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## A Curious Parental Right

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# A CURIOUS PARENTAL RIGHT

Margaret Ryznar\*

## ABSTRACT

*The United States Supreme Court has not articulated the appropriate level of scrutiny for judicial review of interferences with the parents' care, custody, and control of their children, despite determining it to be constitutionally fundamental. While some observers have called for the selection of a level of scrutiny to prevent inconsistencies among the lower courts, the complexity of the parental right has made it difficult for courts to use one level of scrutiny in such cases. To accommodate this complexity, this Article begins to build a new framework for conceptualizing the parental right in a way that explains and justifies using more than one level of scrutiny in a consistent and predictable way, depending on the specific parental issue at stake.*

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## I. INTRODUCTION

THE right of parents to make decisions concerning the care, custody, and control of their children (hereinafter parental right) is deeply rooted and has been described by the U.S. Supreme Court as a fundamental right.<sup>1</sup> Despite lofty language in the case law aiming to protect this right,<sup>2</sup> and despite the U.S. Supreme Court's usual role of providing an applicable level of scrutiny,<sup>3</sup> the Court has not articulated a consistent level of scrutiny for judicial review of restrictions on the parental right.<sup>4</sup> It is unclear whether strict scrutiny would apply to such state interferences,<sup>5</sup> and various levels of scrutiny have been applied, depend-

1. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[ ] . . . to direct the education and upbringing of one's children."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) ("[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'") (footnote omitted) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

2. See *infra* Part II. "Parental autonomy is protected under the Constitution as a fundamental right." Sarah Abramowicz, *Beyond Family Law*, 63 CASE W. RES. L. REV. 293, 307 (2012). See also Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 73 (2011) ("The notion of parental autonomy is so deeply embedded in American society that courts have recognized a constitutionally protected interest in parents' right to raise children as they deem appropriate with minimal government interference.")

3. "[N]ormally, the Supreme Court must provide an applicable standard of review that governs its disposition of the case." Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087, 2116 (2002) [hereinafter *Epitaphios*].

4. Daniel E. Witte, Comment, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 187 (1996) ("highlight[ing] the disparity that some perceive between the expansive language higher courts have used to characterize constitutionally protected parental rights and the lack of deference many lower courts actually show when applying parental rights within specific fact settings"). Normally,

[w]hen the right infringed is "fundamental," the governmental regulation must be "narrowly tailored to serve a compelling state interest." Rights are fundamental when they are "implicit in the concept of ordered liberty," or "deeply rooted in this Nation's history and tradition." Where the claimed right is not fundamental, the governmental regulation need only be reasonably related to a legitimate state objective.

*Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460-61 (2d Cir. 1996) (citations omitted). The Parental Rights and Responsibilities Act of 1995, S. 984 (104th Congress), which was never enacted, would have codified the parental right and protected it from government interference without compelling justification. For background, see Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996).

5. "The Supreme Court, however, has never expressly indicated whether this 'parental right,' when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review." *Immediato*, 73 F.3d at 461. "One thing is clear: the majority of Justices past and present agree emphatically that the Due Process

ing on the specific parental issue at stake.<sup>6</sup> As a result, the lower courts, in addition to parents and states, have been uncertain about the strength and contours of the parental right for decades.<sup>7</sup>

The problems created by a lack of an articulated level of scrutiny are not merely academic,<sup>8</sup> as illustrated by *Troxel v. Granville*, wherein the parental care, custody, and control of children was reaffirmed without mention of a level of scrutiny.<sup>9</sup> After the U.S. Supreme Court struck down Washington state's third-party visitation statute, state legislators around the country rushed to rewrite their own grandparent visitation statutes, which were then challenged in state courts that did not have guidance on the appropriate level of scrutiny.<sup>10</sup> Ultimately, the U.S. Su-

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Clause of the Fourteenth Amendment guarantees parents a right to the care, custody, and control of their children. The clarity ends there. The Court has left open for debate the nature of the right, the appropriate standard of review, and which state interests allow for a decision against a parent's wishes for his or her child." Kristen H. Fowler, *Constitutional Challenges to Indiana's Third-Party Custody Statutes*, 82 IND. L.J. 499, 507 (2007) (footnote omitted); see also Nicole Thieneman Maddox, *Silencing Students' Cell Phones Beyond the Schoolhouse Gate: Do Public Schools' Cell Phone Confiscation and Retention Policies Violate Parents' Due Process Rights?*, 41 J.L. & EDUC. 261, 267 (2012) ("Thus, courts have not consistently applied strict scrutiny analysis to cases involving parental rights throughout the history of due process jurisprudence. Even after the Supreme Court's announcement of parents' rights to manage their children as fundamental, the question of the appropriate standard of review for a state's justified intrusion remains unclear. The Supreme Court has not announced a consistent standard to be applied in cases addressing this issue.") (footnotes omitted).

6. Most commonly, either strict scrutiny or rational basis review is applied in substantive due process cases. See Kelly A. Spencer, Note, *Sex Offenders and the City: Ban Orders, Freedom of Movement, and Doe v. City of Lafayette*, 36 U.C. DAVIS L. REV. 297, 302 (2002). However, the U.S. Supreme Court has also used other levels of scrutiny in such cases. *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 210, 210–11 (1992) [hereinafter *Leading Cases*]. See also *infra* Part II. This Article neither challenges nor defends applying the current framework of hierarchical tiers of judicial scrutiny to parental right cases, but works within it.

7. "American common law gives parents the primary right to govern their children's activity, but specific issues of statewide importance are resolved by statute." Sy Moskowitz, *American Youth in the Workplace: Legal Aberration, Failed Social Policy*, 67 ALB. L. REV. 1071, 1081 (2004) (footnote omitted).

8. Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1586 (2017) ("Scholars have long noted that the level of scrutiny is often dispositive in equal protection cases. This is particularly true in gay rights litigation.").

9. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

10. See Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927, 929 (2009) (reviewing state cases triggered by *Troxel*). For example, Indiana Code 31-17-5-1 on grandparent visitation survived constitutional challenge in *Crafton v. Gibson*, 752 N.E.2d 78, 91 (Ind. Ct. App. 2001) (declining to apply strict scrutiny). Other courts used different levels of scrutiny in reviewing their state's grandparent visitation statute. See, e.g., *In re L.B.S. v. L.M.S.*, 826 So. 2d 178, 184 (Ala. Civ. App. 2002) (applying strict scrutiny in the grandparent visitation context); *Jackson v. Tangreen*, 18 P.3d 100, 106 (Ariz. Ct. App. 2000) (declining to apply strict scrutiny because "only Justice Thomas would have applied strict scrutiny to the statute in *Troxel*" and "*Troxel* dealt with grandparents' visitation imposed by a court on the natural mother of a child born out of wedlock who wanted to restrict it but not deny it"); *Sightes v. Barker*, 684 N.E.2d 224, 233 (Ind. Ct. App. 1997) (finding the Grandparent Visitation Act constitutional even under strict scrutiny); *In re Guardianship of Blair*, No. 01-1565, 2003 WL 182981, at \*3–4 (Iowa Ct. App. Jan. 29, 2003) (upholding a grandparent visitation law despite applying strict scrutiny); *Blixt v. Blixt*, 774 N.E.2d 1052, 1062 (Mass. 2002) (applying strict scrutiny to grandparent visitation statute); *Rideout v. Riendeau*, 761 A.2d 291, 300

preme Court did not grant certiorari to clarify grandparent visitation, leaving much uncertainty and litigation at the lower courts.<sup>11</sup> The result was that *Troxel* “led to an avalanche of state court litigation over the constitutionality of child custody and visitation laws,”<sup>12</sup> yielding unpredictability and inconsistency in this area of family law.<sup>13</sup>

A uniform or predictable level of scrutiny in parental right cases will not appear without being addressed by the U.S. Supreme Court. On the contrary, selecting a level of scrutiny grows more complicated as courts encounter a wider range of parental right cases and as states regulate more on issues implicating parents.<sup>14</sup> Given that one role of the Supreme Court is to clarify the law,<sup>15</sup> the Court should not get accustomed to leaving the levels of scrutiny in family law cases unclear.<sup>16</sup>

Other constitutional and family law issues also lack guidance on the appropriate level of scrutiny from the U.S. Supreme Court.<sup>17</sup> For example, the Court’s omission of a level of scrutiny in *Obergefell* left observers wondering what level of scrutiny applies to state interferences with same-

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(Me. 2000) (analyzing grandparent visitation act using strict scrutiny); *Fausey v. Hiller*, 851 A.2d 193, 199 (Pa. Super. Ct. 2004) (upholding a grandparent visitation statute under strict scrutiny).

11. “While many scholars have offered suggestions in the past to repair the problems created in the *Troxel* decision, no one has proposed a uniform solution—a law which all states may use as guidance in redrafting their own third-party visitation statutes.” Garza, *supra* note 10, at 929.

12. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 864 n.324 (2006) [hereinafter *Fatal in Theory*]. “Parental rights cases typically arise in state courts. . . . In scores of decisions the state courts have upheld laws despite applying strict scrutiny.” *Id.*

13. Other commentators have similarly expressed concern about the lack of guidance for the “lower courts adjudicating and litigants advancing substantive due process claims.” *Leading Cases*, *supra* note 6, at 211. “[T]he Court has neither adhered in practice to its formal framework for analyzing substantive due process claims nor applied a coherent standard of scrutiny in its departures.” *Id.*

14. *See infra* Part III.

15. “One of the Supreme Court’s roles is to interpret the Constitution and develop constitutional law, rules, tests, and doctrines that will ensure its implementation.” Maureen N. Armour, *Federal Courts as Constitutional Laboratories: The Rat’s Point of View*, 57 DRAKE L. REV. 135, 149 (2008).

16. “[N]ormally, the Supreme Court must provide an applicable standard of review that governs its disposition of the case.” Krotoszynski, *Epitaphios*, *supra* note 3, at 2116. *But see* Ronald J. Krotoszynski, Jr., *Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 1004 n.405 (2006) [hereinafter *Dumbo’s Feather*] (noting the cases in which “the [U.S.] Supreme Court has been less emphatic about the appropriate standard of review”); MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES §3.05 (4th ed. 2017-2 supp.) (“The *Troxel* Court’s reluctance to articulate a definitive standard of judicial review, and the plurality’s decision to limit its decision to holding Washington’s visitation policy unconstitutional only as applied rather than facially, are somewhat understandable. After all, the constitutional right of parents to custody, care, and control of their children clashes with the notion that family law is overwhelmingly a matter of state concern and governed by state law rather than constitutional law.”).

