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Notes

Parental Rights and the Right to Intimate Association

by
DAVID FISHER*

Introduction

In his dystopian science fiction novel, Brave New World, Aldous Huxley depicts a not-too-distant society where the state has taken over all stages of child rearing. With malignant paternalism, the state controls reproduction (achieved in test tubes on a conveyer belt) and the teaching and “nurturing” of children (using heavy-handed, brain-molding techniques to press children into assigned social castes).

The specter of an all-devouring state replacing the natural role of parents has recently become the rallying cry of a number of conservative, mainly Christian, groups nationally. These advocates complain that despite early Supreme Court pronouncements supporting parents’ power over their children, many lower courts have refused to treat parenting as a constitutionally protected right. As a result, they claim, state intervention in parental decisions is increasing. Cathy Cleaver, Director of Legal Studies for the Family Research Council, echoes many in the movement in her assessment: “We’ve ushered in a new age where children who don’t want to obey their parents can do

1. ALDOUS HUXLEY, BRAVE NEW WORLD (1946).
2. Id.
3. These groups include the increasingly influential Christian Coalition (led by Pat Robertson and Ralph Reed) and organizations specifically premised on parental rights, such as Of the People (led by economist Jeffrey Bell) as well as rightist think-tanks such as the Heritage Foundation. See Charles Levendosky, Parental Rights Bill Protects Parental Wrongs; Broad Law Would Leave Children Exposed to Abuse, DAYTON DAILY NEWS, Sept. 4, 1996, at A11.
what they want, and when the government can overrule what a parent thinks is best. It’s time to turn that around.”

In response to this perceived threat, advocates have organized what has been called the “parental rights movement.” This movement is quickly gathering momentum both in the political and legal arenas. In addition to continuing legal challenges, parental rights advocates have introduced constitutional amendments and other bills in twenty-eight states, as well as a bill in Congress called the “Parental Rights and Responsibilities Act” (PRRA), all designed to ensure a fundamental right of parents to control the upbringing of their children. Interestingly, none of these proposed changes is explicitly related to parents’ religious rights or beliefs, though they are being championed by religious organizations and it is clear that many of the issues involved in parental control implicate religious beliefs.

At the same time, a number of scholars have suggested that the state be accorded a very active part in the rearing of children, and that parents be relegated to the role of “licensees” or stewards in service of their children’s needs. These scholars contend that the recognition of parental rights inevitably damages the interests of children and denies them their own fundamental rights.

Clearly, there are many consequences of recognizing (or reviving) a fundamental right of parenting as a non-religiously based constitutional right. Such recognition could bring profound change in such diverse areas of the law as parental authority over children’s medical treatment, abortion, birth control, sex education, and home school-

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6. See James E. Barnes, Parent Power, NAT’L J., June 12, 1993, at 1399 (describing the growth of national training and the organization of groups such as Of the People fostering the growth of parental rights advocates).
9. See infra Part IV.
10. Although the PRRA is a proposed statute, it explicitly aligns itself with early constitutional analysis on the issue of parental rights and invites the courts to apply it as if it were a rule based on the Constitution. See H.R. 1946, 104th Cong., 1st Sess. §§ 1, 4 (1995); see also Interview of Rep. Steven Largent, Burden of Proof (CNN television broadcast, Nov. 1, 1995) (“[W]hat we are doing is basically codifying into federal statute those Supreme Court cases that say that parental rights are a fundamental right.”).
PARENTAL RIGHTS

It could also boost parental power over public school curricula and strengthen the parents’ position in neglect and abuse cases. This Note will argue that current reform efforts to strengthen parental rights go too far towards isolating parental authority from the oversight of the community, to the detriment of children’s interests and rights. This extended right of parental control results in a dangerous and unnecessary cession of state power that necessarily tramples on the fundamental rights of children.

On the other hand, there is an unquestioned value for children in a close, loving relationship with their parents and in the guidance and direction they offer. A parent’s authority cannot be undermined by the state without seriously damaging the parent-child relationship and inhibiting children’s development. Crucially, this relationship carries important benefits and meaning to parents as well, not just to their children. As individuals forming intimate relationships, parents deserve at least as much protection for those relationships with their children as is accorded to spouses and unmarried partners. Thus, this Note will also disagree with scholars advocating “licensee” or stewardship models inasmuch as they deny parents protection for this valuable and historically recognized relationship with their children.

Instead, this Note will offer a model of an associational parental right derived from existing Supreme Court precedent and the work of Professor Kenneth Karst. It will suggest that parental rights should be recognized as already falling within the right to privacy that has been previously identified as emanating from the Bill of Rights. However, because the right should be one of association rather than of control (in the sense of an owner’s control over her property), it would only extend to situations that might endanger the quality of the parent-child relationship.

In Part I, this Note will offer an interpretation of the confused constitutional history of parental rights at the Supreme Court level. Part II will canvass the varied and contradictory lower court interpretations of those cases. Part III will survey reform efforts on the national and state levels and make comparisons to another recent codification of Supreme Court constitutional precedent, the Religious Freedom Restoration Act. Using the example of sex education in public schools, this Part will demonstrate how the extension of parental rights proposed by reformers will burden the rights of children. Part IV will contrast these approaches with suggestions by some schol-


12. See Woodhouse, A Public Role in the Private Family, supra note 11, at 406.
ars that the state should take a much more active role in the rearing of children than it presently does in order to safeguard children's rights and interests. Part V will argue that parental rights should be protected under the auspices of the constitutional right to privacy. It will contend that this is more consistent with the Court's treatment of other personal due process rights, such as the right to use contraception and the right to have an abortion, than is a right predicated on a property-style relationship between parents and children. Also, it will argue that this offers an adequate balance between the need for family and personal autonomy from the state and the need to protect children's interests and rights.

I. The Constitutional History of Parental Rights—An Interpretation of Supreme Court Precedent

A. The Lochner Era

Although parents received a great deal of protection from state intervention at common law, the Supreme Court first recognized a constitutional right of child-rearing in 1923 in the case of Meyer v. Nebraska. The defendant in that case was a grade-school German teacher who had been prosecuted under a Nebraska statute making it unlawful to teach any languages other than English to children before the eighth grade.

The Supreme Court of Nebraska had upheld the statute, finding that the state had a legitimate interest in countering "the baneful effects of permitting foreigners who had taken residence in this country, to rear and educate their children in the language of their native land." According to the Nebraska high court, teaching modern foreign languages to young children would "naturally inculcate in them the ideas and sentiments foreign to the best interests of this country." The court dismissed the due process claim, noting that choices

13. These protections included parental immunity from suit by their children over torts such as personal injury, negligence, and even rape. This common law immunity has been chipped away significantly in the last century. Also, many state agencies with responsibility to curb parents' excesses were denied significant enforcement power in an effort to curb governmental intrusion. See Andrew Jay Kleinfeld, The Balance of Power Among Infants, Their Parents and the State, 4 Fam. L.Q. 410, 425-33 (1970).
14. 262 U.S. 390 (1923). For an extraordinarily thorough historical examination of the politics, personalities and social forces behind Meyer and other cases of the period, see Barbara Bennett Woodhouse, "Who Owns the Child?: Meyer and Pierce and the Child as Property, 33 Wm. & Mary L. Rev. 995 (1992) [hereinafter Who Owns the Child?].
16. Id. at 397-98.
17. Id. at 398.
in subject matter taught in schools must inevitably be made because of limited time and resources.  

In an opinion by Justice McReynolds, the Supreme Court reversed, holding that the state action violated the Fourteenth Amendment. Justice McReynolds described a broad reading of "liberty" in the Amendment:

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

Because liberty was impinged by this state intrusion into children's schooling, the state could not enforce a law that was "arbitrary or without reasonable relation to some purpose within the competency of the State to effect." In finding the state's ends invalid, the Court compared the statute to Plato's theory that the state should entirely usurp the parent's role, providing common guardianship, such that "no parent is to know his own child ...." The Court also compared it to the practice of the Spartans who tried to discourage individualism in order to develop "ideal citizens" by housing boys together in barracks and entrusting their care to trainers. These social models, the Court stressed, had been rejected by American society and the Constitution.

Two years later, Justice McReynolds wrote again for the Court in Pierce v. Society of Sisters. In that case, the Court struck down an Oregon statute requiring nearly all children between the ages of eight and sixteen to attend public schools, in effect outlawing private and

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18. See Id.
19. "No State shall ... deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV, § 1.
20. Meyer, 262 U.S. at 399 (citations omitted). The Court cited a string of cases in support of this proposition, most of which treated the rights of employees and freedom of contract. None of the cases cited treated the issue of child-rearing or parental rights.
21. Id. at 400.
22. Id. at 401.
23. Id. at 402.
24. Id. at 401-02. See also Bartels v. Iowa, 262 U.S. 404, 409 (1923) (citing Meyer to invalidate similar statutes in Iowa and Ohio).
26. The law provided exemptions for children too physically disabled to attend school or who lived at a great distance from a school and for those who had completed the eighth grade. 1922 Or. Laws § 52529. The statute also created a limited mechanism whereby
home schooling at that level. In invalidating the statute, the Court cited the “doctrine of Meyer:” that there is a “liberty of parents and guardians to direct the upbringing and education of children under their control.” Justice McReynolds again invoked the specter of the all-enveloping government, insisting that the “child is not the mere creature of the state.”

