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Since the Supreme Court decided West Virginia State Board of Education v. Barnette *in 1943, free speech law has been clear: public schools may not force students to recite the Pledge of Allegiance. Nevertheless, in two states—Texas and Florida—students may decline to participate only with parental permission. The Eleventh Circuit Court of Appeals upheld the law on the grounds that the parental requirement furthered parents' substantive due process right to control the upbringing of their children.*

The Eleventh Circuit decision is flawed both in its understanding of the First Amendment right to be free of compelled speech and the substantive due process rights of parents. These mandatory pledge laws are viewpoint-based and therefore presumptively unconstitutional. While the free speech rights of students are more circumscribed than adults, none of the established justifications for curtailing student speech rights at school apply in this case. On the contrary, forcing students to pledge against their will exemplifies all the harms of compelled speech. Finally, parents' constitutional right to control the upbringing of their children is meant to protect parents from the state, not to empower parents to trample on the rights of their children. In the end, the parental permission rule is simply a pretext for the state's own viewpoint-based compulsion.

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INTRODUCTION

> *I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.*

Every day, in public school classrooms across the country, students begin their morning by reciting the Pledge of Allegiance. Many believe the thirty-one word pledge unifies children of disparate backgrounds and inspires love of country.[1] It is, after all, a pledge to the American flag, a foundational symbol of the United States.

However, not all students are as keen about the pledge as the legislatures and school boards that instituted these recitations. Fortunately for these students, the First Amendment of the U.S. Constitution gives them the right to opt out of these ostensibly patriotic exercises. In addition to protecting the right to speak, the Free Speech Clause also protects the right not to speak.[2] Moreover, the Supreme Court

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1. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 6 (2004) ("[T]he Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.").

2. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all."); Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

specifically held in 1943 that students in public schools cannot be forced to recite the pledge. Thus, since World War II, students have had a constitutional right to sit them out.

Nevertheless, two states, Florida and Texas, curtail that right. In these states, students may decline to join the daily pledge only with parental permission. In Florida, for example, every public elementary, middle, and high school must start the day with the pledge, and students are excused from reciting it "[u]pon written request by his or her parent."[3] Texas law is similar.[4]

Not surprisingly, both laws have been challenged. Although the pledge is usually recited first thing in the morning, Cameron Frazier found himself in math class at Boynton Beach Community High School, Palm Beach County, when it was time for the daily recitation.[5] When ordered to stand, the high school junior tried to explain to his teacher that he stopped participating in the sixth grade.[6] After an unfruitful exchange, his teacher upbraided him, telling Frazier "You clearly have no respect! You are so ungrateful and so un-American."[7] The teacher then called the principal's office, and Frazier was removed from the classroom by the assistant principal and school police officer.[8]

A similar story unfolded in Texas. India Landry was a student at Windfern High School, near Houston.[9] She too had a history of sitting down during the pledge as a form of protest.[10] Inspired by football player Colin Kaepernick,[11] she explained, "I felt the flag doesn't represent what it stands for, liberty and justice for all, and I don't feel what is going on in the country, so it was my choice to remain seated, silently.

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3. FLA. STAT. § 1003.44 (2021) ("The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. . . . Upon written request by his or her parent, the student must be excused from reciting the pledge, including standing and placing the right hand over his or her heart.").

4. Students in Texas must also pledge their allegiance to the Texas state flag each day unless their parents excuse them. Landry v. Cypress Fairbanks Indep. Sch. Dist., No. 4:17-CV-3004, 2018 WL 3436971, at *2 (S.D. Tex. July 17, 2018).

5. Frazier *ex rel.* Frazier v. Alexandre, 434 F. Supp. 2d 1350, 1353–54 (S.D. Fla. 2006), *aff'd in part*, *rev'd in part sub nom*. Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008).

6. *Frazier*, 434 F. Supp. 2d at 1354.

7. *Id.* The exchange continued: "'Do you know what's out there fighting our war? That flag you refuse to show respect to.' (Am. Compl. ¶ 20.) Frazier replied 'no, our soldiers are out fighting a war. The flag is an inanimate piece of cloth that doesn't move and surely can't hold a gun.' Alexandre said 'You are so ridiculous! I can't believe you are so disrespectful!' (Am. Compl. ¶ 21.) Frazier tried to respond, saying 'I choose not to say the . . .' but was interrupted by Alexandre who said 'No! You're out of here. I'm so sick of you!'" *Id.*

8. *Frazier*, 434 F. Supp. 2d at 1354.

9. *Landry*, 2018 WL 3436971, at *1–2.

10. *Id.*

11. Alex Horton, *A Black Student Refused to Recite the Pledge of Allegiance—Challenging Texas Law Requiring It*, WASH. POST (Sept. 26, 2018), https://www.washingtonpost.com/nation/2018/09/26/black-student-refused-recite-pledge-allegiance-challenging-texas-law-requiring-it/ [https://perma.cc/RE9K-QDYG] (reporting that student's attorney "said her actions were partly inspired by Kaepernick's protest of police brutality").

It was a silent protest."[12] She too was berated for her "disrespectful" decision.[13] Indeed, the principal expelled her from school.[14] As Landry was leaving, the school secretary remarked, "This is not the NFL."[15]

The Texas Attorney General defended the law on the grounds that "[r]equiring the pledge to be recited at the start of every school day has the laudable result of fostering respect for our flag and a patriotic love of our country." He continued, "This case is about providing for the saying of the pledge of allegiance while respecting the parental right to direct the education of children."[16] Texas settled with Landry in 2019 without a ruling on the law's constitutionality,[17] and the law is still on the books.[18] Florida, meanwhile, took it to the Eleventh Circuit and won.[19] According to the court of appeals panel, the law requiring parental permission furthered parents' substantive due process rights to control the upbringing of their children.[20]

The Eleventh Circuit decision is flawed both in its understanding of the First Amendment right to be free of compelled speech and the substantive due process rights of parents. These mandatory pledge laws are viewpoint-based speech requirements and are therefore presumptively unconstitutional. While the free speech rights of students are more circumscribed than adults, none of the established justifications for curtailing student speech rights at school apply in this case. On the contrary, forcing students to pledge against their will exemplifies all the harms of compelled speech. Finally, the claim that parents' constitutional right to control the upbringing of their children justifies making the right to refuse contingent on parental permission misunderstands the nature of the parents' right: it is meant to protect parents from the state, not to empower parents to trample on the rights of their children. The state's invocation is instead a pretext for its own viewpoint-based, unconstitutional compulsion.

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12. Ryan Korsgard, *What to Know About Civil Rights Lawsuit over Pledge Protest at Cy-Fair ISD High School*, NBC HOUSTON (July 19, 2018, 5:41 PM), https://www.click2houston.com/news/2018/07/19/what-to-know-about-civil-rights-lawsuit-over-pledge-protest-at-cy-fair-isd-high-school/ [https://perma.cc/LPW6-ENYL].

13. *Landry*, 2018 WL 3436971, at *1.

14. *Id.*

15. *Id.*

16. Emma Platoff, *Attorney General Ken Paxton Defends Texas Law Requiring Students to Stand for Pledge of Allegiance*, TEX. TRIB., (Sept. 25, 2018), https://www.texastribune.org/2018/09/25/ken-paxton-texas-law-student-stand-pledge-allegiance-/ [https://perma.cc/5H96-KLZU].

17. *Landry*, 2018 WL 3436971, at *7–8 (noting that "[t]here is no analogous case that has determined the Texas Pledge Statute is not a violation of the Free Speech Clause"). In addition to her free speech claims, Landry brought due process and equal protection ones. The district court rejected the school's motion to dismiss, *id.*, and it eventually settled with Landry. *Settlement Reached in Texas Student's Pledge of Allegiance Lawsuit*, ABC 6 (Dec. 29, 2018), https://6abc.com/4985473/ [https://perma.cc/HLA8-PJPU].

18. TEX. EDUC. CODE ANN. § 25.082 (West 2017).

19. Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1285 (11th Cir. 2008) ("We conclude that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech.").

20. *Id.* at 1284 ("The State, in restricting the student's freedom of speech, advances the protection of the constitutional rights of parents.").

Part I describes how these pledge laws are viewpoint-based and therefore presumptively unconstitutional. Part II explains why none of the reasons to curtail student speech apply in this case. Part III explores how forcing students to recite the pledge exemplifies all of the harms of compelled speech. Finally, in applying strict scrutiny, Part IV analyzes why parental rights cannot justify these harms, and Part V concludes that even if parental rights were compelling, these laws are not narrowly tailored.

I. PRESUMPTIVE UNCONSTITUTIONALITY OF PLEDGE LAWS

It is black letter law that content-based speech regulations are subject to strict scrutiny, and that viewpoint-based ones are presumptively unconstitutional.[21] Because they are viewpoint-based, the pledge laws in Florida and Texas should be presumed to violate the Free Speech Clause.[22]

The Supreme Court has repeatedly held that the most rigorous scrutiny applies to government laws that regulate speech based on its message.[23] This strict scrutiny applies to both laws that censor speech and laws that compel speech.[24] The government should not be in the business of controlling what speech we can see or say.

The admonition is even stronger when the government attempts to regulate not just the subject matter of speech, but its viewpoint. There is nothing more anathema to a democracy than the government censoring perspectives it disapproves or forcing people to parrot perspectives it espouses.[25] As a consequence, viewpoint-based regulations are assumed to be unconstitutional. At the very least, they are subject to strict scrutiny and unlikely to pass muster.

The pledge laws in Florida and Texas are content-based and viewpoint-based. They require recitation of particular content, making them incontrovertibly content-based.[26] But they are also structured to favor one particular viewpoint.[27] Under the

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21. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional.").

22. And yet, as noted by the dissent to the Eleventh Circuit denial of en banc review, "Notwithstanding that it is beyond peradventure that minors have constitutional rights, the panel opinion fails to consider them, much less to weigh them." Frazier *ex rel.* Frazier v. Alexandre, 555 F.3d 1292, 1293 (11th Cir. 2009) (Barkett, J., dissenting).

23. The one exception to this rule—content-based but viewpoint-neutral regulations in a nonpublic forum—does not apply, since mandatory pledges do not occur in nonpublic forums. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799–800, 806 (1985).

24. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988) ("The constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression was established in *Miami Herald Publishing Co. v. Tornillo*.").

25. Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) ("[A] core postulate of free speech law [is]: The government may not discriminate against speech based on the ideas or opinions it conveys.").

26. *Reed*, 576 U.S. at 163 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

27. Matal v. Tam, 137 S. Ct. 1744, 1766 (2017) ("At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.").

law, if parents do nothing, their child must participate in reciting the pledge. Only with written parental permission may a child abstain. Because the law requires parental consent for one viewpoint but not the other, it is viewpoint based. As such, it is presumptively unconstitutional.

