J. Prinstein eds. 2011); Susie D. Lamborn et al., *Patterns of Competence and Adjustment among Adolescents from Authoritative, Authoritarian, Indulgent, and Neglectful Families*, 62 CHILD DEV. 1049 (1991); Patrick C. L. Heaven & Joseph Ciarrochi, *Parental Styles, Conscientiousness, and Academic Performance in High School: A Three-Wave Longitudinal Study*, 34 PERSONALITY & SOC. PSYCH. BULL. 451 (2008); Sigrun Adalbjarnardottir & Leifur G. Hafsteinsson, *Adolescents' Perceived Parenting Styles and Their Substance Use: Concurrent and Longitudinal Analyses*, 11 J. RSCH. ON ADOLESCENCE 401 (2001); Laurence Steinberg et al., *Over-Time Changes in Adjustment and Competence among Adolescents from Authoritative, Authoritarian, Indulgent, and Neglectful Families*, 65 CHILD DEV. 754 (1994).

164. DAVID SIKKINK & SARA SKILES, HOMESCHOOLING AND YOUNG ADULT OUTCOMES: EVIDENCE FROM THE 2011 AND 2014 CARDUS EDUCATION SURVEY 10, https://content.cardus.ca/documents/download/2591 (last visited Apr. 16, 2023).

165. David Sikkink, *The Social Realities of Homeschooling*, INST. FOR FAM. STUDS. BLOG (May 7, 2020), https://ifstudies.org/blog/the-social-realities-of-homeschooling.

166. Fineman & Shepherd, *supra* note 5, at 84 (footnote omitted) ("We have seen that to succeed in life, students must be exposed to demographic and ideological diversity; such exposure allows the students to succeed in diverse workplaces that are becoming increasingly common, become more effective employees, and earn higher salaries. Homeschooling denies children exposure to this diversity.").

Education Survey (using large random samples of high school graduates who had been educated in private schools or homeschools) indicates that homeschoolers are just as likely as public school children to have a close friend of a different race or ethnicity.[167] Likewise unfounded are Bartholet and Fineman and Shepherd's claims that homeschooled girls are being given a second-class education and taught to be subservient to men.[168] The NHES data showed no gender difference in religiously-conservative homeschooling parents' educational expectations for their children.[169] Based on his analysis of these large, nationally representative surveys, Sikkink concludes that

> Bartholet seems to take the "home" in homeschooling too seriously, as if their windows have prison bars. In actual practice, homeschoolers are 'organized for instruction' in complex networks with educational organizations, civic, religious, and cultural organizations, informal personal and virtual support groups, friendship circles, extended family, and so on.[170]

Bartholet and Fineman and Shepherd's claims regarding the failure of homeschooling to prepare children for democratic citizenship are likewise unsupported by the evidence. Based on the results of the 2011 and 2014 Cardus Education Survey, Sikkink and Skiles note:

> We might expect that the private and familial approach of education would fail to prepare students for effective participation in a democracy. But we don't find any evidence for this. As we have seen, religious homeschoolers believe that religion should be active in public life, rather than only kept within the private sphere. Even so, homeschoolers are more willing than public schoolers to extend freedom of speech to those who want to speak out against religion. And we don't find any difference in the extent that homeschoolers favor greater tolerance for non-Christian religions in American society. Relatedly, some might expect that religious homeschoolers would socialize students into more authoritarian orientations to public life. However, on one of the measures often used to capture authoritarian orientations, respect for authority, we don't find that homeschoolers are any more supportive than public schoolers are of the notion that one of the main problems in the US today is the lack of respect for authority. It seems that one of the strengths of homeschooling, which may be related to the counter-cultural

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167. Sikkink, *supra* note 165 ("When asked about four closest friends, about 37% of young adult homeschoolers in the CES mention someone of a different race or ethnicity—exactly the same as public schoolers.").

168. *See* Bartholet, *supra* note 4, at 12; Fineman & Shepherd, *supra* note 5, at 88.

169. *See* Sikkink, *supra* note 165 ("I do not find evidence that religiously conservative homeschoolers are opposed to higher education for their girls. Again, this is not surprising news, since sociology of religion scholars have long known that religious conservatives—along with everyone else—ignore their own scripts. Like evangelical Protestant home schoolers, religiously conservative homeschoolers are not walled off from dominant cultural trends.").

