

# The New Parents' Rights Movement, Education, and Equality

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## INTRODUCTION

*“The cultural debate heats up when the structure of American society appears to be in flux: moments of large-scale immigration (like the present), broad economic change (like the present), and shifting social relations (particularly when they involve changing racial or gender relations—again, like the present). Not surprisingly, contemporary politics reverberate with culture conflicts. The conflicts set off ancient anxieties.”<sup>1</sup>*

— James A. Morone

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<sup>1</sup> James A. Morone, *Political Culture: Consensus, Conflict, and Culture War*, in *THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT* 132, 144 (Richard Valley et al. eds., 2014). In 2022, Suzanne Nossel, chief executive officer of PEN America, echoed these same sentiments: “Social and generational shifts in thinking about racial justice, sexual orientation, and gender identity have stoked concerns in some quarters about how marriages, families, and society at large may be changing in unrecognizable, irreversible ways.” Suzanne Nossel, *Parents Should Have a Voice in Their Kids’ Education—But We’ve Gone Too Far*, *TIME* (Sept. 20, 2022), <https://perma.cc/8V7T-XAET>. Similarly, legal scholars Jon Michaels and David Noll wrote:

Following a script reminiscent of the Fugitive Slave Acts and, later, the written and unwritten rules of Jim Crow, today’s private subordination regimes authorize and legitimate what can only be called *legal vigilantism*, deputizing and directing the MAGA GOP base to reimpose or reinforce a Christian nationalist caste system at precisely the moment when that system is imperiled by an increasingly diverse and inclusive electorate.

Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 *CORNELL L. REV.* 1187, 1193 (2023) (emphasis in original).

In previous decades, claims of parents' rights in education focused largely on parents opting their children *out*: out of newly integrated schools and into segregated ones,<sup>2</sup> out of sex education,<sup>3</sup> out of traditional public schools, and into charter schools,<sup>4</sup> private schools,<sup>5</sup> or homeschools.<sup>6</sup> These opt-out educational policies are grounded in the idea that parents should have significant, if not complete, control over how their children are educated. There are substantial risks to society when this belief about educational decision-making becomes the dominant one, however. Most notably, although prioritizing parents as decision-makers fosters viewpoint diversity in the short term by enabling families to more easily pass along their worldviews to their children, it also feeds polarization because the state's interests in creating a shared civic identity, incorporating a range of worldviews, and creating citizens that perpetuate democracy, are not part of decisions about children's education (or if they are, it is coincidental that parents share these interests).<sup>7</sup> This risk of exacerbating polarization is particularly dangerous at the present moment, when the United States has been designated a backsliding democracy.<sup>8</sup>

Recently—specifically, since mid-2021—a new movement has commanded national attention.<sup>9</sup> What I call the New Parents' Rights Movement has augmented the prior opt-out claims with

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<sup>2</sup> See, e.g., Catherine E. Smith, *Keynote Speech: 'Children's Equality Law' in the Age of Parents' Rights*, 71 KAN. L. REV. 533, 543 (2023) (quoting 102 CONG. REC. 4460 (1956) (statement of Rep. Howard Smith, presenting the *Southern Manifesto*)); Joshua Weishart, *What the Law Says About Parents' Rights over Schooling*, EDUC. WK. (Nov. 29, 2021), <https://perma.cc/48L3-RZ3K> [hereinafter Weishart, *What the Law Says*].

<sup>3</sup> See, e.g., Sarah Camille Conrey, Note, *Hey, What About Me?: Why Sexual Education Classes Shouldn't Keep Ignoring LGBTQ Students*, 23 HASTINGS WOMEN'S L.J. 85, 90–91 (2012).

<sup>4</sup> See, e.g., Jane A. Lincove, Joshua M. Cowen & Jason P. Imbrogno, *What's in Your Portfolio? How Parents Rank Traditional Public, Private, and Charter Schools in Post-Katrina New Orleans' Citywide System of School Choice*, EDUC. FIN. & POLY 194, 210–14 (2022).

<sup>5</sup> See *id.*

<sup>6</sup> See, e.g., Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 59 (2016) ("Schools have become a significant battleground in American culture (and elsewhere) as parental rights are entangled with religious freedom, and education is seen as having profitable private potential."); Melissa Moschella, *School Choice: Protecting Parental Rights, Resolving Curriculum Wars, and Reducing Inequality*, PUB. DISCOURSE (Mar. 23, 2022), <https://perma.cc/84JZ-C9PU> (advocating a school choice model that would allow parents to receive stipends for homeschool expenses).

<sup>7</sup> See AMY GUTMANN, DEMOCRATIC EDUCATION 42 (1987).

<sup>8</sup> Mano Sundaresan & Amy Isackson, *Democracy Is Declining in the U.S. but It's Not All Bad News, a Report Finds*, NPR (Dec. 1, 2021), <https://perma.cc/J284-9KU7>.

<sup>9</sup> See *infra* Part III.0

proposed policies that seek to impose anti-egalitarian views on all children in the name of parents' rights and framed within a neutral-sounding focus on decision-making authority.<sup>10</sup> It is intertwined with our present culture wars, which I do not consider trivial disputes (the term originated with a disparaging connotation<sup>11</sup>) but rather ones of fundamental import. Drawing on Professor James Morone's words once more: "Underlying the specific complaints lurks the deepest question in every culture war: can we be a single people? With *them*?"<sup>12</sup> A deep question, indeed.

A small but strong literature is already analyzing aspects of the New Parents' Rights Movement, especially regarding restrictions on anti-racist teaching, which is often mistakenly described as teaching Critical Race Theory.<sup>13</sup> In this Essay, I add to that literature by arguing that the New Parents' Rights Movement seeks to change foundational assumptions in law about both the balance of educational decision-making authority and the values public education transmits, and that these attempted changes have serious consequences. To make this argument, I first set out four normative theories about the balance of power in educational decision-making as identified by political theorist Amy Gutmann.<sup>14</sup> I also identify the dominant theory of educational decision-making today<sup>15</sup> as reflected in the new Restatement of Children and the Law.<sup>16</sup> Second, I discuss in broad strokes the parents' rights movement from the 1970s through the 2010s

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<sup>10</sup> *See id.*

<sup>11</sup> *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991). *See* Nima Shirazi & Adam Johnson, *Episode 157: How the "Culture Wars" Label Obscures and Trivializes Life-and-Death Political Issues*, CITATIONS NEEDED PODCAST (Mar. 9, 2022), <https://perma.cc/9LJL-H4PE>.

<sup>12</sup> Morone, *supra* note 1, at 144 (emphasis in original).

<sup>13</sup> Much of this burgeoning literature focuses on recent controversies regarding anti-racist education, more commonly known (though not accurately so) as Critical Race Theory. *See, e.g.*, LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139, 2160 (2023); Joshua Gutzmann, *Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools*, 106 MINN. L. REV. HEADNOTES 333, 344 (2022); Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61, 74 (2021); Osamudia James, *White Injury and Innocence*, 108 VA. L. REV. 1689, 1711 (2022) [hereinafter James, *White Injury and Innocence*].

<sup>14</sup> *See infra* Section II.A.

<sup>15</sup> RESTATEMENT OF CHILDREN AND THE LAW § 5.10 (AM. L. INST., Tentative Draft No. 4, 2022) [hereinafter RESTATEMENT Draft No. 4]; *see infra* Section II.B.

<sup>16</sup> Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

and also the New Parents' Rights Movement.<sup>17</sup> As part of this discussion, I empirically document the emergence of the new movement by presenting data about the dramatic rise in "parents' rights" rhetoric in the national media beginning in mid-2021. I also synthesize the movement's approach in curriculum, book banning, and other disputes regarding race, anti-racism, sexual orientation, and gender identity. Finally, I begin to explore the potential implications of a shift in formal decision-making authority from being shared among parents, the state, and professional educators, to being dominated by parents; I also explore the potential consequences of the anti-egalitarian policy the new movement seeks to broadly enact in the name of parents' rights.<sup>18</sup> Based on these potential implications, I contend we should resist the New Parents' Rights Movement and recommit to the educational decision-making theory, and the values, that anchor the current state of the law.

#### I. POLITICAL THEORY AND EDUCATIONAL DECISION-MAKING

In 1987, political theorist Amy Gutmann published *Democratic Education*, seeking to answer the question, "How should citizens be educated, and by whom?"<sup>19</sup> Gutmann's engagement with this question somewhat uniquely bridged theory and practice, although the unusual nature of her approach is masked by the straightforward nature of her statement that "[a]ll significant policy prescriptions presuppose a theory, a political theory, of the proper role of government in education."<sup>20</sup> Drawing on the history of Western political thought, Gutmann identified and analyzed three normative theories about the distribution of educational authority before proposing her own. In this Part, I will discuss each of the four theories in turn: the Family State, the State of Families, the State of Individuals, and the Democratic State of Education. This discussion will summarize the theory, provide an example of what the theory looks like in practice, and discuss the extent to which the theory focuses on education as a public or private good as well as how it intersects with egalitarian educational policy. I will then analyze the current state of the law as synthesized in

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<sup>17</sup> See *infra* Part III.

<sup>18</sup> See *infra* Section O.I.C.

<sup>19</sup> See GUTMANN, *supra* note 7, at xi.

<sup>20</sup> *Id.* at 6; see also *id.* at 17.

the Restatement of Children and the Law to discern the theories of education that serve as its conceptual foundation.

#### A. Normative Theories of Education

##### 1. The Family State.

Drawing on ideas traced back to philosophers Plato and Socrates, Gutmann first identified the theory of the Family State, in which the state “claims exclusive educational authority as a means of establishing a harmony . . . between individual and social good.”<sup>21</sup> Put differently, the overarching goal of the Family State is for society to function like a family in which a shared understanding of ethics, values, and virtue leads to social unity and satisfaction with the society that produced that harmony, therefore propagating social stability.<sup>22</sup> In *The Republic*, Plato proposed that this sort of expansive state control over education and resulting harmony was possible only by removing children from their families at a young age and educating them in a communal setting in which the state would impart shared values, thus generating social harmony.<sup>23</sup>

This approach likely seems extreme to parents and non-parents alike, but it has been the foundation of some education policy. For example, it is part of what undergirded the policy of forced removal of thousands of North American and Australian Indigenous children from their families during the late nineteenth and twentieth century and their placement in euphemistically named “boarding schools” or with non-Indigenous families.<sup>24</sup> Whether the state was seeking to eradicate Indigenous culture, create opportunities for children by assimilating them, or something else, these policies did not improve the lives of Indigenous children and their descendants. Rather, these policies created substantial intergenerational, racialized trauma.<sup>25</sup> This example

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<sup>21</sup> *Id.* at 23.

<sup>22</sup> *See id.*

<sup>23</sup> *See* GUTMANN, *supra* note 19, at 25–26 (citing PLATO, *THE REPUBLIC* 541(a) (Allan Bloom trans., Basic Books 1968)).

<sup>24</sup> *See generally* MARGARET B. JACOBS, *WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940* (2009); MARGARET B. JACOBS, *A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD* (2014).

<sup>25</sup> *See, e.g.*, Amy Bombay, Kimberly Matheson & Hymie Anisman, *The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical*

suggests another important question, though: Even if the state had not been acting out of and reinforcing systemic racism, do we want to live in a society with such homogenous values as this theory requires?