17. For example, the key Second Amendment gun possession cases have avoided specifying a level of scrutiny, but have noted several specific contexts in which the right can be limited or overridden. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

sex marriage and other family law rights.<sup>18</sup> This is an issue not only for such recent cases, but also for the oldest, such as those related to the parental right to the care, custody, and control of children.<sup>19</sup>

There may be various reasons for the lack of guidance on the level of scrutiny in parental right cases. They range from the Supreme Court's reluctance to create or expand rights under the Due Process Clause, to an intentional decision of the Court to leave the scope of the fundamental right of parenting undefined, to the doctrine of abstention.<sup>20</sup>

This Article focuses on another potential reason for the lack of a level of scrutiny not sufficiently explored in the literature—the difficulty of taking a narrow approach to a broad question. In other words, the reason that nearly one hundred years have passed without a level of scrutiny may be the complexity of the right to the care, custody, and control of a child.

Many features of the parental right make it uniquely complex. It is difficult to set one level of scrutiny for different issues that variously burden the essence of parenthood, ranging from student uniforms in public schools to removal of children from their home.<sup>21</sup> Additionally, the parental right spans both the private and public arenas, with parenting roles in the home and in the public arena, such as schools. The parental right might also conflict with the child's best interests, or those of other children, such as in the vaccination context.<sup>22</sup> Finally, the U.S. Supreme Court often considers the parental right in conjunction with other constitutional rights, complicating the context.<sup>23</sup>

This high level of complexity for a constitutional right makes a single and static rule or approach difficult, which is seen in the diverse variety of approaches used by the lower courts.<sup>24</sup> However, various levels of scru-

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18. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). “While *Obergefell* made no reference to standard of review, did it nevertheless plant the seeds for heightening scrutiny for purposes of equal protection analysis at a later point? . . . These kinds of basic doctrinal questions about how *Obergefell* will play out in future cases are intensified by a striking fact: the majority opinion was written by the same justice who wrote every other Fourteenth Amendment opinion on lesbian and gay rights.” Jane S. Schacter, *Obergefell's Audiences*, 77 OHIO ST. L.J. 1011, 1016 (2016).

19. Garza, *supra* note 10, at 927 (noting that the parental right is the oldest recognized fundamental right).

20. See *infra* Part III.A.

21. See *infra* Part II.

22. See *Reno v. Flores*, 507 U.S. 292, 304 (1993) (“So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.”); see also Margaret Ryznar, Note, *Adult Rights as the Achilles' Heel of the Best Interests Standard: Lessons in Family Law from Across the Pond*, 82 NOTRE DAME L. REV. 1649, 1659 (2007).

23. See, e.g., Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & FAM. STUD. 71, 73 (2006) (“Notwithstanding *Meyer's* reputation as a parental rights case, in this article I demonstrate that, in fact, the use of *Meyer* in support of a substantive due process liberty right of parents qua parents is sporadic and often is joined with other constitutional claims.”); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (considering free exercise and the parental right).

24. See *infra* Part II.

tiny have been used in parental right cases<sup>25</sup> without much method, logic, or reason.<sup>26</sup> This Article begins to establish a framework through which to select an appropriate level of scrutiny for state interferences with the parental right.<sup>27</sup>

This Article proposes to do so through two models of conceptualizing the parental right. The first model is a sliding scale, which adjusts the level of scrutiny depending on the issue's closeness to the core of parenthood. The second model is the bundle of rights, which would assign a particular level of scrutiny to each right in the bundle. While the sliding scale model has the virtue of relative flexibility and similarity to the current approach when compared to the bundle of rights model, both require looking at the different functions of parenthood, defining them, and taking a nuanced approach to setting the appropriate level of scrutiny, which is dynamic and changes according to the parental issue at stake.

Utilizing the resulting framework will result in more predictability and consistency in selecting a level of scrutiny in parental right cases, as well as judicial efficiency.<sup>28</sup> Furthermore, a formal framework would aim to better protect the parental right as compared to the current lack of consistency in selecting a level of scrutiny, which may fail to protect the constitutional right of parents.<sup>29</sup> Finally, such a framework is consistent with previous constitutional law proposals, such as Justice Stephen Breyer's interest-balancing approach<sup>30</sup> and Justice Thurgood Marshall's sliding scale approach to equal protection.<sup>31</sup> The parental right is uniquely well-

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25. "Constitutional adjudication through one or more levels, or hierarchical tiers, of judicial scrutiny is entirely familiar. For example, one or more varieties of tiered scrutiny typically appear in adjudication involving equal protection, freedom of speech, the free exercise of religion, substantive due process, the Second Amendment, and even in adjudicating the exercise of enumerated congressional powers." R. George Wright, *What If All the Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165, 165–66 (2014) (footnotes omitted).

26. See *infra* Part II.

27. John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 760 (2017) (noting arbitrary decision-making and Justice Scalia's position that "more 'general traditions'—such as parental or family rights—'provide[d] such imprecise guidance, they [would] permit judges to dictate rather than discern the society's views.") (alterations in original) (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989)).

28. See, e.g., Edgardo Buscaglia & Thomas Ulen, *A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America*, 17 INT'L REV. L. & ECON. 275, 282 (1997) (measuring judicial efficiency as case "clearance rates and times-to-disposition").

29. For example, courts can arbitrarily decide to exclude certain issues from the parental right, and they do. See *infra* Part II, notes 65–67, 77 and accompanying text. "If a court determines that a parent's rights do not encompass a particular concern, the standard of review it would have applied to a violation of such rights is irrelevant." Eric A. DeGross, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years*, 38 J.L. & EDUC. 83, 103 (2009).

30. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting).

31. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 460 (1985) (Marshall, J., concurring in part and dissenting in part) ("I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'") (citations omitted).

situated for these types of flexible approaches that change based on the parental issue at stake.

This Article begins developing the framework for selecting a level of scrutiny for judicial review in parental right cases. Part II starts by exploring the U.S. Supreme Court's rulings on the parental right and the lower courts' interpretations of it, highlighting the confusion caused by the lack of a consistent level of scrutiny. Part III explores two new ways of conceptualizing the parental right, both of which explain and justify using different levels of scrutiny by debundling the parental right into its component parts. This Part concludes by offering a framework through which to select the appropriate level of scrutiny in parental right cases, which will have the benefit of introducing consistency and predictability to this area of family law.

## II. CURRENT LEGAL BACKGROUND

The law on the parental right to the care, custody, and control of a child has developed over decades. The language from the U.S. Supreme Court is clear on protecting a parent's right to the care, custody, and control of a child; but without an articulated level of scrutiny, the lower courts are not cohesive.<sup>32</sup>

### A. U.S. SUPREME COURT LEGAL FRAMEWORK

The parental right has a long history in the case law of the U.S. Supreme Court, with the Court declining to select a level of scrutiny despite many opportunities to do so.<sup>33</sup> Thus, the Court's consideration of the parental right on many occasions has not yielded a consistent level of scrutiny or a consistent approach to selecting the level of scrutiny.

Some of the U.S. Supreme Court's jurisprudence predates the current constitutional analytic framework of the various levels of scrutiny,<sup>34</sup> but a recent Court case highlights the problem created by the lack of a level of scrutiny in parental right cases since then. In *Troxel*, the paternal grandparents of children wanted more significant visitation than the mother allowed.<sup>35</sup> The lower court granted such visitation under a Washington statute that allowed the petition for visitation with a child by anyone at any time. The U.S. Supreme Court determined that the parental right prevents a third party from being able to petition for visitation at any time, resting its reasoning on the parent's right to the care, custody, and control of children as a liberty interest under the Fourteenth Amendment

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32. This is also seen in other constitutional areas left without an articulated level of scrutiny, such as gun possession cases. *See, e.g.*, Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 737 (2012); *supra* note 18.

33. *See infra* Part II.A.

34. DeGross, *supra* note 29, at 100–101.

35. *Troxel v. Granville*, 530 U.S. 57, 60 (2000); *see supra* Part I.

to the U.S. Constitution.<sup>36</sup>

The language of the *Troxel* plurality established the importance of this parental right, but failed to articulate a level of scrutiny.<sup>37</sup> There was not even a majority opinion to clarify the approach to the parental right, only a plurality.<sup>38</sup> Other ambiguities in the decision resulted in unclear mandates to the state legislatures and to the courts reviewing post-*Troxel* statutes.<sup>39</sup>

The concurring and dissenting opinions in *Troxel* highlighted the ensuing disagreement on the appropriate level of scrutiny in cases on the parent's care, custody, and control of a child. In his short concurrence, Justice Thomas not only wrote in favor of articulating a level of scrutiny, but also suggested strict scrutiny: "I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. . . . I would apply strict scrutiny to infringements of fundamental rights."<sup>40</sup>

Meanwhile, in his dissent, Justice Scalia noted that "[o]nly three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since

36. *Troxel*, 530 U.S. at 65–66 ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.' Two years later, in *Pierce v. Society of Sisters*, we again held that the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.' We explained in *Pierce* that '[t]he 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.' We returned to the subject in *Prince v. Massachusetts*, and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'") (citations omitted).

37. *See id.* *See also* JEFFREY SHULMAN, *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD* 126 (2014); Kristina Thomas Whiteaker, Note, *West Virginia Takes Refuge in Troxel's Safe Harbor: State ex rel. Brandon L. v. Moats*, 105 W. VA. L. REV. 547, 556 (2003).

38. "[A] plurality, rather than a majority opinion would be another measure of the strength of reasoning." Lee Epstein, William M. Landes & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1139 n.122 (2015).

39. *See supra* Part I.

40. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring). "Although Justice Thomas would apply a strict scrutiny standard of review to infringements of a parent's fundamental right, the rest of the Court was notably silent on this issue." Daniel R. Victor & Keri L. Middle-ditch, *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*, 22 J. AM. ACAD. MATRIM. LAW. 391, 401 n.33 (2009). *See also Troxel*, 530 U.S. at 65 (plurality opinion) (explaining "heightened protection [for] . . . certain fundamental rights and liberty interests" before describing the parental interest in the care, custody, and control of children as a "fundamental liberty interest").

been repudiated.”<sup>41</sup> He concluded that “the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection,”<sup>42</sup> but none of them offered a level of scrutiny for the substantive due process right that parents enjoy.