170. *Id.*

> minority status of homeschooling, is robust support for democratic principles of individual freedom and freedom of expression.[171]

Overall, Sikkink and Skiles find that homeschoolers' sense of themselves as "an embattled cultural minority somewhat alienated from dominant institutions and life trajectories appears to lead to stronger support for other cultural minorities as well as support for freedom of thought and expression."[172] As a result, they are "quite active in political life,"[173] and are just as likely as public school graduates to have voted in the 2016 presidential election or to vote in local elections.[174]

What about Bartholet's concern that homeschooling is incompatible with children's right to be protected from abuse and neglect? Undoubtedly, Bartholet's accounts of children whose parents were claiming to homeschool them while in fact subjecting them to serious abuse or neglect are tragic.[175] Yet these are rare, isolated instances.[176] We could find equally tragic accounts of children traumatized by bullying at school or by sexual abuse from teachers or coaches. In some cases, sending children to school means exposing them to gang violence or other serious physical safety risks, including risks to life itself.[177] But just as it would be unreasonable to shut down all schools because some children are bullied, some schools are unsafe, and some school officials take advantage of their position to abuse their students, it is likewise unreasonable to ban homeschooling because a few homeschooling parents (or parents who claim to be homeschooling) abuse or neglect their children.

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171. SIKKINK & SKILES, *supra* note 164, at 12.

172. *Id.* at 14.

173. *Id.*

174. *See* Sikkink, *supra* note 165.

175. *See* Bartholet, *supra* note 4, at 41–42.

176. *See contra* Balingit, *supra* note 14.

177. *See, e.g.*, *Fast Facts: School Crime*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/fastfacts/display.asp?id=49 (last visited on Dec. 4, 2021) (citations omitted) ("From July 1, 2017, through June 30, 2018, there were a total of fifty-six school-associated violent deaths in the United States, which included forty-six homicides, nine suicides, and one legal intervention death." Also, "In 2019, about five percent of students ages twelve to eighteen reported that they had been afraid of attack or harm at school during the school year, which is higher than the percentage of students (three percent) who reported that they had been afraid of attack or harm away from school during the school year."); *Teen Fatally Shot in Sterling, Virginia on Way to School*, NBC WASH. (Sept. 4, 2015, 7:42 AM), https://www.nbcwashington.com/news/local/shooting-reported-in-sterling-6-schools-on-lock-out-mode/55211/; *Michigan First-Grader Fatally Shot by Classmate*, CNN (March 1, 2000, 8:44 A.M.), https://web.archive.org/web/20080103013335/http:/archives.cnn.com/2000/US/02/29/school.shooting.04/; Laura Meckler and Valerie Strauss, *Back to School Has Brought Guns, Fighting and Acting Out*, WASH. POST (Oct. 26, 2021, 2:00 P.M.), https://www.washingtonpost.com/education/2021/10/26/schools-violence-teachers-guns-fights/; Emily Pierce, *As Students Return to School, So Does School Violence*, U.S. NEWS AND WORLD REP. (Nov. 17, 2021, 10:17 A.M.) https://www.usnews.com/education/k12/articles/as-students-return-to-school-so-does-school-violence;