The purpose of education, even in Plato's ideal, is articulated as a purely public one: to sustain democracy by producing good citizens and social harmony. That is not to say that forced dispossession of children is necessary for education to operate as a public good—it is not—or that (re)producing systemic racism should be understood as a public good—it should not. Rather, in the Family State, interests of individuals (both parents and individual children) are irrelevant, and the state's interests in preparing future citizens and social harmony are the only interests that matter.<sup>26</sup> Today, a less exclusionary version of the public good argument shapes common rhetoric about public education's importance in cultivating democratic citizenship, but the power of the citizenship argument has diminished over time.<sup>27</sup>

## 2. The State of Families.

In many ways, the State of Families theory is the polar opposite of the Family State theory—here, families have complete control over educational decision-making, and it is the state that is without a voice.<sup>28</sup> This approach enables parents to pass along their values to their children through both private sphere activity of family life and public sphere activity of education. It is justified by three reasons: First, parents are most likely to act in the best interest of their children, a premise articulated by philosopher John Locke and others and still common today.<sup>29</sup> Second, parental liberty is a robust individual right, as economist Milton Friedman and others have contended.<sup>30</sup> Third, natural law precedes social

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*Trauma*, 51 *TRANSCULTURAL PSYCHIATRY* 320, 322–24 (2014) (indicating a greater incidence of suicidal thoughts among adults whose parents or grandparents attended Canada's "Indian Residential Schools"); Karen Menzies, *Understanding the Australian Aboriginal Experience of Collective, Historical, and Intergenerational Trauma*, 62 *INT'L SOC. WORK* 1522, 1526–28 (2019).

<sup>26</sup> See David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 *AM. EDUC. RES. J.* 39, 43–44 (1997).

<sup>27</sup> See *id.* at 43–46.

<sup>28</sup> See GUTMANN, *supra* note 19, at 28–29.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* (first citing MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85–107 (1962); and then citing JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978)).

structures and vests parents with this authority, according to noted theologian Thomas Aquinas and contemporary scholars who build on Catholic theology.<sup>31</sup>

The Supreme Court's 1972 decision in *Wisconsin v. Yoder*<sup>32</sup> illustrates the State of Families theory. In *Yoder*, the Court held that Amish parents' liberty interests in controlling the upbringing of their children, when combined with those same parents' religious Free Exercise interests, justified them opting their children out of school after eighth grade even though state statute required children to attend school until they were 16.<sup>33</sup> The core value of this theory and the *Yoder* decision is that parents should be able to socially reproduce their family. As this example suggests, the State of Families approach is politically easier for the state in the short term as it avoids controversy among citizens (parents) by considering education a private good in service of reproducing families' unique values and allowing parents to opt their children out of generally applicable requirements. (Home-schooling law and policy, which I will discuss later, has since subsumed the practical question at issue in *Yoder*.) It also initially fosters pluralism within the society and across family groups.

However, as Gutmann highlights, the State of Families theory "mistakenly conflates the welfare of children with the freedom of parents."<sup>34</sup> Dissenting in part in *Yoder*, Justice William O. Douglas expressed similar concerns: the lack of a high school education severely limits children's future opportunities, and the children's views were not known, much less considered.<sup>35</sup> Denying children a high school education does not prioritize preparing children to participate in broader society as citizens or as individuals who can contribute to the economy. Rather, it significantly limits their future opportunities as individuals and also as members of a diverse democracy. Thus, this theory does not guarantee that children are taught to value "mutual respect among persons

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<sup>31</sup> See *id.* (first citing THOMAS AQUINAS, SUPPLEMENT SUMMA THEOLOGICA UN DIVINI ILLIUS MAGISTRI OF HIS HOLINESS POPE PIUS XI; and then citing CHARLES FRIED, RIGHT AND WRONG 152 (1978)); see also Helen M. Alvaré, *Families, Schools, and Religious Freedom*, 54 LOYOLA U. CHI. L.J. 579, 586–87 (2023) (describing how observations of natural norms support the special status of the marriage union and parents in both U.S. family law and Christianity); Melissa Moschella, *Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 402–03 (2023).

<sup>32</sup> 406 U.S. 205 (1972).

<sup>33</sup> See *id.* at 234–35.

<sup>34</sup> GUTMANN, *supra* note 19, at 32.

<sup>35</sup> See *Yoder*, 406 U.S. at 241–45 (Douglas, J., dissenting).

[or] rational deliberation among ways of life”; these values are grounded in the idea that education is a public good with the primary purpose of creating citizens.<sup>36</sup> In the long term, the State of Families cannot help but rend the social fabric.<sup>37</sup>

### 3. State of Individuals.

The third normative theory Gutmann identified centers children and seeks, through value-neutral education, to preserve the greatest possible range of opportunities for children when they become adults.<sup>38</sup> This theory is anchored in the idea that children’s choices should not be constrained by the social harmony the state may want, or by the particular ethics, morals, and values their families may hold.<sup>39</sup> It is inspired by philosophers John Stuart Mill, Jeremy Bentham, and Immanuel Kant.<sup>40</sup> Educational decision-makers are neither the state nor parents (neither of whom can maintain such neutrality, practically speaking), but rather professional educators.<sup>41</sup> Rather than teaching value neutrality, this approach teaches that individual freedom trumps all other values,<sup>42</sup> itself a contentious claim because freedom and equality often conflict and are regularly balanced in democratic societies. Additionally, a strong focus on individualism can minimize the barriers that systemic discrimination and oppression still present, thus perpetuating inequality.<sup>43</sup>

Aside from the significant concerns about equality, the difficulty of putting the State of Individuals theory into practice is significant. For example, social emotional learning involves teaching students about “the processes by which people acquire and effectively apply the knowledge, attitudes, and skills to understand and manage their emotions, to feel and show empathy for others, to establish and achieve positive goals, to develop and

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<sup>36</sup> See GUTMANN, *supra* note 19, at 30–31.

<sup>37</sup> See *id.* at 32–33.

<sup>38</sup> See *id.* at 33–34 n.26 (citing JOHN STUART MILL, ON LIBERTY (London, John W. Parker & Son 1859)) (noting that philosopher John Stuart Mill’s skepticism of the state can lead some to read his approach as closer to the State of Families, but contending it is not because it also retains skepticism of parental decision-making and thus only supports “severely limit[ed]” parental authority).

<sup>39</sup> See *id.* at 34.

<sup>40</sup> See *id.* at 34–35.

<sup>41</sup> GUTMANN, *supra* note 19, at 34.

<sup>42</sup> See *id.* at 38.

<sup>43</sup> See, e.g., James, *supra* note 13, at 1695 (“Our national story about the end of racism as the result of a victorious civil rights movement has impeded efforts to engage institutional bias and systemic oppression.”).



maintain positive relationships, and to make responsible decisions.”<sup>44</sup> In social emotional learning, students are not merely taught content knowledge; the goal is for students to apply what they learn because when students have stronger social emotional skills, they are more likely to have positive academic and life outcomes.<sup>45</sup> Thus, social emotional learning may at first seem consistent with the State of Individuals theory: it maximizes students’ future opportunities and chances of success. Yet, as Gutmann noted and others agree for varying reasons, value-neutral education is not possible;<sup>46</sup> and some parents strongly object to the values conveyed through social emotional learning instruction.<sup>47</sup> In doing so, these parents conceive of education as a private good either in service of their family values, or aligned with their interests in their children’s economic independence and social mobility.<sup>48</sup> Similarly, because the State of Individuals theory prioritizes preserving future individual options, it understands education as a private good, not a public one, and especially not the public good of sustaining democracy.<sup>49</sup>

#### 4. Democratic State of Education.

Gutmann sought to draw value from each of the three theories just discussed in shaping her theory, the Democratic State of Education. She embraced individuals’ different views about educational policies as a democratic virtue and contended that deliberative processes are needed to reconcile those views.<sup>50</sup> Central to her theory is the idea that distributing educational decision-making authority “among citizens, parents, and professional educators supports the core value of democracy: conscious social reproduction

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<sup>44</sup> Kimberly A. Schonert-Reichl, *Social and Emotional Learning and Teachers*, 27 *FUTURE CHILD*. 137, 139 (2017).

<sup>45</sup> *See id.* at 138–39.

<sup>46</sup> *See* GUTMANN, *supra* note 19, at 40. In recent years, conservative commentators increasingly agree. *See, e.g.*, Kevin D. Williamson, *There’s No Such Thing as a Value-Neutral Education*, *NAT’L REV.* (Apr. 22, 2022), <https://www.nationalreview.com/2022/04/theres-no-such-thing-as-a-value-neutral-education/>.

<sup>47</sup> *See* Matt Zalaznick, *Parents Bill of Rights’ Targets Critical Race Theory—and SEL*, *DIST. ADMIN.* (June 25, 2021), <https://perma.cc/E7SQ-X77Z>; GUTMANN, *supra* note 19, at 35–36.

<sup>48</sup> *See* Labaree, *supra* note 26, at 50–54.

<sup>49</sup> *See id.*

<sup>50</sup> *See* GUTMANN, *supra* note 19, at 8–11.

in its most inclusive form.”<sup>51</sup> This distributed authority also recognizes that children are not only members of the state or a family, or individuals, but an amalgam of all three.

So, what does this look like? The Democratic State of Education theory does not assume that the state or families can or should be neutral about the good life, so it prioritizes cultivating critical thinking in children so they are able to evaluate these and other disagreements and choose their own way of life.<sup>52</sup> A Democratic State of Education is possible if parents, professional educators, and the state work together to make decisions about children’s education. While parents and the state may advocate for different values, Gutmann contended professional educators should limit the imposition of those values in two ways: First, rational deliberation of values and virtues must be permitted.<sup>53</sup> Not irrational deliberation, not ad hominem attacks, not violence—but rational deliberation. Second, all educable children must be educated.<sup>54</sup> This enacts the principle of nondiscrimination, helping to ensure that the opportunity to participate in social reproduction includes as many voices as possible. The Democratic State of Education thus seeks to sustain not just democracy, but democracy that is robust because of its pluralism.<sup>55</sup>

Much of the litigation surrounding the right to education that has occurred in state courts since the U.S. Supreme Court’s 1973 decision in *San Antonio Independent School District v. Rodriguez*,<sup>56</sup> which largely foreclosed federal courts as an avenue for these claims, has embraced a modified Democratic State of Education approach. One core question in these cases is how to conceptualize what an “adequate” education is, under the terms of the relevant state constitution, and another is whether the state has sufficiently funded the system of education so that it can provide this adequate education. Courts and legislatures thus regularly ask what an education should prepare an individual to know and be able to do.<sup>57</sup> Although the answers inevitably include training for citizenship, thus recognizing education as, in part, a stand-alone public good, they also routinely recognize the goals of social

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<sup>51</sup> *Id.* at 42.

<sup>52</sup> *See id.* at 42–43, 45–46.

<sup>53</sup> *See id.* at 44.

<sup>54</sup> *See id.* at 45.

<sup>55</sup> *See* GUTMANN, *supra* note 19, at 47.

<sup>56</sup> 411 U.S. 1 (1973).

<sup>57</sup> *See, e.g.,* *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 210 (Ky. 1989) (citing *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)).

efficiency (preparing productive participants in the economy) and social mobility (preparing individuals able to advance in society). Thus those answers also conceive of education as a public good in service to private interests, and as a private good.<sup>58</sup> Some of the most recent litigation in this tradition has been explicitly race-conscious, contending that integration and preparation to live in a multiracial society are part of a constitutional right to education.<sup>59</sup> It has also been implicitly race-conscious, focusing on communities of color in which educational outcomes, such as literacy, are heartbreakingly low.<sup>60</sup> A significant reason why litigation surrounding the right to education fails to enact the Democratic State of Education theory is that it neglects to explicitly consider the interests of parents, however.