In favoring recitation of the pledge over sitting out the pledge, the government is favoring more than patriotism. With the addition of "under God" during the Cold War,[28] the pledge also endorses a particular stance on religion. Consequently, some students object to the pledge for religious reasons. According to Jehovah's Witnesses, they cannot join the pledge because "the flag salute [is] an act of worship, and worship belongs to God; they cannot conscientiously give worship to anyone or anything except God."[29] Other students may balk at its endorsement of monotheism. As one high school student who stopped saying the pledge explained, "I have no connection to religion whatsoever. The fact that they added the 'under God' part to the Pledge of Allegiance doesn't represent me, and it doesn't represent others who do not have religious affiliations."[30]

Students also refuse to join their school's daily Pledge of Allegiance for political reasons. As long as the flag has symbolized the United States,[31] people have targeted the flag to protest injustices in the country. Some have done it by burning the flag;[32] Others by refusing to salute it. One senior in high school remained seated during the pledge because "[e]verything it's saying is a lie—this isn't a nation under God and there isn't justice for all."[33] Another protesting student remarked, "I wanted people to see that there is social injustice, racial inequality and police brutality."[34]

Many students are following the example of Colin Kaepernick, a former NFL quarterback for the San Francisco 49ers.[35] To bring attention to the systemic racism suffered by black Americans, particularly police violence against young black men,

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28. Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1032 (9th Cir. 2010) ("In 1954, during the escalating Cold War . . . Congress further amended the Pledge by changing the phrase 'one Nation indivisible' to 'one Nation under God, indivisible.'").

29. WATCH TOWER BIBLE & TRACT SOC'Y OF PA., *Moral Values that Merit Respect: Jehovah's Witnesses and Education*, WATCHTOWER ONLINE LIBR., https://wol.jw.org/en/wol/d/r1/lp-e/1101995044#h=9 [https://perma.cc/29Q5-GBZ9].

30. Valerie Safronova & Joanna Nikas, *High School Students Explain Why They Protest Anthems and Pledges*, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/style/high-school-students-explain-why-they-protest-anthems-and-pledges.html [https://perma.cc/L5QA-T3KX].

31. Texas v. Johnson, 491 U.S. 397, 405 (1989) ("The very purpose of a national flag is to serve as a symbol of our country. . . . Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'").

32. *See*, *e.g.*, *id.* at 399 (noting that Johnson "burn[ed] an American flag as a means of political protest").

33. Priscella Vega, *Lakewood High Confrontation: Student Refuses to Say Pledge*, PRESS TELEGRAM (Sept. 1, 2017, 1:10 AM), https://www.presstelegram.com/2015/09/18/lakewood-high-confrontation-student-refuses-to-say-pledge/ [https://perma.cc/49VR-TQ5A].

34. Safronova & Nikas, *supra* note 30.

35. Steve Wyche, *Colin Kaepernick Explains Why He Sat During the National Anthem*, NFL (Aug. 27, 2016, 3:04 AM), http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem [https://perma.cc/76GR-BJPC].

Kaepernick began to kneel during the national anthem that starts so many sporting events.[36] "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color . . . I have to stand up for people that are oppressed."[37] With this simple gesture of protest, Kaepernick "transformed a collective ritual . . . into something somber, a reminder of how far we still have to go to realize the high ideal of equal protection under the law that the flag represents."[38] One teacher thanked the football player for "inspiring kids" after six of his students "took a knee" during the Pledge of Allegiance.[39] After the on-camera murder of George Floyd by police[40] and the explosion of Black Lives Matter protests nationwide during June 2020,[41] students are expressing their commitment to antiracism by kneeling during patriotic exercises.[42]

School administrators and teachers are fully aware of the racial justice message conveyed by abstaining from patriotic exercises. Whether it is the school secretary

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36. John Branch, *The Awakening of Colin Kaepernick*, N.Y. TIMES (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/sports/colin-kaepernick-nfl-protests.html [https://perma.cc/968R-U6RX].

37. Wyche, *supra* note 35 (quoting Kaeperick); *see also* John Mullin, *49ers QB Colin Kaepernick: Anthem Protest About 'Change,' Not Just Police Violence*, NBC SPORTS CHI. (Nov. 30, 2016, 4:18 PM), https://www.nbcsports.com/chicago/chicago-bears/49ers-qb-colin-kaepernick-anthem-protest-about-change-not-just-police-violence [https://perma.cc/H9P3-CM8Z] ("I've been very clear from the beginning that I'm against systematic oppression. . . . Police violence is just one of the symptoms of that oppression. For me that is something that needs to be addressed but it's not the whole issue.").

38. Jeremy Adam Smith & Dacher Keltner, *The Psychology of Taking a Knee*, SCI. AM. (Sept. 29, 2017), https://blogs.scientificamerican.com/voices/the-psychology-of-taking-a-knee/ [https://perma.cc/4J9K-QR65].

39. Jay Michaelson, *Mini-Kaepernicks Sit Out the Pledge of Allegiance—but Not All Teachers Know the Law*, DAILY BEAST (Apr. 13, 2017, 2:52 PM), https://www.thedailybeast.com/mini-kaepernicks-sit-out-the-pledge-of-allegiancebut-not-all-teachers-know-the-law?ref=scroll [https://perma.cc/EJB5-75HP].

40. Police Officer Derek Chauvin was filmed pressing his knee into Floyd's neck for over eight minutes, even after Floyd begged him to stop because he could not breathe. Josh Campbell, Sara Sidner & Eric Levenson, *All Four Former Officers Involved in George Floyd's Killing Now Face Charges*, CNN (June 4, 2020), https://www.cnn.com/2020/06/03/us/george-floyd-officers-charges/index.html [https://perma.cc/W799-V977]. He has been found guilty of second-degree murder. Laurel Wamsley*, Derek Chauvin Found Guilty of George Floyd's Murder*, NPR (Apr. 20, 2021), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial [https://perma.cc/4LQK-ZD84].

41. Janie Haseman, Karina Zaiets & Mitchell Thorson, *Tracking Protests Across the USA in the Wake of George Floyd's Death*, USA TODAY (June 4, 2020, 1:31 PM), https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/ [https://perma.cc/R2J4-CNR4] (noting that as of June 4, 2020, there have been protests in at least 430 towns and cities in all fifty states).

42. *Cf.* Kurt Streeter, *Kneeling Fiercely Debated in the N.F.L., Resonates in Protests*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/06/05/sports/football/george-floyd-kaepernick-kneeling-nfl-protests.html [https://perma.cc/F4U5-2RLL] ("Within a week of Floyd's death, kneeling became a common gesture.").

telling a protesting student that "this is not the NFL"[43] or a teacher complaining that students who refuse to honor the flag are as immature as "some pampered arrogant celebrities and athletes,"[44] the gesture is well understood. Indeed, "taking a knee" has become widespread including among celebrities and athletes[45] and a defining symbol among those protesting police violence against black Americans.[46]

In short, a law that demands recitation of the pledge also means it demands affirmation of some viewpoints over others—a compulsion anathema to free speech. In a famous passage, the Supreme Court declared, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[47] Notably, it was a state law mandating that public-school children recite the pledge that provoked this rebuke to state-mandated orthodoxy.

Challenges to these laws should easily win. The Supreme Court has already ruled that it violates the First Amendment to force children to recite the Pledge of Allegiance. Even if the parental permission version of the law is not exactly the same, it is still viewpoint-based, and viewpoint-based laws are subject to the most rigorous scrutiny. Moreover, it is a scrutiny they rarely survive, as little generates more suspicion than government attempts to censor or chill an unpopular viewpoint.

Nonetheless, content-based speech regulations occasionally survive strict scrutiny when they advance another constitutional right,[48] and Florida and Texas claim that the parental permission laws promote parents' constitutional right to control the upbringing of their children. Moreover, minors' speech rights, never coextensive

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43. *See supra* note 15 and accompanying text.

44. Jenna Lyons, *Florida Teacher Removed After Viral Whiteboard Rant Against Students Who Don't Stand for the Pledge*, ORLANDO WKLY. (Aug. 16, 2019, 11:03 AM), https://www.orlandoweekly.com/Blogs/archives/2019/08/16/florida-teacher-removed-after-viral-whiteboard-rant-against-students-who-dont-stand-for-the-pledge [https://perma.cc/CD39-UNUT].

45. Some of the athletes who have followed the example of Colin Kaepernick include football players from the Tampa Bay Buccaneers, Miami Dolphins, Jacksonville Jaguars, Indianapolis Colts, Baltimore Ravens, Atlanta Falcons, Detroit Lions, Washington Commanders, New England Patriots, New York Giants, Cleveland Browns, San Diego Chargers, Green Bay Packers, Denver Broncos, Buffalo Bills, and Kansas City Chiefs, as well as the entire Dallas Cowboys team. Stanley Kay, *Every NFL Player Who Has Protested During the National Anthem This Season*, SPORTS ILLUSTRATED (Aug. 22, 2017), https://www.si.com/nfl/2017/08/22/national-anthem-protests-list-players-kneel. [https://perma.cc/32MF-KDYY]. Famous actors and singers who have "taken a knee" include Stevie Wonder, John Legend, Pharrell Williams, Tracie Ellis Ross, Uzo Aduba, Shonda Rhimes and the cast of Gray's Anatomy. *US Celebrities #TakeAKnee in Support of NFL Protestors*, BBC (Sept. 27, 2017), https://www.bbc.com/news/newsbeat-41415060 [https://perma.cc/3VX5-H5PE].

46. *Taking a Knee: Athletes Protest Against Racism Around the World—In Pictures*, GUARDIAN (Aug. 27, 2020), https://www.theguardian.com/sport/gallery/2020/aug/27/nba-strike-athletes-kneeling-black-lives-matter-protest [https://perma.cc/HL74-PGAT].

47. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

48. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (upholding viewpoint-based speech restriction in order to promote the right to vote).

with adults, are even more curbed at school. The next two Sections will explain why neither the lesser rights of students nor the constitutional rights of parents justify these laws.

II. MINORS' SPEECH RIGHTS

The Constitution protects both adults and minors. However, minors' rights are not the same as adults', and several Supreme Court cases have particularly curtailed students' speech rights at public schools. Nevertheless, none of those limits apply in this case.

A. Minor Rights Generally

It has long been settled that the Constitution protects everyone, including children.[49] "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."[50]

At the same time, the constitutional rights of minors are not coextensive with the rights of adults.[51] Minors are, by definition, immature and therefore presumed to need advice when making major decisions.[52] For example, while minors have bodily autonomy rights, they need parental permission to undergo surgery.[53] When the stakes are high, and the decisionmaker is young, guidance is deemed necessary. "The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."[54]

However, that need for adult supervision has less force with free speech, as exercising that right rarely results in any life-altering consequences in the way that something like surgery might. Thus, at least with respect to free speech generally, minors enjoy the same level of protection as adults.

There is one doctrinal caveat: minors may not buy sexually explicit materials legally available to adults.[55] Or more specifically, laws banning the sale to minors are subject only to an easily satisfied rational basis scrutiny.[56] The restriction dates

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49. In re Gault, 387 U.S. 1, 13 (1967) ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

50. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

51. *Id.* ("The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.").

52. Charlene Simmons, *Protecting Children While Silencing Them: The Children's Online Privacy Protection Act and Children's Free Speech Rights*, 12 COMMC'N. L. & POL'Y 119, 134 (2007) ("While the Court has acknowledged that children have constitutional rights, it has also recognized that children lack the maturity to make certain decisions.").

53. Hodgson v. Minnesota, 497 U.S. 417, 444–45 (1990).

54. *Id.* at 444 (justifying need for parental consent).

55. Ginsberg v. New York, 390 U.S. 629, 637 (1968) ("We conclude that we cannot say that the statute [banning sale of 'girlie magazines' to minors] invades the area of freedom of expression constitutionally secured to minors.").