Both Meyer and Pierce are coy about calling the parental right a “fundamental right.” This has led at least one commentator to accuse the Court of “flirt[ing] with the notion that such authority could be characterized as ‘fundamental,’” and others to say that the rights were not meant to be fundamental. In his general analysis in Meyer, however, Justice McReynolds does note that “the individual has certain fundamental rights which must be respected.” This is a good indication that he meant parental rights to be understood as fundamental.

It is important to note, however, that the division of due process into “just plain” liberty rights, requiring a legitimate state interest to overcome, and “fundamental rights,” requiring a compelling state interest, was not as crucial in due process jurisprudence at the beginning of the century as it is today. For instance, Lochner v. New York, the infamous case that struck down a state maximum work hours law, never described the “right to contract” as “fundamental.” Under Lochner and its associated cases, heightened scrutiny was not necessary for the courts to review and strike down legislative acts. Only in relatively modern cases has the court begun finding “fundamental” rights as part of the process of reasserting the Court’s competence to review legislative acts. The Court in Meyer and Pierce clearly en-

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27. See Pierce, 268 U.S. at 534.
28. Id. at 534-35.
29. Id. at 535.
31. See infra Part IV.
34. 198 U.S. 45 (1905).
35. See Nowak & Rotunda, supra note 33, at 383.
36. See Nowak & Rotunda, supra note 33, at 383-84; Lawrence H. Tribe, American Constitutional Law 769-74 (2d ed. 1988). This can be seen in the “incorporation”
gaged in what would today be considered heightened scrutiny of government objectives despite using "rational basis" language.

This association of *Meyer* and *Pierce* with the *Lochner* Era arguably presents a problem of their viability as precedent today. During the *Lochner* Era, the Court expanded the reach of Fourteenth Amendment due process to strike down laws designed to create minimum wages and regulate conditions for workers.\(^{37}\) This expansive judicial review of state legislative acts was repudiated in many subsequent cases from the 1940s through the 1960s.\(^{38}\) However, *Meyer* and *Pierce* seem to have escaped the general disapproval of due process cases of this era both in constitutional scholarship\(^ {39}\) and in dicta of many subsequent Supreme Court decisions.\(^ {40}\) This might be attributable to the fact that unlike the other famous *Lochner* Era due process cases, *Meyer* and *Pierce* concerned individual rights outside the workplace. Laissez-faire economic philosophy had little to do with these decisions and so the repudiation of the Court’s intervention in state economic policies did not implicate them directly.\(^ {41}\)

Another suggested weakness of *Meyer* and *Pierce* as precedent for a fundamental liberty of parenting is that the issues involved really

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37. The “*Lochner* Era” has been described as stretching from the Court’s decision in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), through *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). See Tribe, supra note 36, at 567. Like the case for which it is named, *Lochner* v. New York, 198 U.S. 45 (1905), many *Lochner* Era cases involve broad interpretations of employees’ due process “contract rights” as against state efforts to shore up minimum wages and working conditions. Id. at 567-68.

38. See, e.g., *Lincoln Fed. Lab. Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949) (“This Court beginning at least as early as 1934...has steadily rejected the due process philosophy enunciated in the Adair-Coppage [*Lochner* Era] line of cases.”); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.”); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).


41. See Moore v. City of East Cleveland, 431 U.S. 494, 502 n.8 (1977) (making this argument for *Meyer*’s and *Pierce*’s longevity).
arose under the First Amendment. In *Meyer*, the issue was the communication of the German language. In *Pierce*, it was religious and other non-public types of education. Apparently this was also the analysis of Justice Douglas, who described the decisions in First Amendment terms in dicta in *Griswold v. Connecticut*. While the Court might very well have chosen to resolve the issues involved in *Meyer* and *Pierce* via the First Amendment, however, both decisions make explicit reference to due process (well before any incorporation of the Bill of Rights had taken place) and do not make reference to the First Amendment. Thus, this argument has little textual support in the cases themselves.

**B. Limits to Parental Rights and the Intertwining of Freedom of Religion and Due Process Rights**

Since *Meyer* and *Pierce*, the Court has been somewhat erratic in its approach to a fundamental right of child-rearing. While continuing to acknowledge the traditional authority of parents and espousing hesitation in state involvement in family affairs, the Court has imposed both explicit and implicit limitations on child-rearing rights.

In the 1944 case of *Prince v. Massachusetts*, the Court described the relationship of state and parent in broad terms: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” However, *Prince* also provided some important limitations on the scope of the rights, and has therefore also been cited by opponents of strong parental authority. In *Prince*, Justice Rutledge’s majority opinion upheld the conviction of a Jehovah’s Witness under a statute that forbade adults to permit minor children to work. The defendant in that case had allowed her young niece to sell copies of religious tracts

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42. *See* Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 Ga. L. Rev. 975, 989 (1988). Professor McCarthy further notes that parents were not a party in either *Meyer* or *Pierce*, but that the Court nevertheless addressed their rights as an important part of its analysis. *Id.* at 986 n.53.


44. Though it may be wishful thinking on the part of modern commentators to make *Meyer* and *Pierce* into First Amendment cases, in later cases, such as *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court did explicitly link First Amendment protections of religion with the due process parental right. See infra Part I.C.


47. *See* *Prince*, 321 U.S. at 170.
alongside her on the street and to participate in preaching. The defendant brought a First Amendment freedom of religion claim "buttressed" with a due process parental rights claim. The Court insisted, despite its "cardinal rule" quoted above, that the state has "a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." Both the child and the community as a whole have an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." Operating on this interest, the state may compel school attendance, regulate child labor, and demand that children be vaccinated (whether or not this violates parents' personal and religious views of medical treatment).

Unlike Meyer and Pierce, the Prince majority also analyzed the issue from the standpoint of the child—in that case, the child's right to work. The Court held that the state may constrain children's rights more than those of adults in an effort to secure their development into productive adult citizens. The Court noted that selling religious tracts on the street could expose children to dangerous and difficult situations, and famously stated: "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children."

In the 1960s and 1970s, the Court began the process of rehabilitating the Due Process Clause and creating the modern right of privacy. A number of the seminal cases make mention of the parental rights protections of Pierce, Meyer, and Prince, without specifically relying on them for their results. In Griswold v. Connecticut, the Court held that married couples had a right to receive and use contraceptives, by finding that the enumerated rights of the Bill of Rights have "penumbras" which extend to unmentioned protections necessary to protect the explicitly guaranteed rights. The Court discussed Meyer

48. Id. at 162. The defendant was her niece's guardian. Id. at 161.
49. Id. at 164.
50. Id. at 167.
51. Id. at 165.
52. Id. at 166.
53. But see James G. Dwyer, Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 Calif. L. Rev. 1371, 1382 (1994) (arguing that the Prince Court was only really interested in the harms to society caused by child labor and did not seek to protect children against harms parents subject them to because of their religious beliefs).
54. Prince, 321 U.S. at 168.
55. Id. at 170.
56. 381 U.S. 479, 484 (1965). See also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending the right of contraception to non-married couples under an equal protection analysis, and reaffirming "the right of the individual, married or single, to be free from
and *Pierce* as cases guaranteeing rights peripheral to First Amendment free speech rights.\(^57\) The Court also noted the creation, in *NAACP v. Alabama*,\(^58\) of the "freedom to associate and privacy in one's associations," which it found also to be in assistance of the First Amendment.\(^59\) In addition to the First Amendment, penumbras from the Third, Fourth, Fifth, and Ninth Amendments contributed to the right to privacy.\(^60\) Similarly in *Roe v. Wade*, the Court mentioned *Pierce* and *Meyer* as among the building blocks of the right to choose whether or not to bear children.\(^61\)

Although the Court seemed to be incorporating the earlier guarantees of parental rights in its new right to privacy, subsequent cases on due process parental rights have sounded a hesitant note. In *Wisconsin v. Yoder*, adherents of the Old Order Amish sect were prohibited by the state from withdrawing their children from public school after the eighth grade in violation of truancy laws.\(^62\) In holding for the Amish parents, the Court seemed to rely primarily on their religious beliefs.\(^63\) The Court balanced the admittedly strong state interest in providing public schooling to children (calling it "the very apex of the function of a State") against the centuries-old traditions of the Old Order Amish of avoiding contact with and knowledge of the world outside their communities in order to focus on their religious way of life.\(^64\) The Amish parents' interest was in keeping their children both mentally and physically inside their community, and involving them in the physical labor that their parents' religious beliefs valued highly.\(^65\) Justice Burger's majority opinion exhaustively details the depth and age of the Old Order Amish religious beliefs to show that the criminal liability the state wished to impose on them stemmed from religious practice.\(^66\)

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\(^{57}\) *Griswold*, 381 U.S. at 482.

\(^{58}\) 357 U.S. 449, 462 (1958) (invalidating state attempts to halt the organizing activities of a civil rights activist and compel production of membership lists and other information about the NAACP).