#### B. Theoretical Underpinnings of Educational Decision-Making in the Restatement of Children and the Law

Before we can consider whether current controversies seek to shift the theoretical underpinning of education law and policy, we must first determine what the dominant theoretical underpinning of such law and policy is today. To do so, I turn to the Restatement of Children and the Law, an ambitious project that integrates the law relevant to children across the various domains they may inhabit: the family, society, schools, and the justice system. After presenting and discussing the three portions of the Restatement most relevant to my query, I will connect the state of the law as presented in the Restatement to the theories laid out by Gutmann, contending that the Restatement reflects the law's deep commitment to sharing educational decision-making authority between parents and the state. We will see that the Restatement

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<sup>58</sup> See *id.*; Labaree, *supra* note 26, at 50–54.

<sup>59</sup> See generally MICHAEL A. REBELL, *FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION* (2018). See also *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 174 (D.R.I. 2020) (noting that the plaintiffs advanced the theory Professor Michael Rebell laid out in his book *Flunking Democracy*); Linda Borg, *RI Outlines Steps to Strengthen Civics Education in Response to Lawsuit*, PROVIDENCE J. (June 15, 2022), <https://perma.cc/XN7C-LB2P> (describing the settlement).

<sup>60</sup> See, e.g., *Gary B. v. Whitmer*, 957 F.3d 616, 627–28 (6th Cir. 2020), *reh'g en banc granted, vacated*, 958 F.3d 1216 (6th Cir. 2020); Kristine L. Bowman, *Kids Have a Right to a Basic Education, According to a New Legal Milestone*, THE CONVERSATION (Apr. 28, 2020), <https://perma.cc/5AWL-P7B7>; *Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case*, GOV. GRETCHEN WHITMER (May 14, 2020), <https://perma.cc/P5MK-H7N7>.

echoes the Democratic State of Education in that it integrates aspects of the theories of the Family State, the State of Families, and the State of Individuals.

The Restatement summarizes the law focused on education as [a]im[ing] to balance deference to parental authority against the state's interest in children's education. Arguably, both sides of the balance are especially weighty in the education context: For parents, educational control often represents a centrally important aspect of their childrearing commitments, and for the state, the interests reach beyond the safeguarding of individual children's well-being to the promotion of a successful society, economy, and democratic system of government.<sup>61</sup>

I contend that children's interests are more prominent in education law than this summary suggests, particularly in the context of the right to education litigation which is often called school finance or school funding litigation. Setting that aside, this summary is a masterful synthesis of many complex areas of law.

Three sections of the Restatement, taken together, encapsulate the duty and authority "shared between parent and state" to educate children.<sup>62</sup> They are as follows:

1.20 Parental Duty and Authority to Educate

(a) Duty. Parents have a duty to ensure that their children receive a sound, basic education. A sound, basic education is one that enables children to acquire the knowledge and skills necessary to prepare them to participate effectively and responsibly as adults in the economy, in society, and in a democratic system of self-governance.

(b) Authority. Parents have broad authority to choose among educational institutions and approaches, including teaching their children at home, so long as they provide their children with a sound, basic education.<sup>63</sup>

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<sup>61</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.26 cmt. a (AM. L. INST., Tentative Draft No. 4, 2022) [hereinafter RESTATEMENT Draft No. 4].

<sup>62</sup> *Id.* pt. 2, intro. note; *see also id.* § 1.20. The Restatement also discusses students' individual rights to due process in discipline and exclusion, *id.* § 7.20, and from interference by others that seriously jeopardizes students' ability to learn, *id.* § 8.10 cmts. b–c. It also briefly discusses law that protects students with disabilities. RESTATEMENT Draft No. 4 pt. 2, intro. note.

<sup>63</sup> RESTATEMENT Draft No. 4 § 1.20.

### 2.26 Educational Neglect

(a) In a civil child-protection proceeding, educational neglect is the failure or refusal of a parent, guardian, or custodian to take the actions required, in compliance with state compulsory attendance laws, to provide a child with a sound basic education, by either:

- (1) ensuring the child's attendance at a public school; or
- (2) ensuring the child is provided with a substantially equivalent education in an alternative setting.

(b) In a criminal proceeding, educational neglect is the purposeful, knowing, or reckless failure or refusal of a parent, guardian, or custodian.<sup>64</sup>

### 5.10. The State's Duty to Provide Free Public Education for All Children

The state has a duty to provide a sound basic education in primary and secondary school to all children living within its jurisdiction at no cost to children or their families.

A sound basic education is one that enables children to acquire the knowledge and skills necessary to prepare them to participate effectively and responsibly as adults in the economy, in society, and in a democratic system of self-governance.<sup>65</sup>

As these excerpts illustrate, although answering the question “who decides” necessarily focuses on authority, the Restatement broadens the discussion about decision-making rights by also identifying a corresponding duty to educate, shared by parents and the state, and suggesting that this duty is owed both to the child and to society.<sup>66</sup>

The Restatement summarizes the law's justification of the state's authority over parents, and its corresponding duty to provide an education to children, on several bases: (1) “an educated citizenry is required for effective self-governance in a democracy”; (2) “[a] sound basic education is also required to prepare individuals to exercise their rights . . . to participate in governance . . .

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<sup>64</sup> *Id.* § 2.26.

<sup>65</sup> *Id.* § 5.10.

<sup>66</sup> *See id.* § 1.20 cmt. a. Professor Jeffrey Shulman similarly argued—normatively, not empirically—in 2010 that “the parent's right to educate his or her children is strictly circumscribed by the parent's duty to ensure that children learn habits of critical reasoning and reflection.” Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290, 299 (2010).

[and] exercise the autonomy associated with personal liberty”; (3) “an education is required to prepare individuals for employment”; (4) “education plays an important role in the pro-social development of young people and in their successful transition to adulthood”; and (5) “education can help prepare individuals to live harmoniously . . . in a diverse society.”<sup>67</sup> The reporters’ notes indicate that even from the founding of the Republic, universal education was understood as necessary to democratic self-governance.<sup>68</sup> However, the right to a sound, basic education is not a fundamental federal right for children, but instead is guaranteed to them via state constitutions.<sup>69</sup> Thus, the specific contours of that right vary somewhat, though the Restatement adopts the six capacities identified in the *Rose v. Council for Better Education*<sup>70</sup> litigation in Kentucky in the 1980s as giving meaning to this relatively ambiguous idea.<sup>71</sup>

In contrast, “parents’ duty to educate their children,” the Restatement opines, “is one of the central parental duties long identified at common law . . . now [ ] codified in states’ compulsory attendance laws and incorporated into state laws governing child neglect.”<sup>72</sup> The state enforces the duty parents owe to their children: it can regulate what constitutes a “sound, basic education”<sup>73</sup> which may include “certain studies plainly essential to good citizenship,”<sup>74</sup> require that students are provided an education that meets this threshold, even in the context of homeschooling,<sup>75</sup> and enforce compulsory attendance requirements (which all

<sup>67</sup> RESTATEMENT Draft No. 4 § 5.10 cmt. a.

<sup>68</sup> See *id.* § 5.10 reporters’ note cmt. a.

<sup>69</sup> See *id.* § 5.10 cmt. a, b, reporters’ note cmt. a.

<sup>70</sup> 790 S.W.2d 186 (Ky. 1989).

<sup>71</sup> See RESTATEMENT Draft No. 4 § 5.10 (citing *Rose*, 790 S.W.2d 186); *id.* reporters’ notes cmts. a, b.

<sup>72</sup> See *id.* § 2.26 cmt. a. As Professor Anne Dailey notes, “parental rights bore an ambivalent relationship to the early twentieth-century goal of educating children for democracy.” Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 441 (2006).

<sup>73</sup> RESTATEMENT Draft No. 4 § 1.20 cmt. a; see also *id.* § 1.20 cmt. c. (explaining the scope of parents’ authority to educate their children at home); *id.* § 1.20 cmt. e (outlining the enforcement of parents’ duty to educate their children); *id.* § 1.20 reporters’ notes cmts. a, c (describing the history of parental control over education in the United States and detailing the scope of parents’ authority to educate their children at home).

<sup>74</sup> *Id.* § 1.20 reporters’ notes cmt. b (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)).

<sup>75</sup> RESTATEMENT Draft No. 4 § 1.20 cmts. a, c, e, reporters’ notes cmt. a, c; see also *id.* § 2.26 reporters’ notes cmt. e.

states have<sup>76</sup>) through civil and criminal actions against parents.<sup>77</sup> Family law scholars Anne Dailey and Laura Rosenbury describe the authority part of this balance as the “authorities framework,” focusing on “who has authority over children’s lives—parents, the state, or (less frequently) children themselves.”<sup>78</sup>

Parents also retain discretion to determine “how, where, and by whom their children are educated” and “to supplement the prescribed curriculum with other content, including religious content,” so long as the education meets the quality threshold.<sup>79</sup> The Restatement summarizes this authority as “allow[ing] parents to shape that education to reflect their beliefs, values, and commitments.”<sup>80</sup>

A pair of cases decided by the U.S. Supreme Court in the early twentieth century is often cited in support of the parental liberty interest claim: *Meyer v. Nebraska*<sup>81</sup> struck down a state statute prohibiting schools from teaching any non-English language in grade school because the prohibition violated parents’ and teachers’ liberty interests,<sup>82</sup> and *Pierce v. Society of Sisters*<sup>83</sup> guaranteed parents’ right to choose to send their children to private school.<sup>84</sup> Around this same time, the Court decided *Farrington v. Tokushige*,<sup>85</sup> limiting the extent of regulation of private schools and noting the importance of parents’ ability to access language instruction for their children.<sup>86</sup> Nearly fifty years later, *Wisconsin v. Yoder* built on this parental liberty interest, combining it with a Free Exercise claim by parents and effectively permitting homeschooling of children after age 14.<sup>87</sup>

Although parents can choose to send their children to public schools or not, the Restatement explains that parents do not have the authority to modify the public school curriculum.<sup>88</sup> A handful

<sup>76</sup> *Id.* § 2.26 reporters’ notes cmt. a.

<sup>77</sup> *Id.* § 2.26 cmt. a.

<sup>78</sup> Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1456 (2018) [hereinafter Dailey & Rosenbury, *New Law*]; see also Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 29.

<sup>79</sup> RESTATEMENT Draft No. 4 § 1.20 cmt. a, reporters’ notes cmt. b.

<sup>80</sup> *Id.* § 1.20 cmt. a.

<sup>81</sup> 262 U.S. 390 (1923).

<sup>82</sup> See *id.* at 403; RESTATEMENT Draft No. 4 § 1.20 reporters’ notes cmt. a.

<sup>83</sup> 268 U.S. 510 (1925).

<sup>84</sup> See *id.* at 535; RESTATEMENT Draft No. 4 § 1.20 reporters’ notes cmt. b.

<sup>85</sup> 273 U.S. 284 (1927).

<sup>86</sup> See *id.* at 298; RESTATEMENT Draft No. 4 § 1.20 reporters’ notes cmts. a–b.

<sup>87</sup> See *Yoder*, 406 U.S. at 234; RESTATEMENT Draft No. 4 § 1.20 reporters’ notes cmt. c.

