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Against Ventriloquizing Children: How Students' Rights Disguise Adult Culture Wars

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ABSTRACT. This Essay argues against the pursuit of students' rights, which function mainly as a smokescreen behind which adults have advanced their own partisan agendas in our culture wars. Independent rights for students are both theoretically untenable and politically damaging to our liberal democracy.

INTRODUCTION

Since 2020, national media outlets have reported dozens of stories of so-called school "book banning"—the removal of books from public-school libraries and curricula at the behest of parents and school boards. In one characteristic case in 2022, the school board in McMinn County, Tennessee, removed *Maus* from its middle schools, citing violence, nudity, and inappropriate language in its depiction of the Holocaust.[1] The board's decision was followed by condemnations from the usual suspects—advocacy groups like PEN America,[2] teachers'

1. Andrew Jeong, *Holocaust Graphic Novel 'Maus' Banned in Tennessee County Schools over Nudity and Profanity*, Wash. Post (Jan. 27, 2022, 6:22 AM EST), https://www.washingtonpost.com/education/2022/01/27/maus-ban-tennessee-mcminn-county-holocaust [https://perma.cc/9HYT-ZUY5].

2. Lisa Tolin, *Art Spiegelman on Banning 'Maus,'* PEN Am. (June 14, 2023), https://pen.org/art-spiegelman-on-banning-maus [https://perma.cc/YYE6-ZLTT].

and librarians' associations,[3] and liberal political organizations.[4] A common complaint was that the decision, in the words of one librarian, "restrict[s] our children's freedom to read."[5] PEN America claimed that over 2,500 books had been illicitly removed from American schools in the 2021-2022 school year, threatening "students' First Amendment rights."[6]

This conventional legal framing of book-removal controversies dates back to federal cases in the 1970s and early 1980s,[7] which culminated in *Board of Education, Island Trees Union Free School District v. Pico*[8] in 1982. But there is another way to understand these conflicts—as part of an ongoing culture war between factions of *adults*. In book-removal cases, progressive educators who publish and shelve contentious titles about race, gender, and sexuality are typically pitted against conservative parents and school boards that oppose exposing children to these ideas on the grounds that the ideas are developmentally harmful or outright false. Students, who neither select nor remove books from their school curricula and libraries, are notably passive in this picture. The substantive question at stake is straightforwardly one for adults: what should be taught in K-12 schools? Instead of confronting this question, we divert it into "rights talk" by submerging the curricular and pedagogical dispute into one about the scope of students' rights.[9]

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3. Alex Sharp, *The Banning of Maus: A Call to Action*, 72 TENN. LIBRS. (2022), https://www.tnla.org/page/72_2_Sharp [https://perma.cc/93UP-ZCWH]; *see* Ruth McKoy Lowery, *But These Are Our Stories! Critical Conversations About Bans on Diverse Literature*, 58 RSCH. TEACHING ENG. 34-35 (2023).

4. *See* Sophie Kasakove, *The Fight over 'Maus' Is Part of a Bigger Cultural Battle in Tennessee*, N.Y. TIMES (Mar. 4, 2022), https://www.nytimes.com/2022/03/04/us/maus-banned-books-tennessee.html [https://perma.cc/KB9X-CRGM].

5. Sharp, *supra* note 3.

6. Jonathan Friedman, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools [https://perma.cc/DKE8-B7MZ]. A subsequent study cast significant doubt on PEN America's accounting, demonstrating that seventy-four percent of the titles it characterized as "banned" remained on library shelves. *See* Jay P. Greene, Max Eden & Madison Marino, *The Book Ban Mirage*, EDUC. FREEDOM INST. 4 (2023), https://www.efinstitute.org/wp-content/uploads/2023/07/EFI-Book_Ban_Mirage.pdf [https://perma.cc/JCM2-J22P].

7. *See, e.g.*, Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25, 457 F.2d 289 (2d Cir. 1972); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577 (6th Cir. 1976); Right to Read Def. Comm. v. Sch. Comm. of the City of Chelsea, 454 F. Supp. 703 (D. Mass. 1978); Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300 (7th Cir. 1980).

8. 457 U.S. 853 (1982).

9. For discussions of this strategy and its history in our jurisprudence, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); and JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART

This Essay argues that most of our major constitutional contests over students' rights in public schools since *West Virginia State Board of Education v. Barnette*[10] can be more honestly and fruitfully understood as political contests between shifting coalitions of adults—parents, school boards, teachers, administrators—seeking an edge in twentieth- and twenty-first-century culture wars. Beneath claims about children's rights in cases like *Tinker v. Des Moines Independent Community School District*,[11] *Pico*,[12] *Goss v. Lopez*,[13] *Morse v. Frederick*,[14] and *Mahanoy Area School District v. B.L.*[15] are conflicts among adults over substantive social values concerning education and childrearing.[16] Should prayer be part of education? Should children be exposed to sexually explicit, bigoted, or violent books? Should they be permitted to dress or behave in provocative or vulgar ways? To engage in political activism? How harshly should they be punished for violating rules?

These cases misleadingly present students as independent agents, as though they were the architects of their educations and the initiators of lawsuits to defend their designs. But no one permits students to select the library books or write the curricula. The designs are always those of adults standing offstage and hoping that courts will vindicate their own pedagogical and childrearing preferences. Under the aegis of rights for minors, adults ask courts to approve the books that they have selected for the curriculum; invite their partisan views into the classroom; permit observation of their religion on campus; or allow them to enshrine their approach to child psychology and discipline in the school handbook. The *Tinker* parents won the right, as Justice Black put it, to "use the schools at their whim as a platform" for their political views by winning a right to student expression.[17] The *Pico* administrators and teachers won the right to

(2021). Scoring partisan victories is not the sole reason that education-related conflicts find their way to courts and there is a wide variety of school-related litigation I do not address in this Essay, including the realms of special education, racial integration, state constitutional issues, and school financing. On other causes of litigation, see Joshua M. Dunn & Martin R. West, *The Supreme Court as School Board Revisited*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 3, 4-6 (Joshua M. Dunn & Martin R. West eds., 2009).

10. 319 U.S. 624 (1943).

11. 393 U.S. 503 (1969).

12. 457 U.S. at 853.

13. 419 U.S. 565 (1975).

14. 551 U.S. 393 (2007).

15. 594 U.S. 180 (2021).

16. These categories of cases should also be understood as raising particular complexities and arising from disparate political genealogies, which I am purposely simplifying throughout this Essay to get at one set of important commonalities.

17. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting).

offer students books to which their parents objected by winning a right for students to "receive information."[18]

The student plaintiffs might well share these adults' preferences—they are, after all, minors under these adults' influence and authority. But they exercise comparatively little agency. Students rarely initiate these battles; rather, they are recruited to them *in media res* by the party of adults in search of a nominally nonpartisan vehicle through which to smuggle their partisan claims.[19] Adults ventriloquize students to achieve their own victories in culture-war battles that have become easier to win through legal proceduralism than through political contestation.