Bartholet, as well as Fineman and Shepherd, criticize defenders of homeschooling rights like the Home Schooling Legal Defense Association ("HSLDA") for opposing what appear to be relatively minimal regulations on homeschooling aimed at preventing abuse or neglect.[178] While I have already argued that I believe reasonable regulations can be compatible with respect for parental rights in principle, it is important to note that opposition to such regulations is often a response to justified concerns that in practice they can lead to serious violations of parental rights that are highly disruptive to family life and harmful to both parents and children. For instance, both Bartholet and Fineman and Shepherd criticize the HSLDA for opposing bills that would restrict homeschooling rights for parents with a prior substantiated incidence of abuse or neglect on their record.[179] While at first glance opposition to such bills may indeed sound unreasonable, a deeper analysis reveals that the issue is much more complex than it initially seems. The problem is that, due to lack of due process rights, many loving and responsible parents may be wrongfully listed on a child abuse registry as a result of false or unreasonable accusations; some may not even know that they are on the list. In one case, for instance, a woman was placed on the list after accidentally splashing her 17-year-old daughter with hot coffee. She did not know that she had been placed on the list until several years later when applying for a volunteer job, and getting removed from the list required two years of litigation.[180] In another case, parents were placed on the child abuse registry after removing their special needs child from school to protect him from abuse by a school staff member, a problem that they had repeatedly reported to school administrators.[181] One mother was placed on her state's child abuse registry because, while dealing with her mother's death from cancer, she was late filing her quarterly homeschool report.[182] Even though she did eventually file the report, which showed that the children had been consistently homeschooled and were making good academic progress, the CPS investigator placed her on the registry for educational neglect.[183] Months of litigation were required before her name was finally removed.[184] Huntzinger summarizes the problems with the current child abuse registry system:

> While the intent to track maltreatment and protect children is noble, the implementation of central registries has caused undue harm to many individuals. Parents can find their names listed in an official

178. Bartholet, *supra* note 4, at 48–56; Fineman & Shepherd, *supra* note 5, at 66 (alterations in original) ("The HSLDA fights attempts by state authorities to impose 'even [the most] modest oversight' or regulation on homeschool parents.").

179. Bartholet, *supra* note 4, at 55; Fineman & Shepherd, *supra* note 5, at 66.

180. David Crary, *Flaws Found in State Child-Abuse Registries*, THE HOUR (Apr. 21, 2010), https://www.thehour.com/opinion/article/Flaws-found-in-state-child-abuse-registries-8296397.php.

181. CHARISSA HUNTZINGER, THE BLACKLIST: HOW CENTRAL REGISTRY REFORM CAN PROTECT KIDS AND PROMOTE PROSPERITY, TEX. PUB. POL. FOUND. 3 (May 2020), https://files.texaspolicy.com/uploads/2020/05/28093855/Huntzinger-Central-Registry.pdf

182. *Id.*

183. *Id.*

184. *Id.*

> government database of child abusers prior to or even without a court ruling that they actually committed the alleged maltreatment. Individuals in Texas who have been wrongly identified in the registry and want to challenge their inclusion face an uphill battle navigating a complex bureaucratic process that rarely provides them with the opportunity to have their case reviewed by a neutral arbiter. These flaws are far from benign consequences and create long-term social and economic hardships for those wrongfully listed, as well as for those whose contact with the child welfare system was a result of conditions of poverty.[185]

As already noted, my point here is not to argue that regulations on homeschooling are never justified. On the contrary, I have argued that reasonable regulations to promote compelling state interests like protecting children from abuse and ensuring that children receive an education that prepares them to be law-abiding and self-supporting adults can be compatible with respect for parental rights, if necessary for the achievement of a compelling state interest and narrowly tailored to that interest. Here, I am simply pointing out that regulations that might seem to meet these criteria in principle may in fact seriously violate parental rights in practice, leading to disruptive intrusions into the lives of loving families that can cause serious harms to both parents and children.[186] As noted by Martin Guggenheim, New York University law professor and former family court lawyer:

> The reckless destruction of American families in pursuit of the goal of protecting children is as serious a problem as the failure to protect children . . . . We need to understand that destroying the parent-child relationship is among the highest forms of state violence. It should be cabined and guarded like a nuclear weapon.[187]

In other words, while greater state oversight of the family and less deferential treatment of parents by state authorities may seem like a good idea when presented with tragic cases of abuse or neglect like those that Bartholet mentions, the truth is that although more zealous state oversight may prevent or

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185. HUNTZINGER, *supra* note 181, at 2.

186. Thus, contrary to the claims of Bartholet and Fineman and Shepherd, parental rights organizations' opposition to such regulations does not mean that they view parental rights as absolute and unlimited. When Bartholet criticizes parental rights advocates for "parental rights absolutism"—the view "that parents have, and should have, absolute power over the education of their children"—she is attacking a straw man. Bartholet, *supra* note 4, at 49; *see also* Fineman & Shepherd, *supra* note 5, at 65. Such groups defend parental rights as fundamental rights, not absolute rights, and believe that they ought to be respected as such by legislatures, child protection agencies, and courts. HSLDA's mission statement, which Bartholet herself quotes, reflects this stance clearly. Bartholet, *supra* note 4, at 44.

