



What Do ‘Parents’ Rights’ Mean Legally for Schools, Anyway?

Mark Walsh

October 20, 2022

The issue of parents’ rights is among the most heated in public education, invoked in political campaigns and debates over everything from COVID policy and curriculum choices to classroom discussions about race, gender, and sexuality.

Most recently, the principle has been a potent rallying cry for conservative activists and politicians, including Virginia’s Republican Gov. Glenn Youngkin in his winning gubernatorial campaign. But the concept is tangled in more than a century of legal wrangling, court precedents, federal and state statutes, and rhetoric over what it actually means, especially in education.

“People who invoke the term ‘parental rights’ have different things in mind and different aspirations,” said Neal McCluskey, the director of the Center for Educational Freedom at the libertarian Cato Institute in Washington. “My general impression when I see people invoking ‘parental rights,’ it’s been connected to a general idea that parents have been cut out of decisions made by schools.”

Jeffrey Shulman, a visiting professor at Georgetown University Law Center and the author of several law journal articles on parental rights, said he agrees the term “is thrown about loosely” and could refer to rights under the U.S. Constitution, under federal statutes, under state constitutions or state statutes, or even school board regulations.

“Generally speaking, when parents use the term in the heat of battle, they are pretty much calling upon some amorphous, free-floating right,” Shulman said.

The arguments advanced by some conservative parents today reflect a longstanding and deep-seated fear, he said, “that our system of public education indoctrinates children in a left-wing ideological agenda; that public schools alienate children from their families and cultures, thereby undermining parental authority; [and] that, basically, the goal of public education is to enlist children on the wrong side of our current culture wars.”

“These arguments should not be dismissed out of hand,” Shulman added. “But much of what we’re seeing in the news is outright hostility to any form of common education.”

Moms for Liberty advocate sees at least some common ground

That’s certainly not how some parental-rights advocates on the conservative side view things.

Tiffany Justice, a co-founder of the group Moms for Liberty, which has grown quickly as a major voice for parental rights since being founded last year, is quick to point out that she served on her local school board, in Florida’s Indian River County. The mother of four school-aged children worked on such mundane issues as school start times. (She tried to make them later.)

“We support public education,” said Justice. “But we have an education system that is failing parents.”

Moms for Liberty was formed in early 2021 in Florida and now has nearly 250 chapters in 42 states. The group pushed for parental rights statutes passed in the state in 2021 and 2022.

The 2022 law, called the Florida Parental Rights in Education Act, prohibits classroom instruction about sexual orientation or gender identity in K-3 classrooms, and requires such conversations after 3rd grade to be age-appropriate, which the state board of education has yet to define. The measure has been derided by opponents as the “Don’t Say Gay” law and has been challenged in court.

The measure, which built on a 2021 state law called the Florida Parents’ Bill of Rights, also requires that parents be notified about health-care services offered at the child’s school, with the right to decline any service offered. And the law requires parental approval for questionnaires or health screenings given to K-3 students.

Florida’s recent laws address “the audacity of the teachers and some bureaucrats to think they know better” than parents what is best for students, Justice said.

Justice now travels the country speaking in favor of similar legislation. Some 26 states are considering legislation this year that would expand parental rights in education, according to FutureEd, a think tank at Georgetown University's McCourt School of Public Policy.

Justice pushed back at the idea that her group is responsible for sowing division in public schools.

"I think we have much more in common with most parents than people think," she said.

Conservatives would bolster Supreme Court precedents with a constitutional amendment

Conservative lawmakers have proposed parents-rights amendments to the U.S. Constitution, so far with little success, for years. The most recent one introduced by Rep. Debbie Lesko, R-Ariz., would establish that "the liberty of parents to direct the upbringing, education, and care of their children is a fundamental right." The amendment further says the parental right to direct a child's education includes the right to choose public, private, religious, or home schools, and "the right to make reasonable choices within public school's for one's child."

Similar measures have been introduced in seven previous sessions of Congress. Coming so late in the current session, Lesko's resolution is unlikely to be adopted before a new Congress begins.

"We're kind of setting this up for the next Congress," said William Estrada, the president of the Purcellville, Va.-based Parental Rights Foundation, which grew out of the home schooling movement and makes the amendment a major goal.