At present, this move to turn cultural conflicts into questions of students' rights is mainly made by the left, with battle lines typically drawn between liberal educational professionals on one side and conservative parents and school boards on the other. It is the former who argue that students have a privacy right to change their names and genders in school without parental consent,[20] a free-speech right to access controversial books and websites about gender and race,[21] and a "citizenship right" to be taught "critical race theory and gender identity in school."[22]

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18. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)). Although *Pico*'s plurality decision weakened its national influence on school policy, it nonetheless concluded the dispute in Island Trees, New York in favor of the plaintiffs.

19. For example, during the book-banning conflicts of the 1970s, the professional educators' journals would include in their instructions to teachers dealing with book challenges suggestions for how to prepare students to oppose such challenges, which included discussing strategies in class and having students practice writing op-eds to local and national newspapers defending their teachers' book selections. *See, e.g.*, James F. Symula, *Censorship and Teacher Responsibility*, 60 ENG. J. 128, 128-31 (1971). For a broader account of the partisan dynamics in American school book-removal contests, see Rita Koganzon, *There Is No Such Thing as a Banned Book: Censorship, Authority, and the School Book Controversies of the 1970s*, 12 AM. POL. THOUGHT 1, 1-9 (2023). The means by which parents recruit their children to their political causes against teachers and school districts, as in *Goss*, is more direct and intuitive, but either way, it is adult recruitment—not the independent initiative of students—that creates these legal contests.

20. Katie M. Baker, *When Students Change Gender Identity, and Parents Don't Know*, N.Y TIMES (Jan. 23, 2023), https://www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html [https://perma.cc/6BWD-7TGV]; Open Letter from James D. Esseks, Dir., ACLU Lesbian Gay Bisexual Transgender & HIV Project, to Schools About LGBTQ Student Privacy 1 (Aug. 26, 2020), https://www.aclu.org/documents/open-letter-schools-about-lgbtq-student-privacy [https://perma.cc/7SBV-BK9H].

21. *See, e.g.*, Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 422 (2023); AMY GUTMANN, DEMOCRATIC EDUCATION 97-99 (1999); Jensen Rehn, *Battlegrounds for Banned Books: The First Amendment and Public School Libraries*, 98 NOTRE DAME L. REV. 1405, 1429-33 (2023).

22. Dailey, *supra* note 21, at 423, 469.

But these alliances have fluctuated over time. The political right, like the left, employs "rightsification" when advantageous for its cause. For example, conservative or religious parents hoping to circumvent enforced secularism in public schooling make their case against liberal school districts in the register of students' rights to free exercise. The Amish parents in *Wisconsin v. Yoder*, for example, claimed a free-exercise right for their children to withdraw from compulsory schooling.[23] More recently, a high-school Christian club won a free-exercise right to convene.[24]

When liberal or atheist parents have wanted less religious practice, they have done the same with an anti-establishment claim. In *Lee v. Weisman*, the father of a middle schooler sued on his daughter's behalf to prohibit local clergy from offering nondenominational benedictions at graduation.[25] In other instances, liberal parents have demanded students' rights in the face of opposition from more conservative schools and educators. In *Tinker*, liberal, antiwar parents who wanted their children to protest in school seized on students' rights to triumph over a more conservative school administration that preferred to keep political displays out of schools.[26] Similarly, in *Goss v. Lopez*[27] and *Ingraham v. Wright*,[28] school administrators represented the conservative position in favor of strict discipline, while parents seeking leniency for their children represented a broader push from the left against punitive and racialized discipline in urban schools.[29]

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23. 405 U.S. 205, 209 (1972).

24. Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., 82 F.4th 664, 695-96 (9th Cir. 2023); *see also* Carson v. Makin, 596 U.S. 767 (2022) (striking down the "nonsectarian" requirement of Maine's tuition-assistance program under the religion clauses). *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), is also relevant here, but involved an adult plaintiff at a school.

25. 505 U.S. 577, 580-84 (1992).

26. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504, 506 (1969). Justice Black's dissent emphasized the Tinker parents' professional employment by antiwar organizations, as well as the ages of their children (including an eight-year-old), drawing attention to the improbability that the students petitioning for speech rights in the case were doing much more than repeating their parents' speech. *Id.* at 516 (Black, J., dissenting). One of the plaintiffs, Mary Beth Tinker, also recollects her parents as a decisive influence on her decision to protest. *Mary Beth Tinker Describes Influence of Parents in Taking Civil Action*, IOWA PBS (2019), https://www.iowapbs.org/iowapathways/artifact/1420/mary-beth-tinker-describes-influence-parents-taking-civic-action [https://perma.cc/XFK3-KGQA].

27. 419 U.S. 565 (1975).

28. 430 U.S. 651 (1977).

29. *See, e.g.*, JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 156-58, 166-75 (2018); CAMPBELL F. SCRIBNER & BRYAN R. WARNICK, SPARE THE ROD: PUNISHMENT AND THE MORAL COMMUNITY OF SCHOOLS 79-82 (2021); Warren Weaver, Jr., *Supreme Court, 5-4, Backs Rights of Suspended Pupils*, N.Y. TIMES (Jan. 23, 1975), https://www.nytimes.com/1975/01/23/archives/supreme-court-54-

Evidently, both sides of culture-war contests have hidden behind the smokescreen of students' rights. They unsurprisingly seek the support of the countermajoritarian judiciary when their preferred outcome is unlikely to be achieved through the relevant majoritarian institutions. That majority in these cases is rarely national, but more often determined on the local or state level, where school-governance decisions are made.[30] Consequently, we find liberal parents and educators suing in conservative districts like Escambia County, Florida, and conservative parents suing in liberal districts like Montgomery County, Maryland.[31] By obscuring their less popular substantive position (e.g., "children should be shown images of same-sex intimacy") underneath a more popular procedural one (e.g., "censorship is wrong"), numerical minorities on both sides have sought courts' vindication of partisan desires through nonpartisan students' rights.

This Essay will proceed in two Parts. The first Part examines whether the arguments advanced on behalf of so-called students' rights can be grounded in concerns that transcend the partisan purposes of adults. First, I consider a set of edge cases in family law where minors' desires run counter to all adult purposes. These cases demonstrate that, when it comes to permitting minors to act in ways that *transcend* partisan affiliation (such as refusing lifesaving medical care), our commitment to minors' rights usually falters. I then interrogate arguments for students' rights as nonpartisan educational tools to show that these purportedly transpartisan arguments about civic formation are still grounded in highly partisan assumptions. After sketching the theoretical contradictions in such arguments for students' rights, I turn in Part II to the damage that indulging in students'-rights talk inflicts on our constitutional system. I focus on two specific challenges: first, a challenge to the philosophical underpinnings of liberalism's vision of liberty, and second, a challenge to the functioning of America's democratic institutions. The conclusion briefly discusses the practical implications of rejecting students' rights.

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backs-rights-of-suspended-pupils.html [https://perma.cc/34RE-57ER]; Dolores Barclay, *Ruling on Suspended Pupils' Rights Hit: High Court Didn't Go Far Enough on Guarantees, Critics Say*, L.A. TIMES, Apr. 16, 1975, at C10, C10-11.