187. Larissa MacFarquhar, *When Should a Child Be Taken from His Parents?* THE NEW YORKER (July 31, 2017), https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents (examining the story of a family torn apart—with ruinous consequences for the lives of mother and children—after an angry grandmother called child protection services accusing her daughter of intentionally burning her granddaughter, even though she knew that the burn was an accident).

stop some cases of abuse, it will do so only at the cost of inflicting irreparable harm on a large number of families, especially poor and minority families who are less likely than affluent white families to be given the benefit of the doubt by child protection officials and judges.[188] Further, the constant threat that any number of normal childhood mishaps —falls, scrapes, burns, bruises—or even reasonable parenting practices like allowing one's children to play unsupervised in the yard or the neighborhood could lead to an investigation by child protection officials creates a climate of fear that in itself can undermine family intimacy and distort parental decision-making to the detriment of children.[189]

The defenders of parental rights whom Bartholet and Fineman and Shepherd caricature as parental rights absolutists are simply trying to protect children and families from these serious state-inflicted harms. It is ironic that parental rights critics like Bartholet, who worry that "the current homeschooling regime is based on a dangerous idea about parent rights—that those with enormous physical and other power over infants and children should be subject to virtually no check on that power,"[190] should so blithely presume that children will be safer if subject to the incomparably greater power of state officials who are complete strangers to the children whose lives are at the mercy of their judgments.[191]

It is also ironic that Bartholet's article attacking the right to homeschool should have been published in the spring of 2020, just as all public schools and many private schools were shut down due to the Covid-19 pandemic, thrusting many parents into a much more direct and active role in their children's education. Frustrated by the shortcomings of online education and the unwillingness of many public schools to return to in-person learning, an increasing number of parents turned to homeschooling. According to the U.S. census bureau, the percentage of U.S. households in which children were homeschooled doubled between spring and fall of 2020, rising from 5.4% to 11.1%.[192] Even more dramatic, there was a five-fold rise in homeschooling rates among Black individuals, from 3.3% in the spring to 16.1% in the fall.[193] Many families have found that, while challenging, homeschooling has been a positive experience.[194] Many parents note that their children are actually

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188. *See* Jessica McCrory Calarco, *'Free Range' Parenting's Unfair Double Standard*, ATL. (Apr. 3, 2018), https://www.theatlantic.com/family/archive/2018/04/free-range-parenting/557051/.

189. *See id.*

190. Bartholet, *supra* note 4, at 6.

191. *See supra* notes 17–20 and corresponding text.

192. See Casey Eggleston & Jason Fields, *Homeschooling on the Rise During COVID-19 Pandemic: Census Bureau's Household Pulse Survey Shows Significant Increase in Homeschooling Rates in Fall 2020*, U.S. CENSUS BUREAU (Mar. 22, 2021), https://www.census.gov/library/stories/2021/03/homeschooling-on-the-rise-during-covid-19-pandemic.html.

193. *See id.*

194. *See, e.g.*, Arianna Prothero & Christina A. Samuels, *Home Schooling Is Way Up with COVID-19. Will It Last?* EDUC. WEEK (Nov. 9, 2020), https://www.edweek.org/policy-politics/home-schooling-is-way-up-with-covid-19-will-it-last/2020/11; J.D. Tuccille, *Homeschoolers Triple in Number During the Pandemic*, REASON (Mar. 24, 2021, 7:00 AM),

happier, more engaged, and learning more, because there is more time and flexibility to tailor education to their children's unique needs and talents.[195] As a result, some say they want to continue homeschooling even after the pandemic ends, and in general, public opinion about homeschooling has become much more favorable.[196] It is also interesting that many public schools have still (as of spring 2021) not returned to full-time in-person schooling,[197] while 95% of private schools—which, unlike public schools, are directly accountable to the parents—have been offering in-person schooling since the fall, and of course homeschooled children have continued their education uninterrupted the entire time.[198] Thus, contrary to the arguments of Bartholet and Fineman and Shepherd, the experience of the pandemic highlights the fact that children are clearly much better served when education is in the hands of parents or of schools directly accountable to parents, rather than in the hands of the government.