\(^{59}\) *Griswold*, 381 U.S. at 483.

\(^{60}\) *Id.* at 484. In a line of cases running parallel to the development of the modern right to privacy, the Court held that nearly all of the protections of the Bill of Rights were applicable to state action through "incorporation" in the due process clause of the Fourteenth Amendment. *See generally* Tribe, *supra* note 36, at 772-74.


\(^{63}\) *Id.* at 216.

\(^{64}\) *Id.* at 213-29.

\(^{65}\) *Id.* at 210-12.

\(^{66}\) *Id.*
After having laid the basis for affirming the First Amendment freedom of religion claim, Justice Burger asserts that "this case involves the fundamental interests of parents, as contrasted with that of the State, to guide the religious future and education of their children." The opinion does not use the word "right" to describe what is at stake for parents, but instead uses "interests." That this is of more than semantic concern is shown by the subsequent paragraphs. Justice Burger cites Pierce v. Society of Sisters but narrows its holding to issues of religious concern to parents:

However read, the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely "a reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment.

By implication, Justice Burger said that, while a combined freedom of religion and parental "interests" claim invokes heightened scrutiny, an unadorned claim of parental rights under due process does not. In an earlier portion of the opinion, Justice Burger is careful to note that it is only because of the religious attachment of the Old Order Amish to their lifestyle that the lifestyle was significant to

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67. Id. at 232 (emphasis added). Justice Burger was careful to avoid the issue of what happens when children expressly disagree with what their parents want them to do, finding that this was not raised in the facts of Yoder. Id. at 231. But see id. at 243-46 (Douglas, J., dissenting) (finding that the issue must be addressed and arguing that the child's own views should be respected). This question seems to have been decided in favor of the parents in Parham v. J.R., 442 U.S. 584, 604 (1979), in which the Court upheld parents' right to commit their children to mental institutions against their will.

68. 268 U.S. 510 (1925).

69. Yoder, 406 U.S. at 233 (emphasis added).

70. See Employment Div. v. Smith, 494 U.S. 872, 881 (1990) (noting that First Amendment freedom of religion rights and parental rights combined powerfully in Yoder and other cases to bar application of a neutral, generally applicable law). One commentator argues that another implicit limitation to the parental rights doctrine recognized in Meyer and Pierce took place in the wake of Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I), and 349 U.S. 294 (1955) (Brown II). See Kleinfeld, supra note 13, at 419-23. Kleinfeld points out that in several cases including Griffin v. Prince Edward County School Board, 377 U.S. 218, 232 (1964), and Green v. Country School Board, 391 U.S. 430, 441-42 (1968), the Court invalidated state attempts to give parents control over where they sent their children to school because they were efforts to evade desegregation. Id. at 423. Kleinfeld argues that this limits the Meyer-Pierce doctrine in cases in which an important public policy conflicts with parents' desires. Id. This limitation is even stronger than the one articulated in Prince v. Massachusetts, 321 U.S. 158 (1944), because the Court in Green and Griffin held that the states must prohibit parents from exercising their discretion, whereas in Prince the Court simply allowed that states may circumscribe parental rights. Id. at 422 n.34. Another interpretation, of course, is that the state had a compelling interest in achieving desegregation that overrode the fundamental parental right.
the Court. A "simple" lifestyle based on non-religious morality or philosophy, like that advocated by William Thoreau, would merit no protection. Thus, simply as moral parents, the Old Order Amish would have no claim.

Also telling are the concurring and dissenting opinions. In his concurring opinion by Justice Stewart (joined by Justice Brennan), no mention of parental rights is made. In his concurring opinion, Justice White (joined by Justices Brennan and Stewart) insists that Pierce v. Society of Sisters lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society . . . .

In his dissent, Justice Douglas dismissively notes that "[o]ur opinions are full of talk about the power of the parents over the child's education," but insists that children have rights that are not necessarily identical to their parents', and that these rights must be protected. For Justice Douglas, it was very important that children be heard: "It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny."

These implicit doubts about the scope of Pierce and Meyer were reinforced by the Court in Norwood v. Harrison and Runyon v. McCrory. In Norwood, the Court rejected claims by parents of children in racially-discriminatory private schools that Pierce required the state to provide textbooks to those schools in order to effectuate the parents’ right to control their children's upbringing. Justice Stewart's majority opinion insisted that Pierce only ensured the right of private schools to exist, not that the state had to participate to give parents' choices equal support. In Runyon, the Court upheld a claim by black parents that their statutory right to make and enforce contracts

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71. See Yoder, 406 U.S. at 215-16.
72. Id.
73. Id. Given that in this part of the opinion Justice Burger is focused on the First Amendment analysis, an argument could be made that these statements do not pertain to due process rights, and only stand for the unsurprising insight that religious belief is necessary to make out a freedom of religion claim. Nevertheless, it is notable that the opinion makes no effort to reserve the due process parental rights question at this point.
74. See id. at 237 (Stewart, J., concurring).
75. Id. at 239 (White, J., concurring) (citations omitted).
76. Id. at 243 (Douglas, J., dissenting in part).
77. Id. at 243-46 (Douglas, J., dissenting in part).
78. Id. at 245 (Douglas, J., dissenting in part).
81. See Norwood, 413 U.S. at 461-62.
82. See id. at 462.
equally was violated by the defendant private school's refusal to admit their children. The defendants raised parental rights as one of their defenses. In dismissing this defense, Justice White noted that *Yoder* and *Norwood* had read parental rights narrowly, to exclude parents' idiosyncratic views on education.

**C. A Turn Toward a Stronger Parental Rights Standard?**

Several years after *Yoder*, the Court seemed to turn toward a more expansive view of parental rights in several cases in the realm of health care and termination of custody rights. In *Parham v. J.R.*, the Court upheld a Georgia statute that allowed parents to commit their children to mental institutions against their will and without a hearing. Justice Burger's majority opinion placed a great deal of faith in parents to make crucial decisions about the best interests of their children: "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." This authority would be expressed in the assumption that parents act in the best interests of the child. So, even though a child "may balk at hospitalization," that should not diminish the parents' authority, because parents can use their mature reasoning to act in the best interests of the child. The state should involve itself as little as possible in this personal family realm. The Court indicated that there is a limit to parents' authority, but was vague about where that limit lies. In the "voluntary" commitment setting, parents should have "a substantial, if not the dominant, role in the decision."

Nevertheless, the Court recognized that the child has "a protectible interest" in avoiding bodily restraint, and that the state also has interests, identified as saving money by discouraging unnecessary institutionalization and reducing procedural barriers to commitment of mentally ill patients. It balanced these interests against those of

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83. Runyon, 427 U.S. at 172.
84. Id. at 176.
85. Id. at 177.
86. 442 U.S. 584, 616 (1979). Under the statute, however, a parent's decision to commit a child must be supported by the mental hospital's superintendent after examining the child. Id. at 591.
87. Id. at 602.
88. See id. This would be so despite the high incidence of child abuse because the majority of parents shouldn't suffer a loss of their authority due to the abuses of a minority. Id. at 603.
89. Parham, 442 U.S. at 603-04.
90. See id.
91. See id. at 604-05.
92. Id. at 604.
93. Id. at 601, 604-05.
the parents and found that to protect the child's and the state's interests, a neutral, detached fact finder must make the final decision as to the commitment.\textsuperscript{94} However, this could be an "informal" decision based on medical investigation by a physician.\textsuperscript{95} The Court distinguished the facts of \textit{Planned Parenthood v. Danforth}, in which the Court invalidated a statute giving parents an absolute veto over their minor children's decision to have an abortion.\textsuperscript{96} In \textit{Parham}, the parents were required to gain the assent of a physician before committing their child, and thus did not have plenary power.\textsuperscript{97}

Even in cases involving parental abuse and neglect, the Court has upheld the presumption that parents act in their children's best interest. In \textit{Santosky v. Kramer}, this presumption was expressed by requiring a heightened standard of evidence to terminate parental rights.\textsuperscript{98} The Court held that the "clear and convincing" evidence standard (rather than the preponderance of the evidence standard) must be used in hearings regarding the termination of parental rights due to abuse or neglect.\textsuperscript{99} The majority explained that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."\textsuperscript{100}