Estrada is well aware of roughly a century of U.S. Supreme Court case law supporting parents' right to direct the upbringing of their children. But he and other amendment proponents say such a change to the Constitution is still desirable.

"We're very grateful for the 100-year line of unbroken Supreme Court precedent," he said. "But this is something that is so important that it needs to be in the black and white of the U.S. Constitution."

The line of jurisprudence, while longstanding, has left gray areas Estrada and other advocates are uncomfortable with.

In 1923, in *Meyer v. Nebraska*, the high court struck down a Nebraska law barring the teaching of a foreign language through 8th grade or any instruction conducted in a foreign language because it interfered with parents' right to "control the education of their own." Two years later, in *Pierce v. Society of Sisters*, the justices struck down an Oregon law mandating public school attendance and thus precluding enrollment in parochial schools.

In *Pierce*, the court said the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." The court said the "child is not the mere

creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

In 2000, in the case of Troxel v. Granville, the Supreme Court considered parental rights in the context of a Washington state law that gave grandparents and certain others stronger rights to petition family courts for visitation rights with a child. In a fractured opinion, the court limited the application of that statute; a majority of the court nonetheless reaffirmed the right of parents to direct their children’s upbringing.

Still, the decision rang alarm bells among some conservatives and parental rights advocates, in part because of a dissent by Justice Antonin Scalia that raised doubts about whether Meyer, Pierce, and another decision, Wisconsin v. Yoder, which in 1972 recognized Amish parents’ right to end their children’s schooling after 8th grade, deserved respect as precedents.

Scalia suggested parents’ right to control their children’s upbringing was an “unenumerated right” that was not the province of the judiciary to enforce. As Scalia described it to a law school audience in 2015, such a parental right is “simply not in the Constitution.”

Despite the nominal reaffirmance of parental rights in Troxel, Scalia’s dissent and his powers of persuasion instilled concern among parental rights advocates that the long line of Supreme Court decisions might face reassessment, Estrada said.

“The good news is that in the 23 years since the decision, those fears have by and large not come to pass,” he said.

But Estrada also points to several federal appeals court decisions over the last 15 to 20 years that he views as giving short shrift to parental rights in education as recognized in Meyer and Pierce and stresses that a constitutional amendment would give parents the right to make “reasonable choices” for their children in public schools.

Rulings on parents and school curriculum add to debate

Shulman, of Georgetown Law, said that the Meyer-Pierce formulation of parental rights in education is “really quite limited,” and by itself does not mean that courts address alleged violations of such rights with the highest level of constitutional scrutiny, known as strict scrutiny.

The proposed constitutional amendment’s casting of parental rights as fundamental would trigger strict scrutiny, he said. That could result in more court rulings for parents over schools.

“Still, there is no parental right to say I don’t want my child to be taught this or that,” he said, referring to lower court opinions that have ruled against parents seeking such broad influence over a school’s curriculum.

Jack Schneider, an associate professor of education at the University of Massachusetts-Lowell, recalled co-writing an opinion essay in The Washington Post last year emphasizing that idea that parents may not dictate the curricular choices of public schools that expose children to ideas with which the parents may disapprove.

That idea, coupled with an aggressive headline, cluttered up his inbox for days.

“The amount of hate mail that generated ... holy cow!” he said. “People aren’t interested in being told they don’t have rights. That is a losing argument.” The current movement in support of parental rights is motivated by various goals, including social, religious, and political ones that are tied up with conservatives’ aims of limiting discussions of race, LGBTQ rights, or other controversial topics in schools, he said. “You are working against decades of rhetoric where nobody is talking about schools as anchors of communities, as places that return all kinds of value to communities and states and the nation,” said Schneider.

“It is a lot harder to tell people the reason we pay for public schools with our tax dollars is we all benefit from them and so we ought to all be included in the decisionmaking process,” he said. McCluskey, the libertarian from the Cato Institute, is not sure that the debate around public school issues and parental rights is likely to turn more harmonious anytime soon.

“It used to be people were in school districts that were very homogenous,” he said. “So it seems we have a lot more of these conflicts than we used to. But public schools have faced this kind of values-based conflict constantly.”