<sup>88</sup> Schools may permit parents to opt their children out of particular content, as has long happened in the context of sex education. See *id.* § 1.20 cmt. d; Shulman, *supra* note 66, at 331–36.

of judicial decisions in the late 1800s and early 1900s did support parents who demanded curricular modifications or exemptions, but a series of judicial decisions beginning in the late 1980s have found consistently to the contrary, even though parents brought liberty interest claims based on *Pierce* and *Meyer*, and often also based on their own religious beliefs.<sup>89</sup> Courts routinely acknowledge the logistical difficulties such exemptions would create and also draw on the role of public schools in preparing citizens, creating a public good, and teaching a corresponding curriculum.<sup>90</sup>

So, which theory anchors the current state of the law? The Supreme Court unequivocally rejected the pure State of Families approach in *Meyer* in 1923, and various scholars have questioned whether *Pierce* and *Meyer*, in particular, were ever as strong in their legal holdings as they were in their rhetoric.<sup>91</sup> Yet, parents' rights are still the starting point judges, scholars, and policymakers regularly use when considering children's interests.<sup>92</sup> As Dailey and Rosenbury have explained, these rights are historically and doctrinally rooted in mid-1600s English courts' concepts of custody and coverture,<sup>93</sup> and more recently in parents' liberty interests.<sup>94</sup> As a result, privileging parents' rights "decenter[s] and devalue[s] children in legal analyses" and serves as a "circuitous and unreliable means of" advancing children's interests.<sup>95</sup> Even so, Dailey and Rosenbury described the law related to education as an exception to the "near-absolute parental rights of childrearing."<sup>96</sup>

The law does not reflect the State of Individuals approach, either. In all of the cases discussed above, the Court's focus was on parents' rights and interests, into which the Court collapsed the interests of children.<sup>97</sup> And, parents' rights and interests were

<sup>89</sup> RESTATEMENT Draft No. 4 § 1.20 reporters' notes cmt. d.

<sup>90</sup> *Id.*

<sup>91</sup> See *Meyer*, 262 U.S. at 402; Dailey, *supra* note 72, at 482 (commenting on this aspect of *Meyer*); Caroline Mala Corbin, *The Pledge of Allegiance and Compelled Speech Revisited: Requiring Parental Consent*, 97 IND. L.J. 967, 989 (2022); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1086 (2010); Shulman, *supra* note 66, at 293, 301.

<sup>92</sup> See Dailey & Rosenbury, *New Law*, *supra* note 78, at 1460.

<sup>93</sup> See *id.* at 1457; Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 85, 89, 97 (2021) [hereinafter Dailey & Rosenbury, *New Parental*]; Barbara Bennett Woodhouse, "Who Owns the Child"?: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1045 (1992).

<sup>94</sup> See Dailey & Rosenbury, *New Law*, *supra* note 78, at 1470.

<sup>95</sup> *Id.* at 1471.

<sup>96</sup> See Dailey & Rosenbury, *New Parental*, *supra* note 93, at 78.

<sup>97</sup> See *id.* at 112 (discussing *Meyer* and *Pierce*); Corbin, *supra* note 91, at 992 (discussing *Yoder*). Somewhat differently, Professors Clare Huntington and Elizabeth Scott



balanced against the state's—not meaning professional educators, but meaning the state writ large, the funder of the activity of public education and host of the civic community.

Likewise, the law does not embrace the Family State approach. The state's control is far from absolute, as the Family State would demand. Children are most often raised in the families in which they are born, and these families maintain near-absolute discretion over where children are to be educated. This discretion is subject only to state interference when families abdicate their responsibility to provide opportunities for children to be educated.<sup>98</sup>

So, what about the Democratic State of Education? Taken as a whole, these provisions of the Restatement and the law they synthesize acknowledge both duty and authority over education on the part of the state and parents. The provisions further balance the duty and authority that both have; this blending and balancing reflects an acknowledgement of the multifaceted identity of the child. This approach thus understands education as four things at once: a public good which, in part, produces citizens; a private good for parents who can shape their children's upbringing; a public good in service of the private sector when it prepares children to participate in the economy; and a private good that promotes social mobility.<sup>99</sup> For all of these reasons, the Restatement reflects law that builds on the Democratic State of Education as its theoretical foundation.

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contend that the legal era, in which parents competed against the state for authority over children and in which children's interests were thought not to exist or were assumed to be furthered by the adults with authority, is over. Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1383–84 (2020) [hereinafter Huntington & Scott, *Conceptualizing*]. While this concept may be well-developed in juvenile law, I do not see it animating past or present law and policy in education law. However, because this framework has the potential to shape judicial response to current parents' rights claims in a principled way that does not further polarization, I will engage it again in the final Part of this Essay.

<sup>98</sup> See RESTATEMENT Draft No. 4 § 2.26 cmt. a.

<sup>99</sup> As education policy scholar David Labaree has demonstrated, the goals of education have waxed and waned over time, and from the mid-nineteenth century to the present, the social mobility goal has steadily become more significant, now holding place as “the most influential factor in American education.” See Labaree, *supra* note 26, at 43. Similarly, Professor Caitlin Millat described the past hundred years as a century in which “any such protection the Court may once have offered to public education as a democratic tool has . . . been undercut.” Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529, 563 (2023).

## II. PARENTS' RIGHTS MOVEMENTS AND EQUALITY

Parents' rights have been recognized by courts and legislatures literally for centuries; they are an essential component of the Restatement's discussion about education; and they continue to be the focus of a nuanced scholarly literature.<sup>100</sup> What is different about the New Parents' Rights Movement is that it augments traditional opt-out claims with policy proposals that seek to shape the environment of public schools for all children in anti-egalitarian ways. In this Part, I analyze this new movement first by providing historical context, describing the new movement's origins, and presenting data about national media attention<sup>101</sup> to document the movement's emergence. I then turn to the anti-egalitarian curriculum, content, and policy the new movement seeks to impose on public schools in the name of parents' rights. Finally, I consider the implications of the potential shift in the grounding theory and resulting policy.

### A. Parents' Rights Movements

Seventy years ago during another set of culture wars, the rhetoric of "parents' rights" was invoked to justify white parents' resistance to school desegregation.<sup>102</sup> This Section provides the broad strokes of the connection between parents' rights claims and education policy from that point through the present, also illuminating the emergence of the New Parents' Rights Movement.

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<sup>100</sup> See generally Dailey & Rosenbury, *New Law*, *supra* note 78; Buss, *supra* note 78.

<sup>101</sup> These sources are collected and made available by Media Cloud, an open-source database and content analysis tool originated by Harvard University and the Massachusetts Institute of Technology and now maintained by the Media Ecosystems Analysis Group, the University of Massachusetts Amherst, and Northeastern University. All figures in this Part were created via Media Cloud. See About, MEDIA CLOUD, <https://perma.cc/3YBM-PLL4>.

It is important to explain more details about, and related limitations of, the data generated by this search tool. First, frequency count indicates the number of articles in which a given term or terms appear, not the number of times they appear. Thus, an article that mentions a term in passing is counted the same as an article that mentions a term repeatedly and is entirely focused on that topic. Additionally, because I am not analyzing the articles, I make no claims about whether the mention of parental rights is supportive or critical. My focus is on the frequency of a term as demonstrating a particular level, or changing level, of widespread discussion about the term. I did seek to minimize articles that were about other topics, so I excluded articles that contained the terms "custody," "vaccine," or "social media." It is possible that some of the excluded articles are also relevant to the topic at hand, but more likely that the remaining articles contain articles that may not be relevant to the topic at hand.

<sup>102</sup> Smith, *supra* note 2, at 543.

Soon after the Supreme Court decided *Brown v. Board of Education*<sup>103</sup> in 1954, a Southern representative claimed on the floor of Congress that *Brown* wrongly denied (white) parents the choice to have their children educated in segregated schools.<sup>104</sup> The same rhetoric of “parental choice” was subsequently used to justify various mechanisms designed to empower resistance to *Brown* by enabling whites to avoid school integration.<sup>105</sup> The rhetoric of parental choice and parents’ rights claims eventually dissipated and then reemerged in the 1980s when a conservative lawyer challenged public school curricula in courts in an effort to impose religious values on public school students.<sup>106</sup> After those efforts were unsuccessful, proponents turned their focus to expanding homeschooling policy, again pursuing the goal of opting out of public school environments rather than changing them.<sup>107</sup> For many years, homeschooling advocates continued to pursue the relaxation of homeschool regulations, but remained a relatively marginal group.<sup>108</sup> However, as a result of their efforts, homeschooling went from being illegal in many states in the 1980s to now permitted in all. This core group’s efforts led to a parental rights constitutional amendment being proposed in Congress about a decade ago.<sup>109</sup>

During this same time, law and policy creating charter schools, vouchers, and tax credits—all united under the banner of “school choice”—grew dramatically in popularity.<sup>110</sup> One common aspect of these policies was the idea that, grounded in principles of market economics, alternatives to public schools would spur competition and thus increase quality of public schools. Of course,

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<sup>103</sup> 347 U.S. 483 (1954).

<sup>104</sup> See Smith, *supra* note 2, at 543 (quoting 102 CONG. REC. 4460 (1956) (statement of Rep. Howard Smith, presenting the *Southern Manifesto*)). See generally Weishart, *supra* note 2.

<sup>105</sup> See Joshua E. Weishart, *Separate but Free*, 73 FLA. L. REV. 1139, 1184 (2021); Fineman & Shepherd, *supra* note 6, at 67–68.

<sup>106</sup> See Nossel, *supra* note 1.

<sup>107</sup> *Id.*

<sup>108</sup> With fear for their newfound autonomy, parental rights advocates opposed the adoption of the International Convention on the Child, but so have many others. See Fineman & Shepherd, *supra* note 6, at 94 & n.184 (noting that the United States is the only country to not have signed and that Somalia and South Sudan both signed in 2015); Michael P. Farris, *Nannies in Blue Berets: Understanding the United Nations Convention on the Rights of the Child: A Legal Analysis*, 2 REGENT J.L. & PUB. POL’Y 107, 117–19 (2010).

<sup>109</sup> See Fineman & Shepherd, *supra* note 6, at 66.

<sup>110</sup> *Id.* at 67–68.

another core aspect of these policies was that parents were empowered—and, increasingly, arguably expected<sup>111</sup>—to act on behalf of their children and provide them with “better” educational opportunities than traditional public schools. In other words, it became progressively easier for parents to opt their children out of traditional public schools because the barrier of private school tuition became lower and lower. Today, these policies are common features of the educational landscape across the country, although the details vary across states. These policies also are the subject of a voluminous literature.<sup>112</sup>

Then, in 2020, multiple events occurred. Journalists and scholars alike cite a combination of parental frustration over and activism in response to COVID-19-related school shutdowns and other COVID-19-related policy beginning in spring 2020, and reactions to the summer 2020 racial justice protests in response to the police killing of George Floyd and other unarmed Black Americans.<sup>113</sup> Conservative organizers and politicians capitalized on the combination of dissatisfaction and backlash, “channeling voter frustration into a sophisticated national campaign aimed at restricting [classroom] instruction on race and gender,” and activating parents to advance this agenda.<sup>114</sup> Parents’ rights rhetoric<sup>115</sup> spread quickly and the New Parents’ Rights Movement blossomed at the local, state, and national levels, nurtured by groups such as Moms for Liberty and the Parental Rights Foundation.<sup>116</sup> Among

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<sup>111</sup> Thanks to education scholar Rebecca Jacobsen for this insight. See Rachel M. Cohen, *How Education Culture Wars Have Shaped the Midterms*, VOX (Nov. 4, 2022), <https://perma.cc/5LLC-V99M>.