*Meyer v. Nebraska* stood for the proposition that there is a substantive constitutional right of parents to direct the upbringing of their children.<sup>43</sup> At issue in the case was a Nebraska law enacted after World War I that prevented the teaching of any modern language other than English to any child who had not successfully passed the eighth grade.<sup>44</sup> Under the law, a teacher was convicted for teaching German to a ten-year-old child in school.

The U.S. Supreme Court struck down the Nebraska law on substantive due process grounds.<sup>45</sup> The Court determined that the property element in the Fourteenth Amendment encompassed the teacher’s right to earn a living, and the liberty interest in the Fourteenth Amendment included the right of parents to engage him to instruct their children. Specifically, the liberty interest included the right of parents to control the education of their children. The Court concluded that the law did not rationally relate to the state’s objectives. This is the very foundation for expanding the understanding of the Fourteenth Amendment and for applying it to family law issues.

Meanwhile, at issue in *Pierce v. Society of Sisters*<sup>46</sup> was the decision of Oregon voters that all students between eight and sixteen years of age

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41. *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) (footnote omitted). Justice Scalia cites *Meyer v. Nebraska*, 262 U.S. 390, 391, 401 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972).

42. *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) (“A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.”). Nonetheless, the *Troxel* plurality noted, “[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Id.* at 66 (plurality opinion) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting “the interest of a parent in the companionship, care, custody, and management of his or her children”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); and *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”)).

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

44. “One of the most remarkable things about the Supreme Court’s decisions concerning free speech in schools is how much each of the cases has reflected important issues and trends of its day. Each case is like a time capsule capturing something significant about the era in which it arose. Fear of radical foreign influences during the Red Scare following the first World War led to *Meyer v. Nebraska*, where the Court struck down a Nebraska law prohibiting schools from teaching foreign languages to children until after the eighth grade.” Allen Rostron, *Intellectual Seriousness and the First Amendment’s Protection of Free Speech for Students*, 81 UMKC L. REV. 635, 636–37 (2013) (footnote omitted).

45. *Meyer*, 262 U.S. at 403.

46. *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925).

would be required to attend public schools only, not private ones, in order to promote a common American culture following World War I.<sup>47</sup> The U.S. Supreme Court struck down this state law on substantive due process grounds.<sup>48</sup> Although the decision protects the schools' economic rights as part of the property element in the Due Process Clause, its language also provides a foundation for a rule that presumptively keeps the state out of some family choices. The Court additionally emphasized the right of parents to direct the upbringing and education of the children under their control, concluding that the law did not rationally relate to the state's objectives.<sup>49</sup> The Court interpreted the liberty protected by the Due Process Clause to encompass parental autonomy to rear a child as the parent sees fit.<sup>50</sup> Thus, this case served as the foundation of the constitutional right of parental autonomy.

Finally, in *Wisconsin v. Yoder*, the U.S. Supreme Court considered the refusal of several Amish parents to send their children to public school after the eighth grade despite a Wisconsin law requiring all children to attend public school until the age of sixteen.<sup>51</sup> The parents argued that high school attendance was contrary to their religious beliefs, and they won in the U.S. Supreme Court.<sup>52</sup>

In the case, the Supreme Court wrote in lofty language about the parental right, noting:

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.<sup>53</sup>

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47. *Id.* at 530.

48. *Id.* at 534–35.

49. *Id.*

50. *Id.* at 535.

51. *Wisconsin v. Yoder*, 406 U.S. 205, 207–08 (1972).

52. *Id.* at 209, 234.

53. *Id.* at 232. The Court added:

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.

*Id.* at 233 (citation omitted) (internal quotation marks omitted). However, in his concurrence, Justice White wrote:

*Pierce v. Society of Sisters* lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in *Pierce*, both the parochial and military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not pre-empt the educational process by requiring children to attend public schools. . . . A

The Supreme Court determined that “[w]hen balancing the free exercise claims of the parents against the state’s interest, courts must apply heightened scrutiny.”<sup>54</sup> As to the “fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children . . . [t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.”<sup>55</sup>

In light of this precedent, the Due Process Clause of the Fourteenth Amendment protects parents in making decisions regarding the care, custody, and control of their children. Additional U.S. Supreme Court cases continued to use this language as well.<sup>56</sup> However, the lack of a level of scrutiny in such cases has been confusing the lower courts for years, resulting in their use of various levels of scrutiny when reviewing state interferences with the parental right.<sup>57</sup>

## B. LOWER COURT DECISIONS

Due to the U.S. Supreme Court’s lack of an articulated level of scrutiny, the lower courts have also been inconsistent when considering parental right cases.<sup>58</sup> The wide range of parental matters at stake also

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State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past.

*Id.* at 239–40 (White, J., concurring) (citation omitted).

54. Jennifer Ann Drobac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1615 (1998).

55. *Yoder*, 406 U.S. at 232.

56. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The rights to conceive and to raise one’s children have been deemed ‘essential,’ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), ‘basic civil rights of man,’ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and ‘[r]ights far more precious . . . than property rights,’ *May v. Anderson*, 345 U.S. 528, 533 (1953).”); *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) (“This insistence that the asserted liberty interest be rooted in history and tradition is evident, as elsewhere, in our cases according constitutional protection to certain parental rights.”).

57. *See, e.g.*, John M. Lewis, *Re-Evaluating Grandparental Visitation in North Carolina in Light of Troxel v. Granville*, 23 CAMPBELL L. REV. 249, 254 n.39 (2001) (noting two state supreme courts’ interpretations of the parental right). “Consequently, federal circuits have split regarding the boundaries of parental rights, with some circuits adopting the traditional view of the *Meyer-Pierce* right and others finding that parental rights terminate upon the choice to send a child to a public school rather than a private school.” Lauren Vanga, Comment, *Ending Bullying at a Price?: Why Social Conservatives Fear Legislatively Mandated LGBT Indoctrination in Schools*, 17 CHAP. L. REV. 659, 669 (2014).

58. “In the absence of clear guidance from the Supreme Court, the lower federal and state courts inevitably have split on the matter. The Third and Sixth Circuit Courts of Appeals, as well as state courts in Washington, Ohio, Massachusetts and New York, have expressly classified parental interests as fundamental or have applied strict scrutiny in reviewing alleged violations. Other courts, including the Michigan Supreme Court, have explicitly stated that ‘parents *do not* have a constitutional right [to direct their children’s education] requiring strict scrutiny.’ Somewhere in the middle, perhaps, is the Fifth Circuit Court of Appeals, which recently affirmed parental rights as fundamental but applied a rational basis test to the question of mandatory school uniforms. Similarly, the United States District Court for the District of New Hampshire appears to have employed a type of relaxed strict scrutiny in denying plaintiffs’ right to have their children removed from

contributes to divergent approaches.<sup>59</sup> The result is that the lower courts use various levels of scrutiny when considering state interferences with the parental right.<sup>60</sup> The courts have also carved out certain issues from the parental right without offering a method for doing so.

There have been many instances of the courts using rational basis in these cases. For example, the Second Circuit has applied rational basis in several instances. In one case, a public high school student and his parents brought an action against the school district alleging that its mandatory community service program violated their due process rights.<sup>61</sup> According to the court, “[t]he Supreme Court . . . has never expressly indicated whether this ‘parental right,’ when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review. Our reading of the appropriate caselaw convinces us that rational basis review is appropriate.”<sup>62</sup> In so concluding, the Second Circuit relied on several decisions from other circuits applying rational basis review in cases involving parental control of a child. The court determined that since the program was rationally related to the legitimate state interest of education, it was constitutionally valid.

In another such case, the Second Circuit defined the parental right as excluding the parental choices at issue.<sup>63</sup> In the case, the father argued that “his constitutional right to direct the upbringing and education of his child require[d] the [public school] . . . to excuse his minor son . . . from attending health education classes.”<sup>64</sup> Citing *Troxel*, the father argued that his Fourteenth Amendment fundamental liberty interest had been violated and thus strict scrutiny was the proper level of scrutiny. The Second Circuit rejected his argument and applied rational basis review to uphold the school’s curriculum. It reasoned that the father lacked a fundamental right to tell public schools what to teach and, based on its previous jurisprudence, concluded that rational basis review was appropriate because the father had attempted to exempt his child from an educational requirement: “*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught.”<sup>65</sup> Thus, the Second Circuit narrowly interpreted the parental right to exclude the parental issue at stake.

The First Circuit similarly distinguished *Troxel* from the facts before it in *Parker v. Hurley*.<sup>66</sup> Specifically, “[t]he First Circuit narrowly defined

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activities in the public schools that offended their religion.” DeGross, *supra* note 29, at 101–02 (alterations and emphasis in original) (footnotes omitted).

59. See *supra* Part II.B.

60. *Id.*

61. *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 457 (2d Cir. 1996).

62. *Id.* at 461.

63. *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003).

64. *Id.* at 135.

65. *Id.* at 141.

66. *Parker v. Hurley*, 514 F.3d 87, 101 (1st Cir. 2013). Charles J. Russo, “*The Child is Not the Mere Creature of the State: Controversy Over Teaching About Same-Sex Marriage*

the parents' due process rights with regard to their children's education"<sup>67</sup> so as to evade implicating the parental right and considering strict scrutiny.