56. *Id.* at 643 ("We therefore cannot say that § 484–h, in defining the obscenity of material

to an earlier era, when such materials were known as "girlie magazines,"[57] and the danger posed by these magazines was mostly undisputed. Although the Supreme Court is not on course to overrule this arguably paternalistic rule, it is unlikely to expand it.

On the contrary, the Court has declined to allow special limits on minors' access to explicitly violent materials, such as extremely violent video games.[58] According to the Supreme Court, such a restriction is subject to strict scrutiny,[59] and in the case before it, the state failed to offer sufficient evidence that access to these games causes harm.[60] Without concrete proof of harm, minors' free speech rights should prevail.

B. Minors' Speech Rights in School

The calculus is a bit different in public schools.[61] Students, without question, have free speech rights, as the *Barnette* pledge case made clear in 1943. Yet Supreme Court decisions since then have imposed various limits on those rights. Still, none justify anything less than strict scrutiny for Florida's and Texas's pledge laws.

The default assumption is that students' free speech rights at school are fully protected.[62] As the Supreme Court famously proclaimed in *Tinker v. Des Moines Independent Community School District*, where students silently protested the Vietnam War by wearing black armbands,[63] students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[64] In fact, the Court continued, "This has been the unmistakable holding of this Court for almost 50 years."[65]

At the same time, the *Tinker* Court observed schools must be able to accomplish their educational mission, justifying two limits on its rights-wielding students.

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on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.").

57. *Id.* at 631.

58. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794–95 (2011) ("No doubt a State possesses legitimate power to protect children from harm, *Ginsberg*, 390 U.S. at 640–641; *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944), but that does not include a free-floating power to restrict the ideas to which children may be exposed.").

59. *Id.* at 799.

60. *Id.* ("California . . . cannot show a direct causal link between violent video games and harm to minors.").

61. Note that these limits apply to students' school-based speech. They do not apply to speech outside the public-school context. For example, the Supreme Court has held that school authorities could not discipline a disappointed cheerleader's off-campus, expletive-filled rant on Snapchat: "Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility." Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021).

62. This argument is limited to students at public schools. The Free Speech Clause does not protect students in private schools. Public schools are state actors; private schools are not.

63. 393 U.S. 503, 504 (1969) ("The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands.").

64. *Id.* at 506.

65. *Id.*

Specifically, students' right to free speech does not extend to interfering with the rights of other students nor to substantially disrupting class or school.[66]

Like the *Tinker* armbands, a silent, passive protest against the pledge does neither. Quietly sitting does not interfere with any classmate's rights, whether it be that classmate's free speech right to pledge themselves, their right to equal treatment, or their right to learn. Quietly sitting does not disrupt any classroom instruction, either.

Although school administrators might argue that a protester's iconoclastic stance might upset others and lead to upheaval, *Tinker* precludes this ground for punishment. According to *Tinker*, the fear of possible disruption is not a reason to violate a student's rights.[67] After pointing out that any unconventional opinion may provoke argument,[68] the *Tinker* Court insists that this is an inevitable and necessary risk in a free society with a robust exchange of ideas: "But our Constitution says we must take this risk and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[69]

Subsequent Supreme Court decisions have further curbed students' free speech rights, but none in a way applicable to students sitting out the daily Pledge of Allegiance. The Supreme Court condoned editorial control over school newspapers when the newspaper's content might be attributed to the school.[70] In particular, the school worried about age-inappropriate articles such as a story on student pregnancy.[71] But besides the lack of age-inappropriate content in students' silence,

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66. *Id.* at 509 (protecting students' speech because it did not "substantially interfere with the work of the school or impinge upon the rights of other students").

67. *Id.* at 508 ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").

68. *Id.* ("Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.").

69. *Id.* at 508–09. In reality, most of the disruptions that have followed a student's refusal to join the daily recitation of the pledge is the fault of hostile teachers. Instead of letting students quietly sit, these teachers overreact and needlessly escalate the situation. Teachers have harshly upbraided students, and some have even tried to physically force compliance. *E.g.*, Kristine Phillips, *Florida Sixth-Grader Arrested After Dispute with Teacher over Pledge of Allegiance*, WASH. POST (Feb. 18, 2019), https://www.washingtonpost.com/education/2019/02/17/florida-sixth-grader-charged-with-misdemeanor-after-refusing-recite-pledge-allegiance/ [https://perma.cc/5VQV-FUWP] (recounting how a teacher argued with the eleven-year-old, telling him if the United States was so bad, he should move somewhere else); Mitchell Byars, *Colorado Teacher Pleads Guilty to Child Abuse After Forcing Student to Stand for Pledge of Allegiance*, DENVER POST (Aug. 31, 2018, 8:07 AM), https://www.denverpost.com/2018/08/31/karen-smith-teacher-pledge-allegiance/.

70. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–73 (1988) (describing school paper as "bear[ing] the imprimatur of the school" and holding that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

71. *Id.* at 263 (1988) ("[The principal] believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school.").

there is no risk of misattribution in pledge cases, as no one would confuse the student's speech for the school's.

The Supreme Court has also allowed schools to discipline students for bawdy innuendos[72] made during a school assembly.[73] That is, "the First Amendment gives a high school student [] the right to wear Tinker's armband, but not Cohen's [Fuck the Draft] jacket."[74] But lewd jokes about a "firm in his pants" fellow student who "pounds" his "point" until the very end has little in common with a decision not to participate in the Pledge of Allegiance.[75]

Finally, the Supreme Court has permitted schools to punish students for speech that advocates illegal drug use.[76] In *Morse v. Frederick*,[77] during a school-sponsored excursion to watch the Olympic torch relay, a student unfurled a fourteen-foot banner proclaiming "BONG HiTS 4 JESUS."[78] The principal argued that the phrase, which the student described as a bit of nonsense,[79] could be read as encouraging or celebrating marijuana use.[80] The Supreme Court held that given the grave threat that drugs posed to student health,[81] school authorities had a compelling reason to ban the promotion of drugs at school.[82] Because a failure to pledge cannot by any stretch of the imagination be interpreted as advocating any dangerous behavior, never mind drugs, the *Morse v. Frederick* limits are as inapposite as the others.

He also claimed he worried that the details of that story, as well as the details in a story on the impact of divorce, would allow readers to identify the students whose names were not revealed. *Id.*

72. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986) ("During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.").

73. *Id.* at 685–86 (1986) ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

74. *Id.* at 682 (internal citation omitted) (Newman, J., concurring). While Tinker protested the Vietnam War with a black armband, Cohen protested it with a jacket that read, "Fuck the Draft."

75. The student was endorsing a classmate for vice president. His speech included the following statement: "I know a man who is firm—he's firm in his pants, . . . who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president." *Id.* at 687 (Blackmun, J., concurring).

76. Morse v. Frederick, 551 U.S. 393, 397 (2007) ("[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.").

77. *Id.* at 396.

78. *Id.* at 397.

79. *Id.* at 401 ("Frederick himself claimed 'that the words were just nonsense meant to attract television cameras.'").

80. *Id.*

81. *Id.* at 407 ("Drug abuse can cause severe and permanent damage to the health and well-being of young people.").

82. *Id.* at 410 ("The First Amendment does not require schools to tolerate at school events student expression that contributes to th[e] dangers [of illegal drug use].").

Doctrinally, then, as a viewpoint-based regulation, the pledge requirement ought to trigger strict scrutiny. While some regulations of student speech avoid this rigorous scrutiny, the pledge requirement does not fall into any of the recognized exceptions: remaining silent during the Pledge of Allegiance neither interferes with other students' rights nor disrupts the school (*Tinker*); it is not attributable to the school (*Hazelwood*); and it cannot be characterized as lewd (*Bethel*) or drug-promoting (*Morse*). Thus, none of the accepted justifications for regulating school speech apply. On the contrary, all of the recognized harms of compelled speech are realized when schools force students to recite the Pledge of Allegiance unless their parents excuse them.

III. FREE SPEECH HARMS OF COMPELLED PLEDGE

A closer look reveals that all the recognized harms of compelled speech are present when students are forced to recite the pledge. To understand why compelled speech undermines the Free Speech Clause, it is necessary to understand why the First Amendment protects speech in the first place. The three most prominent reasons for constitutional protection of speech are (1) to promote a robust marketplace of ideas; (2) to enable participatory democracy; and (3) to foster individual autonomy, self-expression, and self-realization.[83] Finally, distrust of government, while not technically a value or goal, is a consistent theme running through free speech jurisprudence.[84] Just as free speech can help realize these goals, compelled speech can compromise them.[85]

A. Marketplace of Ideas

The purpose of a marketplace of ideas is to ensure that listeners have access to the widest possible array of knowledge, ideas, and opinions.[86] Exposure to wide-ranging information ensures that listeners can make their own informed decisions. Or to put it another way, to control what an audience hears may unduly influence their views—views they might not hold with access to more complete information and more varied opinions.

Compelling students to recite the pledge distorts the marketplace of ideas available for students at school.[87] Students who want to join the pledge still can, even

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83. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1291 (2014).

84. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 85–86 (1982).

85. Corbin, *supra* note 83, at 1293.

86. The phrase itself originates in a Justice Holmes dissent: Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.").

87. *Cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) ("'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative

if their parents would prefer they do not. Students who do not want to pledge must, unless their parents consent to their abstention. Parents may deny permission for different reasons. They may disagree with their child's opinion on the matter. Or parents may actually agree with their child's views but fear the repercussions of dissent;[88] whether more realistic or more fearful, adults may be less willing to make waves. The bottom line is that the school's rule will decrease the odds that any one child will have a classmate who sits out or takes a knee during the Pledge of Allegiance. Instead, almost everyone, including classmates who oppose it, will stand and pledge.

The end result is a less robust marketplace of ideas for the students at school. Moreover, the school has tilted the debate in favor of its own viewpoint. This is especially true if students misinterpret participation in the pledge as support for all that it represents. That is, "if government forces speakers to convey an opinion they disagree with, and if an audience believes that the message is the private speakers' rather than the government's, the audience may erroneously conclude that the message is more widespread than it really is."[89] Moreover, the perceived popularity of a message, studies show, will increase its persuasiveness.[90] While we are all susceptible to this type of cognitive error, school children may be especially so. In short, the government uses its coercive power to persuade, not by virtue of the underlying worthiness of its message, but by controlling the messages that students are exposed to. This is not how the marketplace of ideas is supposed to work.

Some might argue that this is how school is supposed to work, and that the marketplace of ideas in school should be more circumscribed than the general marketplace. Granted, because schools have a responsibility to teach certain rules of civil discourse,[91] perhaps certain means of engagement should be discouraged, such as inflicting crude sexual innuendo on a captive audience.[92] But silent protest is not one of them. Perhaps certain subjects and even certain viewpoints should be off limits

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selection.'" (quoting Keyishian v. Bd. Of Regents, 385 U.S. 589, 603 (1967) (Brennan, J., dissenting))).

88. *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 208–09 n.3 (1963) (explaining that parents challenging mandatory Bible readings initially did not seek to excuse children for fear they "would be 'labeled as "odd balls"' before their teachers and classmates every school day," that "they would have to stand in the hall outside their 'homeroom,' and that this carried with it the imputation of punishment for bad conduct").

89. Corbin, *supra* note 83, at 1295.

90. *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 668–69 (2008); Gia B. Lee, *Persuasion, Transparency, and Government Speec*h, 56 HASTINGS L.J. 983, 1010 (2005) ("The phenomenon of popular influence is well-established in the social science literature, which shows that ideas perceived to have achieved broad acceptance are generally more persuasive."); *see also id.* at 1011–13 (citing studies).

91. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.").

92. *Id.* at 683 ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.").

in school, such as glamorizing illegal drug use.[93] Again, however, religious liberty and racial justice are not among them.[94]

On the contrary, "the objectives of public education [are] the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.'"[95] Nothing is more fundamental to a democracy than basic liberties like freedom of religion, and nothing embodies American ideals more than equality for everyone, regardless of race. Yet, instead of fostering inquiry and training thoughtful future citizens, the compulsory pledge does just the opposite. And it does it by distorting the marketplace of ideas, thereby impeding students' search for truth and knowledge.

B. Democratic Self-Governance

The second reason the Constitution protects free speech is to facilitate democratic self-rule.[96] In order for our democracy "of the people, by the people, for the people"[97] to work, the people need the opportunity to shape political debate and the knowledge to make informed political decisions.[98] Denying students the right to sit out the pledge interferes with both these mechanisms of political speech.

At a minimum, this denial prevents students from articulating their political views. Part of what makes the United States a democracy is not just that everyone gets to vote for policymakers, but that everyone gets to opine on what the policies should be.[99] As Robert Post argues, "the ability of individual citizens to participate in the formation of public opinion" is crucial to democratic self-determination.[100]

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93. Morse v. Frederick, 551 U.S. 393, 410 (2007) ("It was reasonable for [the school principal] to conclude that the banner promoted illegal drug use . . . and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use."); *id.* at 408 ("The 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.").

94. Indeed, white supremacy has persisted for so long in part because it has not been acknowledged and discussed.

95. *Bethel Sch. Dist.*, 478 U.S. at 681.

96. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1965) ("The principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.").

97. Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863).

98. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) ("[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."); Boos v. Barry, 485 U.S. 312, 318 (1988) ("We have recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open,' and have consistently commented on the central importance of protecting speech on public issues.") (citations omitted).

99. Corbin, *supra* note 83, at 1293.

100. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88

As discussed above, sitting out or taking a knee during the daily Pledge of Allegiance is often politically motivated.[101] It may be how students demonstrate their support for wider political movements, such as Black Lives Matter. In the aftermath of George Floyd's murder, taking the knee may not only represent a demand for social justice but also serve as a reminder of the method by which yet another black body was rendered lifeless.[102] To deny students the chance to convey this symbolic message is to deny them full democratic participation,[103] thereby frustrating rather than facilitating students' ability to contribute to the political discourse.

At the same time, removing this message from the political marketplace of ideas at school inhibits students from becoming fully informed on important social and political questions—and the issue of racism is of paramount importance in the United States.[104] Participatory democracy suffers because citizens need exposure to a wide range of views in order to vote wisely.[105] As James Madison wrote, "[A] people who mean to be their own Governors, must arm themselves with the power knowledge gives."[106]

In short, instead of cultivating political debate among students, the school is essentially trying to eliminate a viewpoint from the discussion. Yet, as the *Tinker* Court noted, children "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[107] Public schools are supposed to help students develop the skills they need to become active participants in our democracy.[108] Stifling dissent is contrary to this core mission of public education. To repeat the *Barnette* Court: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we

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CALIF. L. REV. 2353, 2368 (2000).

101. Ben Riley-Smith, *'Take a Knee': How a Quarterback's Simple Gesture Became the US Protests' Rallying Cry*, TELEGRAPH (June 3, 2020, 9:21 PM), https://www.telegraph.co.uk/news/2020/06/03/take-knee-quarterbacks-simple-gesture-became-us-protests-rallying/ [https://perma.cc/62XY-CLEN].

102. Streeter, *supra* note 42.

103. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004) ("What makes a culture democratic . . . is not democratic governance but democratic participation.") (emphasis omitted).

104. The long-standing problem of racism in the United States should not need a footnote.

105. *Cf.* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948) ("What is essential is not that everyone shall speak, but that everything worth saying shall be said."). This free flow of knowledge and opinions is essential in order for citizens to vote wisely. *Id.* (urging that "all facts and interests relevant to the problem shall be fully and fairly presented [so] that all the alternative lines of action can be wisely measured in relation to one another").

106. Letter from James Madison to W. T. Barry (Aug. 4, 1822), THE FOUNDERS' CONSTITUTION, available at http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html [https://perma.cc/NW35-9CAQ].

107. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

108. Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.").

are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[109]

Moreover, it is not just any viewpoint the state is hoping to chill. It is one critical of the government, and it is one the government has criticized.[110] Comments like those spouted by a U.S. Senator from Texas—"I, for one, am not a fan of rich, spoiled athletes disrespecting the flag"[111]—or by a U.S. Representative from Florida—"I'd rather the US not have a soccer team than have a soccer team that won't stand for the National Anthem"[112]—are far from uncommon.[113] Of course, the athletes were trying to use their privileged position to spotlight racial inequality, including racial violence by the government.[114] Kaepernick's own protests were sparked by the police shooting of a young black man,[115] one of many such deaths across the country.[116]

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

110. AP, *Trump Says N.F.L. Players Should be Fired for Anthem Protests*, N.Y. TIMES (Sept. 23, 2017), https://www.nytimes.com/2017/09/23/sports/trump-nfl-colin-kaepernick-.html [https://perma.cc/LM46-V3U8]; *see also* Bryan Armen Graham, *Donald Trump Blasts NFL Anthem Protesters: 'Get that Son of a Bitch Off the Field,'* GUARDIAN (Sept. 23, 2017, 6:43 PM), https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests.

111. Matthew Choi, *Texas Officials Criticize NFL Players Over National Anthem Protests*, TEX. TRIB. (Sept. 25, 2017, 8:00 PM), https://www.texastribune.org/2017/09/25/texas-republicans-criticize-nfl-players-national-anthem/ [https://perma.cc/RSW8-X6UE] (quoting Sen. Ted Cruz).

112. Andrew Blake, *Matt Gaetz Threatens U.S. Soccer with 'Financial Repercussions' If Athletes Don't Stand for Anthem*, WASH. TIMES (Jun. 13, 2020), https://www.washingtontimes.com/news/2020/jun/13/matt-gaetz-threatens-us-soccer-with-financial-repe/ [https://perma.cc/DQ6H-637T] (quoting Rep. Matt Gaetz).

113. Matt Dixon, *Leading Florida Republicans Side with Trump in Feud with NFL*, POLITICO (Sept. 25, 2017, 5:02 AM), https://www.politico.com/states/florida/story/2017/09/24/leading-florida-republicans-side-with-trump-in-feud-with-nfl-114680 [https://perma.cc/48ZH-FSNN]; *see also* Choi, *supra* note 111.

114. Amina Khan, *Getting Killed by Police is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 16, 2019), https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men (summarizing study that police are two and a half times more likely to kill black men and boys than white ones, and that "about 1 in 1,000 black men and boys in America can expect to die at the hands of the police"); *Mapping Police Violence*, https://mappingpoliceviolence.org/ [https://perma.cc/M8XG-BPPY] (providing statistics on police shootings); Rob Picheta & Henrik Pettersson, *American Police Shoot, Kill and Imprison More People than Other Developed Nations. Here's the Data*, CNN (June 8, 2020, 7:13 AM), https://www.cnn.com/2020/06/08/us/us-police-floyd-protests-country-comparisons-intl/index.html [https://perma.cc/3FBC-37VH] (reporting that U.S. police are at least thirty times more likely to shoot people compared to European nations, and that U.S. police are almost four times as likely to use force on black as opposed to white people).

115. David K. Li, *Colin Kaepernick Reveals the Specific Police Shooting that Led Him to Kneel*, NBC NEWS (Aug. 20, 2019, 11:36 AM), https://www.nbcnews.com/news/us-news/colin-kaepernick-reveals-specific-police-shooting-led-him-kneel-n1044306 [https://perma.cc/A6MR-SWU2].

116. Killings that have resulted in protests include Eric Garner (choked to death despite repeatedly saying "I can't breathe" in 2014); Michael Brown (killed in Ferguson, Missouri

In short, patriotic exercises are a site of resistance to the government and a student's refusal to join the pledge is often intended as a rebuke of the government. A hallmark of democracy is the right to criticize the government—a right the public schools are effectively denying when they preclude the student's silent political protest.[117] Not only is it contrary to democratic values, it also stymies democratic accountability: how can citizens vote for new politicians and new policies if they are ill-informed about the current ones?[118]

To be sure, most students in public school are not yet old enough to vote. But they will be soon enough. As the Seventh Circuit observed: "Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise."[119] And again, schools are supposed to prepare the next generation for their civic duties, which includes contributing to the political discourse and making political decisions at election time. "America's public schools are the nurseries of democracy,"[120] yet the pledge law denies both student speakers their right to weigh in on the political debates of the day and the student audience their right to hear a wide range of views to help inform their own thinking.

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after being accused of stealing a box of cigars in 2014); Tamir Rice (twelve-year-old boy with toy gun in open carry state shot in 2014); Walter Scott (shot in the back five times in 2015); Alton Sterling (killed during struggle for selling homemade CDs in 2016); Philando Castile (shot while reaching for ID during traffic stop in 2016); Stephon Clark (shot in grandmother's backyard by police investigating nearby break-in in 2018); Breonna Taylor (shot in her own apartment during botched raid in the middle of the night in 2020); George Floyd (2020); Daunte Wright (shot by officer who says had meant to use taser in 2021). *George Floyd: Timeline of Black Deaths and Protests*, BBC NEWS (April 22, 2021), https://www.bbc.com/news/world-us-canada-52905408 [https://perma.cc/WNT4-M9R2]; *see generally*, Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns [https://perma.cc/AKM8-WK4A]; *Fatal Police Shootings of Unarmed Black People in US More than Three Times as High as in Whites*, BMJ (Oct. 27, 2020), https://www.bmj.com/company/newsroom/fatal-police-shootings-of-unarmed-black-people-in-us-more-than-3-times-as-high-as-in-whites/ [https://perma.cc/E2NQ-4JE2].

117. *Cf.* W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 641 (1943) ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.").

118. *Cf.* Alan K. Chen, *Forced Patriot Acts*, 81 DENV. U. L. REV. 703, 707 (2004) ("Electoral upheaval is unlikely where false perceptions of uniform public satisfaction are pervasive.").

119. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

120. Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021).

C. Autonomy

The value of free speech to individual autonomy[121]—the third rationale—is the one that most directly relies on the inherent dignity of human beings.[122] Rather than view speech instrumentally as a means to help us gain knowledge or govern our nation, the autonomy rationale views speech as an end in itself. Speech is how people express themselves—their inner thoughts, their passionate beliefs—which is an inherent good. Constitutional protection for free speech promotes speaker autonomy by ensuring that the individual rather than the government controls what they say and what they think.[123]

Forcing students to stand and recite the pledge with their hand over their heart, however, insults individual autonomy.[124] Not only is the government forcing students to speak when they would rather stay silent, it commandeers students own bodies to do so.[125] This disregard of autonomy is exacerbated when the government's message is contrary to one's own beliefs.[126] For religious objectors, the pledge may actually violate religious beliefs. For Black Lives Matter supporters, it replaces the student's own message with the government's. It should be self-evident that forcing someone to deliver the government's message intrudes on their sense of self. Students obviously cannot be considered autonomous in thought or speech if forced to express viewpoints anathema to them.[127] Finally, "[t]his insult to the speaker's dignity is compounded if listeners misattribute the government's opinion to the speaker."[128] Of

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121. *See, e.g.*, C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 980 (1997) ("Speech can relate to autonomy in two ways: as itself an exercise of autonomy or as an informational resource arguably essential for meaningful exercise of autonomy.").

122. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423 (2000) ("From Kant to Rawls, a central strand of Western philosophical tradition emphasizes respect for the fundamental dignity of persons.").

123. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) ("[A]t the heart of the First Amendment is the notion . . . that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

124. Compelled speech may, for various reasons, also insult the autonomy of audiences, but for this Essay, I will focus on the speaker. *See* Corbin, *supra* note 83, at 1300 ("A very strong strain of anti-paternalism underlies our free speech jurisprudence."). *See generally id.* at 1300–08.

125. Corbin, *supra* note 83, at 1299 ("For the speaker, this loss of autonomy becomes particularly grating when the government commandeers not only one's speech, but one's body as well.").

126. *Id.* ("Compelled speech is doubly offensive when the message represents an opinion or ideology contrary to one's own beliefs.").

127. Seana Shiffrin takes the argument one step further and argues that daily recitation of the pledge might actually influence the "autonomous thinking process[es]" of the compelled students. Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840 (2005); *see also id.* at 859 ("[C]ompelled speech may come to exert an influence on the thoughts (and actions) of the speaker in a way that surreptitiously bypasses the agent's conscious consideration and does not reflect her sincere deliberation about the matter.").

128. Corbin, *supra* note 83, at 1298.

course, even if no one misunderstands the speaker's personal views, being forced to parrot the state's ideological message is still an insult to personal autonomy.

It is true that students' autonomy vis-à-vis speech is regularly curtailed in school. Students cannot chime in at will in the middle of class. They must write essays on designated topics. But these examples of silencing or compelling speech are directly linked to basic pedagogical goals. They are necessary to the business of teaching. Mandating the Pledge of Allegiance is not. As a matter of education, a school might require an essay on the meaning or history of the pledge, but that is distinct from requiring students to actually participate in it. And while the school might want to encourage patriotism, it cannot dictate it. As the Supreme Court noted in another case involving the American flag, "a government cannot mandate by fiat a feeling of unity in its citizens."[129]

In short, a regulatory scheme that forces unwilling students to pledge allegiance, including students who would rather make a political statement by abstaining, embodies all the harms of compelled speech: it diminishes the marketplace of ideas at school; it silences a powerful criticism of the government; and it insults the autonomy of the compelled student. Because viewpoint-based speech regulations often cause these harms, they are presumptively unconstitutional.[130] At a minimum they are subject to strict scrutiny, which requires that the law be narrowly tailored to achieve a compelling government interest.[131] What government interest could possibly justify this trampling of students' free speech rights? According to the Eleventh Circuit Court of Appeals, it is a parent's constitutional right to control the upbringing of their children.[132]

IV. PARENTS' SUBSTANTIVE DUE PROCESS RIGHTS

It is the rare free speech regulation that survives strict scrutiny,[133] and the Supreme Court regularly describes speech regulations triggering strict scrutiny as presumptively unconstitutional.[134] When a regulation does survive, it is often because the regulation is promoting another constitutional right, such as the right to vote.[135] Perhaps a law advancing parents' substantive due process right to control the

129. Texas v. Johnson, 491 U.S. 397, 401 (1989) (internal quotation omitted).

130. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) ("[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional.").

131. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

132. Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1285–86 (11th Cir. 2008).

133. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) ("We have emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion))).

134. *See, e.g.*, Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) ("[V]iewpoint discrimination is an 'egregious form of content discrimination' and is 'presumptively unconstitutional.'" (quoting *Rosenberger*, 515 U.S. at 829–30)).

135. Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding ban on electioneering within 100 feet of polling place in order to protect integrity of right to vote); *cf. Williams-Yulee*, 575

upbringing of their children satisfies these stringent requirements. Certainly the Eleventh Circuit cited to this right as the state's compelling interest behind its parental-consent regulation.[136]

However, the right fails to justify the pledge laws for at least three reasons. First, "the right to parent is weaker than the Court's rhetoric suggests,"[137] and it is even weaker in the public-school context. Second, the right is meant to be a limit on the state, not on one's own children. In fact, parents' right to control their children ends when harm to their child begins. Third, while parents' control over some decisions may be justified on the grounds that their children are too immature to make those decisions themselves, the free speech decision whether to recite the pledge is not one of them.

A. Background on Substantive Due Process

Not every right protected by the U.S. Constitution is specifically listed. These unenumerated rights are currently grounded in the Due Process Clause of the Fourteenth Amendment and are known as "substantive due process rights."[138] One of the earliest substantive due process rights is the right of parents to control the upbringing of their children.[139]

The right dates from at least the 1920s,[140] when the Supreme Court struck down laws limiting educational options for schoolchildren in part because they infringed on the right of parents to direct their children's education.[141] As the Court held, "Evidently the legislature has attempted materially to interfere . . . with the

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U.S. at 448–49 (upholding bar on judicial candidate solicitations to protect integrity of judiciary). *But cf.* Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010) (finding that "combating terrorism is an urgent objective of the highest order").

136. Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1284 (11th Cir. 2008) ("We see the statute before us now as largely a parental-rights statute.").

137. Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. REV. 1055, 1086 (2010).

138. The more logical textual basis for unenumerated rights includes the Privileges or Immunities Clause of the Fourteenth Amendment, which states, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," U.S. CONST. amend. XIV, § 1, or even the Ninth Amendment, which reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," *id.* amend. IX. However, the Supreme Court eviscerated the scope of the Privileges or Immunities Clause in the *Slaughter-House Cases*, 83 U.S. 36 (1873), and the Court has so far proven reluctant to rely on the language of the Ninth Amendment, despite occasional reference to it. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

139. Hamilton, *supra* note 137, at 1088 ("The Court reads [*Meyer* and *Pierce*] as having established 'that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and . . . "to direct the upbringing and education of children under their control."'").

140. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

141. In *Meyer*, Nebraska barred the teaching of foreign languages in schools before the eighth grade. 262 U.S. at 397. In *Pierce*, Oregon required schoolchildren to attend public school. 268 U.S. at 531.

opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[142]

Like free speech rights, parental rights have both instrumental and intrinsic value. Instrumentally, parents are given authority to make decisions on behalf of their children on the assumption that their love for and intimate knowledge of their children will lead parents to do what is best for them.[143] For parents, there is also inherent value in shaping their children: "[T]he freedom to rear our children according to the dictates of conscience is for most of us as important as any other expression of conscience."[144]

This parental right has been reaffirmed in modern times. In *Wisconsin v. Yoder*,[145] decided in 1972, the Supreme Court struck down a compulsory education law as violating Amish parents' religious and substantive due process rights.[146] Wisconsin required that students stay in school until they were sixteen.[147] The Amish parents wanted their children to pursue vocational education at home instead of remaining in public schools, where they would be exposed to "worldly influence[s]" antithetical to Amish values.[148] Noting that "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition,"[149] the Court found for the parents. However compelling the states' interests in ensuring that students learn enough to fulfill their civic responsibilities and become economically independent,[150] the Court held that staying in public school until age sixteen was not necessary for Amish students to achieve those goals.[151]

The right of parents to control the education and upbringing of their children also played a role in several Supreme Court cases involving custody and visitation of children. In *Troxel v. Granville*,[152] parents challenged a state law that allowed anyone to petition the superior courts for visitation rights and authorized the court to grant visitation despite objecting parents if the court believed it was in the best interest of the child.[153] In the particular case, the lower courts had awarded to a widowed mother's in-laws the right to visit with her very young daughters.[154] Although the Supreme Court did not question the importance of advancing "the best interest of the

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142. *Meyer*, 262 U.S. at 401; *see also Pierce*, 268 U.S. at 534–35 ("[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.").

143. Hamilton, *supra* note 137, at 1083, 1085.

144. *Id.* at 1085 (quoting EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY 143 (1997)); *see also id.* at 1081 ("Expressing their identities and living according to their values usually includes instilling those values in their children and thus influencing *their* conceptions of the good life.").

145. 406 U.S. 205 (1972).

146. *Id.* at 207.

147. *Id.*

148. *Id.* at 210–11.

149. *Id.* at 232.

150. *Id.* at 221.

151. *Id.* at 222.

152. 530 U.S. 57 (2000).

153. *Id.* at 60.

154. *Id.* at 60–61.

child," the Court held it could be achieved in a way that better respected parents' constitutional rights to control their children's upbringing.[155]

B. Parental Rights in School

Although well-established, the parental right to control the education and upbringing of one's child is not necessarily robust.[156] Not only were *Meyer* and *Pierce* decided at the height of the now discredited *Lochner* era, but also the parental right was combined with other rights no longer recognized.[157] Similarly, *Yoder* also included Free Exercise Clause claims. As Vivian Hamilton has argued, "Although the Court regularly describes the right as fundamental, it has employed something like true strict scrutiny only in cases where state action has gone so far as to threaten the existence of the parent-child relationship itself."[158] Even when custody or visitation is at stake (as opposed to termination), the right on its own no longer triggers strict scrutiny.[159] Outside state interference with custody, the right is weaker still.[160]

Moreover, courts always rebuff the claim that parents have a substantive due process right to control what occurs in public school.[161] In *Baker v. Owen*,[162] the

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155. *Id.* at 65–69.

156. Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 128 (2018) ("[T]he Court has not articulated a consistent level of scrutiny for judicial review of restrictions on the parental right."); *see also id.* at 145 ("Adam Winkler has noted in his empirical research that courts 'tend to reject another type of substantive due process infringement: restrictions on parents' rights to control their children's upbringing.'").

157. William G. Ross, *The Contemporary Significance of* Meyer *and* Pierce *for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 178 (2000) ("Despite their ringing declarations about human rights, *Meyer* and *Pierce* were both formally decided largely on the basis of property rights—the liberty of the schools to conduct a business, the right of private school teachers to follow their occupation, and the freedom of the schools and the parents to enter into contracts."); Ryznar, *supra* note 156, at 144 ("First, much of the precedent on the parental right is a product of its time.").

158. Hamilton, *supra* note 137, at 1086.

159. *Id.*; Elizabeth J. Sher, *Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157, 176 (1983) (noting that parental rights are "most prominent when the state seeks to separate the parents from the child permanently, terminating parental rights completely").

160. *Cf.* Ryznar, *supra* note 156, at 143 ("[T]he parental right to the care, custody, and control of a child is too complex for one level of scrutiny."); *id.* at 157 ("An undertheorized reason for the lack of guidance on the appropriate level of scrutiny is that the parental right is too complex—spanning too many different issues that variously burden the essence of parenthood—to have one static level of scrutiny.").

161. Ross, *supra* note 157, at 188 ("Courts also have rejected parental objections to public school practices and curriculum even in cases in which parents have relied both on parental rights and the free exercise of religion."); Frazier v. Smith, No. 08-1351, 2009 WL 1931582, at *12 (U.S. July 1, 2009) ("Parents do not have a constitutional right to insist that public schools teach their children in accordance with the parents' beliefs, no matter how fervently and sincerely held.").

162. 423 U.S. 907 (1975).