<sup>112</sup> See generally Carolyn Sattin-Bajaj & Allison Roda, *Opportunity Hoarding in School Choice Contexts: The Role of Policy Design in Promoting Middle-Class Parents’ Exclusionary Behaviors*, 34 EDUC. POL’Y 992 (2020); Lincove et al., *supra* note 4.

<sup>113</sup> See Lauren Gambino, *Parents’ Rights: Republicans Wage Education Culture War as 2024 Looms*, THE GUARDIAN (Mar. 24, 2023); Laura Meckler, Hannah Natanson & John D. Harden, *Liberals Try to Reclaim ‘Parents’ Rights’ from Conservatives in Education*, WASH. POST (June 13, 2023), <https://www.washingtonpost.com/education/2023/06/12/progressive-education-activist-m4/>; James, *supra* note 13, at 1702; Clark, *supra* note 13, at 2146–47, 2161.

<sup>114</sup> Gambino, *supra* note 113; see also Nossel, *supra* note 1.

<sup>115</sup> Professor Naomi Cahn also writes about this rhetoric, focusing primarily on the context of minors’ rights to have an abortion. See generally Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory* (Va. Pub. L. & Legal Theory Rsch. Paper No. 2023-19, 2023).

<sup>116</sup> See Nossel, *supra* note 1.

the new movement's early successes<sup>117</sup> were Florida's 2021 Parents' Bill of Rights law<sup>118</sup> and a similar bill 2022 in Georgia.<sup>119</sup>

By April 2023, multiple potential conservative presidential candidates had declared they supported a "parents' rights agenda," focusing on allowing parental control over public school curricula and expanding school choice.<sup>120</sup> During this same time frame, calls for "bring[ing] back parental rights" were met with ovations at large campaign events.<sup>121</sup> Yet, many viewed this with concern. For example, PEN America president Suzanne Nossel cautioned: "[T]he rallying cry of 'parents' rights' is being wielded to do far more than give parents their rightful voice. It is turning public schools into political battlegrounds, fracturing communities, and diverting time and energy away from teaching and learning."<sup>122</sup>

Almost as quickly as the New Parents' Rights Movement emerged, scholars began studying it and collecting data. Focusing on attempts to exclude Critical Race Theory (CRT) instruction from schools, Professor LaToya Baldwin Clark identified and analyzed the introduction of over 560 pieces of legislation, regulations, resolutions, and policy across the country from January 2021 through December 2022, categorizing them by type and identifying major themes.<sup>123</sup> Politics of education scholar Rebecca Jacobsen and co-authors used narrative policy framework to analyze local-level CRT debates and identify common different narrative plots across the debates.<sup>124</sup> Focused on school board book bans, University of Maryland doctoral students Pamela Callahan and Joel Miller analyzed policies in twenty-nine school districts that experienced a book banning challenge between 2017 and 2021, noting

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<sup>117</sup> *See id.*

<sup>118</sup> FLA. STAT. tit. XLIX, ch. 1014 (2023).

<sup>119</sup> GA. CODE ANN. § 20-2-786 (2022).

<sup>120</sup> *See Gambino, supra* note 113; Libby Stanford, *What Educators Should Get Used to Hearing on the Campaign Trail*, EDUC. WK. (Apr. 7, 2023), <https://perma.cc/G5SS-EMCZ>.

<sup>121</sup> *See Gambino, supra* note 113 (quoting former President Donald Trump).

<sup>122</sup> *See Nossel, supra* note 1.

<sup>123</sup> *See Baldwin Clark, supra* note 13, at 2145.

<sup>124</sup> *See generally* Rebecca Jacobsen, Ariell Bertrand, Sandy Frost Waldron, Annie Gensterblum & Jane Lo, *Narrative Spillover and Narrow Plots in the Ban—CRT Policy Narrative: A New, Inductive Approach to Operationalizing Plot* (unpublished manuscript) (on file with author).

that some states reported “record levels” of attempted school library book removal actions during 2020–2021.<sup>125</sup>

Tracking proposed legislation and regulations is one way to identify the trajectory of a movement (especially its formal impact, to the extent proposals are enacted); tracking the attention topics receive in national media is another.<sup>126</sup> The latter approach allows us to consider many things, including the emergence of a movement over time, how issues are framed for and thus presumably understood by the general public and also the impact of a movement, as illustrated by consistent use of terms and connection of concepts.<sup>127</sup> Thus, to continue to build out what we know about the New Parents’ Rights Movement, in this Section I provide several figures that help create a baseline by tracking the frequency of national media attention to parents’ rights over time. The figures draw from the publicly available source Media Cloud, specifically its database of 256 national media sources. The figures all bear the same format: the x-axis tracks chronology, beginning July 1, 2018, and ending June 30, 2023; it is the same in all figures. The y-axis shows the number of articles in the database that matched the search terms. Readers are cautioned to pay attention to the values on the y-axis, which often change from one figure to the next.

As Figure 1 shows, the term “parents rights” began appearing much more frequently in new articles also mentioning “school” “education” or “student” in mid-2021. Of the 9,842 articles from this time period, 8,895 (90.4%) appeared after July 1, 2021.<sup>128</sup>

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<sup>125</sup> See Pamela Catherine Callahan & Joel Miller, *Avenues for Engagement? Testing the Democratic Nature of Library Book Challenge Processes 2* (2023) (unpublished manuscript) (on file with author).

<sup>126</sup> Pew Research describes its national media research methods and rationale in doing so on its website. See *News Coverage Index Methodology*, PEW RSCH. CTR., <https://perma.cc/E2GK-VPE3>.

<sup>127</sup> See generally George C. Edwards III & B. Dan Wood, *Who Influences Whom? The President, Congress, and the Media*, 93 AM. POL. SCI. REV. 327 (1999); Yue Tan & David Weaver, *Agenda-Setting Effects Among the Media, the Public, and Congress, 1946–2004*, 84 JOURNALISM & MASS COMMUN. Q. 729 (2007).

<sup>128</sup> This data is based on Media Cloud, described *supra* in note 99.

FIGURE 1. FREQUENCY OF PARENTS' RIGHTS RHETORIC IN U.S. NATIONAL MEDIA COVERAGE OF EDUCATION, JULY 2018–JUNE 2023<sup>129</sup>

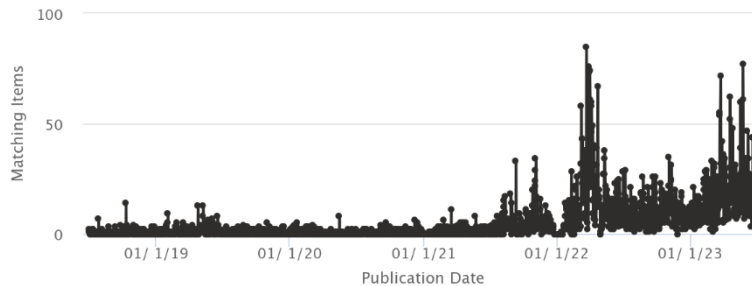


Figure 1 shows in broad strokes the emergence of a new social movement that scholars have already begun to study.

#### B. Policy Proposals Advanced by the New Parents' Rights Movement

This new movement has a policy agenda and, as with social movements generally, it seeks to create change. As the Restatement made clear, parents have a right to choose whether their child attends a traditional public school, a charter school, a private school, or is homeschooled.<sup>130</sup> However, the Restatement also documents that when a child attends public school, parents do not have a legal right to edit that school's curriculum for their child or for other children.<sup>131</sup> The New Parents' Rights Movement contests this boundary: grounded in parents' rights claims, various proposals seek to enable a parent to opt their child out of particular curriculum, to change the generally applicable curriculum by objecting to it being taught to an individual child, and to grant parents access to curriculum and lesson plans on demand.<sup>132</sup> In this Section, I provide a high-level synthesis of these complex con-

<sup>129</sup> Figure 1 is based on a search for (“parents rights” or “parental rights”) AND (“school” or “education” or “student”).

<sup>130</sup> RESTATEMENT Draft No. 4 § 1.20(b); see *supra* Section I.B.

<sup>131</sup> See *id.* § 1.20 cmt. d; Shulman, *supra* note 66, at 331–36.

<sup>132</sup> See Baldwin Clark, *supra* note 13, at 2182; Moschella, *School Choice*, *supra* note 6. These proposals are sometimes framed as a partial remedy for the “injustice” of public schools receiving most of the public funding for education.

troversies; I gratefully draw on the emerging literature that engages these issues in more depth.<sup>133</sup> I begin by summarizing disputes prior to 2021, then turn to the claims beginning in mid-2021 focused on race and racism before addressing those focusing on sexual orientation and gender identity. Throughout, I continue to document the presence of “parents’ rights” rhetoric in the national media. All of this lays the groundwork for the following Section, in which I will discuss the significance of the attempted shifts.

For many decades, the two more controversial areas of curriculum had been evolution and sex education, and despite occasional intense flare-ups, agreements had been effectively negotiated: states’ science standards resolve in each state whether, and if so how, the theory of evolution will be taught,<sup>134</sup> and forty states have laws that permit parents to opt their children out of or into sex education.<sup>135</sup> Thus, for decades prior to mid-2021, widespread curriculum battles had been relatively quiet, or at least limited in the national attention they drew. Additionally, prior to 2021, it was rare for books to be removed from school libraries due to their content, with the Supreme Court’s 1982 decision in *Island Trees School District v. Pico*<sup>136</sup> featuring one of the more prominent disputes.<sup>137</sup> Finally, although some parents’ rights disputes and litigation focused on transgender students, these cases were infrequent and also seemed to be isolated incidents.<sup>138</sup>

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<sup>133</sup> See generally Baldwin Clark, *supra* note 13; James, *White Injury and Innocence*, *supra* note 13; Osamudia James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083 (2014); Millat, *supra* note 99.

<sup>134</sup> See Kristi L. Bowman, *An Empirical Study of Evolution, Creationism, and Intelligent Design Instruction in Public Schools*, 36 J.L. & PUB. EDUC. 301, 323 (2007); Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer’s Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL’Y 417, 430–31 (2006) (finding that as of 2005, only about half of states’ public school science standards received passing grades by the nonprofit Fordham Foundation for their treatment of evolution); Stephen Sawchuk, *What’s Driving the Push to Restrict Schools on LGBTQ Issues?*, EDUC. WEEK (Apr. 19, 2022), <https://perma.cc/58NP-T6HV>.

<sup>135</sup> SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., POLICY BRIEF: SEX ED & PARENTAL CONSENT, OPT-IN V. OPT-OUT (2018). If parents opt out, it is usually because they have moral—particularly religious—beliefs about sex, gender, and sexual orientation and do not want their children to be exposed to beliefs that do not promote an abstinence-only approach to sexual activity and are accepting of nonheterosexual couples and noncisgender identities. See, e.g., LUCY ALEXANDER, *STRAYING FROM THE FLOCK* (2017).

<sup>136</sup> 457 U.S. 853 (1982).