Meanwhile, in the Fourth Circuit, students and parents brought an action challenging a school district's mandatory community service program.<sup>68</sup> The Fourth Circuit held that although the *Meyer* and *Pierce* decisions used the language of rational basis review, the two decisions alone were not dispositive, as they did not use the modern framework of scrutiny. However, the Fourth Circuit explained that the line of cases beginning with *Meyer* up to the Supreme Court's 1976 decision in *Runyon* consistently held that reasonable regulation by the state was permissible even when conflicting with the parental liberty interest. The court equated this language to rational basis review and held that the school district had a legitimate interest in teaching students the value of service.<sup>69</sup>

The Fifth Circuit also applied rational basis review to a school's mandatory uniform policy.<sup>70</sup> The parents argued that the policy violated their fundamental right to control their children's education and that strict scrutiny was the appropriate level of scrutiny. The Fifth Circuit rejected the parents' argument and applied rational basis review to uphold the statute, reasoning that *Troxel* did not cover a school uniform policy as the "parental right [is] not absolute in the public school context and can be subject to reasonable regulation." Citing *Meyer* and *Pierce*, the Fifth Circuit further reasoned that its decision "follow[ed] almost eighty years of precedent analyzing [the] parental right[ ] in the context of public education under a rational-basis standard."<sup>71</sup>

The Sixth Circuit applied rational basis review when the father of a middle school student challenged the school's dress code as a violation of his Fourteenth Amendment due process right to control the education of

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*in Public Schools*, 232 W. ED. L. REP. 1, 8 (2008) ("As to the parents' due process and free exercise claims, the court rejected their reliance on the Supreme Court's judgment in *Troxel v. Granville (Troxel)* in defense of their right 'to make decisions concerning the care, custody, and control of their children.' The First Circuit distinguished the plurality in *Troxel* on the bases that the Supreme Court's analysis dealt with cases involving child custody and the fundamental control of the education of their children as in *Yoder*. Additionally, the court interpreted *Troxel* as not addressing the standard of review in due process cases."). See also Timothy Brandon Waddell, Note, *Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Re-Regulation of Homeschooling*, 63 VAND. L. REV. 541, 573 (2010) ("In defining the scope of the parental due process right to direct the education of one's children to exclude homeschooling decisions or in applying a standard of review different than that normally applied to violations of fundamental rights, courts have taken several doctrinally troubling steps.").

67. Amy Lai, *Tango or More? From California's Lesson 9 to the Constitutionality of a Gay-Friendly Curriculum in Public Elementary Schools*, 17 MICH. J. GENDER & L. 315, 321 (2011) ("The First Circuit narrowly defined the parents' due process rights with regard to their children's education.").

68. *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 176 (4th Cir. 1996).

69. *Id.* at 179.

70. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001).

71. *Id.* at 289.

his child.<sup>72</sup> In rejecting the father's claim, the Sixth Circuit held that "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child" as these issues are committed to the control of state and local authorities. Furthermore, the court concluded that the father fell far short of showing that the dress code failed to satisfy rational basis review.<sup>73</sup>

In the Seventh Circuit, a private religious school brought an action challenging a high school association's bylaw that made a transferring student eligible for athletics only if the transfer was from a private to a public school.<sup>74</sup> The Seventh Circuit rejected the school's argument that the transfer rule burdened the fundamental right of parents to direct the education of their children. The court explained that rational basis review, rather than strict scrutiny, was the appropriate level of scrutiny and upheld the transfer policy.<sup>75</sup>

In the Ninth Circuit, parents "alleged . . . that the school district violated their fundamental right 'to control the upbringing of their children' . . . by administering a psychological assessment questionnaire containing several questions that referred to subjects of a sexual nature."<sup>76</sup> The Ninth Circuit rejected the parents' argument and held that although the Fourteenth Amendment Due Process Clause protected their right to control their children's upbringing, it did not include the right to direct how a public school teaches their child. Thus, rational basis review was appropriate.<sup>77</sup> Once again, to avoid any heightened review, a court excluded the parental issue in the case from the parental right.

The district courts have similarly often applied rational basis review when considering state restrictions on the parental right. For example, the parents of middle school students challenged the validity of a school policy requiring students to wear uniforms.<sup>78</sup> The federal district court held that the parents did not have a fundamental right to direct the dress code or uniform policy at the school and that rational basis review was appropriate. To support its decision, the court reasoned that the policy was rationally related to a legitimate government purpose in the school's effort to improve student discipline, academic performance, and gang-related activity.<sup>79</sup>

Federal lower courts have also discussed applying intermediate scrutiny to infringements on the parental right. For example, in one case, a group of parents sought to enjoin enforcement of a juvenile curfew law.<sup>80</sup> The

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72. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 396 (6th Cir. 2005).

73. *Id.*

74. *Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d 671, 672–73 (7th Cir. 1987).

75. *Id.* at 674.

76. *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1188 (9th Cir. 2006) (per curiam).

77. *Id.*

78. *Derry v. Marion Cmty. Sch.*, 790 F. Supp. 2d 839, 842 (N.D. Ind. 2008).

79. *Id.* at 851.

80. *Hutchins v. District of Columbia*, 188 F.3d 531, 535 (D.C. Cir. 1999) (en banc). See also *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998), for another cur-

court explained that the fundamental parental right focuses on the parents' control of the home and formal education of their children, but does not include a parent's ability to unilaterally determine when and if children will be on the streets, especially at night. According to the court, even if the right involved was fundamental in nature, the appropriate level of scrutiny was intermediate.<sup>81</sup>

In another case, parents challenged a local ordinance that required a license for door-to-door solicitation of donations and prohibited those under sixteen years old from any such solicitation without being accompanied by a parent or legal guardian, arguing that it violated their Fourteenth Amendment right to the care, custody, and control of their children.<sup>82</sup> Citing *Troxel*, *Meyer*, and *Pierce*, the court recognized that parents have a fundamental right to the care, custody, and control of their children. Given the ordinance's restriction on the parents' right to allow their children to move freely at night, the court reasoned that intermediate scrutiny was proper, but the constitutionality of the ordinance could not be determined at that time.

In a few cases, however, federal courts have applied strict scrutiny to infringements on the parental right. For example, in one case, parents argued that the state statute mandating that students recite the Pledge of Allegiance or the national anthem each morning violated their Fourteenth Amendment rights.<sup>83</sup> The court agreed with the parents and applied strict scrutiny in holding that the statute was unconstitutional. Citing *Meyer*, *Pierce*, and *Troxel*, the court reasoned that parents had a fundamental liberty interest in directing the upbringing and care of their children.<sup>84</sup> Following Justice Thomas's concurrence in *Troxel*, the court determined that strict scrutiny was the proper level of scrutiny given the fundamental right at issue.

In another case, the Ninth Circuit considered a curfew.<sup>85</sup> The court addressed the parental right, stating that

[t]he right to rear children without undue governmental interference is a fundamental component of due process. Substantive due process under the Fourteenth Amendment "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what

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few case in which the court rejected the parents' fundamental right argument under *Yoder*, *Stanley*, and *Meyer*, but settled on intermediate scrutiny.

81. *Hutchins*, 188 F.3d at 531.

82. *New York Youth Club v. Town of Smithtown*, 867 F. Supp. 2d 328, 332 (E.D.N.Y. 2012).

83. *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616 (E.D. Pa. 2003), *aff'd in part sub nom.* *Circle Sch. v. Pappert*, 381 F.3d 172 (3d Cir. 2004). However, the Third Circuit declined to address the Fourteenth Amendment issue in its decision in *Circle Sch. v. Pappert*, 381 F.3d 172, 183 (3d Cir. 2004).

84. "Subsequently, courts around the country, including the courts of the states surveyed here, have cited *Troxel* for the proposition first set forth in *Meyer v. Nebraska* over eighty years ago: Parents have a fundamental right to control the care and custody of their children." Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL'Y 1, 9 (2006).

85. *See Nunez v. City of San Diego*, 114 F.3d 935, 938 (9th Cir. 1997).

process is provided, unless the infringement is narrowly tailored to serve a compelling government interest.”<sup>86</sup>

Thus, the lower courts have differed in their approaches in the absence of guidance from the U.S. Supreme Court. The level of scrutiny applied by the lower courts links to their understanding of the parental right, which differs across courts. They have also addressed various parenting issues in their cases, which contributes to the differing levels of scrutiny. On occasion, they have even rejected that the parental right encompassed a particular parental issue, without much explanation.

To increase consistency among the lower courts, some observers have urged the U.S. Supreme Court to simply state a level of scrutiny. Yet, there has been no agreement about which level is appropriate, and various levels have been used in state interferences with the parental right. There is a way, however, to explain and justify the current use of different levels of scrutiny for the parental right while still clarifying the law to make it more predictable and consistent.

### III. A NEW FRAMEWORK FOR SELECTING THE LEVEL OF SCRUTINY

There may be various reasons for the lack of a consistent level of scrutiny in parental right cases, but an undertheorized one is that the parental right is too complex and spans too many different issues that variously burden the essence of parenthood to have one level of scrutiny. If the complexity of the parental right is the obstacle to articulating a single level of scrutiny in parental right cases,<sup>87</sup> this Article proposes two new models through which to view the parental right in order to facilitate guidance on the appropriate level of scrutiny, which can be dynamic and change according to the parental issue at stake. The first is to use a sliding scale to determine the level of scrutiny based on the burden of the challenged state interference on the essence of parenthood. The second is to break down the parental right into its component parts and select a nuanced level of scrutiny for each depending on the weight of the parental interest involved.

#### A. LACK OF A CONSISTENT LEVEL OF SCRUTINY

There may be several different reasons for the lack of a consistent level of scrutiny in parental right cases. They range from the U.S. Supreme

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86. *Id.* at 951–52 (citation omitted) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

87. See Daniel E. Witte, Comment, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 189 (1996) (explaining “three independent interpretive theories of the Ninth Amendment that have been used by parental rights advocates in support of a fundamental right to direct the upbringing of a child: natural law theory, original intent interpretation, and public policy analysis”). See also Susan Tomaine, Comment, *Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. U. L. REV. 731, 781 (2001) (proposing a presumption that favors parents in third-party visitation statutes).

Court's reluctance to create new rights under the Due Process Clause, to an intentional decision of the Court to leave the scope of the fundamental right of parenting undefined, or the doctrine of abstention. However, these reasons are insufficient to explain the problem.

Specifically, the U.S. Supreme Court's omission of guidance regarding the appropriate level of scrutiny for the parental right cannot be the Court's goal given its role to clarify the law for the lower courts.<sup>88</sup> Additionally, the doctrine of abstention cannot fully explain it,<sup>89</sup> at least partly because it would be in contravention of the function of the U.S. Supreme Court to set appropriate levels of scrutiny.<sup>90</sup> Finally, although the U.S. Supreme Court is reluctant to create and expand new rights,<sup>91</sup> the parental right is among the earliest established.<sup>92</sup>

One possible reason for the lack of an articulated level of scrutiny insufficiently explored in the literature is that the parental right to the care, custody, and control of a child is too complex for one level of scrutiny. Indeed, not only are there many rights inherent to the parental right, but it also spans both the public and private arenas, ranging from parenting at the kitchen table to enrolling a child in a public school. These characteristics of the parental right mean that it has eluded the simplest resolution, which is the selection of one level of scrutiny.<sup>93</sup> Instead, the lower courts are inconsistently applying various levels of scrutiny because of the lack of guidance, creating confusion. They are also excluding, without signifi-

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88. "The Supreme Court's struggle to clarify its position cannot be considered merely accidental. Rather, the ambivalence that surrounds the jurisprudence regarding familial rights is indicative of the Court's reluctance to permit the familial sphere to become sufficiently fortified such that it would prevent regular state intervention." Scott J. Richard, Note, *Familia Interruptus: The Seventh Circuit's Application of the Substantive Due Process Right of Familial Relations*, 3 SEVENTH CIR. REV. 140, 166 (2007).