The state's power to act on the child's behalf was found to be similarly limited in other Supreme Court dicta of the same period. In a concurrence in \textit{Smith v. Organization of Foster Families}, Justice Stewart asserted that the state could not break up a family over both the parents' and children's protest just to further the "children's best interest."\textsuperscript{101} Similarly, the majority in \textit{Stanley v. Illinois} found that the state's interests in the care and custody of a child would be "de minimis" if the child were in the custody of a "fit" parent.\textsuperscript{102}

\begin{itemize}
  \item\textsuperscript{94} See \textit{id.} at 606.
  \item\textsuperscript{95} \textit{Id.} at 607-08.
  \item\textsuperscript{96} 428 U.S. 52, 74 (1976).
  \item\textsuperscript{97} See \textit{Parham}, 442 U.S. at 604.
  \item\textsuperscript{98} 455 U.S. 745, 769 (1982).
  \item\textsuperscript{99} \textit{Id.} at 769.
  \item\textsuperscript{100} \textit{Id.} at 753. For an argument that the \textit{Santosky} standard ignores the realities of abused and neglected children, see Raymond C. O'Brien, \textit{An Analysis of Realistic Due Process Rights of Children Versus Parents}, 26 \textit{Conn. L. Rev.} 1209, 1246 (1994).
  \item\textsuperscript{101} 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring).
  \item\textsuperscript{102} 405 U.S. 645, 657-58 (1972). \textit{See also} Quillio\textit{n v. Walcott}, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); \textit{Cleveland Bd. of Educ. v. LaFleur}, 414 U.S. 632, 639-40 (1974) ("[F]reedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").
\end{itemize}
Most recently, the Court again reaffirmed the prominence of parental rights in *M.L.B. v. S.L.J.*\(^{103}\) In that case, the Court upheld the right of an indigent parent to have court fees waived in proceedings to terminate her rights to her child.\(^{104}\) The Court’s decision was based on equal protection doctrine borrowed from *Griffin v. Illinois*, other cases guaranteeing indigent criminal defendants access to the courts, and due process.\(^{105}\)

In making its due process argument, the Court stated, “choices about marriage, family life and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in society,’ . . . rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard or disrespect.”\(^{106}\) In support of this statement, the Court cited, among other authority, *Meyer* and *Pierce*.\(^{107}\)

### II. Parental Rights in the Lower Courts

With the modern Supreme Court’s view of the meaning of *Meyer* and *Pierce* so unsettled, it can hardly be surprising that the lower courts have also produced an array of interpretations. Although there are numerous examples of lower courts making strong statements in favor of parental rights,\(^{108}\) many recent decisions have refused to recognize a fundamental parental right, especially in cases having to do with public education.

In *Medeiros v. Kiyosaki*, the Hawaii Supreme Court rejected a claim by parents that a sex education television series shown to their children in a public school violated their constitutional right to direct their children’s upbringing.\(^{109}\) The court rejected claims based on freedom of religion and privacy rights of parents.\(^{110}\) The court read *Griswold v. Connecticut*\(^{111}\) to forbid the use of “unnecessarily broad means” by the government in achieving its goals when they conflict

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\(^{103}\) 117 S. Ct. 555 (1996).
\(^{104}\) *Id.* at 569.
\(^{105}\) *See id.* at 560-64.
\(^{106}\) *Id.* at 564 (citation omitted).
\(^{107}\) *Id.*
\(^{108}\) *See, e.g.*, State v. Whisner, 351 N.E.2d 750, 768 (Ohio 1970) (“[I]t has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a ‘fundamental right’ guaranteed by the due process clause of the Fourteenth Amendment.”); In re J.P., 648 P.2d 1364, 1373, 1377 (Utah 1982) (finding that parental rights are fundamental under both the U.S. and Utah constitutions and that “[t]he integrity of the family and the parents’ inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo-American culture, presupposed by all our social, political, and legal institutions”).
\(^{110}\) *See id.* at 317, 319.
\(^{111}\) 381 U.S. 479 (1968).
with the right to privacy. In this case, because the state had allowed parents to submit excuses for their children in advance if they objected to the education programs, the program was not compulsory and therefore not "unnecessarily broad." The court dismissed the plaintiffs' reliance on *Meyer* and *Pierce*, holding that they applied to speech and press freedoms, rather than the penumbral privacy rights of parents, and that restricting speech by stopping the use of the educational programs would be inimical to First Amendment protection.

In *State v. Bennett*, the Michigan Supreme Court was equally dismissive of the notion of a fundamental parental right in holding that a state teacher certification requirement did not infringe on any fundamental parental right by making it more difficult for parents to engage in homeschooling. The court interpreted both *Meyer* or *Pierce* to concern issues within the First Amendment. Therefore, the state court argued, all of *Meyer*'s and *Pierce*'s statements about parental rights were dicta. Similarly, the court found that *Wisconsin v. Yoder* primarily concerned parents' freedom of religion and did not establish or support a due process parental right. The court concluded that the right of parents to direct their children's educations is not fundamental, and thus not deserving of strict scrutiny.

The federal circuit courts have also given varying support for parental rights. The Third Circuit found in *Halderman v. Pennhurst State School and Hospital* that the Supreme Court's decision in *Parham v. J.R.* had established a balancing test between parents', state's, and children's interests, which it applied in that case to the court-ordered state transfer of a retarded child from a state school and hospital to a community living situation after review by a hearing master. After examining *Meyer, Pierce, Yoder, and Parham*, the court found

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113. *Id.* at 317. The freedom of religion claim failed for the same reason. *Id.*
116. *See Bennett*, 501 N.W.2d at 328.
117. *See id.* at 113.
119. *See Bennett*, 501 N.W.2d at 113-14.
120. *Id.* at 115.
121. 707 F.2d 702, 708 (3d Cir. 1983).
123. *See Halderman*, 707 F.2d at 703-04.
that there is a protectible parental right, but that this is a "substantial" right, not a "fundamental" one. The court analogized the peculiar situation of parents' "substantial, if not dominant" status to the intermediate level of scrutiny used for gender, alienage, illegitimacy, and some other classes under the equal protection clause. The Fifth Circuit also found that parental rights are not absolute and must be balanced with state interests. By contrast, the Second, Fourth, and Eighth Circuits have found that parental rights, while protected, only merit "rational basis" review.

In Brown v. Hot, Sexy, and Safer Productions, Inc., the most recent circuit decision on the subject, the First Circuit concluded that the Supreme Court has yet to determine if parental rights are fundamental, and declined to decide that issue. In that case, the First Circuit struck down claims by parents that a public school safe sex presentation given to their children without prior notice violated their freedom of religion and their due process parental rights. The court held that even if parental rights were fundamental, the state had a compelling interest in providing safe sex information to children at risk. The court refused to read Meyer v. Nebraska and Pierce v. Society of Sisters as creating a fundamental parental right because they were "decided well before the current 'right to privacy'" cases. Even if they did create such a right, the court held, the parents' claim would fail because "plaintiffs have failed to demonstrate an intrusion of constitutional magnitude on this right." The court explained that Meyer and Pierce protected parents' ability to choose different paths of education for their children, but not to dictate the curricula of pub-

124. Id. at 709. See supra note 91 and accompanying text.
125. See Halderman, 707 F.2d at 709 n.7.
126. See Brantley v. Surles, 718 F.2d 1354, 1359 (5th Cir. 1983) (finding that parental rights must be balanced against the state's interests in education in a case where a public school employee was fired after sending her child to a private school).
127. See Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 463 (2d Cir. 1996) (upholding a school community service requirement against claims that it violated, inter alia, due process parental rights to direct the upbringing of their children); Murphy v. Arkansas, 852 F.2d 1039, 1044 (8th Cir. 1988) (upholding a state law requiring home school students to undergo standardized testing against claims that it violated parental rights to educate their children at home for religious reasons); Cornwell v. State Bd. of Educ., 428 F.2d 471, 472 (4th Cir. 1970) (incorporating the reasoning of the lower court which applied rational basis review to parental rights claims), cert. denied, 400 U.S. 942 (1970).
128. 68 F.3d 525, 532-35 (1st Cir. 1995), cert. denied, 116 S. Ct. 1044 (1996). See also Doe v. Irwin, 615 F.2d 1162, 1167-69 (6th Cir. 1979), cert. denied, 449 U.S. 829 (1980) (declining to find whether a compelling state interest is necessary to infringe on parental rights because they were not implicated in the case of a health center distributing contraception to children without parents' consent).
130. See id. at 533.
131. See id.
lic schools once they had chosen to send their children there. Because their parental rights had not been violated, the court also rejected the parents' hybrid claim (including both First Amendment free exercise of religion rights and due process parental rights) under Wisconsin v. Yoder.