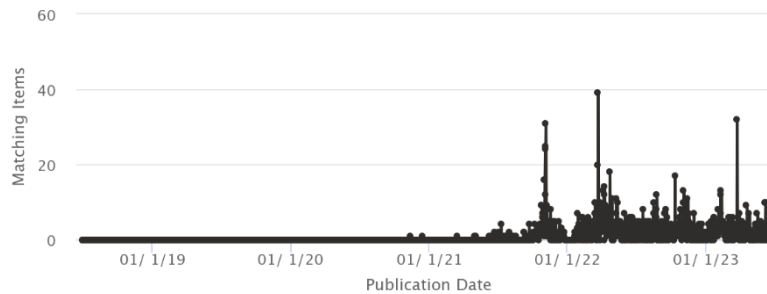
<sup>137</sup> See generally Jonathan Friedman & Nadine Faird Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Dec. 19, 2022), <https://perma.cc/3VUX-NZLB>.

<sup>138</sup> See generally, e.g., *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118 (D. Md. 2022).



Then, in mid-2021, the New Parents' Rights Movement took off, focusing on curriculum and policy focusing on (1) race and racism, and (2) sexual orientation and gender identity. As Figure 2 shows, the term "Critical Race Theory" (CRT) was all but absent from national media discussion related to parents' rights prior to 2021.

FIGURE 2. FREQUENCY OF PARENTS' RIGHTS RHETORIC IN U.S. NATIONAL MEDIA COVERAGE OF CRITICAL RACE THEORY, JULY 2018–JUNE 2023<sup>139</sup>



Spanning from mid-2018 through mid-2023, 1,869 national news stories mentioned CRT along with “parents’ rights” or “parental rights”; only twelve mentions occurred before July 2021, and all but two of those twelve occurred in the first six months of 2021.

National media mentions of CRT in the educational context climbed sharply beginning in mid-2021. This was the result of a strategy conceived of and implemented by a conservative journalist,<sup>140</sup> which gained momentum early on when then-President Donald Trump issued a short-lived executive order prohibiting “race- and diversity-related education in federal workplaces” including the military, government contractors, and federal grant recipients.<sup>141</sup> By May 2023, eighteen states had enacted laws or other regulations aimed at restricting teaching about race and

<sup>139</sup> Figure 2 is based on a search for (“parents rights” or “parental rights”) AND (“critical race theory”).

<sup>140</sup> See Tiffany Justice & Tina Descovich, Opinion, *What ‘School Board Moms’ Really Want—and Why Candidates Ignore Us at Their Peril*, WASH. POST (Nov. 8, 2021), <https://www.washingtonpost.com/opinions/2021/11/08/moms-for-liberty-education-elections/>; Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://perma.cc/LA4Z-5RXH>; Baldwin Clark, *supra* note 13, at 2143–44.

<sup>141</sup> Hamilton, *supra* note 13, at 74; (citing Combating Race and Sex Stereotyping, 85 Fed. Reg. 60683 (Sept. 22, 2020)); Baldwin Clark, *supra* note 13 at 2143–44 (discussing the executive order).

racism; they often restrict teaching about “oppression,” “shame,” or “intersectionality,” although they are discussed as restricting instruction about CRT.<sup>142</sup> CRT’s creators and supporters respond that CRT is a way to understand how law has contributed to systemic racism and how systemic racism has impacted individuals’ lives; furthermore, it is taught at the graduate level in universities, not to K–12 students.<sup>143</sup> (Banning CRT from colleges and universities also has been a focus of legislative attention.<sup>144</sup>) In an insightful 2022 article, Professor Osamudia James explained why the banned content and curriculum are more accurately described as anti-racism education which “teach[es] more explicitly about the function, operation, and harm of racism in the United States,”<sup>145</sup> but framing these as disputes about teaching CRT has held.

During this same time, national media attention to issues of sexual orientation and gender identity in the context of parents’ rights became especially pronounced, as Figure 3 shows.

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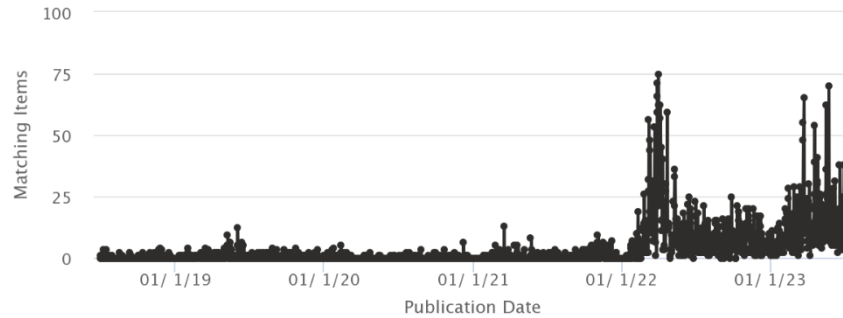
<sup>142</sup> Kiara Alfonseca, *Critical Race Theory in the Classroom: Understanding the Debate*, ABC NEWS (Feb. 2, 2023), <https://perma.cc/S3ZJ-N5JA>; see Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (June 11, 2021), <https://perma.cc/U8XQ-6DYB> (documenting the total number of states with bans through June 13, 2023); Baldwin Clark, *supra* note 13, at 2165 tbl. 2 (summarizing the number of measures introduced and adopted through December 31, 2022); *id.* at 2171–76 (discussing the prohibitions advanced by the measures); Laura Beth Kelly, *What Do So-Called Critical Race Theory Bans Say?*, 52 EDUC. RESEARCHER 248, 248 (2023) (providing a content analysis of statutes); Gutzmann, *supra* note 13, at 336–45 (documenting bans through late 2021 or early 2022).

<sup>143</sup> Alfonseca, *supra* note 142. There are a variety of excellent primers on CRT. See, e.g., Hamilton, *supra* note 13, at 81–102; Baldwin Clark, *supra* note 13, at 2149–59.

<sup>144</sup> For a thorough chronicle and analysis of legislative attempts to ban instruction in CRT in public higher education institutions, see generally Vanessa Miller, Frank Fernandez & Neal H. Hutchens, *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education*, 88 MO. L. REV. 61 (2023).

<sup>145</sup> James, *White Injury and Innocence*, *supra* note 13, at 1691.

FIGURE 3. FREQUENCY OF PARENTS' RIGHTS RHETORIC IN U.S. NATIONAL MEDIA COVERAGE OF SEXUAL ORIENTATION AND GENDER IDENTITY, JULY 2018–JUNE 2023<sup>146</sup>



Of the 6,999 articles that appeared in the five years after June 2018, 92.9% of those (6,499) appeared between July 2021 and June 2023.<sup>147</sup> A Florida statute enacted in 2022 earned the nickname “Don’t Say Gay” because it prohibited discussion about LGBTQIA+ individuals and issues in public schools.<sup>148</sup> Although the Florida law was not the first to do so, it was by far the most high profile.<sup>149</sup> By mid-2023, ten states had similar laws on the books, and five states also required parental notification and opt-out of curriculum that is inclusive of LGBTQIA+ individuals.<sup>150</sup> Some scholars describe these and the anti-CRT curricular prohibitions as “educational gag laws” and identify them as one of three areas in which recent state statutes have enabled private actors to enforce state law even though (unlike whistleblower statutes,

<sup>146</sup> Figure 3 is based on a search for (“parents rights” or “parental rights”) and (“transgender” or “gender identity” or “sex at birth” or “sexual orientation” or “lesbian” or “gay” or “bisexual” or “lgbt” or “homosexual”).

<sup>147</sup> Jaelyn Diaz, *Florida’s Governor Signs Controversial Law Opponents Dubbed ‘Don’t Say Gay,’* NPR (Mar. 28, 2022), <https://perma.cc/YJ7Z-77P5>.

<sup>148</sup> *Id.*

<sup>149</sup> See MOVEMENT ADVANCEMENT PROJECT, *LGBTQ YOUTH: LGBTQ CURRICULAR LAWS* (2023), (providing a fifty-state summary of relevant law); Anne Branigin, *10 Anti-LGBTQ Laws Just Went into Effect. They All Target Schools.*, WASH. POST (July 8, 2022), <https://www.washingtonpost.com/nation/2022/07/08/anti-lgbtq-education-laws-in-effect/> (“Florida’s novel restrictions banning classroom discussions of gender and sexuality . . . have become a template for other states.”); Dustin Jones & Jonathan Franklin, *Not Just Florida. More than a Dozen States Propose So-Called ‘Don’t Say Gay’ Bills,* NPR (Apr. 10, 2022), <https://perma.cc/8VN5-7R3N>.

<sup>150</sup> See *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT (last updated Aug. 3, 2023), <https://perma.cc/KJ29-3M84> (visualizing the data); MOVEMENT ADVANCEMENT PROJECT, *supra* note 149.

for example) the curriculum does not in any significant way impact the parents' identity, that of their children, or parents' own life choices.<sup>151</sup> Parents' rights rhetoric infused discussion of all these measures, which also advocated for expanded opt-out policies under the name of school choice.<sup>152</sup>

Relatedly, between May 2022 and June 2023, ten states enacted laws that allow teachers and other school staff to disregard a student's request to be known by different pronouns or a name that reflects a different sex than that at birth. Six of these ten provisions also require schools to notify parents when students request to be known by different pronouns or a different name. Some of the provisions also restrict gender-affirming care in schools, and limit sports participation or bathroom use to that of a student's sex at birth.<sup>153</sup> The responses of courts to this range of issues regarding LGBTQIA+ identity have been mixed: On one hand, judicial challenges to Florida's law were unsuccessful.<sup>154</sup> On the other hand, six states' courts have rejected legal claims by parents that they must be informed of their children's requested name and pronoun changes.<sup>155</sup>

During this same time, the number of books removed, or attempted to be removed, from public school libraries skyrocketed.<sup>156</sup> In the 2021–2022 school year, PEN America identified 2,532 incidents of books being banned from public schools in thirty-two states; these bans involved a total of 1,648 different titles.<sup>157</sup> More than fifty groups across the country advocated for

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<sup>151</sup> See Michaels & Noll, *supra* note 1, at 9–11; cf. Baldwin Clark, *supra* note 13, at 2181 (noting that parents' rights mobilization "deputizes parents as teaching and curriculum watchdogs").

<sup>152</sup> See Millat, *supra* note 99, at 17.

<sup>153</sup> See Eesha Pendharkar, *Pronouns for Trans, Nonbinary Students: The States with Laws That Restrict Them in Schools*, EDUC. WK. (June 14, 2023), <https://perma.cc/4R3H-QM3M> (discussing legislation enacted in Alabama, Arkansas, Florida, Indiana, Iowa, Kentucky, Montana, North Dakota, Tennessee, and Utah, and noting that two bills had been sent to the Louisiana governor for signature when the article was published).

<sup>154</sup> See Mike Schneider, *Judge Tosses Challenge to Florida's 'Don't Say Gay' Bill*, AP (Oct. 21, 2022), <https://perma.cc/9CW6-V58L>.