89. See Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 170–71 (2009). The author explains that unlike some lower federal courts, the Supreme Court has never fashioned a doctrine of wholesale abstention for domestic relations. Citing the Supreme Court's decisions in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the author notes that "[f]ederal courts have a 'strict,' 'virtually unflagging' duty to exercise the jurisdiction conferred by Congress" and "[a]bstention remains the exception [and] not the rule." Further, the author suggests that "the existence of a federal question should make federal courts more circumspect about abstention rather than less," stating that "in certain contexts the Supreme Court has deemed abstention inappropriate because of the important constitutional claims alleged." *Id.*

90. See Krotoszynski, *Epitaphios*, *supra* note 3.

91. Adam K. Ake, Comment, *Unequal Rights: The Fourteenth Amendment and De Facto Parentage*, 81 WASH. L. REV. 787, 807 (2006). Ake highlights the Supreme Court's reluctance to create new rights under the Due Process Clause. One example Ake uses to support the assertion that the Supreme Court is reluctant to create new rights under the Fourteenth Amendment is the Court's language in *Michael H. v. Gerald D.*, 491 U.S. 110, 112 (1989). Ake, *supra*, at 807–08. In *Michael H.*, "the plurality stated that the Fourteenth Amendment's [objective] is to prevent future generations from lightly casting aside important traditional values—not to enable courts to invent new ones." *Id.* at 808. Therefore, Ake suggests that "the Court has purposefully made it difficult to expand substantive due process rights under the Fourteenth Amendment." *Id.*

92. See Garza, *supra* note 10, at 927.

93. See *supra* Part III.A.

cant explanation, certain parental issues from the parental right.<sup>94</sup>

As illustrated by the split among the lower courts in parental right cases, it is difficult to achieve consistency without a level of scrutiny.<sup>95</sup> The simplest solution is for the U.S. Supreme Court to articulate the appropriate level of scrutiny in its next parental right case. Yet, there is no consensus on what that level of scrutiny should be. Although Justice Thomas has suggested strict scrutiny,<sup>96</sup> many of the lower courts utilize less stringent review. Commentators have also split on whether strict scrutiny would be applicable.

There are several reasons for the hesitancy to apply strict scrutiny to parental right cases. First, much of the precedent on the parental right is a product of its time.<sup>97</sup> Justice Scalia noted that only a few U.S. Supreme Court cases regarding the parental right relied on substantive due process.<sup>98</sup> “[*Meyer and Pierce*], read as parental rights cases, are often seen as the only two remaining *Lochner*-era substantive due process cases that are still good law and the Supreme Court invokes them as a starting point in much of its modern substantive due process analysis.”<sup>99</sup>

Second, fundamental rights do not trigger strict scrutiny all the time.<sup>100</sup> Indeed, much case law exists applying less than strict scrutiny to such

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94. See *supra* Part II.

95. See William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 182–83 (2000) (“But while *Troxel* demonstrates the continuing significance of *Meyer and Pierce*, it also illustrates the continuing enigma of those decisions. Although Justice Kennedy correctly pointed out in his dissent that all of the Justices seemed to agree that a ‘custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture and educate the child,’ various members of the Court interpreted this right in different ways. Both the four-justice plurality opinion and Justice Souter’s concurring opinion relied heavily upon *Meyer and Pierce* to argue that parents have a powerful interest in controlling their children’s personal associations. As Justice Souter acknowledged in his concurring opinion, however, the Court’s decisions ‘have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.’ Therefore, it is not surprising, as Justice Thomas pointed out in his concurrence, in which he argued in favor of strict scrutiny, that the opinions of the Court and of Justice Souter did not articulate a standard of review for legislation that interferes with the parental rights enunciated by *Meyer and Pierce*.”) (footnotes omitted).

96. See *supra* Part II.A.

97. Lawrence, *supra* note 23, at 77 (asserting that the Court’s reasoning in *Meyer* was routine to the *Lochner* era and stating that the Court relied on the Fourteenth Amendment to a “limited and peripheral extent”).

98. See *supra* Part II.

99. Lawrence, *supra* note 23, at 71.

100. “Fundamental rights do not trigger strict scrutiny, at least not all of the time. In fact, strict scrutiny—a standard of review that asks if a challenged law is the least restrictive means of achieving compelling government objectives—is actually applied quite rarely in fundamental rights cases. Some fundamental rights trigger intermediate scrutiny, while others are protected only by reasonableness or rational basis review. Other fundamental rights are governed by categorical rules, with no formal ‘scrutiny’ or standard of review whatsoever. In fact, only a small subset of fundamental rights triggers strict scrutiny—and even among those strict scrutiny is applied only occasionally. In short, the notion that government restrictions on fundamental rights are subject to strict scrutiny review is fundamentally wrong.” Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENTARY 227, 227–28 (2006).

rights.<sup>101</sup> This very question arose after *Obergefell*, where it is possible that the U.S. Supreme Court applied less than strict scrutiny despite noting that the right to marry is one of the fundamental liberties.<sup>102</sup> In addition, access to the courts is a fundamental right, but the court in one case refused to conduct a strict scrutiny analysis of certain provisions of the Prison Litigation Reform Act, applying rational basis instead.<sup>103</sup>

Adam Winkler has noted in his empirical research that courts “tend to reject another type of substantive due process infringement: restrictions on parents’ rights to control their children’s upbringing.”<sup>104</sup> In examining strict scrutiny, Winkler noted that context matters. His methodology consisted of “the results of a census of every strict scrutiny decision published by the district, circuit, and Supreme courts between 1990 and 2003.”<sup>105</sup>

Other commentators have similarly noted the difficulty of applying strict scrutiny in parental right cases.<sup>106</sup> For example, David Meyer has asserted that intermediate scrutiny should apply in these cases because “the rigidity of traditional fundamental-rights analysis is ill-suited to the task of mediating the complex and intersecting private and communal interests which are often at stake in the family.”<sup>107</sup> Furthermore, Meyer has suggested that the Supreme Court acknowledge that intermediate scrutiny is the correct level of scrutiny.<sup>108</sup>

Although the Supreme Court has stated that parents have a fundamental right, Meyer pointed out that the Court is reluctant to embrace strict scrutiny.<sup>109</sup> According to Meyer, lower courts sometimes apply intermediate scrutiny, while “a handful . . . have applied strict scrutiny.”<sup>110</sup> Thus, Meyer emphasized the need for the Supreme Court to openly accept that intermediate scrutiny is appropriate in order to secure family privacy rights and avoid confusion.<sup>111</sup>

One method that courts have employed to avoid selecting a level of scrutiny in parental right cases has been to entirely exclude certain paren-

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101. See *supra* Part II.

102. See Ruthann Robson, *Court Decides Same Sex Marriage Cases: DOMA (Windsor) and Proposition 8 (Perry)*, CONST. L. PROF. BLOG (June 26, 2013), <http://lawprofessors.typepad.com/conlaw/2013/06/court-decides-same-sex-marriage-cases-proposition-8-and-doma.html> [https://perma.cc/P8RF-837N].

103. *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 602 (E.D. Pa. 1998), *aff’d sub nom. Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999). In another case, the court declined to apply strict scrutiny to a law disallowing certain classes of felons from receiving private detective or security guard licenses even though “the right to hold specific employment is a vital and constitutionally protected one.” *Smith v. Fussenich*, 440 F. Supp. 1077, 1079 (D.C. Conn. 1977). However, the court did not claim the right was fundamental, but only vital and constitutionally protected. *Id.*

104. Winkler, *Fatal in Theory*, *supra* note 12, at 864.

105. *Id.* at 795.

106. For further background on strict scrutiny, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007). See also SHULMAN, *supra* note 37, at 3.

107. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 527 (2000).

108. *Id.* at 527.

109. *Id.* at 549. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

110. Meyer, *supra* note 107, at 547.

111. *Id.* at 577.

tal issues from the right to the care, custody, and control of a child.<sup>112</sup> However, in doing so, courts have seemed to draw arbitrary lines. It is difficult to say that if an issue implicates a parent it does not trigger the parental right, especially when it includes the care and control of a child. Yet this is what courts have done.<sup>113</sup>

In sum, although commentators have for years called for the U.S. Supreme Court to simply set a level of scrutiny for the parental right, it has not yet done so. If this is because the parental right is too complex, then it should be unpacked to facilitate setting a level of scrutiny. In other words, unbundling the parental right into its elements would allow a more nuanced approach to the selection of a level of scrutiny based on the exact parental issue at stake. For example, the protection of a parent's right to custody might be more compelling than the protection of a parent's decision to shield the child from contraceptives offered by the school nurse's office.<sup>114</sup> Yet, the current law is complicated and incoherent on these issues, allowing parental opt-out of a child's sex education in many states, but not requiring parental consent for other reproductive decisions of the child.<sup>115</sup>

It may be that the complexity of the parental right precludes setting only one level of scrutiny because different parental issues deserve different levels of deference to the parent. If the parental right eludes setting one level of scrutiny, then a framework for the parental right can help organize judicial approaches to such cases, making them consistent and more predictable. Indeed, selecting one level of scrutiny may be difficult given the uniqueness of the parental right, resulting from the many roles of a parent as well as the complexity of the parental right and its place in both the public and private realms.

This Article facilitates a dynamic approach to selecting a level of scrutiny by offering two ways to view the parental right—as a bundle of rights or as a sliding scale. These conceptions of the parental right both explain and justify the current judicial use of various levels of scrutiny, but also facilitate the selection of the appropriate level of scrutiny in a more consistent and predictable manner.

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112. See *supra* Part II, notes 65–67, 77 and accompanying text.

113. *Id.*

114. For a case on condom distribution at public schools, see *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265 (N.Y. App. Div. 1993) (finding a “compelling state interest” necessary to override parental rights in a dispute over condom distribution in the New York City schools).