III. Movement for Reform

A. The Parental Rights and Responsibilities Act

In response to their difficulty in the courts, conservative organizations such as the Christian Coalition and Of the People have pressed for a reaffirmation of child-rearing rights in the political arena. On the federal level, they have championed the Parental Rights and Responsibilities Act (PRRA). The PRRA, sponsored by Representative Steven Largent in the House of Representatives and (in an identical version) by Senator Charles E. Grassley in the Senate, declares the fundamental "right of parents to direct the upbringing of a child" and requires that a compelling state interest be shown before the parents' role is "usurped." The "right of a parent to direct the upbringing of a child" includes but is not limited to: directing a child's education; making health care decisions (except where such a decision may result in death or serious physical injury); disciplining a child—including corporal punishment (limited by a separate section excluding "abuse and neglect as the terms have been traditionally defined"); and directing the religious teaching of a child. The bill also creates a four-part process for analyzing cases involving parental rights: the parent must demonstrate (1) that his or her claim arises from the parental right and (2) that the government has usurped that right. The burden then shifts to the government to show (3) that the "usurpation" furthers a compelling governmental interest and (4) that it is

132. See id.
133. See id. at 539. Such a hybrid would be necessary for a First Amendment claim to overcome a generally applicable law not specifically designed to burden religion. Id. See Employment Div. v. Smith, 494 U.S. 872, 882 (1990).
134. See Allen, supra note 7, at A10.
136. "Prohibition on Interfering with or Usurping Rights of Parents. No Federal, State, or local government, or any official of such a government acting under color of law, shall interfere with or usurp the right of a parent to direct the upbringing of the child of the parent." H.R. 1946, § 4. "Strict Scrutiny. No exception to section 4 shall be permitted, unless the government or official is able to demonstrate, by appropriate evidence, that the interference or usurpation is essential to accomplish a compelling governmental interest and is narrowly drawn or applied in a manner that is the least restrictive means of accomplishing the compelling interest." Id. § 5.
137. Id. § 3(4)(A)(iii) and (C).
138. Id. § 3(4)(A)(iv).
achieved by the least restrictive means of accomplishing the compelling interest.\textsuperscript{139}

The authors of the bill consider it to be a reaffirmation of the original rules of \textit{Meyer v. Nebraska} and \textit{Pierce v. Society of Sisters}. The “Findings and Purposes” section of the PRRA cites these decisions,\textsuperscript{140} seemingly linking it to this due process adjudication. In comments to the press and in congressional hearings, the sponsors have confirmed this intent.\textsuperscript{141}

A companion bill with a narrower scope, the Family Privacy Protection Act, has already passed in the House of Representatives and is currently under consideration in the Senate.\textsuperscript{142} The bill would require researchers seeking information from an unemancipated minor in a number of areas (including psychological problems, sexual behavior or attitudes, and parental political affiliation and beliefs) to obtain prior written permission from a parent or guardian.\textsuperscript{143} The political genesis of this bill seems to have been hostility towards sexual practices and drug use surveys administered to youth and the belief that these surveys encourage such behavior.\textsuperscript{144}

It is interesting to note the similarities between these bills and the Religious Freedom Restoration Act (RFRA).\textsuperscript{145} That bill was passed to avoid the Supreme Court’s ruling in \textit{Employment Division v. Smith}\textsuperscript{146} that the First Amendment free exercise of religion clause does not, by itself, suffice to overcome a law that is generally applicable and not designed to burden religion. Under the RFRA, any government burden on the free exercise of religion must be justified by a compelling interest and be narrowly tailored to that interest.\textsuperscript{147}

\begin{enumerate}
\item Id. § 2(b)(6).
\item Id. § 2(a)(1) and (b)(3).
\item “[W]hat we are doing is basically codifying into federal statute those Supreme Court cases that say that parental rights are a fundamental right.” Interview of Rep. Steven Largent, \textit{Burden of Proof} (CNN television broadcast, Nov. 1, 1995). “[T]he Supreme Court clearly regards the right of parents to direct the upbringing of their children as a fundamental right under the Fourteenth Amendment to the Constitution. [Cites \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923) and \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925)]. While the Supreme Court’s intent to protect parental rights is unquestionable, lower courts have not always followed this high standard to protect the parent child relationship. The recent lower court assault on the rights of parents to direct their children’s education, health care decisions, and discipline is unprecedented.” \textit{Parental Rights and Responsibilities Act of 1995; Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995)} (statement of Sen. Charles E. Grassley).
\item Id. § 2.
\item Marilyn Elias, \textit{Consent Bill Upsets Researchers}, \textit{USA TODAY}, Jan. 22, 1996, at 1D.
\item 494 U.S. 872, 881 (1990).
\end{enumerate}
the PRRA, the RFRA explicitly links itself to a former Supreme Court ruling on the application of an individual right from the Bill of Rights, in this case the First Amendment. The RFRA carefully states that it is not meant to (directly) preempt the First Amendment. The Ninth Circuit recently upheld the constitutionality of the RFRA in a case involving prosecutions of Rastafarians (among other charges) for the simple possession of marijuana. Given this success, national parental rights advocates can be encouraged that the PRRA’s approach of reviving the Meyer and Pierce protection of parental rights will also be upheld.

B. State Efforts

A growing number of states are proposing language similar to the PRRA as state constitutional amendments and state statutes.

148. Among the purposes of the RFRA was “to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” 42 U.S.C. 2000bb(b)(1) (1995).

149. “Nothing in this Chapter shall be construed to affect, interpret, or in any way address portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the ‘Establishment Clause’). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Chapter. As used in this section, the term ‘granting,’ used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.” 42 U.S.C. § 2000bb-4 (1995).


The most common version of the constitutional amendments reads: "The right of parents to direct the upbringing and education of their children shall not be infringed." None of these bills or amendments have been enacted by the state legislatures at the time of the publication of this Note, and bills have been defeated in Kansas, Virginia, and North Dakota. Parental rights advocates suffered an important setback in the November 5, 1996, election when Colorado voters soundly rejected Amendment 17, an initiative to add a parental rights amendment to the Colorado constitution. The Amendment 17 campaign had been closely watched nationally as a test of public sentiment on this issue. Despite this setback, advocates remain determined to press forward and the movement is picking up powerful backers, such as Virginia Governor George F. Allen and Michael P. Farris, president of the Home School Legal Defense Association and former co-chair for Patrick Buchanan's presidential campaign.


153. See Allen, supra note 7 at A10.

154. Id. See also Warren Fiske & Laura Lafay, Senate Kills “Parental Rights” Bill, Democrats Lead Vote Against Amendment, VIRGINIA PILOT, Jan. 29, 1997, at A1.


156. See id.

157. See id.

158. See Fiske & Lafay, supra note 154, at A1.

As the reformers frame it, the question in the parental rights debate is who will decide what is in the best interests of children: parents or the government. However, the issue is not so simple. Under the regime proposed by the reformers, there is essentially a zero-sum relationship between the rights of children and those of their parents. If the government is entirely shut out of the family, then the rights of children will not be enforced unless it suits the whim of their parents. Because children cannot be expected to demand enforcement of their own rights, they must rely on some outside party to do so. Thus, their rights will only be protected to the extent that the governmental interest in them prevails over parental rights. By narrowing the government’s ability to intervene between parents and children to situations where the government can show a compelling interest and narrowly tailored solution, children’s rights are inevitably squeezed out.

An example of how this might work can be seen in the issue of sex education, as presented by the facts of the case in the First Circuit’s last encounter with the parental rights issue: Brown v. Hot, Sexy, and Safer Productions, described above in Part II.\textsuperscript{160} Under the approach favored by the parental rights advocates (and written into their reform bills), the Court would recognize a fundamental right of parents to control their children’s upbringing, and analyze the situation to see if the state had infringed this right. The parental right in Meyer and Pierce (as well as in the PRRA and other reform bills) is defined broadly to encompass “direct[ing] the upbringing and education of children.”\textsuperscript{161} Parental rights advocates would argue that compulsory sex education presented to children without prior parental notification would infringe on this right. Certainly, in the basic sense, such a presentation would impinge on a parent’s decision to keep her child away from sexual information.\textsuperscript{162} Therefore, the burden should

\textsuperscript{160} 68 F.3d 525 (1st Cir. 1995), cert. denied, 116 S. Ct. 1044 (1996). Apart from the fact that it has been the locus of the parental rights battle in the courts, sex education is also a useful example for a number of other reasons. It appears to be one of the major areas that reformers have in mind in pursuing greater parental rights. See, e.g., Reverend Louis Sheldon, Parents Must Have Right to Rear Kids, CHI. SUN-TIMES, Sept. 28, 1996, at A14 (noting with alarm the facts of the case in Brown). It also combines the areas of education and public health, two of the main areas that parental rights will affect.

\textsuperscript{161} Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

\textsuperscript{162} In Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. Rptr. 68, 90 (Cal. Ct. App. 1975), the California appellate court found that because the school district allowed parents to opt their children out of sexual education programs, the parents’ right to privacy had not been violated. Advocates in Brown, on the other hand, were able to argue that the school system contravened the parents’ rights because the parents were not allowed to opt their children out of the “assembly.” See Brown, 68 F.3d at 534. The
shift to the government to show that it has a compelling interest and that its action was narrowly tailored to that interest.

It is not difficult to make the case for a compelling government interest in reducing teen pregnancy and the spread of sexually-transmitted diseases in children. There are over a million teenage pregnancies in the United States every year.\textsuperscript{163} Teenagers also have the highest incidence of sexually transmitted diseases and HIV infection.\textsuperscript{164} This phenomenon leads to enormous costs for government in the form of financial and medical assistance, as well as the social costs of youth raising children.\textsuperscript{165} Clearly, the government has a strong interest in taking measures to stem this tide among teenagers.