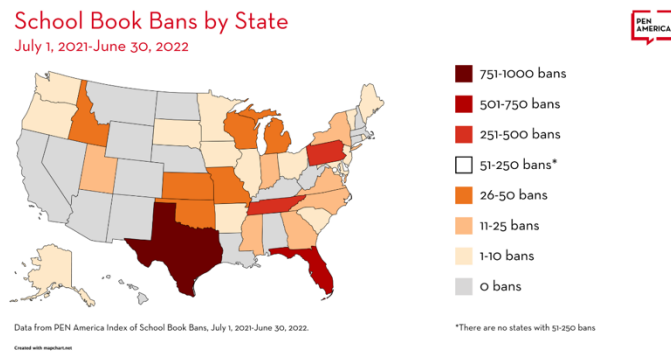
<sup>155</sup> See Pendharkar, *supra* note 153; *Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d at 118; SUZANNE E. ECKES, PUBLIC SCHOOL TEACHERS WHO REFUSE TO USE PREFERRED NAMES AND PRONOUNS: A BRIEF EXPLORATION OF THE FIRST AMENDMENT LIMITATIONS IN K-12 CLASSROOMS, 14 CONLAWNOW 159 (2022). See generally Suzanne E. Eckes & Maria M. Lewis, *Transgender and Gender Expansive Students*, OXFORD HANDBOOK OF US EDUCATION LAW (Kristine L. Bowman ed., 2021); Suzanne Eckes, *A Conflict in the Courts: An Update on School Restroom Policies*, 11 BARRY CHILD & FAM. L.J. 1 (2023).

<sup>156</sup> See Friedman & Johnson, *supra* note 137.

<sup>157</sup> *Id.*

book bans; almost three-quarters of these groups seem to have been established since 2021. PEN America documented and visualized book bans between July 1, 2021 and June 30, 2022, which I have reproduced as Figure 4 below, to demonstrate where the activity was initially concentrated. Unlike the media counts depicted in other tables, this figure only depicts one year of activity, not two:

FIGURE 4. PEN AMERICA'S DOCUMENTATION OF SCHOOL BOOK BANS BY STATE, JULY 1, 2021–JUNE 30, 2022<sup>158</sup>



PEN America documented that these bans included 1,648 titles by 1,261 authors. Of these titles, 41% contained what PEN America describes as “LGBTQ+ themes or [ ] protagonists or prominent secondary characters”; 40% featured “protagonists or prominent secondary characters of color”; 22% had “sexual content”; and 21% addressed “issues of race and racism.”<sup>159</sup> A June 2023 poll showed that over half of Americans oppose book banning practices regardless of political affiliation, although opposition is substantially stronger among Democrats (84% oppose local bans; 86% oppose state bans) than Republicans (46% oppose local bans; 51% oppose state bans).<sup>160</sup>

As the PEN America heat map reproduced in Figure 4 suggests, these disputes have not been isolated in one state or region. Professor LaToya Baldwin Clark’s research complements PEN America’s work on book bans; her data show that between during

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (listing the subject matters of banned content).

<sup>160</sup> See Cory Turner, *Poll: Americans Say Teachers Are Underpaid, About Half of Republicans Oppose Book Bans*, NPR (June 2, 2023), <https://perma.cc/R7QW-7ZUH>.

2021 and 2022, 513 measures to restrict teaching of “Critical Race Theory” in public schools were proposed across the country; of these, nearly half (226) were adopted.<sup>161</sup> Although the greatest number of these measures were introduced at the state level (351)—almost twice as many as at the local level (177) and ten times more than at the federal level (35)—local measures were the most successful, with 77% of local proposals approved, compared to 30% of state measures and 0% of federal measures.<sup>162</sup> Contrary to what the enacted measures may suggest, nearly 80% of Americans polled in May 2023 supported “teaching about the history of slavery, racism, and segregation in public schools.”<sup>163</sup>

As this discussion shows, the New Parents’ Rights Movement has sought to advance anti-egalitarian values in public schools by tying controversial policy proposals to more seemingly agnostic discussions of parental control over educational decision-making. If this movement is successful, the changes it seeks could have significant implications.

### C. Theoretical and Practical Implications of the New Parents’ Rights Movement

The New Parents’ Rights Movement explicitly aims to increase parents’ decision-making authority in educational matters, especially as compared to the authority of the state.<sup>164</sup> As I will discuss below, this reflects a shift in the underlying theory of educational decision-making from Democratic State of Education to State of Families. Such a shift can exacerbate growing polarization. Still, the changes are not ones only about decision-making authority. Claims that parents should be allowed to opt their children out are augmented by claims that some individual parents should be able to influence what all children learn or are exposed to and share the common implicit goal of advancing anti-egalitarian values. In this Section, I discuss some conceptual consequences of this attempted shift. As I conclude, I call for recommitting to the theory of educational decision-making underlying the current state of education law and policy and for protecting curriculum and library books that are inclusive of the diverse students who comprise the United States’ school-age population.

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<sup>161</sup> Baldwin Clark, *supra* note 13, at 2204 tbl.6.

<sup>162</sup> Given the dynamics of locally elected school boards, this may not be surprising. This Essay’s calculations are based on Baldwin Clark’s data. *See id.* at 2165 tbl.2.

<sup>163</sup> Turner, *supra* note 160.

<sup>164</sup> *See supra* text accompanying notes 134–165.

A May 2023 public opinion poll asked about educational decision-making authority, a key issue in this Essay. In response to the question “Which of the following groups do you believe should be primarily responsible for decisions about what is taught in public schools in the United States?” 30% of respondents chose teachers; 27% chose parents; 26% chose school boards; 8% chose federal legislators; and 6% chose state legislators.<sup>165</sup> Under Gutmann’s Democratic State of Education theory, however, decision-making must be shared among stakeholders if it is going to produce citizens capable of sustaining our democracy, and if it is going to do so through democratic processes. Although prioritizing parents’ educational decision-making authority over all other stakeholders’ through a State of Families theory enables families to culturally reproduce themselves, doing so also contributes to a danger much more prominent now than when Gutmann initially developed her theory: growing polarization.

During the twenty-first century, polarization has been intensifying in democracies around the world. The Carnegie Endowment for International Peace published a comparative analysis of intracountry polarization in 2019, concluding that in general, political leaders who push for radical change while also exacerbating and entrenching basic divisions have a profound impact on polarization.<sup>166</sup> Polarization in the United States is distinctive in multiple ways, however: First, the United States has been polarized for longer than most of the comparator countries.<sup>167</sup> Second, American polarization is not driven primarily by politicians but rather, as political scientists describe it, “is the outcome of a profound sociocultural struggle between contending conservative and progressive visions of the country.”<sup>168</sup> Third and relatedly, its societal roots are deep. Fourth, while in most countries studied, divisions are usually along the lines of ethnicity, ideology, or religion, or perhaps two of the three identity groups, in the United States, divisions are particularly strong because they involve all

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<sup>165</sup> See Turner, *supra* note 160.

<sup>166</sup> See generally Thomas Carothers & Andrew O’Donohue, *How to Understand the Global Spread of Polarization*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Oct. 1, 2019), <https://perma.cc/5B2X-53FG>; DEMOCRACIES DIVIDED: THE GLOBAL CHALLENGE OF POLITICAL POLARIZATION (Thomas Carothers & Andrew O’Donohue eds., 2019).

<sup>167</sup> See Carothers & O’Donohue, *supra* note 166; Henry E. Brady & Thomas B. Kent, *Fifty Years of Declining Confidence & Increasing Polarization in Trust in American Institutions*, 151 DAEDALUS 43, 50–53 (2022).

<sup>168</sup> Carothers & O’Donohue, *supra* note 166.

three identity groups.<sup>169</sup> The consequences are dramatic: as polarization grows, it undermines “crucial norms of tolerance and moderation” in public life; it “reverberates throughout the society as a whole, poisoning everyday interactions and relationships”; and it becomes self-perpetuating.<sup>170</sup> Divisions entrench not just between political elites, but also between neighbors, as individuals become less and less willing to socialize with and marry those with divergent views.<sup>171</sup>

Polarization escalates rapidly, and reducing polarization is challenging, likely part of the reason why the study of polarization is an emerging interdisciplinary field.<sup>172</sup> Scholars have proposed that political elites can enact changes that lead to depolarization, and while this is certainly important, it is not the whole picture of depolarization.<sup>173</sup> There are two particularly relevant connections between depolarization, school curriculum, and policy. First, increasing tolerance can reduce polarization.<sup>174</sup> This is consistent with the contact hypothesis, which has shown that individuals develop greater acceptance of those different from them when they have individual interactions, and which Professor Yael Tamir and colleagues have interpolated into their proposal about how schools can help to reduce polarization.<sup>175</sup> Second, nurturing a shared civic identity—a role public schools are uniquely positioned to play—challenges the us-versus-them dynamic that is at the root of polarization.<sup>176</sup> In the words of Suzanne Nossel, president of PEN America: “In an era of intensifying polarization and fragmentation, public schools are among the few unifying institutions with the potential to help solder together a diverse rising

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<sup>169</sup> See *id.*

<sup>170</sup> *Id.*; see also Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Jan. 18, 2022), <https://perma.cc/4WV2-NCAR>.

<sup>171</sup> See McCoy & Press, *supra* note 170.

<sup>172</sup> See generally Simon A. Levin, Helen V. Milner & Charles Perrings, *The Dynamics of Political Polarization*, 118 PNAS, 2021, at 1, 4.

<sup>173</sup> See McCoy & Press, *supra* note 170.

<sup>174</sup> See Stephanie Forrest & Joshua Daymude, *Reducing Extreme Polarization Is Key to Stabilizing Democracy*, BROOKINGS (Jan. 26, 2022), <https://perma.cc/43TT-AEK5>.

<sup>175</sup> See Ilana Paul Binyamin, Wurud Jayusi & Yael Tamir, *To Sir with Love: Advancing Civic Awareness Through Cross Communal Teachings*, NOMOS (forthcoming 2023) (draft manuscript at 5–8, 11) (on file with author); Kristine L. Bowman, *Exploring an Epistemic Conflict over Free Speech on American College Campuses, and the Promise of the New Democratic Model*, NOMOS (forthcoming 2023) (manuscript at 34–35) [hereinafter Bowman, *Epistemic Conflict*].

<sup>176</sup> See Nossel, *supra* note 1; McCoy & Press, *supra* note 170.



generation of Americans ready and equipped to live together, solve problems and help build a better nation.”<sup>177</sup>

As of this writing, the United States is in the longest period of intense polarization that the world has seen.<sup>178</sup> And, a shift to the State of Families as the theory grounding educational policy means that an increasing number of children will be exposed only to their family's worldview, thus perpetuating polarization and contributing to democratic decline.<sup>179</sup> That a family's worldview could have such a significant impact on a child's education and on society is a feature, not a bug, of the State of Families theory.

The attempted shift in the theory of educational decision-making that underlies education policy is one important aspect of the New Parents' Rights Movement; the other is the set of anti-egalitarian values the movement seeks to advance in the name of parents' rights and a debate about educational control. These values run counter to the principle of nondiscrimination that anchors the Democratic State of Education and the principle of equality that is a core American constitutional value.<sup>180</sup>

As discussed earlier, the New Parents' Rights Movement continues to advance opt-out policies, and also advocates for broadly applicable, anti-egalitarian changes to public school curriculum and policies.<sup>181</sup> A couple of examples help to illustrate the distinction between these approaches: under the traditional parents' rights framework, opposition to curriculum would result in a request that a child be exempted from a class session or an entire course; the New Parents' Rights Movement retains this approach, and adds to it the claim that an entire curriculum should be changed. Similarly, consider opposition to library books; under the traditional parents' rights framework, the remedy for an aggrieved parent would be that a child not be allowed to access a particular book. The New Parents' Rights Movement broadens

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<sup>177</sup> See generally Nossel, *supra* note 1.

<sup>178</sup> See McCoy & Press, *supra* note 170 (“At least since 1950, no other established democracy has become this polarized this long.”).