30. *The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html [https://perma.cc/SLT5-CT9P].

31. In Escambia County, educators and publishers filed a case against a school board for book banning. Amended Complaint at 1-2, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23-CV-10385, 2024 WL 133213 (N.D. Fla. Jan. 12, 2024). In Montgomery County, parents challenged the district's policy on students' gender-support plans. John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 78 F.4th 622, 626 (4th Cir. 2023).

I. CAN STUDENTS' RIGHTS BE ANYTHING BUT A SMOKESCREEN?

Because student plaintiffs in these cases sue at the direction of adults—for a right to do something either their parents or their schools want them to do—it is difficult to discern whether any rights victory primarily serves the interests of students or adults. How can we know if securing a right vindicates a student's independent desires, or merely what he has been coached and inspired to desire by the most important and influential adults in his life?[32] Given children's dependence and immaturity, this is an inherently difficult distinction to draw.

Nonetheless, it is noteworthy that claims about students' rights never seem to extend *beyond* the boundaries of adult desires. There is no question, for example, of students themselves selecting the books for the school library or designing the school curriculum. Their rights extend only to supporting the selections of their teachers, against the objections of the school board. Nor is there any interest in allowing students to adjudicate their own punishments for rule violations in schools; instead, they are subjected to formal procedures designed at the behest of parents suspicious of educators' discretion.[33] There are almost no examples of successful rights claims that run counter to the agendas of the adult parties involved.

A. Children's Autonomy at the Edge

Most instructive for students'-rights advocates are the rare instances when minors seek to do what no discernible political faction of adults would sanction. These situations test our commitment to giving students (or children generally) rights that would allow them to exercise real independence. Two situations outside of the schooling context raise this possibility: the withholding of lifesaving medical care and the termination of parental rights in cases of abuse and neglect. In such cases, children have expressed a desire to forgo medical attention for

32. This dilemma is raised by Justice Douglas's dissent in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where he notes how convenient it is that the Amish children share their parents' desire for exemption from further compulsory schooling. *Id.* at 241-42 (Douglas, J., dissenting). But what if they wanted to attend school against their parents' wishes? This would, however, be warmly encouraged by the state in defense of *its* interests. To test our commitment to upholding children's rights, we would need them to request an education that neither their parents nor the state desired—unschooling, perhaps. Such a case is unlikely on the federal docket because of the strong disincentives against defending the desires of minors that serve no discernible adult interest.

33. I do not mean that such experiments in student self-government or peer-led discipline have not occasionally been tried in individual schools, but that their widespread adoption is not the aim of students'-rights advocacy.

religious or bodily-integrity reasons, or to remain with guardians deemed abusive or neglectful by the state. In both cases, courts typically refuse these requests on the ground that they contravene the best-interest-of-the-child standard.[34]

The reasoning behind these refusals is intuitive. It is easy to see how children may believe that pleasing their parents—by, say, following their intensely held religious beliefs or by remaining with them even under abusive circumstances—is better than losing their parents' love or the only home they know. We can sympathize with children's fears under these extreme circumstances, but our sympathy also illuminates the limits of children's reasoning and their susceptibility to adult (in this case, parental) influence. As a result, courts have long prioritized the state's *parens patriae* interest in the basic good of preserving children's lives and have rejected the primacy of children's desires in such cases.[35]

The major exception in this realm is the mature-minor doctrine. This doctrine provides that adolescents deemed capable of informed consent should have some say in medical decisions, even if their choices run counter to the advice of medical professionals or their parents (though rarely both at once). Has this doctrine expanded the independence of minors? One of its main applications by federal courts has been to grant minors rights to access abortion and contraception against their parents' wishes.[36] But, as with students' speech and due-process rights, reproductive rights are at the heart of one of the most heated culture-war battles of the past half-century, and there is an easily recognizable adult constituency for whom expanded access to abortion for minors constitutes a partisan victory.

The logical slippage underlying students' rights comes into focus when we consider the limits of these reproductive rights. The largely uncontested persistence of statutory-rape laws means that minors are highly restricted in their choice of sexual partners, even as the Court insists that "the right to privacy in connection with decisions affecting procreation extends to minors, as well as to adults."[37] These laws are designed to protect minors from sexual exploitation, but the understanding that minors are vulnerable enough to such exploitation

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34. *See* Christine M. Hanisco, Note, *Acknowledging the Hypocrisy: Granting Minors the Right to Choose Their Medical Treatment*, 16 N.Y. L. SCH. J. HUM. RTS. 899, 923-31 (1999). In child-removal proceedings, the court need not entirely disregard the desires of the child, but it is only one of numerous factors it might consider in determining the best interest of the child, which is a key standard in such decisions. *See, e.g.*, Holley v. Adams, 544 S.W.2d 367, 371-72 (Tex. 1976).

35. Hanisco, *supra* note 34, at 905.

36. Privacy rights are also invoked in cases to support minors' access to abortion. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 73 (1976); Carey v. Population Servs. Int'l, 431 U.S. 678, 681 (1977); Bellotti v. Baird, 443 U.S. 622, 651 (1979).

37. *Carey*, 431 U.S. at 693.

that they require special legal protection betrays our belief that they are not really mature.[38] If access to abortion and contraception are legally protected under children's procreative privacy rights, then there is a strong argument that a free choice of sexual partners should be, as well. One cannot, after all, make "decisions affecting procreation" without the legal right to procreate in the first place. But while access to abortion and contraception advance an adult pro-choice agenda, there is little adult appetite to roll back age restrictions on sex itself. This suggests at least an inconsistency in the Court's view of minors' maturity in sexual decision-making.[39]

The mature-minor doctrine at the state level extends to broader medical decision-making as well — mainly decisions to access care, but occasionally also decisions to refuse it.[40] Typically, however, either the child's doctors support her desire to obtain medical treatment against parental wishes, or the child's parents support her decision to refuse treatment against medical advice — though state law and courts are less likely to permit the latter, particularly when the treatment would be lifesaving.[41] Courts' hesitation to allow even so-called "mature" minors to refuse lifesaving treatment exemplifies our society's reticence to recognize children's rights when such recognition serves no partisan goal.

Protecting children from danger, even against their own wishes, is the purpose of the best-interest-of-the-child standard, which always requires

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38. For example, to grasp the paternalism of age-of-consent laws fully, we should recall that they prohibit minors from having sex not just with adults but also with other minors. So-called "Romeo and Juliet Laws" in some states mitigate this prohibition by exempting from prosecution mutually consenting minors who are closer in age. Of course, these laws go largely unenforced, but they can be enforced, especially by angry parents. *See* Commonwealth v. Bernardo B., 900 N.E.2d 834, 844-45 (Mass. 2009).

39. The radical "child liberation" movement that had a brief vogue in the 1970s included advocates like Shulamith Firestone, Richard Farson, and John Holt, who argued for the abolition of age-of-consent laws and even on prohibitions against pedophilia and incest. *See* SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 85-104, 206-21, 238-42 (Bantam 1971); RICHARD FARSON, BIRTHRIGHTS 129-53 (1974); JOHN HOLT, ESCAPE FROM CHILDHOOD 270 (1974). Unsavory as these proposals are, they are the logical conclusion of full bodily-autonomy rights for children, and our culture's mainstream revulsion at them points to the constitutive significance of our doctrine of minority.