However, it is not clear that this intervention could be described as narrowly tailored to the governmental interest. In \textit{Brown}, the school responded with a program clearly designed to command the attention of the students and teach them about safe sex.\textsuperscript{166} Arguably, the school could have achieved this goal without sexual information and graphic language. Abstinence-focused sex education programs such as Teen Aid and Sex Respect, which do not discuss contraception or the mechanics of sex, pregnancy and sexual disease, have been found to have some success on children's attitudes toward sex, which can, in turn, have an effect on sexual activity.\textsuperscript{167} It is well accepted in current research on sex education that simply teaching children the "facts" about disease transmission and reproduction is less effective than a program that also addresses factors of identity and self-esteem.\textsuperscript{168} However, there is no agreement in the scientific literature regarding the relative effectiveness in reducing pregnancy and sexual disease of abstinence-based sexual education programs and those discussing safe sex, when both address these self-esteem and identity issues. Studies have indicated that abstinence-only programs are effective in preventing disease.\textsuperscript{169} On the other hand, some studies have found abstinence-only programs to be less effective than sex edu-

\begin{itemize}
\item \textsuperscript{163} Laura Kann et al., \textit{Youth Risk Behavior Surveillance—United States, 1995}, 66 J. of School Health 365, 365 (1996).
\item \textsuperscript{164} DEPT OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2000: NATIONAL HEALTH PROMOTION AND DISEASE PREVENTION OBJECTIVES (1990).
\item \textsuperscript{165} See Howard B. Eisenberg, A 'Modest' Proposal: State Licensing of Parents, 26 Conn. L. Rev. 1415, 1419 (1994).
\item \textsuperscript{166} 68 F.3d at 529.
\item \textsuperscript{167} Joseph A. Olsen et al., \textit{The Effects of Three Abstinence Sex Education Programs on Student Attitudes Toward Sexual Activity}, 26 Adolescence 631, 640-41 (1991).
\item \textsuperscript{169} See Olsen, supra note 167, at 633.
\end{itemize}
cation that includes information about contraception.\textsuperscript{170} It is at least arguable that the government should be required to use an abstinence-only program that does not infringe on parental rights even if it is not the most effective program possible.

This analysis would be different if, instead of a diffuse governmental interest, the inquiry was focused on the child's right to access to this potentially life-saving knowledge. The child's due process rights to life and health\textsuperscript{171} and First Amendment right to free speech\textsuperscript{172} would be more compelling than the government's immediate interest in spending less money on public health for minors. However, under the model suggested by parental rights reformers, this balancing would not take place. Thus, although one might reasonably assume that a child would choose the most effective sex education program in the interests of his or her health, this choice would not be honored under the reformers' model.

The reforms also would affect other areas of the law. In a detailed critique of the PRRA, Barbara Woodhouse argues that the bill would tip the balance against intervention in child abuse cases and freeze the meaning of abuse and neglect in their "traditional" forms.\textsuperscript{173} She also argues that the bill would force public institutions such as schools to enforce parental values on children instead of providing a common marketplace of information.\textsuperscript{174}

\section*{IV. Proposals from Academia to Limit Parental Rights}

While conservative political forces push for an extension of parental rights, a number of voices in academia have called for parental rights to be curtailed. Many scholars propose legal regimes focused on identifying and satisfying the interests and rights of children. Power over children would flow from the state as sovereign, which would in turn delegate responsibility to parents subject to oversight.

One example of this argument can be found in a recent article in the California Law Review by James Dwyer.\textsuperscript{175} Dwyer proposes that the state should grant parents only the "privilege" (as opposed to the

\begin{footnotes}
\item[173] See Woodhouse, \textit{A Public Role in the Private Family}, supra note 11, at 407-11.
\item[174] See \textit{id.} at 411-13.
\item[175] See Dwyer, \textit{supra} note 53, at 1436-37.
\end{footnotes}
"right") to care for and raise their children, and the responsibility to
ensure the protection of their temporal interests. He argues that if
parents' rights were eliminated the state would be unlikely to inter-
vene in the family except in extreme cases involving the child's basic
needs. In those cases, the parent could act as agent for the child's
right against unnecessary and disruptive interference and press a claim
on the child's behalf against the state. Dwyer would also impute to
children a desire that their parents not be "embattled" by the state so
that their parents can feel "competent and empowered." Switching
to a "privilege/responsibility" format would have the salutary effect of
making parents recognize their children as autonomous individuals
with their own views and life goals.

Another scholar, Barbara Woodhouse, comes to a similar conclu-
sion through a feminist analysis of the issue. Woodhouse uses the
term "generism" to describe her ideal child-centered legal regime:
Justice across generations, or generism, calls for a metaphor of dy-
namic stewardship, in which power over children is conferred by the
community, with children's interests and their emerging capacities
the foremost consideration. Stewardship must be earned through
actual care giving, and lost if not exercised with responsibility.
Generism would place children, not adults, firmly at the center and
take as its central values not adult individualism, possession, and
autonomy, as embodied in parental rights, nor even the dyadic inti-
macy of parent/child relationships.

Woodhouse argues that family law is still mired in the nineteenth
century paradigm of family ownership by the patriarchal male. By
recognizing parental rights, the state renders children the equivalent
of property, inevitably denying them their inherent personhood.
Given the inherent weakness of children in the parent/child rela-
tionship, Woodhouse argues that protection of the parents from the state
must be sacrificed in order to protect the true interests of children.
Woodhouse's generism model "would view obligation as a corollary of
procreation" and would dole out authority to parents as earned
through effective stewardship.

176. Id.
177. See id. at 1438.
178. See id.
179. Id. at 1434 n.267.
180. See id. at 1440-41.
181. See Barbara B. Woodhouse, Hatching the Egg: A Child-Centered Perspective on
182. Id.
183. See also Woodhouse, Who Owns the Child?, supra note 11, at 1001.
184. See Woodhouse, Who Owns the Child?, supra note 11, at 1048.
185. See Woodhouse, Hatching the Egg, supra note 181, at 1816.
186. See id. at 1818-19.
187. Id.
Taking an even more explicit stance in favor of state intervention, another scholar, Howard Eisenberg suggests that the state sponsor and administer mandatory parent training and parenting examinations as one of several prerequisites for a license to have custody of a child.\(^{188}\) Eisenberg notes that those advocating parental rights frequently frame the issue as what is in the long-term best interests of the child.\(^{189}\) Certainly this has been true for the current wave of national reform.\(^{190}\) Yet, Eisenberg argues, many parents have failed in important ways to provide the necessary discipline, care, and financial support for their children.\(^{191}\) Eisenberg notes the dramatic recent increase in single-parent families, "crack babies," and the rise in families relying on government medical and financial assistance programs.\(^{192}\) He also points to increasing reports of child abuse, neglect, and the rise in teenage crime and suicide as results of parental failure.\(^{193}\)

To remedy these problems, Eisenberg describes a plan whereby all potential parents would receive mandatory training in the basics of how to raise children, including dispute resolution, problem solving, child bathing, nutrition, safety, and money management.\(^{194}\) The state would inculcate values rejecting violence, exploitation of weaker people, drug use, and other undesirable behaviors.\(^{195}\) In addition to passing two exams on these topics, parents would be required to submit a child support plan showing that they will be financially able to support the child within one year of birth.\(^{196}\) A number of factors would serve as presumptive bars to receiving this license, including failure to provide court-ordered child support, a history of violence, and use or sale of drugs.\(^{197}\)

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188. See Eisenberg, supra note 165, at 1434-38.
189. See id. at 1429.
190. "America's parents are in a far better position than the government to know [the] needs of their children and to respond to those needs. The parental rights debate boils down to this: Who decides what's in the best interest of children? Parents or the government?" Parental Rights and Responsibilities Act of 1995: Hearings on H.R. 1946 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (statement of Greg D. Erken, Executive Director, Of the People). "Colleagues, children do have rights. They have the right to grow up in a loving, safe home with their parents. They have the right to receive the discipline, religious and moral beliefs, medical attention and education that their parents—those responsible adults like you and me—who know them best and love them most, choose in order to make them the persons they are meant to be." Id. (statement of Rep. Mike Parker).
191. See Eisenberg, supra note 165, at 1429-34.
192. See id. at 1417-21.
193. See id. at 1421-25.
194. See id. at 1434-37.
195. See id.
196. See id. at 1437-39.
197. See id. at 1438.
All three of these proposals recognize that a child cannot adequately protect his or her own rights if the state is unable to interfere with parents’ authority. Dwyer’s innovation of a child’s right to an undisturbed family has the additional advantage of providing some protection from excessive governmental intervention in family affairs.