115. See Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127, 139–40 (2016); see also Kelly Percival & Emily Sharpe, *Sex Education in Schools*, 13 GEO. J. GENDER & L. 425, 426–41 (2012) (reviewing the variations in state sex education policy). However, sex-related issues are particularly complicated given that they are often at the center of cultural disagreements in the United States. See, e.g., Jesse R. Merriam, *Why Don't More Public Schools Teach Sex Education?: A Constitutional Explanation and Critique*, 13 WM. & MARY J. WOMEN & L. 539, 539 (2007).

## B. CONCEPTUALIZING THE PARENTAL RIGHT

This Article proposes two different ways to conceptualize the parental right that facilitate setting a level of scrutiny for state interferences, but they have similarities. The key similarity is that they both allow the level of scrutiny to be adjusted depending on the burden placed on the essence of parenthood, explaining and justifying the current approach while bringing clarity, judicial economy, predictability, and consistency to this area of family law. Any other resolution similarly needs to address the challenges of setting the level of scrutiny for the parental right given its complexity.

### 1. *Sliding Scale—Varying the Level of Scrutiny*

The sliding scale model of the parental right would envision the different rights inherent to the care, custody, and control of a child on a sliding scale.<sup>116</sup> The rights that are core to parenthood would be at one end of the scale, and those that are peripheral would be at the other. The level of scrutiny would then heighten as the burden on the essence of parenthood increases along the sliding scale. In other words, the closer the parental issue is to the most important functions of parenthood, the more stringent the review by the courts.

This approach has several virtues, among which is the flexibility of using various levels of scrutiny depending on the amount of deference to be given to the parent.<sup>117</sup> In other words, being closer to the essence of

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116. In the equal protection context,

The sliding-scale method differs conceptually from the current three-tier standard of review. The three-tier method attempts to pigeonhole rights as either fundamental or nonfundamental. This rigid system does not take into account the relative importance of the rights of those affected but only determines whether or not a right is fundamental. A sliding-scale approach does not cast rights as either/or propositions, fundamental or nonfundamental. Instead, a sliding-scale approach weighs the right according to its relative importance. Fundamental rights are still recognized but in addition so are other non-fundamental rights. All nonfundamental rights are not automatically accorded the lowest standard of review. Instead, vital, crucial, substantial, or moderate rights are all given some varying form of heightened scrutiny depending on the relative importance of the right.

Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis, in with Romer v. Evans*, 30 LOY. L.A. L. REV. 1277, 1317 (1997) (footnotes omitted). “[E]ven the recently developed case law in the Second Amendment area is beginning to take on a variation of a quasi-sliding scale version of formal tiering.” Wright, *supra* note 25, at 182 n.78 (citing *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (“Borrowing from the Court’s First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right.”)).

117. “[A] sliding scale eliminates the discrete step-ups and step-downs of more traditional levels of scrutiny.” Wright, *supra* note 25, at 167. *But see* Winkler, *Fatal in Theory*, *supra* note 12, at 797 (“While it remains true that the majority of laws subjected to strict scrutiny fall and that the government typically faces an onerous task defending laws under this standard, strict scrutiny is not nearly as deadly as generations of lawyers have been taught.”).

parenthood would make the parental right constitutionally more fundamental.

The sliding scale approach does not require assigning an absolute level of scrutiny to a particular sub-right but allows for fluid movement along a scale. For example, it could better adjust to address a slight or unintended infringement of rights close to the core of parenthood, as well as to a more substantial and burdensome infringement on rights further from the core.

The sliding scale approach does not require courts to exclude issues from the parental right that implicate parents. Instead, courts could give deference to the state while acknowledging the parental right by placing it on the end of the sliding scale furthest from the essence of parenthood and thus using rational basis review.

However, there are drawbacks to the sliding scale model. Notably, this approach suffers from some of the problems of the current approach unless markers are defined along the scale to determine which rights lie where. Indeed, while the two ends of the scale are easier to define because they are extreme, there will be grey areas along the sliding scale, endangering the goals of transparency and certainty. The fluidity of rights along the sliding scale may also harm predictability. Finally, this model of the parental right also still speaks in generalities and groups, which may hinder consistency.

## 2. *Bundle of Rights—Assigning a Level of Scrutiny to Sub-Rights*

Another model for the parental right is to view it as a bundle of rights similar to the bundle of sticks in property parlance.<sup>118</sup> Each right inherent to the parental right to the care, custody, and control of a child would be separated and assigned a particular level of scrutiny depending on how close it is to the essence of parenthood. There are many rights in the bundle, and each would have an individual level of scrutiny.

The essence of parenthood would be at the core of the bundle of rights, and state laws seeking to restrict it would receive strict scrutiny. The non-strict scrutiny sticks would be those on the periphery, straying from the core of parenthood.

The criticisms lodged against the bundle of sticks in property law would apply in the family law context as well, including that it is simply a loose aggregate of rights.<sup>119</sup> Additionally, as in the current approach, it can be

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118. “For much of the twentieth century, legal academics conceptualized property as a bundle of rights. The bundle-of-rights metaphor captures well the way in which ownership interests can be divided over time, as in the case of present and future interests, and among different people, as in the case of concurrent interests (e.g., joint tenancies) and common interest communities (e.g., condominiums).” Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 58 (2013).

119. “The metaphor has come under sustained attack for its alleged implicit suggestion that property lacks a stable core and comprises nothing more than a loosely assembled and endlessly disaggregable pile of use rights.” Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1978–79 (2012).

hard to determine which sticks belong in the bundle and what level of scrutiny each should receive. Furthermore, there are more absolutes in the bundle of rights model versus the sliding scale model of the parental right—a sub-right is attached to one stick with one level of scrutiny, as opposed to fluidly sliding between levels of scrutiny. Finally, this model assumes that cases tend to have some uniquely best description, as opposed to conflicting possible descriptions.

Compared to the bundle of rights model, the sliding scale model has the advantages of relative flexibility and similarity to the current approach. However, both models have advantages and disadvantages, but are useful for introducing a framework that helps determine the appropriate level of scrutiny in parental right cases.

### C. SELECTING A LEVEL OF SCRUTINY

Conceptualizing the parental right as either a sliding scale or a bundle of rights facilitates a framework that can bring predictability and consistency to selecting a level of scrutiny. However, both of these models have a few commonalities worth identifying that help their effectiveness. Any other potential framework may also need to integrate the characteristics shared by these models to address the unique complexity of the parental right.

A key commonality is that both models allow different levels of scrutiny to be applied in recognition that not all parental issues are equal in weight, ranging from public school curricular preferences to the procedures for removal of a child from the parent's home. Thus, these proposed models allow strict scrutiny for direct and intended restrictions on the essence of parenthood and lesser scrutiny for merely incidental restrictions.

To some extent, therefore, both of these models facilitate organic solutions because the courts are already using different levels of scrutiny in parental right cases.<sup>120</sup> For example, while it is universally recognized that children should live with their fit parents,<sup>121</sup> parents often do not have a choice to opt-out of the public school curriculum.<sup>122</sup> The sliding scale model, when compared to the bundle of sticks, is closer to how the courts are currently varying the level of scrutiny depending on the parental issue, which would ease the transition to this model.

The main benefit of understanding the parental right as either a sliding scale or a bundle of rights is having a framework through which to envision the parental right in order to facilitate the coherent selection of a level of scrutiny in such cases. In other words, if one level of scrutiny does not suffice for the complexity of the parental right, then more than one

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120. *See supra* Part II.

121. *See infra* Part III.C.

122. Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U. L. REV. 363, 365 (2012) (“[F]amilies in the past four decades have typically failed when trying to opt out of programs and policies of public education.”).

could be used more predictably and consistently by envisioning the parental right as consisting of several sub-rights. Additionally, these models can recognize an intermediate level of scrutiny in these cases.<sup>123</sup>

Both models are also sensitive to the fact that the parental right spans both the public and private spheres. Parental issues require less deference to parenthood when they interact with society's interests or the child's interests.<sup>124</sup> Indeed, it is not only a parent who has an interest in the child—it is also society that has an interest in having healthy and educated members.<sup>125</sup>

Before being imposed on a sliding scale or bundle of rights model, the essence of parenthood and its related sub-rights must be defined. Indeed, both models assume that different parental issues require different protection. For example, some require less protection because they are inconsequential or only tangential to parenthood. Others are at the core of parenthood and merit maximum protection. The gravity of each sub-right and its relationship to the essence of parenthood must be examined.

Thus, the key to any model will be to break down the parental right and to define its terms. Indeed, the definitions and breakdown of relevant terms will drive the outcomes generated by either model. Breaking down the parental right is similar to defining its terms because to break down the right, a court must understand its terms. The courts have started to do this already by carving out exceptions from the parental right,<sup>126</sup> as well as by noting that the right arises in different contexts.<sup>127</sup>

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123. See *supra* Part II; notes 81, 110 and accompanying text; *Craig v. Boren*, 429 U.S. 190, 197–98 (1976). See also Stephen G. Gilles, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69, 123 (2001) (“A strong argument can be made that the plurality opinion [in *Troxel*] implicitly rejected both the rational-basis and strict scrutiny options in favor of a form of intermediate scrutiny.”).

124. “When the state does seek to intervene, it brings the state’s right into direct conflict with the parents’ right. The line-drawing question then becomes one of how extensive the parent’s right is, against the state’s competing interest to act on behalf of the child, and on behalf of society.” David Pimentel, *Protecting the Free-Range Kid: Recalibrating Parents’ Rights and the Best Interest of the Child*, 38 CARDOZO L. REV. 1, 37 (2016). See also *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (noting that a person’s freedom must sometimes be subordinated to the common welfare and is subject to the police power of the state).

125. “Every eight seconds a baby is born in the United States. In that moment, a very special relationship between parent and child is born. Numerous sources of law govern this relationship, including state and federal law, and even the U.S. Constitution. As a result, the relationship between parent and child is not simply between parent and child. Rather, the state, with all of its power and authority, is also involved.” Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773, 1775 (2008) (footnotes omitted). See also *Troxel v. Granville*, 530 U.S. 57, 87–88 (2000) (Stevens, J., dissenting) (“[P]arents have a fundamental liberty interest in caring for and guiding their children,” but “these interests have never been seen to be without limits” and “a parent’s interests in a child must be balanced against the State’s long-recognized interests as *parens patriae*.”).