40. *See* Jonathan F. Will, *My God My Choice: The Mature Minor Doctrine and Adolescent Refusal of Life-Saving or Sustaining Medical Treatment Based upon Religious Beliefs*, 22 J. CONTEMP. HEALTH L. & POL'Y 233, 270 (2006).

41. Refusal of lifesaving treatment represents the hardest set of cases and the option most restricted even under the mature-minor doctrine. *See, e.g.*, Commonwealth v. Nixon, 761 A.2d 1151, 1155-56 (Pa. 2000). Courts often seem unwilling to deem minors sufficiently mature when this particular decision is at stake. *See, e.g.*, *In re* Cassandra C., 112 A.3d 158, 159-60 (Conn. 2015); *In re* Hauser, No. JV-09-068, 2009 WL 1421504, at *17-19 (Minn. Dist. Ct. May 14, 2009). For successful minor refusals of care, see, for example, *In re* E.G., 549 N.E.2d 322, 328 (Ill. 1989).

considerations beyond the child's desires. While there is some political opposition to the assumptions in family law that authorize child removal in the first place, as well as some advocacy for the wholesale abolition of the category of legal minority, these arguments remain at the margins of our political discourse and have been adopted by no organized political constituency.[42] In edge cases like the withholding of lifesaving medical care and the termination of parental rights, the question of children's rights disappears, for there is no significant disagreement over substantive values among adults—no culture war to be fought using children as proxies. If we do not take children's expressed desires seriously in situations as urgent and intimate as these, it is hard to see why we should elevate and sanctify them in local and even national conflicts over social values, where their preferences would become binding on other citizens.

B. Students' Rights as Civic Education

One might say we ought to recognize children's rights precisely because there is so *little* at stake in questions of book removal or school discipline, at least relative to what is at stake in denying lifesaving medical care. Advocates of students' rights have often argued that they serve a wholly nonpartisan, civic purpose, allowing minors to rehearse citizenship duties in safe and contained ways in preparation for majority. Political theorist Meira Levinson, for example, has argued that schools are ideal settings for such civic rehearsal because they can facilitate democratic activity without obstructing family harmony.[43] Justin Driver has similarly defended students' rights as educational tools necessary for children's constitutional formation because schools are the primary sites where we learn "lessons about our constitutional protections" that will follow us into adulthood.[44] These ideas echo Justice Jackson's assertion in *Barnette* that "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[45] Since school is where children's relationship to the Constitution is formed, they must experience that relationship accurately there in order to understand it correctly as adult citizens. Without any experience exercising constitutional rights as children, they will be incapable of defending them as adults.

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42. On the child-welfare-abolition movement, see, for example, DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022). On abolishing the category of minority, see *supra* note 39.

43. MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 62-63 (1999).

44. DRIVER, *supra* note 29, at 13.

45. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

A related argument for students' rights is that, as a matter of justice, liberalism owes all children an "open future," meaning the opportunities and social infrastructure to make and revise their future life choices — including what religion they will observe (if any), what kinds of families they will form, and what careers they will pursue — free from undue pressure by adults.[46] In a recent version of the "open future" argument applied to citizen formation and constitutional law, Anne Dailey proposes that we conceive of children as possessing "citizenship rights that ensure their development as democratic citizens."[47] This includes a fundamental "First Amendment right of access to ideas," which parents and the state have a joint duty to facilitate.[48] On this account, the public school is the key institution that guarantees this open future since it can promote the "exposure to diversity" that makes it possible for children to learn about and choose among possible lives beyond what their parents might be willing to offer them.[49] Students' rights come into play in this argument as guardrails against some parents' efforts to limit children's exposure to diversity.

One problem with these superficially nonpartisan defenses of students' rights, which arise from liberal political theory, is that their partisanship is rarely far from the surface. As Dailey summarizes the policy implications of her argument, her "in loco republicae framework" would

> prevent parents from homeschooling children in ways that isolate children from activities and people outside the family. Parents would also be prevented from opting children out of classes on the history of racial injustice or discussions about gender identity; from denying children access to information about sexual health or contraceptives; and from refusing children relationships with important caretakers and peers outside the home.[50]

This framework would also prevent parents and even legislatures from influencing public-school curricula, as Dailey asserts Florida's legislature has done with its "Parental Rights in Education Act," and it would prohibit parents from opting

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46. The original articulation of this concept is in Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 126 (William Aiken & Hugh LaFollette eds., 1980).

47. Dailey, *supra* note 21, at 424.

48. *Id.* at 425-26.

49. On "exposure to diversity" as one of the purposes of schooling, see STEPHEN MACEDO, DIVERSITY AND DISTRUST 201-03 (2000); Jeff Spinner-Halev, *Extending Diversity: Religion in Public and Private Education*, *in* 68 CITIZENSHIP IN DIVERSE SOCIETIES 74-76 (Will Kymlicka & Wayne Norman eds., 2000); and Amy Gutmann, *Children, Paternalism, and Education*, 9 PHIL. & PUB. AFFS. 338, 352 (1980).

50. Dailey, *supra* note 21, at 426.

their children out of curricula they oppose.[51] Other liberal theorists in this tradition have proposed outright prohibitions on homeschooling and private schooling (as practiced in the United States), or have argued that an open future demands a secular upbringing that avoids unduly prejudicing a child toward one religious tradition over others before she is able to make a rational choice.[52]

Uncoincidentally, these education and family policies are widely favored by the political left and opposed by the right. Although these theorists cast their frameworks for what liberalism owes children as nonpartisan, they offer no examples of a left-coded educational or family policy that would be prohibited by the adoption of their principles. The *only* practices that would be restricted are those championed by conservatives. Once again—this time at a higher level of theoretical abstraction—we find one side of the culture wars hiding partisan preferences behind a screen of facially neutral rights for minors.[53] If the rights of speech, association, due process, and exposure to diverse ways of life are essential to students' civic formation, it turns out to be a formation in one pronounced political direction.

More fundamentally, however, civic-formation-based defenses of students' rights stem from the mistaken "logic of congruence," which assumes that institutions and associations *within* a regime must mirror the structure of the regime itself to train participatory citizens effectively.[54] Thus, congruence assumes that in a democratic regime, intermediary institutions like the family, church, school, and social club should also be egalitarian or majoritarian.[55] And in a liberal, rights-based regime, congruence requires that such intermediary institutions recognize member rights. On this view, every aspect of our lives ought to be a rehearsal for political participation. Of course, childhood *is* a preparation for adulthood, but adulthood is not simply coterminous with democratic

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51. *Id.* at 490-92.

52. *E.g.*, LEVINSON, *supra* note 43, at 145-59; Matthew Clayton, JUSTICE AND LEGITIMACY 3 (2006). As Melissa Moschella puts it in her critique of these liberal theories of civic education, "[r]eligious ways of life will be the most frequent casualty of such an education." MELISSA MOSCHELLA, TO WHOM DO CHILDREN BELONG? 82 (2016).