However, all of these plans imbue the state with the major power to define and control the shape of the parent-child relationship. This would open the doors of the family home that the Supreme Court has been trying to close to government interference since *Meyer* and *Pierce* and would cause a major backslide in the modern right of associational privacy begun in *Griswold*. While it is certainly true that parents dominate the power dynamic in their relationships with their children, as Woodhouse points out, this power imbalance should not serve as a justification to extinguish parents’ rights. The Supreme Court has been fashioning in the freedom of association a realm of autonomy from state intervention in personal relationships that is at least as powerful, if not more powerful, than similar protection for political association. It would be impossible to maintain a logically ordered freedom of association if parents, as a kind of disfavored class, were not allowed protection for what may be their most intimate and important human relationship—their bond with their child. Just as individual adults have the privacy right to form sexual relationships between themselves, and to decide whether and when to become parents through the use of contraception, parents deserve to maintain their particular kind of intimate relationship with their children. In the next Part, this Note argues that it is possible to protect the basis of

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198. Dwyer does not contend that his model is consistent with Supreme Court decisions in *Meyer*, *Pierce*, and *Yoder*. See *Dwyer*, supra note 53, at 1379-88. Similarly, Woodhouse makes clear that she is arguing for a fundamental change in the legal system. See *Woodhouse, Hatching the Egg*, supra note 181, at 1816. Eisenberg, valiantly, does argue that his plan is supported under current constitutional law. He concedes that *Meyer* and *Pierce* created a fundamental parental right to raise their children. See *Eisenberg*, supra note 165, at 1446. He argues convincingly that his plan comes out of the government’s compelling interest in healthy, well-educated children who do not act in anti-social ways. *Id.* at 1447. However, he also maintains that the plan is a narrowly tailored regulatory scheme to achieve that interest. *Id.* at 1446-47. Short of the dictatorial regime portrayed by *Brave New World*, supra note 1, it is difficult to imagine any scheme more intrusive than Eisenberg’s. Eisenberg allows the government to define what a good parent is and does, and creates a constant risk of the loss of custody not just for abuse or neglect but also for such weaknesses as drug use, lack of financial planning, and mental illness. *Eisenberg*, supra note 165, at 1438. This intense social engineering is inimical to Americans’ distrustful relationship to government.


parents' relationships with their children without abdicating state responsibility for supporting children's rights and interests.

V. The Case for an Associational Parental Right

As described in Part I, the Supreme Court has consistently referred to the need for government to respect familial boundaries and the position of parents. Almost all lower court cases interpreting the Supreme Court's pronouncements have agreed that there is some protectible liberty interest in the due process clause for the parental right to direct the upbringing of their children. Because of this, it would seem "late in the day"—seventy-three years after Meyer was decided—to completely take away parental rights, as scholars such as Dwyer, Eisenberg, and Woodhouse have proposed. This would, in any case, damage the modern constitutional framework of privacy rights protecting individuals from the state. On the other hand, the near-absolute protection of parental rights urged by the Christian Right goes beyond what the Court has been willing to do (especially in the realm of education). Moreover, it would inevitably result in the degradation of the fundamental rights of children. This Note proposes a compromise similar to that offered by the Third Circuit in Halderman v. Pennhurst State School and Hospital. Rather than according parental rights an "intermediate" level of scrutiny, this Note defines the scope of the right so that it fits more comfortably into the context of modern privacy cases.

The concept of parental rights has been incorporated into the modern right to privacy. In Griswold v. Connecticut, Justice Douglas' majority opinion described Meyer v. Nebraska and Pierce v. Society of Sisters as part of the First Amendment's "penumbra" of associational privacy. These penumbral rights ensured that the specific rights stated in the Bill of Rights would remain secure. The right to privacy was also held to be supported by "emanations" from the Third, Fourth, and Fifth Amendments. In Roe v. Wade, Justice Blackmun noted that the Court had recognized that "a right of

201. See supra Part II.
203. See supra Part IV.
204. See supra Part II.
205. See supra note 125 and accompanying text.
206. 381 U.S. 479, 485 (1965) (declaring the right of a married couple to receive and use contraceptive devices).
207. Id. at 482.
208. See id.
209. See id. at 484.
personal privacy, or a guarantee of certain areas or zones of privacy
does exist in the Constitution.” The right of privacy had its “roots”
in the amendments cited by Justice Douglas. He also cited Meyer and
Pierce, finding them (more correctly, as argued in Part I above) to
involve the Fourteenth Amendment. The right to privacy spans
several amendments and has an identity of its own.

In his seminal article on associational rights, Kenneth Karst criti-
cizes the “right to privacy” label, which he attributes to Justice Doug-
las’s unwillingness in Griswold to invoke the Lochner-tarnished Due
Process Clause of the Fourteenth Amendment. Instead, he argues
that the freedoms surrounding procreation and family life recognized
by the Supreme Court should be understood as establishing the free-
dom of intimate association; Karst defines this freedom as “a close
and familiar personal relationship with another that is in some signifi-
cant way comparable to a marriage or family relationship.” This
freedom extends to marriage and marriage-like relationships as well
as families and alternative families and the relationship between par-
ents and children. Choice is the operative core of freedom of asso-
ciation. Individuals who freely bind themselves together into units
such as a family come to expect, on a moral level, that this relationship
will lead to a particular kind of treatment and support. This private
expectation has been largely accommodated by the law. The choice
itself is protected, even, Karst asserts, when it is exercised by an older
child to be free from parental control. But, for Karst, this choice
does not extend to “young children” and he approvingly cites the
“common sense” presumption of parental authority in Parham v.
J.R.

This concession to parental authority significantly and unneces-
Sarily weakens Karst’s thesis. Certainly, children are not capable of ma-
ture judgment in all or even many situations involving their long-term
interests. Yet the Court has consistently held that children are “per-
sons” under the Due Process Clause and possess fundamental rights

210. 410 U.S. 113, 164 (1973) (declaring a woman’s right to procure an abortion subject
to government intervention after the first trimester of pregnancy).
211. Id. at 152.
212. Id.
213. Karst, supra note 199, at 664.
214. Id. at 629.
215. See id. at 629.
216. See id. at 637.
217. See id. at 648.
218. Id.
219. See id. at 644.
220. Id. at 644, 645.
like their adult counterparts. How can these rights be accommodated without foolishly putting children in the driver's seat before they can see over the wheel? As James Dwyer noted, the law has historically been able to accommodate this dilemma in the context of parents of mentally and otherwise legally incompetent adults. For instance, in Cruzan v. Director, Missouri Department of Health, the Court dismissed the notion that the parents of an adult daughter who had fallen into a persistent vegetative state should be able to substitute their decision to terminate life support for their adult daughter's. Instead, the Court upheld the state statutory requirement that an incompetent's wishes for the withdrawal of life support be shown by clear and convincing evidence. The Court dismissed the parents' claims that their judgment be given deference and refused to indulge the presumption that they spoke for their daughter.

Similarly in the case of mentally retarded adults, state law has not allowed parents to have final authority over medical decisions regarding their adult children, despite the fact that their children may never be able to make mature decisions on their own. Instead courts have used a "substituted-judgment" procedure to divine what the incompetent adult's decision would have been, were s/he able to form one. Dwyer argues that this same substituted-judgment could be used for all unemancipated minor children. The courts should impute to children the wish to protect their "temporal interests," including medical care, protection from adult infliction of physical, psychological, or emotional trauma, and an adequate and broad-scoped education.

Dwyer argues that any focus on parental rights obscures the rights of children. Instead he proposes that governmental intervention will be avoided by focusing on the child's right to have family integrity, and parents who do not feel harassed. This backdoor protection of parental interests does not go far enough to recognize the value and importance of the relationship from the parents' standpoint. Parents are not simply custodians; they form strong and overriding

221. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976), quoted in Parham v. J.R., 442 U.S. 584, 627 (1979) (Brennan, J. dissenting) (citations omitted).
222. See Dwyer, supra note 53, at 1415-19.
224. See id. at 281-82.
225. See Dwyer, supra note 53, at 1419.
226. Id. at 1420 (citing In re Moe, 432 N.E.2d 712, 721 (Mass. 1982)) (finding it permissible for a court to use objective criteria in divining an incompetent's wishes).
227. Id. at 1432.
228. See id. at 1436.
229. See id. at 1432.
relationships with their children that are, in many ways, incomparably more important to these individuals than any other relationship. The parent-child relationship shares many aspects with other relationships protected under the freedom of association (such as marriage and non-marital sexual relationships) including love, caring, financial, and other types of support. However, parenting is unique in that it necessarily involves teaching, control, discipline, and authority as well. It is not a professional custodian-type relationship. Because parents are not behavioral scientists or professional custodians, there is no “goal” to their relationship with their children (for example, that their children grow up healthy, well-educated, and well-prepared for participation in society), no matter how fervently most parents and the state desire a particular result. The relationship is itself a separate good that transcends these ends, both for the parent who receives personal enrichment through sharing with his or her children, and for the child who desires and needs parental affection and care—not just for sufficient mental health to participate in democratic polity later in life—but because that attention itself is part of the creation of the child as a person.231

The fact that this relationship is valuable, however, does not mean that parents should have plenary authority. Such authority has already been clearly rejected by the courts in situations of abuse,232 in mandatory schooling,233 and in requirements that parents obtain emergency medical treatment for their children.234 In order to accommodate the fundamental rights and the interests of both children and society, parental rights must be tempered. Parental rights advocates argue that this should be done by allowing the government to override any parental decisions only when it has a compelling interest and does so in a way that is narrowly tailored to that interest.235 A better way is

230. “For many years, I was a practicing child clinical psychologist. During that time, I treated many clients and was relatively successful. I like to believe that my clients saw me as a caring and committed professional. But I would not have voluntarily died for even one of my patients. In contrast, I would, quite literally and without hesitation, die for my children. And so would most parents.” Parental Rights and Responsibilities Act of 1995: Hearings on H.R. 1946 Before the Subcomm. on the Constitution of the House Judiciary Comm., 104th Cong., 1st Sess. (1995) (statement of Wade F. Horn, Director of the National Fatherhood Initiative).