126. See *supra* Part II, notes 65–67, 77 and accompanying text.

127. “The sheer diversity of today’s opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that . . . produce[s] such diverse outcomes in . . . [a] simple case . . . is not a legal principle that has induced substantial reliance.” *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting).

There are already many questions regarding terminology in family law. For example, the term “parent” has been expanding along with technology.<sup>128</sup> However, there are two separate sets of questions at issue regarding the definition of parent: “who” is a parent<sup>129</sup> and “what” is a parent, i.e., what are the parent’s roles and obligations.<sup>130</sup> Both terms cause confusion for the lower courts, but this Article limits itself to the latter<sup>131</sup> in cases of minor children.<sup>132</sup> These will have to be better addressed in formulating a framework on the parental right.

In other words, it is not that the U.S. Supreme Court has not articulated the level of scrutiny, but rather that the Court has left the scope of the fundamental right of parenting undefined to some extent. While some parenting issues and decisions fall within the scope of the fundamental right, others do not.<sup>133</sup> Fundamental due process analysis may be ill-suited for such a broad area.<sup>134</sup>

Currently, there is no consistent definition of the parental right or its

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128. See, e.g., Yehezkel Margalit, *Bridging the Gap Between Intent and Status: A New Framework for Modern Parentage*, 15 WHITTIER J. CHILD & FAM. ADVOC. 1, 3–6 (2016).

129. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 113 (1989); Lehr v. Robertson, 463 U.S. 248, 249–50 (1983). “The U.S. Supreme Court has implicitly created a tiered, hierarchical structure of parental rights, and has consistently rejected assertions that adults in the lower tier have rights on par with those in the upper tier—mothers, married fathers, and adoptive parents.” Ake, *supra* note 91, at 810–11. See also Alessia Bell, Note, *Public and Private Child: Troxel v. Granville and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 231 (2001) (proposing “a psychosocial parenting doctrine for resolving visitation disputes”).

130. *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003) (“Writing for a plurality, Justice O’Connor identified Granville’s asserted liberty interest as ‘the interest of parents in the care, custody, and control of their children,’ but left the scope of that right undefined.”) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

131. For an excellent discussion of how the type of parent impacts the level of scrutiny, see Ake, *supra* note 91, at 810–11. Ake suggests that the level of scrutiny applied to a case is dependent on the tier into which the parent falls. *Id.* at 794–95. Ake states that upper-tier parents are more likely to be afforded the fundamental right to the care, custody, and control of their children. *Id.* at 790. Ake states that those in the lower tier have the standard of intermediate scrutiny. *Id.* at 801.

132. “A number of circuits are split on the issue of whether there exists a Fourteenth Amendment due process right of a parent to associate with his or her adult child. . . . The lower courts are reluctant to expand the unenumerated constitutional rights without clear guidance from the Supreme Court.” Meir Weinberg, Note, *The Fourteenth Amendment Due Process Right of Companionship Between a Parent and His or Her Adult Child: Examination of a Circuit Split*, 43 NEW ENG. L. REV. 271, 271 (2009).

133. See *supra* Part II.

134. See David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1129–30 (2001). Meyer suggests that “[t]he daunting complexity of family relationships commands special caution and flexibility in formulating any constitutional rules of decision” and such complexity “signals an approach to family-privacy controversies that is quite different from the rigid, heavy-handed scrutiny prescribed by conventional fundamental rights doctrine.” *Id.* at 1146. Meyer remarks that the Court in *Troxel* appeared to be more hesitant than usual to invade the province of state courts and their ability to handle family law matters. *Id.* at 1153. Meyer proceeds to explain that as a result the Court implicitly rejected strict scrutiny, suggesting that it was warranted because strict scrutiny review is unfit for “[t]he almost infinite variety of family relationships.” *Id.* at 1150–51 (quoting *Troxel v. Granville*, 530 U.S. 57, 90 (2000) (Stevens, J., dissenting)).

elements.<sup>135</sup> Given the difficulty of defining terms without precedent, it is useful to set up narrower categories of the parental right to make it more predictable. While it is usually the state legislatures that define terms, the Supreme Court can use broad brushes to set up different categories within the parental right, as it does in many areas of law.<sup>136</sup> Any narrowing of the parental right into categories will help its understanding more than leaving it a broad category.<sup>137</sup>

There are ways to break down the parental right that are consistent with the current case law, which would facilitate its adoption by the courts. Although the right's breakdown and definition can be set according to public policy, another way to do so is to look at its components. Breaking down the parental right into its three named components is reasonable given the articulation of the three aspects of the right.

Specifically, there are three elements to the parental right: the child's care, custody, and control. Custody may be the clearest concept of the three. Parents should continue to have the right to exercise child custody as against third parties and the state, absent abuse or neglect.<sup>138</sup> Indeed, there is a universal understanding that children should live at home with

135. The U.S. Supreme Court language regarding it is broad. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'") (citation omitted).

136. *See, e.g.*, Daniel J. Klein, *The Integrity of Section 101: A "New and Useful" Test for Patentable Subject Matter*, 93 J. PAT. & TRADEMARK OFF. SOC'Y 287, 288 (2011) (reviewing the categories established in patent law); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003, 1010–11 (1993) (noting the use of categories in First Amendment jurisprudence).

137. *See supra* Part II. "The Supreme Court has never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005).

138. *Billups v. Penn State Milton S. Hershey Med. Ctr.*, 910 F. Supp. 2d 745, 758–59 (M.D. Pa. 2012) ("[A] government actor may constitutionally override parents' rights to the care, custody, and control of their children if he or she possesses 'some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.'") (quoting *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997)). However,

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

*Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982). One district court determined that the state has an interest in protecting children that "become[s] 'compelling' enough to sever entirely the parent-child relationship only when the child is subjected to real physical or emotional harm and less dramatic measures would be unavailing." *Roe v. Conn.*, 417 F. Supp. 769, 779 (M.D. Ala. 1976).

their parents.<sup>139</sup> Thus, it is clear to assert that strict scrutiny should apply to a state's actions that restrict this type of parental right. The state must not interfere with a parent's custody of a child without a compelling governmental interest and should use narrowly tailored means that are the least restrictive for achieving its interest.

It is also easy to set custody at the core of parenthood because it sits squarely in the private home realm.<sup>140</sup> Issues like these at the core of parenthood should be protected to the greatest extent. However, many other parental issues implicate the child, other children, or society, and it is then important to balance all of these parties, making it difficult to set a strict level of scrutiny in these cases.

In parental right cases, courts and commentators have been relatively reluctant to apply strict scrutiny—and strict scrutiny leaves the least opportunity for state interference—so it must be reserved for the most extreme cases, such as the removal of children from the parents' custody into state or third-party care.<sup>141</sup> The state could still remove children for abuse and neglect even under the strictest level of scrutiny, as done now.<sup>142</sup> Thus, parental custody rights would be at the far end of the sliding scale because they are at the core of parenthood, and they would be at the core of the bundle of rights.

Care and control involve many parenting tasks. While parents make numerous decisions regarding the care and control of a child by virtue of living in the same household,<sup>143</sup> the state may have reasons to become

139. See, e.g., *In re McCullough*, 366 N.W.2d 90, 92 (Mich. Ct. App. 1985) (“the policy of [Michigan is] to keep children with their natural parents whenever possible”); *Ready v. Hughes*, 846 S.W.2d 1, 5 (Tex. App.—Waco 1985, no writ) (“the best atmosphere for [the] mental, moral and emotional development of [a] child is [usually] with its natural parents, and there is [a] strong presumption that a child's foremost interest is usually best served by keeping custody . . . with the natural parents”). See also *Stanley v. Illinois*, 405 U.S. 645, 652–53 (1972).

140. This is true in the context of state removal from the parents. See *Carlson v. Wivell*, 152 N.W.2d 98, 100 (Neb. 1967).

The state does not, of course, have unfettered latitude to remove children from the care of their parents. The state's power to interfere in its capacity as *parens patriae* was first limited through the application of the substantive due process clause in a series of landmark Supreme Court cases, beginning with *Meyer v. Nebraska* and *Pierce v. Society of Sisters* in the 1920s.

Theo Liebmann, *What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 *HAMLIN J. PUB. L. & POL'Y* 141, 154 (2006) (footnotes omitted). On the contrary, in custody disputes between the parents themselves, the child's best interests will dictate. June Carbone & Naomi Cahn, *Nonmarriage*, 76 *MD. L. REV.* 55, 75 (2016).

141. This is distinguished from the divorce setting, where both parents have an interest in the custody of the child. See, e.g., Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 *FAM. CT. REV.* 213, 213 (2017). See also *infra* note 145.

142. See, e.g., Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 *VA. J. SOC. POL'Y & L.* 385, 392 (2009).

143. See, e.g., Donald C. Hubin, *Parental Rights and Due Process*, 1 *J.L. & FAM. STUD.* 123, 125 (1999) (“I know of no exhaustive listing of the set of parental rights we typically associate with having full custody of children. The following rights, only some of which are relevant to our present concern, are commonly assumed to be included in the set: the right to physical possession of the child; the right to inculcate in the child one's moral and ethical

involved in the care and control of a child, and the courts would have to allow a lower level of scrutiny for that intervention to occur. Specifically, these reasons include protecting other children and the interests of society.<sup>144</sup>

Care could be limited to health issues and visitation issues, the latter of which creates a whole separate subfield.<sup>145</sup> Decisions over the healthcare of children no doubt pose difficult questions:<sup>146</sup> while the parental right protects parents, the state has to protect the child<sup>147</sup> as well as other children in society. Vaccination is a common example of this, with courts balancing the parental right while protecting other children from communicable diseases.<sup>148</sup> For such parental issues, intermediate scrutiny provides protection for parents while still allowing the state to restrict the parental right when its important interests justify such intervention. Accordingly, these parental issues would occupy the midpoint of the sliding scale and receive intermediate scrutiny in the bundle of rights model.

Control can mean control over the child's education and being, creating the comprehensive category for all other issues beyond custody and care.<sup>149</sup> These are the least weighty issues of parenthood as compared to

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standards, including the right to discipline the child; the right to control and manage a minor child's earnings and property; the right to have the child bear the parent's name; the right to prevent adoption of the child without the parents' consent; the right to make decisions concerning the medical treatment, education, religious training and other activities of the minor child; and, the right to information necessary to exercise the above rights responsibly.") (footnote omitted).