53. Nomi Stolzenberg made a related argument that even the seemingly neutral call for exposure to diversity in education is a partisan value rejected by a substantial swath of American Christians. Nomi Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 586-88 (1993).

54. Nancy Rosenblum, *Democratic Character and Community: The Logic of Congruence?* 2 J. POL. PHIL. 67, 69-79 (1994). See also RITA KOGANZON, LIBERAL STATES, AUTHORITARIAN FAMILIES: CHILDHOOD AND EDUCATION IN EARLY MODERN THOUGHT (2021), for an extended study of the origin and error of the logic of congruence in modern liberalism.

55. The first caricature of this logic appears in Plato's *The Republic*, where Socrates describes the democracy as a regime most prone to it, encouraging fathers to fear their children and teachers their students. PLATO, THE REPUBLIC *562e-563b.

citizenship, nor is childhood a period of constant practice of adult tasks until the child is sufficiently proficient to be deemed an adult.[56] The logic of congruence reduces childhood to a vocational apprenticeship—the only way to succeed at anything as an adult is to have practiced it repetitively as a child.

But education does not occur entirely or even primarily through repetition. Such a conception of education neglects the power of imagination, aspiration, and admiration—not to mention individual dispositions and interests—to lead students toward lives contrary to what their teachers intended and their curricula modeled.[57] We could never account for the significant twentieth-century phenomenon of the political dissident without acknowledging that even the most determined and empowered totalitarian educational systems frequently failed to inculcate their principles of "good citizenship" through schooling. Repetition, or learning by doing, is not synonymous with making citizens.

Nor do we consistently believe that citizens must rehearse in childhood all that they are called on to do in adulthood. If we did, we could not stop at extending to students' constitutional rights. Under the logic of congruence, must children also vote and serve in public office to do so successfully as adults? Must children practice marriage to make good spouses later? Should they have children of their own? We offer low-stakes simulations of these experiences for children—student government, dating, babysitting. But unlike these rehearsals, which come with few corresponding responsibilities, students' constitutional rights are not mere simulations or practice runs of "real" rights. They *are* real rights—rights that distort the structure of education. While liberalism's insistence on the legal status of minority presses us to stop short of offering children the "real thing" in most consequential adult activities, constitutional rights have emerged as the notable exception. But it is no more imperative for children to practice rights than to practice marriage. They can learn about them, argue about them, and try out informal versions of them. Most crucially, though, reserving these activities for adults is essential to the liberal project.

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56. Ironically, an education for a genuinely open future must be open to the possibility that children will, after rational deliberation, reject democracy altogether. On this paradox, see Geoffrey Vaughan, *The Overreach of Political Education and Liberalism's Philosopher-Democrat*, 37 POLITY 389, 408 (2005).

57. Shelley Burtt points to one example of such counterintuitive outcomes in her discussion of the ways that a strict religious education can effectively facilitate *more* critical thinking. Shelly Burtt, *In Defense of* Yoder*: Parental Authority and the Public Schools*, 38 NOMOS 412, 416 (1996). A parallel argument has been made in defense of Hasidic education by Moshe Krawkowski. Moshe Krawkowski, *What Yeshiva Kids Are Actually Studying All Day*, FORWARD (Dec. 26, 2018), https://forward.com/life/faith/416616/what-yeshiva-kids-are-actually-studying-all-day [https://perma.cc/2V6L-WJL6].

II. WHAT WE LOSE WHEN STUDENTS WIN RIGHTS

While it may seem that the extension of rights to previously subordinated groups is always to be encouraged as a consummately liberal-democratic gesture, this view overlooks the important ways in which the subordination of children strengthens our liberal democracy. The legal mechanism of this subordination—the age of majority that forms the boundary between rights and rightlessness—may be easy to criticize for its arbitrariness, but it is the theoretical underpinning of our entire structure of education. Without the concept of minority, we would be hard-pressed to justify schooling at all. More practically, extending rights to students circumvents the forms of democratic self-government that have developed around American public education. Adults who hide behind students' rights in the pursuit of narrow partisan victories thus imperil some of the constitutive mechanisms of our regime.

A. The Necessity of Minority

The danger of the democratic logic of congruence is that it collapses distinctions essential to liberalism—between the state and its intermediary institutions, between children and adults, between public and private. Liberalism depends on these categories and incongruities, just as it depends on the rightlessness of children to permit the full exercise of rights by adults. As John Locke put the dilemma, children are "born to" but not "born in" the "full state of equality."[58] Liberal political thinkers from the seventeenth through nineteenth centuries have offered an account of the gradual development of reason and self-control that demands a universal probationary period of education. From the necessity of this probationary period arises the longstanding common-law duty laid on parents to educate their children.[59] Without a conception of the moral and intellectual defects of minority, so paternalistic an institution as education could not be justified.

As I have argued elsewhere, the fundamental purpose of education in a liberal regime is to inculcate self-control in children, or to put it in more Lockean terms, "self-mastery"—the ability to suspend desire to redirect the will toward a

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58. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 55, at 28 (John W. Gough ed., 1947) (1689).

59. *E.g.*, *id.* § 56, at 28; 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *451. For an extended discussion of the American common-law tradition respecting parental duties, see Joseph K. Griffith II, *"Long Recognized at Common Law":* Meyer *and* Pierce*'s Nineteenth- and Twentieth-Century Precedent on Parental Educational Rights and Civic Education*, 53 PERSPS. POL. SCI. 1 (2024).

more rational end.[60] The problem of childhood irrationality is fundamentally a problem of a weak will and misguided desires: children continually want what is not in their interest and must come not only to want what is, but to strengthen their wills sufficiently to pursue it. Ironically, though, this is not achieved by giving children expansive freedom to pursue their desires. It is most effectively accomplished by empowering authorities like parents and teachers and countering children's desires until they are able to pursue their interests independently, without support from adult authorities. Only citizens capable of self-government in this sense of self-control can sustain a limited government that refrains from controlling them by force, so that adult rights ultimately hinge on children's lack of rights. The family and school are the liberal institutions oriented toward the development of this form of self-control, and they are structured to support adult authority and suppress children's efforts to counteract it.

Students' rights short-circuit this aim by arming students with an untenable form of counter-authority against adults that lacks theoretical justification in the structure of liberal education.[61] Indeed, in the decades since the initial burst of students'-rights decisions in the 1970s, we have seen that schools function less well along several dimensions when they are required to treat students as independent rights-bearers. For example, Richard Arum has described how, in the years since *Goss* and subsequent state litigation over student discipline, disorder and even violence in schools has increased. The introduction of students' rights in school discipline "undermined the legitimacy of a school's moral authority more generally . . . . [S]chools were likely to reduce their disciplinary responses to student misbehavior while at the same time students became less willing to accept school authority or discipline as legitimate."[62] Indeed, the Court itself has

60. KOGANZON, *supra* note 54, at 11.

61. To be clear, none of the advocates for student rights discussed above denies the developmental immaturity of minors or their need for special legal protections. The difficulty is the contradiction between their advocacy for students' rights and their concession of students' developmental incapacity to responsibly exercise them.