Supreme Court summarily reaffirmed one such decision.[163] In particular, a mother complained that the school's use of corporal punishment on her sixth-grade son over her objections violated her substantive due process rights.[164] While the lower court acknowledged that the school's action implicated the mother's constitutional right to choose when and how to discipline her child,[165] it did not find this right to be fundamental;[166] instead, it concluded that "We do not read *Meyer* and *Pierce* to enshrine parental rights so high in the hierarchy of constitutional values."[167] The court then found that the school policy easily survived rational basis scrutiny.[168]

Lower court decisions have followed suit.[169] While acknowledging that *Meyer* and *Pierce* protected parents' right to choose whether to send their children to public school, these courts generally conclude that "parents do not have a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children."[170] Thus, courts have rejected challenges to grade school book selections,[171] middle school health education programs,[172] and high school mandatory community service programs.[173]

Most did not even apply heightened scrutiny. In rejecting one claim, the Fifth Circuit emphasized that eighty years of precedent dictated no more than rational basis scrutiny for assertions of parental rights in public schools.[174] In short, "[t]he courts are unwilling to grant parents any general power to select the educational

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163. Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd*, 423 U.S. 907 (1975).

164. *Baker*, 395 F. Supp. at 296 ("Mrs. Baker alleges that the administration of corporal punishment after her objections violated her parental right to determine disciplinary methods for her child."). The school had paddled her sixth-grade son multiple times despite her repeated request that they not hit him. *Id.* at 295–96.

165. *Id.* at 299.

166. *Id.* at 299; *see also id.* at 300 ("[W]e cannot say that her right of total opposition to his corporal punishment is fundamental in a constitutional sense.").

167. *Id.* at 299.

168. *Id.* at 296 ("We hold that fourteenth amendment liberty embraces the right of parents generally to control means of discipline of their children, but that the state has a countervailing interest in the maintenance of order in the schools, in this case sufficient to sustain the right of teachers and school officials to administer reasonable corporal punishment for disciplinary purposes.").

169. *See, e.g.*, Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381 (6th Cir. 2005) (upholding limited parental access to the classroom and control over school uniforms for their children).

170. Eric W. Schulze, *The Constitutional Right of Parents to Direct the Education of Their Children*, 138 ED. L. REP. 583, 592 (1999) (citing Reid v. Lufkin Indep. Sch. Dist., No. 9:96–CV–420 (E.D. Tex. August 14, 1998)).

171. Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).

172. Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003); *see also* Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974) ("Our system of education could not survive if parents were allowed to dictate the courses and modes of study.").

173. Immediato v. Rye Neck Sch. Dist., 73 F.3d 454 (2d Cir. 1996); In re Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996).

174. Ryznar, *supra* note 156, at 139 (quoting Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 291 (5th Cir. 2001)).

requirements with which they will or will not comply, under the rubric of the constitutional right of parents to direct the education of their children."[175]

Notably, such a result was hinted at as far back as *Meyer* and *Pierce*. Despite the language in support of parental rights, the cases made clear that the state retained the power "to prescribe a curriculum for institutions which it supports,"[176] and to "reasonably [] regulate all schools, [and] to inspect, supervise and examine them, their teachers and pupils."[177] Parents have the right to choose their children's school, but once they opt for public school, they cannot control the curriculum.[178]

The general weakness of the parental right in the school context, and the fact that schools generally resist such claims, suggests that Florida's and Texas's invocation of parental rights was a pretext rather than the true motive for the pledge laws. Of course, even if a constitutional right is not deemed "fundamental," promoting it may still be a compelling government interest. Discrimination based on sexual orientation or gender identity does not trigger strict scrutiny, yet surely the government's goal in eradicating any kind of invidious discrimination is compelling. Nevertheless, any insinuation that the school was required to give parents the power to force their children to participate in the pledge because of their substantive due process right cannot stand. Courts have made it quite clear that once children are in school, the school and not the parents have final authority over their charges, including questions of discipline and curriculum.

C. Parental Rights Against Children

Another problem with relying on parents' substantive due process rights to justify the parental consent law[179] is that this right is generally asserted by parents against the states, not against their own children.[180] "Decisions . . . vindicating parental rights in the context of laws regulating the schooling of children have concerned the rights of parents who wanted their children free from state compulsion, not the rights of parents who sought to impose state compulsion on their children."[181] Moreover,

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175. Schulze, *supra* note 170, at 596.

176. *Id.* at 585 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

177. *Id.* (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925)).

178. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005) ("While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child."); Schulze, *supra* note 170, at 590 ("Although the proper judicial method for analyzing claims of alleged violations of the parental constitutional right remains in doubt, the reported court decisions [on parental challenges to school decisions] nevertheless have been remarkably consistent in rejecting the constitutional claims.").

179. Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1284 (11th Cir. 2008) ("[T]he refusal of students to participate in the Pledge—unless their parents consent—hinders their parents' fundamental right to control their children's upbringing.").

180. Frazier *ex rel.* Frazier v. Alexandre, 555 F.3d 1292, 1298 (11th Cir. 2009) (Barkett, J., dissenting) ("The parental right of upbringing is not a positive right that gives parents the power to *invoke* the aid of the State against a minor's exercise of constitutional rights but a negative right that provides for protection of that right *against the State*.").

181. Brief for Petitioner, Frazier v. Smith, No. 08-1351, 2009 WL 1931582, at *11 (U.S. July 1, 2019).

when parents' preferences and children's wellbeing obviously conflict, the Supreme Court favors children's wellbeing.

In the cases cited above, the parents were challenging an action by the government, not by their children. In *Meyer* and *Pierce*, the parents challenged a law limiting educational opportunities. In *Yoder*, the parents challenged a law mandating educational attendance. In *Troxel*, the parents were pushing back against state interference in visitation decisions. None of the cases explicitly involved the states giving parents power to coercively overrule their children.[182]

One might argue that the cases assumed that if there were a clash between parents and children, the parents would prevail despite the contrary wishes of their child.[183] *Yoder*, for example, presented a potential conflict between parents and children. On the one hand, the parents wanted their high schoolers at home to both avoid the worldly influences of high school and to ensure that their daughters "acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife."[184] On the other hand, perhaps the daughters wanted to stay in public school and acquire skills beyond that of an Amish housewife.

Whether rightly or wrongly, the *Yoder* majority concluded that the parents' and daughters' interests were aligned.[185] Instead, the Court worried that the compulsory attendance might cause "great psychological harm to Amish children."[186] To be sure, Wisconsin tried to make the case that Amish children would find themselves "ill-equipped" should they choose to leave the community,[187] but the Court rejected the claim as "highly speculative" and unsupported by the record,[188] which was devoid of any disagreement between parents and children.[189] Quite the opposite: the one daughter whose viewpoints were noted also expressed a desire to leave public

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182. *Cf. Alexandre*, 555 F.3d at 1299 (11th Cir. 2009) ("Every case that has ever discussed the issue of 'parental upbringing' dealt with the conflict between a parent's right and a State's attempted curtailment of that right, not a conflict between parent and child.").

183. *Cf.* Jocelyn Floyd, Note, *The Power of the Parental Trump Card: How and Why* Frazier v. Winn *Got It Right*, 85 CHI.-KENT L. REV. 791, 808 (2010) ("[T]he tone of the entire opinion respected the parental concern of maintaining the Amish way of life through raising children in accordance with Amish values. . . . [and there was] no indication that the Court would give the child's contrary desire much, if any, weight were the child and parent to be at odds with each other.").

184. Wisconsin v. Yoder, 406 U.S. 205, 211 (1972).

185. *Id.* at 218 (noting that attendance at public high schools "contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child").

186. *Id.* at 212.

187. *Id.* at 224 ("The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life.").

188. *Id.* at 224–25.

189. *Id.* at 231 ("Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary.").

school.[190] In short, the Court did not consider the case "one in which any harm to the physical or mental health of the child . . . has been demonstrated or may be properly inferred."[191]

Despite rejecting the best interest of the child standard, *Troxel* is not to the contrary.[192] Recall that the Supreme Court held that, notwithstanding the trial court's determination that visitation with paternal grandparents was in the children's best interests,[193] the mother's right to control the upbringing of her daughters took precedent,[194] and that the law allowing the grandparents to petition for visitation was unconstitutional.[195] Thus, this case seems to squarely present a clash between the parent's interests and the children's. However, the young children themselves were not consulted, so it is actually a clash between the mother making a decision on behalf of her children and the state making a decision on their behalf.[196] Moreover, nothing indicated that the mother's decision overrode her daughters' preferences. Also, the Court had no reason to conclude the mother had acted against her daughters' best interests. In addition to the presumption "that natural bonds of affection lead parents to act in the best interests of their children,"[197] nothing suggested any unfitness on the mother's part.[198]

Crucial to both decisions was the conclusion that the exercise of parental rights was not in any way detrimental to their offspring. As several cases make clear, parents' substantive due process rights end where harm to children begins. This point was established early in *Prince v. Massachusetts*, another case which implicated both parental and religious rights.[199] Mrs. Prince was a Jehovah's Witness and the guardian of nine-year-old Betty. She challenged the state's child labor laws, which prevented Betty from selling religious tracts in the evening, as required by their religion. The Court described Prince's interests as "sacred," adding that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents."[200]

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190. *Id.* at 231 n.21.

191. *Id.* at 230; *see also id.* at 234 ("The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child.").

192. Troxel v. Granville, 530 U.S. 57 (2000).

193. *Id.* at 61.

194. *Id.* at 63.

195. *Id.* at 60 ("Section 26.10.160(3) of the Revised Code of Washington permits '[a]ny person' to petition a superior court for visitation rights 'at any time,' and authorizes that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.'").

196. *Id.* at 67 ("Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails."); Sher, *supra* note 159, at 169 ("[A]lthough it is ostensibly the child whose 'best interest' is at stake, courts generally are called upon to balance two perceptions of the child's best interest, neither of which necessarily emanates from the individual child.").

197. *Troxel*, 530 U.S. at 68.

198. *Id.*

199. Prince v. Massachusetts, 321 U.S. 158, 164 (1944) ("[S]he rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental right as secured by the due process clause of the latter Amendment.").

200. *Id.* at 166.

At the same time, the Court emphasized, no right is absolute,[201] and the well-being of the child always comes first.[202] Thus, the state may insist that a child be vaccinated, over parental objections.[203] And it may insist that a child obey child labor laws, over parental objections.[204] To prevent the "crippling effects of child employment,"[205] and to ensure "the healthy, well-rounded growth of young people into full maturity as citizens," [206] the state's law trumps the parent's rights.

Yoder itself explicitly acknowledged that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child."[207] Accordingly, lower courts regularly overrule parents' refusal to provide medical care to their child.[208] For example, Jehovah's Witness parents do not have the right to withhold blood transfusions from their ill children.[209] "[C]ourts universally hold that lifesaving medical treatment can be required notwithstanding the parents' sincere religious [or nonreligious] objections."[210] In sum, parental rights must give way when the health or safety of their charges are at stake.

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201. *Id.* ("[N]either rights of religion nor rights of parenthood are beyond limitation.").

202. The state is said to be acting in its role as *parens patriae* when it steps in to protect those who cannot protect themselves. Natalie Loder Clark, Parens Patriae *and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 382 (2000) ("*Parens patriae*, literally 'parent of the country,' is the government's power and responsibility, beyond its police power over all citizens, to protect, care for, and control citizens who cannot take care of themselves, traditionally 'infants, idiots, and lunatics,' and 'who have no other protector.'"); Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's* Parens Patriae *Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 287–88 (1991) ("The doctrine of *parens patriae* has its origin in England and applied to the king and the prerogative of the crown to protect those subjects who could not protect themselves. . . . The power formerly vested in the royal sovereign has now been transferred to each state. The Supreme Court has recognized this as part of a long-standing tradition.").