144. See *supra* Part II.

145. There has been much state court litigation over the constitutionality of child custody and visitation laws. See, e.g., Zurek, *All the King's Horses and All the King's Men: The American Family After Troxel, the Parens Patriae Power of the State, a Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes*, 27 *HAMLIN J. PUB. L. & POL'Y* 357, 399–404 (2006) (discussing how state courts have grappled with the *Troxel* decision and visitation). One problem with constitutionalizing the parental right is that it provides an argument that both parents, upon separation, have an equal right to custody as a due process matter. See, e.g., *Urso v. Illinois*, No. 04-CV-6056 (N.D. Ill., 2004, Kennelly, J.) (dismissed for lack of subject matter jurisdiction).

146. Lynn D. Wardle, *Controversial Medical Treatments for Children: The Roles of Parents and of the State*, 49 *FAM. L.Q.* 509, 511–12 (2015) (noting “the conflict between the constitutional rights of parents to provide their children with medical . . . treatment they believe is needed, and the *parens patriae* interests of the state to regulate parenting activities in the best interests of children”).

147. SHULMAN, *supra* note 37, at 5 (discussing the state's role and authority as *parens patriae*).

148. See, e.g., Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 *BUFF. L. REV.* 881, 893 (2015); Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 *Nw. U. L. REV.* 589 (2016).

149. For example, homeschooling is one issue that is implicated. See, e.g., Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children's Interests*, 46 *U. BALT. L. REV.* 57, 59 (2016); see also *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State.”) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)). However, constitutional rights other than the parental right may protect it. See *infra* note 154 and accompanying text.

a loss of custody to a third party or the state, and include issues such as whether public school students must wear a uniform—although they still need protection because they remain in the purview of parenting. With such less weighty parental matters, or when strong state interests accumulate, rational basis should suffice to protect parents.

This proposed approach resembles current judicial outcomes, but it would provide more predictability and consistency by virtue of a general framework. For example, the proposed approach yields the same outcome as the current use of rational basis review by courts in cases related to public school education, such as curriculum and uniforms.<sup>150</sup> The U.S. Supreme Court has stated that education “is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>151</sup> Thus, when competing with the parental right, the state interests may prevail.

This proposed approach also applies rational basis review to restrictions on the parental right to control the means of disciplining children, as in many previous cases.<sup>152</sup> However, this proposed approach would diverge from the juvenile curfew cases currently using intermediate scrutiny; nonetheless, intermediate scrutiny has not necessarily translated to parent victories in these cases, making the actual outcome the same as under rational basis review.<sup>153</sup>

Despite applying a lesser level of scrutiny to certain state restrictions on the parental right, the courts have additional methods under the U.S. Constitution to protect parents and children, such as the First Amendment in cases challenging the recitation of the Pledge of Allegiance in public school.<sup>154</sup> There is also the child’s best interest to consider in many

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150. See *supra* Part II; *Parker v. Hurley*, 474 F. Supp. 2d 261, 273 (D. Mass. 2007), *aff’d*, 514 F.3d 87 (1st Cir. 2008) (noting that “parents do not have a fundamental liberty interest that permits them to prescribe the curriculum for their children”).

151. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

152. See, e.g., *Baker v. Owen*, 395 F. Supp. 294, 299 (M.D.N.C. 1975), *aff’d*, 423 U.S. 907 (1975); *Cunningham v. Beavers*, 858 F.2d 269, 272–73 (5th Cir. 1988).

153. See *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998). For background on curfew laws, see Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and to Whom?*, 2006 UTAH L. REV. 5, 26 (2006).

154. See, e.g., *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616 (E.D. Pa. 2003), *aff’d in part sub nom. Circle Sch. v. Pappert*, 381 F.3d 172 (3d Cir. 2004); *Yoder*, 406 U.S. at 213–14 (“[A] State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment.”) (citations omitted). See also Lawrence, *supra* note 23, at 73 (arguing that the parental right is commonly combined with other constitutional claims); *Yoder*, 406 U.S. at 243–45 (Douglas, J., dissenting) (“Recent cases . . . have clearly held that the children themselves have constitutionally protectible interests.”). But see Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 741 (2016) (“[T]he discussion of children’s rights is still controversial and the methodology for advocating on behalf of children contested.”); Maxine D. Goodman, *The Obergefell Marriage Equality Decision, with Its Emphasis on Human Dignity, and a Fundamental Right to Food Security*, 13 HASTINGS

family law matters.<sup>155</sup>

In sum, the various concepts inherent to the parental right to the care, custody, and control of a child should be detangled from each other if doing so would facilitate assigning a level of scrutiny. There is little doubt, however, that the complicated nature of these concepts may be preventing a level of scrutiny from being set, causing confusion among the lower courts.

Currently, the courts may be reluctant to select a level of scrutiny because of the packed nature of the parental right. There are many concepts inherent to the notion of care, custody, and control that range from sex education in public schools to a child's removal from the parental home. The only commonality is that these issues relate to the child. The gravity of the child's removal from the home to the state, however, is greater than the parent's interest in a particular dress code at the local public school.<sup>156</sup> Thus, courts must defer to parents in differing amounts depending on the issue.

The world has grown more complicated, with many issues arising related to parenting. One level of scrutiny does not fit all parental issues, making it difficult for the U.S. Supreme Court to provide guidance to the lower courts on parental right cases. Conceptualizing the parental right as a sliding scale or bundle of rights helps break down the parental right into its elements, facilitating setting a level of scrutiny for the different sets of issues that courts encounter regarding parenthood.

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RACE & POVERTY L. J. 149, 197 (2016) (noting that the United States is one of only two countries that has not ratified the Convention on the Rights of the Child). These additional rights can help protect, for example, the parental decision to enroll children in religious schools.

155. The "best interests of the child" standard often guides Anglo-American courts in reaching decisions pertaining to children, such as in child custody cases. For a useful background on the best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006). *But see* Reno v. Flores, 507 U.S. 292, 303–04 (1993) ("The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others.") (emphasis in original).

The models of the parental right proposed in this Article might include another dimension, which would encompass the child's interest and grow more important as the child approaches the age of majority and as the question involved becomes more central to the child's identity, such as issues of abortion, contraception, First Amendment claims, and health treatments. This dimension would become especially important when the child's and parents' positions might conflict. *See, e.g.*, Elk Grove v. Newdow, 542 U.S. 1 (2003); Parham v. J.R., 442 U.S. 584 (1979).

156. *See, e.g.*, Keith Wiens, Comment, *State v. Parent Termination of Parental Rights: Contradictory Actions by the Ohio Legislature and the Ohio Supreme Court in 1996*, 26 CAP. U. L. REV. 673, 673 (1997) ("A legal proceeding to permanently terminate a person's parental rights is one of the most drastic forms of governmental action known to our civil justice system.").

## IV. CONCLUSION

The U.S. Supreme Court has not articulated a consistent level of scrutiny for interferences with the parental right to the care, custody, and control of a child, despite using language that characterizes it as a fundamental right. As a result, the lower courts have split in their approaches, causing inconsistency and unpredictability.

An undertheorized reason for the lack of guidance on the appropriate level of scrutiny is that the parental right is too complex—spanning too many different issues that variously burden the essence of parenthood—to have one static level of scrutiny. If it is difficult to apply a level of scrutiny because the right is complex, then it is important to break it down into the major sub-rights that it entails. To do so, there are two alternate ways to conceptualize the parental right—as a sliding scale or as a bundle of rights—that can facilitate selecting a level of scrutiny by breaking down the parental right into its component parts of care, custody, and control. This is the key to the commonalities between these two models, which any other potential model might also need to incorporate to work effectively.

Indeed, there are numerous issues currently falling into the parental right—from minor school issues to the very custody of children. A dynamic approach to the selection of a level of scrutiny would consider the issue at stake. Implementing a framework for it facilitates clarity, predictability, and better protection of the parental right.

The lack of a level of scrutiny will not disappear without being addressed by the Supreme Court. On the contrary, it will be increasingly felt as parental roles expand and states respond with regulation.<sup>157</sup> Indeed, the courts are hearing a wider range of cases as parents encounter more issues related to parenting and more state interferences, such as those related to public school curriculum choices, procedures for the removal of a child from the parental home, and the parental role in health decisions.<sup>158</sup> Thus, it is important to implement a framework for selecting the level of scrutiny because the parental right is expanding each year, increasing litigation.

As one of the oldest constitutional rights, the parental right has experienced a long period of change.<sup>159</sup> Even the roles of family members in

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157. See, e.g., Tracy Reilly, *The “Spiritual Temperature” of Contemporary Popular Music: An Alternative to the Legal Regulation of Death-Metal and Gangsta-Rap Lyrics*, 11 VAND. J. ENT. & TECH. L. 335, 383 (2009) (arguing that the state should not censor media content even though parents may be too busy in the modern era to properly supervise their children’s consumption of it); Parent’s Day, 1999, 64 Fed. Reg. 41,001 (July 23, 1999) (“The challenges of parenthood have changed as our society has changed.”). See also Ben-Asher, *supra* note 122, at 363 (noting an increase in “conflicts over families trying to ‘opt out’ of various legal structures”).

158. See, e.g., Ralph D. Mawdsley, *Parental Rights and Public Education*, 59 W. EDUC. L. REP. 271, 271 (1990) (“More basically, the enhanced role of the state in education parallels the changing role of parents vis-a-vis their children and students vis-a-vis the school.”).

159. “As the legal system and society have changed, however, both the definitions and roles of parents have changed.” Lindsay Mather, Comment, *The “Other” Parent: Protect-*

society have changed over the decades.<sup>160</sup> Family law has been criticized for not keeping up with the modern family, and this criticism may be especially true when it comes to clarifying the roles of the parent and state in a growingly complex world. It will thus be important to better define the parental right in the future, as well as the level of scrutiny for state laws that restrict it.

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*ing the Rights of Noncustodial Parents in Emergency Removal Situations*, 79 U. CIN. L. REV. 1189, 1189 (2011) (footnote omitted).

160. See, e.g., HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 5–6 (2002) (discussing child labor and the historical role of children as financial contributors to the family); Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 563 (2000) (noting the changing parental roles in the twentieth century); Sandi S. Varnado, *Inappropriate Parental Influence: A New App for Tort Law and Upgraded Relief for Alienated Parents*, 61 DEPAUL L. REV. 113, 148 n.218 (2011) (“[P]arental roles have changed.”).