62. RICHARD ARUM, JUDGING SCHOOL DISCIPLINE 13 (2005). Evidence for diminished school functioning in the late 1970s and 1980s takes several forms – declining academic performance, increased levels of school crime and violence, as well as reports of student and educator perceptions of school safety. Declining academic performance is suggested by measures like average SAT scores (1059 in 1967 versus 998 in 1980, and hovering around that level through the 1980s with some recovery in the 2000s). *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. (2007), https://nces.ed.gov/programs/digest/d07/tables/dt07_135.asp [https://perma.cc/7TT4-2U2Y]. Uniform national measurement of school violence only goes back to the 1990s, so earlier data is not easily comparable. However, some cursory comparisons suggest increases, particularly in the urban districts that Arum argues were most impacted by court decisions. For example, the percentage of urban principals who report physical fighting to be severe problems in their schools in 1978 (15%) had gone up to 25% by 1998. JOSEPH CALIFANO & MARY BERRY, NAT'L INST. OF EDUC., U.S. DEP'T OF HEALTH, EDUC. & WELFARE,

scaled back its own expansive statements of students' rights and increased its deference to school authority since the 1970s, in cases like *Ingraham v. Wright*,[63] *Bethel School District v. Fraser*,[64] *Hazelwood School District v. Kuhlmeier*,[65] and *Morse v. Frederick*.[66] As Scribner and Warnick point out about the speech cases in particular (though it is also true of *Ingraham*), the Court's narrowing of students' rights is justified by the "special characteristics" of the school as an institution, including the need to maintain adult authority so that "[i]n each case, the guidelines for the treatment of student speech grow out of considerations of the nature of the school environment."[67]

Even if we admit the necessity of a probationary period of rightless minority to allow the developmental process to unfold for the sake of the liberty of adults, we might nonetheless object that maturation is progressive. Perhaps adolescents should be treated differently than young children, as the mature-minor doctrine attempts to do. Moreover, as the doctrine implies, some children mature sooner than others, and it seems unjust to hold their rights hostage to an arbitrary age of majority. This is true enough, but then it must be equally true that some, perhaps even many, children will not reach the requisite capacity for self-control to merit enfranchisement at the age of majority—or perhaps ever. Individual evaluation of maturity in a small number of exceptional cases like medical decision-making may be merited despite its challenges, but it would be both logistically difficult and politically dangerous to make individual judicial evaluations of competence a widespread prerequisite for granting rights, even if this would be beneficial to the precocious. This is a matter of accepting the lesser evil—the trigger for majority must be uniform since evaluating rationality on an individual basis would empower the state with potentially tyrannical discretion over

NCJ 45988, VIOLENT SCHOOLS – SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO CONGRESS 38 (1978), https://www.ojp.gov/pdffiles1/Digitization/45988NCJRS.pdf [https://perma.cc/LV3L-MKDW]; SHEILA HEAVISIDE, CASSANDRA ROWAND, CATRINA WILLIAMS, ELIZABETH FARRIS, SHELLEY BURNS & EDITH MCARTHUR, NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., NCES 98-030, VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996-97, at 14 (1998), https://popcenter.asu.edu/sites/default/files/problems/vandalism/PDFs/Heaviside_etal_1998.pdf [https://perma.cc/5HMY-CJ8Z]. Nationally, overall violent crime in schools has declined since 1992, though the decline has been uneven and urban districts continue to report higher rates than other locations. MARY POULIN CARLTON, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ 250610, SUMMARY OF SCHOOL SAFETY STATISTICS 1-2 (2017), https://www.ojp.gov/pdffiles1/nij/250610.pdf [https://perma.cc/9CXX-DQ55].

63. 430 U.S. 651 (1977).

64. 478 U.S. 675 (1986).

65. 484 U.S. 260 (1988).

66. 551 U.S. 393 (2007).

67. SCRIBNER & WARNICK, *supra* note 29, at 97.

individual enfranchisement.[68] Even Locke concedes that "the state of maturity" is only the age when individuals are "*supposed* capable to know [the natural] law," not when they actually know it.[69] The presumption of competence at the age of majority is the best we can get.

B. The Value of Democratic Control

Public schools are government agencies in a formal sense, but because they exclusively serve minors, there is no way to extend to students the full suite of constitutional rights without undermining the schools' purpose. Doing so would negate our conception of minority as a period of imperfect reason requiring guardianship and adult authority. We should instead understand the school as a community institution that stands between public and private control, in which sometimes-opposed groups of adults educate their young according to the principles and ideals they determine through democratic procedures. This is already the understanding suggested by the legal structure of local control around which American public schools were designed, and which they should seek to reclaim.[70]

To the extent that courts can intervene in the internal functioning of schools, they should understand schools as wielding what Robert Post calls "managerial authority" over students.[71] Such authority permits the state (in this case, the school board) to "subordinate" constitutional rights to the "instrumental logic characteristic of organizations . . . on the basis of an organization's need to achieve its institutional ends."[72] The instrumental logic of the public schools is contained in the doctrine of *in loco parentis*, which governed the relationship between schools, communities, and pupils for 150 years before, as Justice Thomas lamented, "the Court simply abandoned the foundational rule [in *Tinker*] without mentioning it."[73] This doctrine understood public schools "not as ordinary state actors, but as delegated substitutes of parents. This principle freed schools from the constraints the Fourteenth Amendment placed on other government

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68. KOGANZON, *supra* note 54, at 88 n.60.

69. LOCKE, *supra* note 58, at § 59 (emphasis added).

70. On the culture wars and the decline of local control, see generally CAMPBELL F. SCRIBNER, THE FIGHT FOR LOCAL CONTROL (2016).

71. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1775 (1987). I am extending Post's conception of the school's authority beyond free speech to students' other constitutional rights as well.

72. *Id.*

73. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 216 (2021) (Thomas, J., dissenting).

actors."[74] In their capacity as parental delegates, school personnel were "limited . . . in almost no way" in their "ability [] to set rules and control their classrooms."[75] While teachers and principals have authority over students within the school, the democratically elected board represents parents and the larger community in its overriding control of curriculum and policies.[76] In this structure, courts have minimal cognizance, and students have none, at least not formally.

Just as students' rights short-circuit the balance of institutional authority necessary for schools to function, students'-rights talk short-circuits local democratic control of schools in situations of community conflict. Rather than allow the direct stakeholders in a district—parents, school boards, teachers, and administrators—to contest (electorally or otherwise) the substantive merits of book selections, curricular changes, discipline policies, or controversial instances of student speech, students'-rights talk forces these stakeholders to disguise partisan goals behind an illusion of neutrality and concern for the unknowable preferences of an unrepresentable constituency: students.