CONCLUSION

In this article I have articulated an account of parental rights as based on the pre-political authority of parents, authority which flows from the very nature of the parent-child relationship and the weighty special obligations that parents have to protect and promote their children's well-being. This philosophical account is in line with the common law tradition and the Supreme Court's recognition of parental rights as fundamental in *Meyer* and *Pierce*. In general, respecting the fundamental rights of parents in law requires a deferential approach to parental decision-making in which fit parents are presumed to know better than the state what is in their children's best interests, and to be acting

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https://reason.com/2021/03/24/homeschoolers-triple-in-number-during-the-pandemic/; Emma Green, *The Pandemic Has Parents Fleeing from Schools—Maybe Forever*, THE ATLANTIC (Sept. 13, 2020), https://www.theatlantic.com/politics/archive/2020/09/homschooling-boom-pandemic/616303/.

195. *See* Eggleston & Fields, *supra* note 192.

196. *See* Mike McShane, *Opinions on Homeschooling Have Changed During the Pandemic*, FORBES (Mar. 9, 2021, 7:45 AM), https://www.forbes.com/sites/mikemcshane/2021/03/09/opinions-on-homeschooling-have-changed-during-the-pandemic/?sh=6e63fbcf4672.

197. *Monthly School Survey Dashboard*, INST. OF EDU. SCI., https://ies.ed.gov/schoolsurvey/ (last visited Sept. 7, 2021).

198. Erica Pandey, *Private Schools Pull Students Away From Public Schools*, AXIOS (Jan. 2, 2021), https://www.axios.com/private-schools-coronavirus-public-schools-d6aaf803-d458-4301-a3a7-71364b00a5b0.html ("Just 5% of private schools were virtual this fall, according to survey data from the National Association of Independent Schools, cited by CNBC. Compare that with the 62% of public schoolkids [sic] who started the fall on Zoom, per Burbio, which has been tracking public school re-opening plans."); *see also* Valerie Richardson, *Catholic Schools Undercut Teachers' Unions with Successful In-Person Reopenings*, WASH. TIMES (Apr. 1, 2021), https://www.washingtontimes.com/news/2021/apr/1/catholic-schools-undercut-teachers-unions-successf/; Daniel Henninger, *The Tragedy of the Schools*, WALL ST. J.: OP. (Feb. 3, 2021, 5:46 PM), https://www.wsj.com/articles/the-tragedy-of-the-schools-11612392369?st=vpkyuh28axopuc6&reflink=share_mobilewebshare.

with their child's welfare in mind, unless there is clear evidence to the contrary and the parents' actions constitute genuine abuse or neglect, non-ideologically defined. Specifically with regard to education, parental rights include the right to exemptions and accommodations in public schools when parents find activities or curricular elements objectionable, as well as the right to send one's children to private school or homeschool them, and the right to genuine school choice—which requires putting an end to government-run schools' monopoly on public educational funding through policies like voucher programs.

I have also defended my account of parental rights from critics who worry that robust protections for parental rights—or even the very notion of parental rights—threaten the rights and well-being of children. I have shown that these critics' arguments are fundamentally flawed, because they fail to recognize the pre-political origins of parental rights, falsely presume that parental rights are inherently in conflict with children's rights, and also—contrary to evidence and common sense—presume that the state is more likely than parents to know what is in the best interests of a child and to be motivated to promote the child's welfare. While no parent is perfect, and some parents are incompetent or even malicious, the vast majority of parents love their children and do their best—often at the cost of great personal sacrifice—to promote their children's well-being and prepare them for the future. Although more zealous state oversight of parenting and intrusion into family life may stop a few cases of abuse or neglect that would otherwise go undetected, it will only do so by inflicting irreparable harm on countless loving families and eroding the family intimacy and trust that is so important for children's welfare. Protecting parents' authority to raise their children in line with the dictates of their consciences is not only a matter of fundamental justice and constitutional rights but is also the best way to promote the well-being of children and the education of future citizens.