203. *Cf. Prince*, 321 U.S. at 166–67 ("Thus, he cannot claim freedom from compulsory vaccination for the child . . . on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.") (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

204. *Id.* at 168–69.

205. *Id.* at 168.

206. *Id.* ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.").

207. Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972).

208. Ellen B. Becker, Note, In re Hofbauer*: May Parents Choose Unorthodox Medical Care for Their Child?*, 44 ALB. L. REV. 818, 822 n.15 (1980) ("[Courts] have unanimously held that when a child's life is in imminent danger, medical care is necessary and a parental refusal, no matter on what grounds, constitutes neglect and authorizes state intervention.").

209. *See, e.g.*, State v. Perricone, 181 A.2d 751 (N.J. 1962); Matter of McCauley, 565 N.E.2d 411, 413 (Mass. 1991); In re Guardianship of L.S. & H.S., 87 P.3d 521, 527 (Nev. 2004) ("[T]he child's interest in self-preservation and the State's interests in protecting the welfare of children and the integrity of medical care outweigh the parents' interests in the care, custody and management of their children, and their religious freedom.").

210. B. Jessie Hill, *Whose Body? Whose Soul? Medical Decision-Making on Behalf of*

In contrast, the pledge laws in Florida and Texas explicitly make parents the victor when their rights and their children's best interests collide.[211] If parents want to force their children to recite the Pledge of Allegiance at school every day, the state gives them the power to do so. Yet as discussed in Part II, the compelled speech harms objecting students. Granted, the compulsion is not on par with denying children needed medical treatment, but it does compromise children's well-being and development. A student's body is pressed into service of a message contrary to their conscience.[212] Instead of helping to develop the faculties students will need as future citizens—the ability to question, analyze, and criticize as they contribute to political discourse—these laws trample on them.[213] To the extent that parents have rights vis-à-vis their children, they were meant to promote their children's development and wellbeing, not crush them.

The constitutional right to parent was meant to limit the state, not undermine children. In fact, the state may step in when parents exploit their right to control the education and upbringing of their children to hurt rather than nurture those children.[214] There is a limit to parental power, and it would be a bizarre irony if a right that is generally curtailed when it harms children is used to justify a law that harms children.

D. Parental Rights vs Children's Immaturity

Finally, while the Supreme Court has on occasion upheld a government-imposed requirement that children consult their parents before exercising a constitutional right, it is only when the Court has thought that the potentially serious consequences combined with a child's immaturity necessitated parental guidance. "Certain decisions are considered by the State to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public."[215] Deciding whether to say the pledge is not one of those situations justifying state interference.

As mentioned earlier, minors cannot undergo surgery without parental permission.[216] Nor may they join the military, or purchase a firearm, or marry.[217] The

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Children and the Free Exercise Clause Before and After Employment Division v. Smith, 32 CARDOZO L. REV. 1857, 1860 (2011).

211. Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1284 (11th Cir. 2008) ("The State, in restricting the student's freedom of speech, advances the protection of the constitutional rights of parents.").

212. Seanna Shiffrin argues that the compulsion can affect their minds as well. *See supra* note 127.

213. Hamilton, *supra* note 137, at 1056 ("Young citizens' accumulated experiences in turn can significantly influence the future mature citizens they will become.").

214. Prince v. Massachusetts, 321 U.S. 158, 167 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.").

215. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 72 (1976); *see also* Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.").

216. See supra notes 51–54 and accompanying text.

217. Hodgson v. Minnesota, 497 U.S. 417, 444–45 (1990) ("The State has a strong and

assumption is that these are life-altering decisions, and that those under eighteen may not be mature or wise enough to make them on their own. To join the military is to commit to serve several years, possibly in combat zones.[218] Matrimony is (ideally) for life. Firearms are deadly. Invasive surgery, too, can come with serious risks. "These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[219]

This is not to say that there is consensus about when these choices arise. Some might argue the Court is overly solicitous on matters related to sexuality. Thus, as mentioned in Part I, over fifty years ago the Supreme Court upheld a ban on the sale of "girlie" magazines to minors, precluding their purchase without parental consent.[220] The *Ginsberg* Court recognized that both parental substantive due process rights[221] and minors' First Amendment rights were at stake,[222] but sided with the parents due to what they perceived as the potential harm.[223] The dangerousness of these publications, which are not obscene but do show naked women,[224] may seem dubious to twenty-first century eyes, but at the time, it was uncontroverted that exposure to these sex magazines could damage young readers.[225]

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legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely. That interest . . . justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service . . . ."); *see also* Cornell L. Sch., *Marriage Laws of the Fifty States, District of Columbia, and Puerto Rico*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_marriage [https://perma.cc/6XY6-EK8W] (listing parental consent requirements for each state).

218. *Joining the Military: What You Should Know Before Committing*, MILITARY.COM, https://www.military.com/join-armed-forces/making-commitment.html [https://perma.cc/PZ98-U6S3].

219. *Bellotti*, 443 U.S. at 635.

220. Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[T]he prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.").

221. *Id.* ("The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.").

222. *Id.* at 636–37. The Court noted that the state also had an interest in ensuring the well-being of minors. *Id.* at 640 ("The State also has an independent interest in the well-being of its youth.").

223. *Id.* at 637 ("We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors."); *Id.* at 649–50 (Stewart, J., concurring) ("I think a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.").

224. *Id.* at 631–33.

225. *Id.* at 641 ("In *Meyer v. State of Nebraska*, . . . we were able to say that children's knowledge of the German language 'cannot reasonably be regarded as harmful.' That cannot be said by us of minors' reading and seeing sex material."); Bellotti v. Baird, 443 U.S. 622, 636 (1979) ("The Court was convinced that the New York Legislature rationally could conclude that the sale to children of the magazines in question presented a danger against which they should be guarded.").

The same decision is less likely to be made today. As it happens, attempts to expand the reasoning of *Ginsberg* from sexually explicit to explicitly violent speech failed. In *Brown v. Entertainment Merchants Association*,[226] the Supreme Court struck down a California law requiring minors to obtain parental consent in order to purchase video games containing a high level of violence.[227] The Court held that although the state has the power to protect minors from harm, it did not encompass "a free-floating power to restrict the ideas to which children may be exposed."[228] The Court likewise rejected as justification for the law that it helped further parental rights by ensuring parents decide what is appropriate for their children.[229] Barring protected speech "just in case" parents would disapprove was a questionable means of aiding parental rights,[230] especially given the parents who simply would not care.[231] Accordingly, minors' speech rights prevailed over parental ones. If minors do not need parental consent for violent speech, they certainly do not need it for nonviolent speech.

Abortion is an area where the Court has upheld parental consent for minors.[232] Yet abortion too is readily distinguishable from the pledge. Underlying the Court's acceptance of parental consent laws is the belief that a young woman's decision to end an unwanted pregnancy may not be in her best interest.[233] Since first-trimester abortions are more than ten times safer than childbirth, the risk cannot stem from the physical consequences.[234] Rather, the Supreme Court seems to labor under the belief that abortion may be psychologically traumatic.[235] Its parental consent decisions only hint at this belief with remarks about "grave decision[s]"[236] and "grave emotional

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226. 564 U.S. 786 (2011).

227. The video games allowed players to kill, maim, dismember, or sexually assault images of human beings. *Id.* at 789.

228. *Id.*; *see also id.* at 795 ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.").

229. *Id.* at 802 ("California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate.").

230. *Id.* ("At the outset, we note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority.").

231. *Id.* at 804 ("Not all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games.").

232. Bellotti v. Baird, 443 U.S. 622 (1979); H. L. v. Matheson, 450 U.S. 398 (1981); Hodgson v. Minnesota, 497 U.S. 417 (1990); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990).

233. *Bellotti*, 443 U.S. at 642 (1979) ("Yet, an abortion may not be the best choice for the minor.").

234. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215 (2012), https://www.ncbi.nlm.nih.gov/pubmed/22270271 [https://perma.cc/8WA9-PTDD] ("The risk of death associated with childbirth is approximately 14 times higher than that with abortion.").

235. *Matheson*, 450 U.S. at 412 (describing abortion as "a decision that has potentially traumatic and permanent consequences").

236. *Bellotti*, 443 U.S. at 641 (describing abortion as "a grave decision").

and psychological consequences."[237] Later decisions were plainer: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."[238] As it happens, multiple scientific studies refute this misconception, finding that abortion is overwhelmingly a relief and rarely traumatic.[239] Nonetheless, the Supreme Court premised the constitutionality of parental consent for abortion on the assumption that abortion has such serious ramifications that a minor should not obtain one without consulting with her parents.[240]

Although "the State commonly protects its youth . . . from their own immaturity by requiring parental consent to or involvement in important decisions by minors,"[241] the choice of participating or abstaining from daily recitation of the pledge is not one of them. The consequences are not severe. To abstain from the pledge brings with it no long-term commitment like joining the military or getting married. On the contrary, a student can change their mind from one day to the next.[242] There is no physical risk, as there may be with joining the military, purchasing a firearm, or undergoing surgery. Nor are there any serious psychological consequences, as the Court (perhaps mistakenly) believed would result from reading girlie magazines or having an abortion.

Moreover, at least with older students, the parents do not necessarily have any greater insight than their children.[243] Whether or not to make a political statement, for example, is an intellectual, cognitive decision, and according to developmental scientists, by age fifteen or sixteen "basic cognitive and information-processing abilities are mature."[244] Because these teens' intellectual facilities are as mature as adults',[245] the immaturity justification for requiring parental guidance fails.

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237. *Matheson*, 450 U.S. at 412–13 (expressing concern about "the potentially grave emotional and psychological consequences of the decision to abort").

238. Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

239. *See* Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1179–86 (2014) (summarizing scientific evidence); *see also* Amanda D'Ambrosio, *Study: Relief Most Common Emotion 5 Years Post-Abortion*, MEDPAGE TODAY (Jan 13, 2020), https://www.medpagetoday.com/obgyn/pregnancy/84345 [https://perma.cc/Z9GY-PCF9].

240. *Matheson*, 450 U.S. at 411 ("The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature.").

241. *Bellotti*, 443 U.S. at 637; *see also id.* at 638–39 ("Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.").

242. Tess Slattery, Note, *Freedom from Compulsion*, 85 CHI.-KENT L. REV. 819, 843 (2010) ("First, the choice is not permanent. A child could reverse her or his decision not to participate in the Pledge.").

243. Hamilton, *supra* note 137, at 1109 ("[R]esearchers have consistently found that '[t]he logical reasoning and basic information-processing abilities of 16-year-olds are comparable to' or 'essentially indistinguishable' from those of adults. . . . By age sixteen, these basic cognitive abilities are mature.").

244. *Id.* at 1063–64.

245. Hamilton acknowledges that even though adolescents may have all the necessary

Furthermore, "in those contexts where [students] have achieved decision-making competence, they should correspondingly have decisional autonomy."[246] Whether or not to join the pledge is one of those contexts. Frazier,[247] who was a high school junior, and Landry,[248] who was a high school senior, certainly had the ability to make their own decisions.