231. See Joseph Goldstein et al., Beyond the Best Interests of the Child 17-20 (1979) (describing how relationships with parents “form the base from which any further relationships develop”).


233. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (finding that the state can require that children of certain ages receive schooling).


235. See supra notes 136-139 and accompanying text.
to focus on the relationship itself. A fundamental associational parental right should be recognized such that the state would have to show a compelling interest when its intrusions substantially undermine that relationship. So, to borrow from the analytical format suggested by the PRRA, the burden would first be on the parent to show that the particular governmental intervention has substantially impaired his or her relationship with the child. The burden would then shift to the government to prove that the intrusion sprang from a compelling interest and was narrowly tailored to achieve that interest. While many governmental actions infringe on parental decisions, few can be seriously argued to do so to such an extent that the relationship between parent and child is damaged.

This relationship-centered, associational approach would retain the advantage of Dwyer's parental privilege/responsibility model and Woodhouse's generism model in allowing breathing room for the protection of children's fundamental rights. Instead of the child's right being pitted against a parental right to make nearly any decision for any reason, it would be balanced against the parent's right to maintain a parental relationship (which must include guidance and discipline) in general. An obedient child need not obey a parent's every whim. But where, in cases such as the parental testing and licensing scheme suggested by Eisenberg, a state intervention dramatically impacts the nature of the parent's authoritative relationship with the child, the state would have to prove it had more than just a legitimate interest in the child's well-being. Certainly, parents should not have to wait for anything as extreme as Eisenberg's plan to invoke their right. For instance, if a state were to require public schooling for all children to the exclusion of private and home schooling, as Oregon did in 1925, parents could credibly argue that removing all educational alternatives undermines their authoritative relationship with their children.

This associational model can be reconciled more easily with modern Supreme Court precedent. In Griswold and its progeny, the Court has recognized a sphere of individual privacy, arguably focused on the intimate relationships between individuals. An associational parental right is consistent with the right to choose whether or when to become a parent, and the right to maintain committed marital and marriage-like relationships. In Wisconsin v. Yoder, the Court held that the state's requirement that all children attend school until the eighth grade infringed on the religious way of life of the Old Amish.

236. See supra note 139 and accompanying text.
237. For an example of how this inquiry would work in practice, see infra notes 234-237 and accompanying text.
239. See Karst, supra note 199, at 634.
Order parents.\textsuperscript{240} The worldly knowledge gained in school and the enforced physical separation of children from the community during school hours undermined their entire approach to parenting and raising their children.\textsuperscript{241} As discussed in Section I, above, the \textit{Yoder} Court relied in large part on the First Amendment free exercise right of the parents. In \textit{Employment Division v. Smith}, Justice Scalia interpreted the Amish parents' claim in \textit{Yoder} (in passing) as a combination of constitutional rights (there, privacy and free exercise) that created a more powerful right.\textsuperscript{242} To be more consistent with the associational model, \textit{Yoder} should be interpreted more narrowly to mean that a parental rights claim is a necessary but not sufficient element of a religion-based claim by a parent. In order to make out a colorable claim that a parent's free exercise rights have been infringed, the parent must first show that the state action has infringed on the parent-child relationship. This was arguably the approach taken by the First Circuit Court of Appeals in \textit{Brown v. Hot, Sexy, and Safer Productions}.\textsuperscript{243} This would make sense in terms of standing for a First Amendment claim: parents, of course, may sue as agents of their children and press their children's free exercise claims.\textsuperscript{244} However, a claim that the parents' free exercise rights have been violated is necessarily dependent on the relationship between parent and child.\textsuperscript{245}

The associational model runs afoul of language in \textit{Parham v. J.R.}, which discussed the Court's wish to presume that parents act in the best interests of their children and urged that their decisions be given deference.\textsuperscript{246} Nevertheless, the \textit{Parham} Court also carefully balanced children's fundamental right to be free of bodily restraint and the state's interests in discouraging useless institutionalization against the parents' interests in the commitment process. The Court found that a psychologist's professional but informal review of "voluntary" commitment of children was sufficient to guarantee that children's rights

\textsuperscript{240} 406 U.S. 205, 210-11 (1972).
\textsuperscript{241} See id.
\textsuperscript{244} See Allen v. Wright, 468 U.S. 737 (1984) (discussing the requirements for standing).
\textsuperscript{245} In the federal courts, for example, one of the requirements in order to have a justiciable claim under the doctrine of standing is that the claimant demonstrate that s/he personally sustained an injury, that the injury is fairly traceable to the event/defendant and that it is redressible through the courts. \textit{See generally} Erwin Chemerinsky, \textit{FEDERAL JURISDICTION} 53-101 (2d ed. 1994). The only way a parent could show that she personally sustained injury by, for instance, the fact that her child was forced to attend a safe sex presentation at school, would be to argue that making decisions about her child's exposure to sex-related information involves her rights as a parent. Thus, the parent cannot make out a claim (at least under the federal rules) of a violation of free exercise rights without implicating parental rights.
\textsuperscript{246} 442 U.S. 584, 601 (1979). \textit{See also supra} notes 86-92 and accompanying text.
and society's interests were taken into account. In light of the logic of the Griswold privacy cases and Yoder, it would be reasonable to interpret the holding of Parham narrowly, to mean only that in the case of commitment to mental institutions, a child's fundamental right to liberty is sufficiently protected by a psychologist's review (as opposed to an adversary hearing). Thus the parents' role, though "substantial" in that they are empowered to begin the process of commitment, is not determinative, because it is the psychologist who makes a medical decision for a possibly mentally ill child. Thus the issue in Parham could be seen as regarding the limits of children's rights (as opposed to adults in the same situation) rather than an expansion of parents' rights.

The operation of the associational model of parental rights might be illustrated using the Brown v. Hot, Sexy, and Safer Productions example as described in Part III, above. Under the associational parental right model advocated in this Note, the parents in Brown would first have to prove that the state intervention, here the mandatory assembly, had substantially impaired their parent-child relationship. In that case, there was a one-time presentation on safe sex with graphic language and potentially offensive humor. The performer presented sexual information laced with attention-getting humor. This would not seem to seriously undermine parents' position of authority and teaching role in their children's understanding of appropriate sexual behavior. However, one of the parents' claims was that the speaker "advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex." If the speaker went beyond information-sharing to a kind of values training, urging the children in effect to reject their parents' admonitions about premarital sex, a more plausible argument could be made that a conscious attempt to undermine the authority of the parents was being made. The focus, though, is on the relationship itself, so it would require that the children actually be affected by the presentation in such a way that their relationship with their parents was impaired. Determining whether the children were affected and the effect on the parent-child relationship would be a task for the fact finder. Given that the children in this case were fully participatory parties in the lawsuit, challenging with their parents a presentation they claimed "humiliated and intimidated" them, it seems unlikely that they took the presenter's suggestions so much to heart that it affected their relationship with their parents. If it were found that the

247. Parham, 442 U.S. at 607.
249. Id. at 528.
250. Id.
presentation had such an effect on the parent-child relationship, then the burden would shift to the school to prove that the program was narrowly tailored to achieving a compelling government interest.251 Through this balancing, the school would be forced to be respectful of the underlying nature of the parent-child relationship. However, parents would not be able to dictate all of the details of school curricula to precisely accord with their own values and ideas.

**Conclusion**

With the rise of parental rights as a significant political as well as legal issue, the likelihood of substantial changes in this area of the law is rapidly increasing. Existing Supreme Court precedent on the existence and scope of parental rights is ambiguous and has led to some confusion in the lower courts. However, consistent treatment of parental rights can be accomplished by placing parental rights within the greater context of the right to privacy and intimate association. This Note has advocated that parents be taken seriously and that their relationships with their children be honored and protected at least to the same degree that other intimate relationships have been. Like other protected relationships, however, this does not and should not translate into the plenary right to control the other party, to the extinguishment of that party's rights. An associational model of parental rights would provide a bulwark against extreme governmental intervention in family life but not shut the door entirely on society's legitimate concern for the rearing of children.

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251. This case, like Wisconsin v. Yoder, 406 U.S. 205, 230 (1972), does not seem to present a situation in which the parents' and children's rights clash. If the parents had sought injunctive relief against such a safe sex program over their children's objections before it was shown to their children, then the Court should engage in the balancing test created by Parham v. J.R., 442 U.S. 584, 599 (1979). The parents' right would be located in the nature and change of the relationship. The children's right would be based not only on First Amendment free speech grounds (the right to receive information), but arguably also a due process right to receive life-saving information that has been prepared especially for them. If the government were to deny the children the ability to hear the presentation shown to their classmates about how to protect themselves from sexually-transmitted diseases such as AIDS on the basis of their parents' objections, this might endanger their lives, violating the Fourteenth Amendment's protection of "life, liberty and property" (emphasis added). In balancing the importance of parental authority with children's health, a determination about the effectiveness and necessity of sex education would be necessary. This would also be relevant to the third inquiry—the government's interest.