In doing so, students'-rights talk offloads the responsibility for self-government from individuals and elected representatives to courts, and it transforms judges into arbiters of community standards in every instance of controversy. Some might view this transfer of authority as salutary, as Dailey does in the context of minority parents suing a district for assigning books containing "racially derogatory terms."[77] In such cases, she claims, "leaving the decision completely in the hands of local school boards, with their highly politically charged decision-making" would endanger students' "rights to an equal education."[78] Instead, a question like whether the racist language in *Huckleberry Finn* is developmentally appropriate for younger students "is properly for the courts to decide."[79] But why a group of constitutional lawyers would be better equipped to determine the developmental suitability for children of a nineteenth-century novel than the children's teachers, parents, or anyone else involved in their education is, at best, unclear.

There is, moreover, no constitutional prohibition on "politically charged" decision-making by school boards. They are political actors, elected in often overtly partisan races and tasked with making political decisions. As Judge

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74. *Id.* (citation omitted).

75. Morse v. Frederick, 551 U.S. 393, 416 (2007) (Thomas, J., concurring).

76. R. Shep Melnick, *Taking Remedies Seriously: Can Courts Control Public Schools?*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 17-23 (Joshua M. Dunn & Martin R. West eds., 2009).

77. Dailey, *supra* note 21, at 476.

78. *Id.*

79. *Id.*

Mansfield wrote in his dissent to the Second Circuit's decision in *Pico* before it reached the Supreme Court, the claim that curricular decisions had to be neutral and unmotivated by moral or political views is untenable:

> [T]he term "politically motivated" is amorphous. If this phrase means a desire to implement the [Island Trees School] Board's conservative philosophy with respect to educational policies in the choice of books for the school's library, there is nothing constitutionally impermissible about the Board[] adopting such a view . . . Those who disagree may avail themselves of democratic election processes, which they apparently have done without success . . . For a federal court to inject itself into this type of local imbroglio is in my view unwise . . . In short, the First Amendment entitles students to reasonable freedom of expression but not to freedom from what some may consider to be excessively moralistic or conservative selection by school authorities of library books to be used as educational tools.[80]

To deflect such "local imbroglios" to courts is to impose an impossible demand on judges that they determine the suitability of individual books, punishments, and instances of student speech to a particular community, as if there were clear constitutional answers. It is to ask judges to apply their *own* political views where local authorities have not been permitted to apply theirs.

The broader question of where to vest decision-making authority plagues much of the advocacy for students' rights. Dailey's *in loco republicae* framework, for example, restricts parents, school boards, and even state legislatures from exercising authority over school curricula or governance, since their involvement threatens students' rights.[81] Whether that leaves teachers, administrators, or state or national departments of education in charge, and how their authority over public education is justified over and above locally elected bodies, are left unspecified.[82] Most of these arguments assume that it is parents who will seek to obstruct children's access to ideas or exposure to diversity, while professional educators will naturally advance this access. Therefore, it is mainly parents who must be restrained by law. This view is shortsighted because nothing prevents professional educators from being more censorious or narrow-minded than parents.

More importantly, this assumption results in a tendency to grant substantial leeway to educators to determine which ideas and what forms of diversity merit

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80. Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist., 638 F.2d 404, 431-32 (2d Cir. 1980) (Mansfield, J., dissenting).

81. Dailey, *supra* note 21, 487-89.

82. *Id.*

inclusion in school, on the assumption that their choices will not include what Dailey calls impermissibly "harmful ideas," an extremely vague category she defines as "developmentally inappropriate" ideas that "frighten or endanger children."[83] If they do, it is not clear what recourse parents or anyone else has to object to their decisions. In our present system, there is no permanent, final decision-making authority over curricular and governance decisions — even a decision by a board can be contested by educators and parents and later revised. But rights theorists like Dailey envision a static set of policies that, while receptive to students' rights claims, are closed to democratic avenues of policy change.

Realistically, there is little chance that, in a country of close to 350 million people, we will reach a national consensus on which ideas are "harmful," "frightening," or "dangerous" for children. There is no alternative but to fight it out locally, and some of these fights can get quite heated. In Loudon County, Virginia, an unusually politically heterogenous district, such fights even verged on violence.[84] Over the past four years, contentious school-board meetings have made national news and have occasionally required police intervention.[85] Of course, avoiding such conflicts with one's neighbors is one of the appeals of "rights talk" in the first place. Rights talk is designed precisely to lower the temperature on intractable, potentially even combustible, values conflicts by shunting them to distant judges and flattening them into mere personal choices protected by law.[86]

However, conflicts with neighbors are, relatively speaking, much more tractable and amenable to peaceful resolution than culture wars fought at the national level, where the incentives to compromise are much weaker. As Alexis de Tocqueville observed about local government in the United States in 1835, it is both the best arena for the widespread exercise of self-government and the most fragile:

> A highly civilized society tolerates the trial efforts of town liberty only with difficulty; it rebels at the sight of its numerous errors and despairs of success before having reached the final result of the experiment. Of all

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83. *Id.* at 475.

84. Karina Elwood, *Loudon County Public Schools Has a Reputation Problem. Can Its New Leader Fix It?*, WASH. POST (Dec. 31, 2023, 6:00 AM EST), https://www.washingtonpost.com/education/2023/12/31/loudoun-county-schools-superintendent-aaron-spence [https://perma.cc/8VPX-2UAU].

85. *Id.*

86. Jamal Greene makes a similar point about the incentive to appeal to rights: "When different people come into contact with each other and must live together, we preserve our values and avoid debilitating erasure by claiming rights." JAMAL GREENE, HOW RIGHTS WENT WRONG, at xvii (2021).

> liberties, town liberty, which is so difficult to establish, is also the most exposed to the encroachments of power. Left to themselves, town institutions could scarcely resist a strong and enterprising government . . . The strength of free peoples resides in the town, however. Town institutions are to liberty what primary schools are to knowledge; they put it within the grasp of the people; they give them a taste of its peaceful practice and accustom them to its use.[87]

It is the constitutional rights of the adults engaged in these contests that we ought to be scrupulous in protecting—to allow local government to persist and function effectively—rather than the Potemkin rights of students, who are only the puppets through which adult constituencies impose their partisan visions from above and foreclose further local action.[88]

When we do leave these contests to localities to resolve, they overwhelmingly do so, even if not always in perfectly orderly ways or with the outcomes that students'-rights advocates would prefer. In McMinn County, the board stood firm in its decision to remove *Maus* from the eighth-grade curriculum, but it remains accessible to students in an elementary-school library, a high-school library, and the public library.[89] In Loudon County, where book challenges were among the numerous conflicts arising in the district in the past few years, the board rejected proposed removals and updated its policy on reviewing challenges.[90] It should be emphasized that these resolutions run in opposite directions. But they were both decided by the local board with input from the community, they are open to revision should the districts' priorities shift, and they leave all other districts free to make their own decisions in such cases—all of which is foreclosed when federal courts make these decisions instead. It would be quite a stretch to conclude from these outcomes that either district is now depriving its students of adequate preparation for democratic citizenship. By contrast, it has been forty-two years since the Supreme Court attempted to resolve the book-removal question, and every year since, districts all over the

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87. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 126-27 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010) (1835).

88. As Justice Thomas put it in *Morse v. Frederick*, "In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools." 551 U.S. 393, 420 (2007) (Thomas, J., concurring).