In addition, the desired outcome of public education—and many parents' childrearing—is a citizen with the critical thinking skills to choose their own religious, ethical, and political commitments.[249] But to develop these abilities, minors need to practice decision-making skills, especially when the stakes are low.[250] Rather than allowing them to develop these capacities, parental consent pledge laws undercut the student's ability to learn how to participate in society.

Finally, an absolute veto power over their children's contrary wishes does not necessarily follow from a Supreme Court determination that parental guidance would be helpful for minors exercising constitutional rights.[251] Even with abortion, states may require parental consent or notification only if there is a judicial bypass alternative.[252] As the Supreme Court held, the parent's constitutional rights do not

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cognitive abilities to make reasonable decisions, "real-world stressors can confound their capacities and impede their decision making." *Id.* at 1064. However, these stressors, such as the need "to quickly assess and react to risk, to reason while highly stressed or in the heat of passion, to make decisions in unfamiliar circumstances, or to act in the presence of peers" are not present in the pledge decision. *Id.* In fact, students opting not to follow their classmates in reciting the pledge usually make that choice in spite of peer pressure. Thus, young people's vulnerability to these stressors may counsel against letting teens drive or enter combat, *id.*, but they should not impact teens' decision about whether or not to recite the pledge.

246. *Id.* at 1063.

247. *See supra* notes 5–8 and accompanying text.

248. *See supra* notes 9–15 and accompanying text.

249. Hamilton, *supra* note 137, at 1080.

250. Harry Brighouse, *How Should Children Be Heard?*, 45 ARIZ. L. REV. 691, 703 (2003) ("[I]t is often observed, and correctly, that one needs to practice skills in order to develop them, and that therefore children should be given considerable latitude with respect to particular arenas of agency in order for them to become competent.").

251. It is true that the Supreme Court held parents may override their children's substantive due process rights and commit them to a mental health care facility. Parham v. J. R., 442 U.S. 584, 604 (1979) ("The fact that a child may balk at hospitalization . . . does not diminish the parents' authority to decide what is best for the child."). Nevertheless, this case is easily distinguishable and does not support the pledge laws. First, the Supreme Court held that parents do not have "absolute and unreviewable discretion" and may commit their child only if a neutral factfinder determines that commitment is necessary. *Id.* at 604, 606. Second, the minor is assumed, by reason of mental illness, incapable of assessing what is best. *Id.* at 603 ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."). Third, the minor is at real risk of harm. In contrast, the pledge involves a minor that has the maturity to make the decision, and there is no danger to physical or mental well-being.

252. Bellotti v. Baird, 443 U.S. 622, 639 (1979) ("We previously had held in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), that a State could not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy."); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510–11 (1990) ("*Danforth* established that, in order to prevent another person from having an absolute veto power over

trump the daughter's constitutional rights.[253] If parents cannot override their children's rights in situations where the court believes there is a risk to the child, they certainly should not have that power when there is no risk at all.[254] To hold otherwise would mean that "the parents' will would control the child's life and extinguish [their] distinct personhood."[255]

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In sum, although "the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences,"[256] the decision whether to participate or not participate in the Pledge of Allegiance does not carry potentially serious consequences. Even when the Supreme Court has allowed states to mandate parental guidance for important decisions, the Court has rejected handing parents veto power when children's own constitutional rights were also at stake. It makes even less sense to award parents control over students' speech in school when minors are mature enough to make their own decisions. Indeed, exercising this decision making is crucial to developing their capacities as future citizens—the avowed goal of public school education.

V. STRICT SCRUTINY

The bottom line is that any content-based speech regulation must pass strict scrutiny. That is, first, the pledge rule must advance a compelling government interest, and second, it must be narrowly tailored to accomplish that interest. This is basic free speech doctrine. The analysis might be different had the regulation satisfied one of the school speech exceptions, but it does not. The exceedingly poor tailoring of the rule raises the very real likelihood that the state's asserted motive—the already questionable claim that the rule advances the substantive due process rights of parents in Florida and Texas[257]—was really just a pretext for imposing state orthodoxy.

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a minor's decision to have an abortion, a State must provide some sort of bypass procedure if it elects to require parental consent.").

253. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) ("Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.").

254. Hamilton, *supra* note 137, at 1077 ("By denying all others absolute, unchecked power over them, the state ensures that even totally dependent immature citizens remain distinct persons, not wholly subsumed by the will of another.").

255. Hamilton, *supra* note 137, at 1078 ("But if the state were to defer absolutely to a child's parents, then the parents' will would control the child's life and extinguish his distinct personhood.").

256. Bellotti v. Baird, 443 U.S. 622, 635 (1979).

257. Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1285 (11th Cir. 2008) ("We conclude that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech."). While this Essay was in production, Florida passed the Parents' Bill of Rights. As a state law, it has no

A. State's Interest

As should be apparent from Part III, it is doubtful whether Florida or Texas have succeeded in proving that their law advances a compelling government interest.[258] Although parents have a right to choose whether or not their child attends the local public school, they have never had much control over what occurs inside that public school. On the contrary, states generally dispute such claims, raising questions about why in this one instance Florida and Texas suddenly support parent intervention. Although parental guidance may be needed for decisions that a child is too immature to make on their own, especially if a rash decision could harm them, abstaining from the pledge is not one of them. It is quite the reverse: imposing their parents' will is harmful, and parents' substantive due process rights do not extend to inflicting harm on those they are meant to protect.

B. Narrow Tailoring

1. Poor Tailoring

Even assuming the state interest in protecting parental rights were somehow compelling, the law is not well calculated to advancing it. Were ensuring parents' rights vis-à-vis the Pledge of Allegiance the true goal, then the school would require parents' involvement for either choice, not just the state's disfavored one. Florida or Texas schools could have done that by sending students home with questionnaires asking all parents whether they wanted their children to participate or abstain in the daily recitation. Or, a less intrusive permission slip could inform parents that unless they requested their child's participation or abstention from the pledge, their child would decide.[259] Instead, parents who favor the pledge need do nothing; only parents who prefer otherwise must act. "While some of the legislation's effect may indeed

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effect on the constitutional analysis in this Article. But it is worth noting that it is framed as parents' rights against the state: "the state, its political subdivisions, other governmental entities, or other institutions may not infringe on parental rights without demonstrating specific information." While it reaffirms parents' right to make medical decisions for their minor children, parents' rights with respect to school curriculum is limited to accessing their child's school records, inspecting their child's instructional materials, and recusing their children from recitation of the pledge, sexuality education, and dissections in biology. HB 241, https://www.flsenate.gov/Session/Bill/2021/241/BillText/er/PDF [https://perma.cc/NE6N-XYRM].

258. In rejecting a law requiring that parents of public-school students who refuse to pledge be notified of the refusal, the Third Circuit held that "the Commonwealth's stated interest of parental notification is simply not 'so compelling of an interest' as to justify the viewpoint discrimination that significantly infringes students' First Amendment rights." Circle Sch. v. Pappert, 381 F.3d 172, 181 (3d Cir. 2004).

259. Alternatively, "[a] policy compelling Pledge recitation only upon parents' affirmative request would protect the school's stated interest in a manner that restricts significantly less protected speech than does the current policy." Amicus Brief of Public Good and the Center for Constitutional Rights, Frazier v. Smith, No. 08-1351, 2009 WL 1931582, at *20 (U.S. July 1, 2009).

be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want."[260]

The pledge laws' poor tailoring may also be described as overinclusive and underinclusive. In *Brown*, the Supreme Court held that parental permission for violent video games, "as a means of assisting concerned parents[,] . . . is seriously overinclusive because it abridges the First Amendment rights of young people whose parents . . . think violent video games are a harmless pastime."[261] Likewise, parental permission for declining to pledge is overinclusive because it infringes the First Amendment rights of students whose parents' beliefs align with their children's or who are not seeking that kind of power over their children.[262] More obviously, the pledge laws are also grossly underinclusive because, as described above, they do not seek parental approval for the choice to participate.

2. Pretext for State Orthodoxy

Eighty years ago, the *Barnette* Court insisted that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[263] The lopsidedness of these pledge laws reveals that the parental rights justification is simply pretext for imposing the state orthodoxy. Orthodoxy is particularly corrosive to democracy when the censored opinion is one critical of the government.

In essence, the government is trying to accomplish indirectly what it is clearly prohibited from doing directly. That is, *Barnette* established unequivocally that schools cannot force students to pledge allegiance to the flag,[264] as it unconstitutionally forces students "to utter what is not in [their] mind."[265] Moreover,

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260. Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 804 (2011). The *Brown* Court continued: "This is not the narrow tailoring to 'assisting parents' that restriction of First Amendment rights requires." *Id.*

261. *Id.* at 805.

262. There may be all kinds of reasons parents might not opt out that have nothing to do with their desire to have their children recite the Pledge of Allegiance: "[It] could reflect a desire that the child recite the Pledge, but it could equally well reflect the parent's indifference, fear of coming to the attention of authorities (perhaps because of immigration status), fear of making waves or angering authority, illiteracy or shame at poor writing skills, to name only a few possibilities." Amicus Brief of Public Good and the Center for Constitutional Rights, *Frazier*, 2009 WL 1931582, at *20.

263. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

264. This right is so bedrock that school officials who violate it are not eligible for qualified immunity. Amicus Brief of Public Good and the Center for Constitutional Rights, *Frazier*, 2009 WL 1931582, at *3 (citing Holloman v. Harland, 370 F.3d 1252, 1259 (11th Cir. 2004)) (stating that student's right to decline to say the pledge was so clearly established that teacher and principal could not claim qualified immunity for violating that right: "Under Barnette, any reasonable person would have known that disciplining . . . for refusing to recite the pledge impermissibly chills . . . First Amendment rights").

265. *Barnette*, 319 U.S. at 634. Barnette also thought mandatory pledges were bad policy: "individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *Id.* at 637.

the Supreme Court recognized that the pledge may be repugnant for political as well as religious reasons. "Symbols of State often convey political ideas just as religious symbols come to convey theological ones."[266] To circumvent the blatant unconstitutionality of compelled pledges, Texas and Florida give parents the right to compel pledges. As Judge Barkett of the Eleventh Circuit observed in dissent, "this statute in its operation delegates a right to the parent that the State constitutionally cannot itself possess."[267] Yet, as the Judge continues, "The State cannot give what it does not have."[268]

CONCLUSION

Since *Barnette*, it has been established that the state cannot force students to pledge allegiance to the U.S. flag. No subsequent decision on student speech alters that holding. To circumvent this clear rule, Florida and Texas claim their law requiring parental permission to abstain from the pledge furthers parental rights. This is nonsense. Parental rights have little force in schools, and no force when they clash with children's best interests. And compelling students to pledge against their will is not in their best interests. In any event, the laws' poor tailoring highlights that the state is merely using parental rights as a pretext to enforce a state-mandated message. State-enforced orthodoxy is always dangerous, and never more so when the message suppressed is criticism of the state itself. These laws, like the acts that trigger students desire to take a knee, need to go.

266. *Id.* at 632.

267. Frazier *ex rel.* Frazier v. Alexandre, 555 F.3d 1292, 1297 (11th Cir. 2009) (Barkett, J., dissenting).

268. *Id.* (Barkett, J., dissenting); *see also id.* at 1293–94 ("Because the State itself cannot compel speech, it lacks the capacity to delegate to parents the power to compel this speech.").