<sup>179</sup> See Jill Anderson, *Parental Rights or Politics?*, HARVARD GRADUATE SCH. OF EDUC. (Feb. 17, 2023), <https://perma.cc/3FJV-B5Y7> (quoting journalist Jennifer Berkshire: “[W]hat's different this time and makes this moment potentially so much more treacherous is the level of political polarization.”).

<sup>180</sup> Bowman, *Epistemic Conflict*, *supra* note 175, at 29 (emphasizing that “a robust free speech environment exists when all voices are included, not just formally but also substantively”).

<sup>181</sup> See *supra* text accompanying notes 132–163.

the claim significantly, seeking to remove the book entirely and thus deny all children access to it.

These examples show that the distinction between the traditional and new parents' rights approaches is blurred because the same rhetoric is used in both cases. This rhetoric formally focuses on decision-making authority (parents versus state), not content. Yet, the proposals advanced by the new movement covertly seek to advance anti-egalitarian educational content and policies in public schools. Greater equality can help ameliorate polarization; greater inequality rarely does.<sup>182</sup> Regarding race, the legacy of slavery continues to shape the United States, impacting Black Americans in profoundly negative material and immaterial ways. Denying this, as the New Parents' Rights advocates attempt to do, further entrenches inequality.<sup>183</sup> Regarding sexual orientation and gender identity, New Parents' Rights advocates' proposals are usually rooted in a belief that sexual and gender minorities, including nonbinary individuals, threaten the nuclear family structure.<sup>184</sup> Both sets of policies prioritize exclusion of individuals in marginalized groups over inclusion, encourage denial of power-sharing rather than sharing of status, and nurture a divisive us-versus-them mindset<sup>185</sup> rather than seeking common ground. In particular, they further harm minoritized children and thus perpetuate inequality.<sup>186</sup>

The New Parents' Rights Movement thus goes far beyond the state of parents' rights captured by the Restatement, which confirms that parents may choose where their children are educated, must ensure that their children are educated, and do share that duty to educate children with the state.<sup>187</sup> At this point, it may bear emphasizing that I am not advocating that parents should

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<sup>182</sup> See Brian Levy, *How Inequality and Polarization Interact: America's Challenges Through a South African Lens*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 27, 2022), <https://perma.cc/Z38B-Y5JP>.

<sup>183</sup> See, e.g., James, *White Injury and Innocence*, *supra* note 13, at 1756; Baldwin Clark, *supra* note 13, at 2198–2200.

<sup>184</sup> See Sawchuk, *supra* note 134.

<sup>185</sup> See generally John T. Jost, Delia S. Baldassarri & James N. Druckman, *Cognitive-Motivational Mechanisms of Political Polarization in Social-Communicative Contexts*, 1 NATURE 560 (2022).

<sup>186</sup> See Jane Gray & Jaime Jara, *The "Parental Rights" Movement Is Harming Our Children*, SALON (Apr. 5, 2022), <https://perma.cc/CN52-3AZP>; Kristina Olson, Lily Durwood, Madeleine DeMeules & Katie A. McLaughlin, *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS, 2016, at 1, 4–6 (finding that transgender children supported in presenting their identities experience better mental health outcomes compared with transgender children who lack such support).

<sup>187</sup> See *supra* text accompanying notes 61–101.

be excluded from educational decision-making. I am indeed convinced by Gutmann's argument that the best way for schools to help sustain democracy is to have parents, professional educators, and the state all involved in decision-making. What I am concerned about is when parents' rights supplant the rights of the state, professional educators, and arguably students, and when parents' rights claims are used to exact influence that perpetuates anti-egalitarian values in a widespread way. As the above discussion reveals, the concerns I identify echo throughout the current education law and policy controversies.

I thus conclude by contending that if we want schools to reinforce the strength of our democracy and not exacerbate polarization, we should resist the New Parents' Rights Movement and recommit to the current state of the law as captured in the Restatement. This means that parents and the state share a duty to educate children, and furthermore, that children are centered in the analysis.<sup>188</sup> Indeed, with limited exceptions, education law in the United States (unlike across much of Europe, for example) has focused on students' rights, and parents have been the vehicle through which students' rights and interests are adjudicated. *Brown v. Board of Education* and its progeny seek to eliminate racial discrimination against students.<sup>189</sup> School finance cases in

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<sup>188</sup> I am curious how the Child Wellbeing framework synthesized by Restatement reporters Clare Huntington and Elizabeth Scott might work in the educational context. Huntington & Scott, *Conceptualizing*, *supra* note 97, at 1397. *See also generally* Clare Huntington & Elizabeth S. Scott, *The Enduring Importance of Parental Rights*, 90 *FORDHAM L. REV.* 2529 (2022) [hereinafter Huntington & Scott, *Enduring Importance*]. Huntington and Scott note that the concept is clearest in juvenile law and that parents' rights when "properly understood and limited . . . promote child wellbeing." *Id.* at 2529. Like Gutmann, Huntington and Scott's discussion considers the interests of parents, the state and society, and the child. The approach they articulate justifies deference to parental authority on the grounds that it "protects the stability of the parent-child relationship," ensures that decisions are made by parents, who "are generally better positioned than state actors to understand their child's needs and make decisions that will further that child's interests," advances society's interests by minimizing state interference in the "weighty" obligations of childrearing, and "protect[s] low-income families of color against an intrusive state." Huntington & Scott, *Conceptualizing*, *supra* note 97, at 1416–17; Huntington & Scott, *Enduring Importance*, *supra*, at 25–33. To what extent are these same grounds applicable in the educational context, given the different aims of public schools and publicly regulated education?

<sup>189</sup> *See* Justin Driver, *Of Big Black Bucks and Golden-Haired Little Girls: How Fear of Interracial Sex Informed Brown v. Board of Education in Its Resistance*, in *THE EMPIRE OF DISGUST: PREJUDICE, DISCRIMINATION, AND POLICY IN INDIA AND THE U.S.* 43 (ZOYA HASAN et al. eds., 2018); Kevin H. Smith, *The Jurisprudential Impact of Brown v. Board of Education*, 81 *N.D. L. REV.* 115, 118–24 (2005); Rachel F. Moran, *Contested Meanings of Equality: The Unrealized Promise of the Anti-Discrimination Principle and the Uncertain Future of a Right to Education*, in *OXFORD HANDBOOK OF U.S. EDUCATION LAW* 215, 228–32 (Kristine L. Bowman ed., 2018). *But see* Chloe Latham Sikes and Liliana M. Garces,

all fifty states focus on educational quality as experienced by students.<sup>190</sup> School speech cases, including the right to receive information, are about the speech rights of students and sometimes teachers, but not parents.<sup>191</sup> IDEA<sup>192</sup> and Section 504 of the Rehabilitation Act of 1973<sup>193</sup> seek to guarantee educational opportunity to students with disabilities.<sup>194</sup> Title IX of the Education Amendments of 1972<sup>195</sup> and the corresponding Equal Protection Clause jurisprudence ensure that educational opportunity is not denied on the basis of a student's sex.<sup>196</sup> Various federal statutes have supported English learners with the goal that limited English proficiency should not be a barrier to any student receiving a quality education.<sup>197</sup> The law does not center parents—as the New Parents' Rights Movement contends it should. Rather, to the extent that parents are part of education law as it exists today, their rights and duties to provide children's education are also balanced with the state's.

Recommitting to the current framework maintains a commitment to shared decision-making authority, to shared availability of educational resources, and to the idea that education is (at least in part) a public good. Parents would remain able to decide where their child would attend school, and to speak up as citizens about generally applicable curriculum and library books. However, if

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*The Past, Present, and Future of Race-Conscious Policies for Addressing Racial Segregation in K-12 Schools*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW 233, 237–50 (Kristine L. Bowman ed., 2019) (describing a retrenchment in jurisprudence and policy which has reinvigorated inequity); Elise C. Boddie, *The Muddled Distinction Between De Jure and De Facto Segregation*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW 253, 268–71 (Kristine L. Bowman ed., 2020) (reviewing case law which introduced intent analyses and contributed to de facto segregation).

<sup>190</sup> See William E. Thro, *State Constitutional Analysis in School Finance Litigation*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW 179, 183–84 (Kristine L. Bowman ed., 2019).

<sup>191</sup> See Francesca Procaccini, *(E)racing Speech in School*, 58 HARVARD C.R.-C.L. L. REV. 457, 472–74 (2023). See generally Kristine L. Bowman, *Eighty Years of Students' Free Speech in Public Schools*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW 511 (Kristine L. Bowman ed., 2019); Emily Gold Waldman, *School Jurisdiction over Online Speech*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW 525 (Kristine L. Bowman ed., 2019).

<sup>192</sup> 20 U.S.C. §§ 1400–1482.

<sup>193</sup> 29 U.S.C. § 794.

<sup>194</sup> See Laura Rothstein, *Students with Disabilities: A Half-Century of Progress*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW 401, 404–05 (Kristine L. Bowman ed., 2019); MARK C. WEBER, *Least Restrictive Environment and the Education of Children with Disabilities*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW 437, 438–43 (Kristine L. Bowman ed., 2018).

<sup>195</sup> 20 U.S.C. §§ 1681–1688.

<sup>196</sup> See Erin E. Buzuvis, *Sex Discrimination and the Transformation of U.S. Education*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW, 367, 368–70 (Kristine L. Bowman ed., 2018).

<sup>197</sup> See Madeline Mavrogordato & Rachel S. White, *Educating English Learners*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW 329, 335–38 (Kristine L. Bowman ed., 2019).

parents send their children to public schools, those children—as students with independent rights and interests—will continue to be exposed to core constitutional and democratic values such as equality, and to interact with individuals who have identities and experiences different from their own.<sup>198</sup>

### CONCLUSION

All education law and policy is built on one theory of educational decision-making or another. In this Essay, I have identified the theory of educational decision-making that underlies a core aspect of education law today, as synthesized in the Restatement of Children and the Law. It is a theory that brings the state, professional educators, and parents to the table. The New Parents' Rights Movement, by contrast, seeks to center parents as the primary educational decision-makers, and the consequences of such a shift have the potential to exacerbate the escalating polarization that grips our country by unsettling the balance in educational decision-making that has anchored education law and policy for a century or more. Furthermore, the New Parents' Rights Movement also seeks to enact a series of changes that not only give parents more control over their own children, but also would allow some parents to impose anti-egalitarian values broadly within public schools by controlling the content of curriculum, removing books from public school libraries, and introducing other policies that further marginalize individuals who are already minoritized based on their race, sexual orientation, or gender identity. Such law and policy changes have been proposed across the country and at all levels of government. The resulting battles are intense, and for good reason. In the words of education historian Jack Schneider,

if what you want to do is convince people that their way of life is being threatened, then telling stories about the schools is a really powerful way to do that. And that's not just because it's the easiest, most common touch point for Americans. It's also because schools are both literally and symbolically places where we make the future.<sup>199</sup>

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<sup>198</sup> See Procaccini, *supra* note 191, at 13.

<sup>199</sup> Anderson, *supra* note 179 (quoting Jack Schneider).

Schools, no stranger to the culture wars, are immersed in them once again,<sup>200</sup> and we are at an inflection point. The choice we, as a society, make will impact the future of our democracy.

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<sup>200</sup> See Shulman, *supra* note 66, at 291–92; Grace Segers, *Are Republicans Winning the War on Public Schools?*, NEW REPUBLIC (Mar. 30, 2023), <https://perma.cc/MXC3-2XQ8>; Baldwin Clark, *supra* note 13, at 2160–66.