89. *McMinn County Schools – Book Inventories*, MCMINN SCHS. https://www.mcminnschools.com/documents/mcminn-county-schools---book-inventories/373651 [https://perma.cc/3Z98-QX5D].

90. Alexis Gustin, *School Board Approves New Policies Around Instructional Material*, LOUNDOUNNOW (June 30, 2023), https://www.loudounnow.com/news/school-board-approves-new-policies-around-instructional-materials/article_07dfbaba-16a7-11ee-9e21-5f602c4c7c6f.html [https://perma.cc/J6AK-DLDW].

country have only found themselves refighting the same contest as the litigants in *Pico*.[91]

CONCLUSION: CAN STUDENTS HAVE ANY RIGHTS?

The underlying partisan motives of adults and the dangers that students' rights pose to our constitutional framework and democratic institutions ought to make us more circumspect about extending constitutional rights to minors. Partisan motives are not on their own a problem; our political system is designed precisely to accommodate them. The problem arises when adults, despairing of enacting their partisan policy preferences by legislative means, try to transform their preferences into someone else's rights. To strike down abortion restrictions, they appeal to minors' privacy rights. To teach critical race theory or gender identity, they claim to defend only students' right to receive information. To introduce prayer into schools, they purport to protect students' free-exercise rights.

But this transformation of partisan preference into rights immediately runs into the contradictions of the underlying logic of minority, to which we should and do hold. Do we really believe that minors have privacy rights to control their bodies if we would not permit them to consent to sex with adults? Do we believe students have a right to receive information if there are huge swaths of violent, pornographic, and demeaning materials we would never deem appropriate for a school? Do we believe minors have independent free-exercise rights if we would not take seriously their claims to religious obligations completely at odds with their family and community? Radical child liberationists have been willing, at least in theory, to take these rights to their logical conclusions and swallow the unappetizing outcomes.[92] But our constitutional and political traditions, because they are rooted in a conception of minors as incapable of exercising rights, are deeply at odds with them.

Instead, those committed to a neutral conception of students' rights run into a zone of vagueness, where they cannot quite articulate the boundary between a legitimate rights claim and an untenable, childish demand. Driver, for example, disclaims that he does not

> contend that the Constitution resolves *every* dispute that arises within public schools. That view is nothing less than absurd . . . students who

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91. Annual national data on book challenges has not been systematically maintained, but one of the better indices is the Cato Institute's "Battle Map" of public-school civil-liberties controversies, including book challenges, going back to 2001 and demonstrating their ubiquity. *Public Schooling Battle Map*, CATO INST., https://www.cato.org/public-schooling-battle-map [https://perma.cc/BE4Q-EF5C].

92. *See supra* note 39.

> dislike their grades have no cognizable right under the Fourteenth Amendment's Due Process Clause to challenge their marks; nor do students assigned to write a paper about the American Revolution . . . have a legitimate claim to their preferred topic under the First Amendment's right to free expression.[93]

As with Dailey's "harm"-based limit on the First Amendment right to receive information, the point where rights end and "absurdity" begins is uncertain. Adult discretion is always necessary to resolve this vagueness, driving us right back to the doctrine of rightless minority that undergirds our legal and political regime.

Just because minors may not have such constitutional rights does not, however, imply that we ought to suppress their preferences and desires at every turn. There are, of course, innumerable family, school, and community situations where children's preferences do and should carry weight. Take, for example, even legally contentious situations like parental-custody disputes. The state's interest in a divorce proceeding is largely satisfied once it is clear that both parents are suitable custodial parents. Allowing children a say in the final custody arrangement, then, might well be appropriate.

This is, of course, far from establishing a right to choose one's custodial parent—as far as the suggestion that children should gradually assume familial responsibilities is from establishing children's legal right to choose what's for dinner. Taking on increasingly complex and consequential responsibilities is a natural part of growing up, and as one proves one's competence, it is equally natural that adults will recognize and respect that competence. But none of this ordinary process of maturation has any inherent connection to rights, much less constitutional rights. An adolescent might be a very responsible driver and might be recognized as such by adults, but this does not give him a right to use the family car, though it is certainly a strong argument in his favor when he requests permission to use it.

The lack of a right does not imply the denial of permission, including in the selection of educational approaches. American education is remarkably decentralized and nonuniform. Parents and educators who prize schooling that grants broad latitude to student expression, restricts punitive forms of discipline, and emphasizes cultural, religious, and lifestyle diversity can find such schools or create them as private or charter institutions. If they believe that rehearsing the rights and duties of citizenship is the road to successful adult citizenship, they can even find or create a fully democratic school like the one idealized in A.S.

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93. DRIVER, *supra* note 29, at 19.

Neill's *Summerhill*,[94] where students can exercise agency over curricular and disciplinary decisions. And they can do all this without any extension of constitutional rights to minors. Indeed, given the decentralization of our educational institutions, we can support *more* freedom and pluralism in education by avoiding rightsification in schools than by indulging it.

There is another sense in which we speak of the rights of minors that this Essay does not call into question: rights that protect or vindicate minors' best interests against malign adult actors, an entirely distinct set of rights from those purporting to liberate minors from adult authority altogether.[95] The ability of the state to act as *parens patriae* and remove children from abusive or dangerous homes is an example of such a right. Another is the right implied in child-labor laws to be protected from the physical and economic demands placed on adults. Such rights — most of which date back to an earlier era of "child saving" advocacy in the early twentieth century — are an effort to make good on the common-law duties laid on parents to care for and educate their children and act in their best interests, permitting the state to compensate for parents where the latter fail.[96] But these rights grant powers exclusively to adults to act on behalf of children, not to children themselves. They thus maintain the foundational liberal distinction between minority and majority.[97] For our purposes, this category of children's rights returns us, more or less, to a vision of education on which Justice Thomas has insisted for the past twenty years: the tradition of democratic government of the schools and the *in loco parentis* government of students within them.[98]

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94. A.S. NEILL, SUMMERHILL: A RADICAL APPROACH TO CHILD REARING 3-92 (1960).

95. I borrow this distinction from C.R. Margolin, *Salvation Versus Liberation: The Movement for Children's Rights in a Historical Context*, 25 SOC. PROBS. 441, 441-52 (1978).

96. *Id.* at 442-43. A contemporary example of such thinking may be found in Joshua Kleinfeld & Stephen E. Sachs, *Give Parents the Vote*, 100 NOTRE DAME L. REV. (forthcoming), https://ssrn.com/abstract=4723276 [https://perma.cc/8JQW-C5PG].

97. Perhaps it is a mistake to describe these powers as rights rather than duties, since this opens the door to conceptual slippage between protective and liberatory rights, but that is a question beyond the scope of this Essay.

98. The precise boundaries between school and parental authority admit of some dispute. As Justice Thomas observed in *Mahanoy*, off-campus speech may affect on-campus conduct, particularly when that speech is about school and accessible to other students. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 217-18 (2021) (Thomas, J., dissenting). Nonetheless, there clearly remains a substantial realm of private family life unconnected to schooling over which parents preside and school authorities can claim no jurisdiction.