

THE POWER OF THE PARENTAL TRUMP CARD:  
HOW AND WHY *FRAZIER V. WINN* GOT IT RIGHT

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INTRODUCTION

Unlike men, not all rights are created equal. Since the advent of substantive due process under the Fourteenth Amendment, the Supreme Court has recognized certain rights as “fundamental” and thus worthy of higher protection.<sup>1</sup> When two fundamental rights are in conflict, however, such that the protection of one requires the infringement of the other, the question remains as to which right ultimately trumps. The problem is further compounded when the specific situation places the rights of parents in conflict with the rights of their children.

On July 23, 2008, the United States Court of Appeals for the Eleventh Circuit dealt with such a question in *Frazier v. Winn*.<sup>2</sup> In that case, the court appropriately affirmed that children’s right to free speech is only as expansive as their parents allow, justified by the parents’ fundamental right to rear their children as they see fit.<sup>3</sup> The conflict arose when Cameron Frazier, a high school junior, challenged the constitutionality of a Florida statute that required him to get parental permission in order to be excused from reciting the Pledge of Allegiance in school.<sup>4</sup> Recognizing that compelled speech violates the First Amendment as much as censorship does, the court acknowledged that the State, acting on its own, had no right to

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1. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997) (stating “The Due Process Clause . . . provides heightened protection against government interference with certain fundamental rights and liberty interests” and tracing the historical judicial recognition of those fundamental rights).

2. *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008), en banc denied, 555 F.3d 1292 (11th Cir. Jan. 26, 2009), cert. denied, 120 S. Ct. 69 (Oct. 5, 2009).

3. *Frazier*, 535 F.3d at 1285-86.

4. *Id.* at 1281. The case also dealt with another portion of the statute requiring all students to stand during the Pledge, even if excused from saying it. *Id.* at 1282. The court agreed with the plaintiff on that front and found that severing that portion of the statute removed the constitutional problem without undermining the statute as a whole. *Id.* at 1283.

force students to recite the Pledge.<sup>5</sup> It went on, however, to demonstrate how this case did not present solely an instance of State versus student in a free speech dispute.<sup>6</sup> Rather, it was a situation in which child and parent were at odds, where any action by the State to protect the rights of one necessarily infringed on the rights of the other.<sup>7</sup> In this case, the court ruled that the State must stand with the parent.<sup>8</sup>

In 1943, in the case *West Virginia State Board of Education v. Barnette*, the United States Supreme Court clearly held that compelled affirmation of a belief in school violates the First Amendment.<sup>9</sup> The Florida statute in *Frazier* acted in accordance with that precedent, though, by both offering a means of refusal and requiring that all students explicitly be notified of that means.<sup>10</sup> As the means required students to get parental permission to be excused, the question shifts from First Amendment rights and the State to an intra-family conflict between the student and his parents.<sup>11</sup>

Children and parents<sup>12</sup> have a unique relationship with respect to personal rights. On the one hand, decisions such as *Brown v. Board of Education of Topeka* established that children are persons in possession of fundamental rights protected by the Constitution.<sup>13</sup> Later decisions explicitly included the right of free speech.<sup>14</sup> However, unlike those of any adult, the rights of children are always defined in relation to their parents,<sup>15</sup> and parents have an affirmative right and duty to direct the upbringing and education of their children.<sup>16</sup> In part, this right “rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>17</sup> The parents’ duty similarly rests on their role of preparing the child for the obligations of

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5. *Id.* at 1284-85 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

6. *Id.* at 1284.

7. *Id.* at 1284-85.

8. *Id.* at 1285.

9. 319 U.S. 624, 642 (1943).

10. FLA. STAT. § 1003.44(1) (2007). Specifically, the statute states, “Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge.”

11. § 1003.44(1). The statute states, “Upon written request by his or her parent, the student must be excused from reciting the pledge.” *Id.*

12. As used in this note, the term “parents” includes parents and guardians—whoever is charged with legal guardianship over the student. The issue of who bears the right of parenthood, through genetics, adoption, or other means, is outside the scope of this note.

13. 347 U.S. 483 (1954).

14. *E.g.*, *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 506 (1969).

15. Theresa Glennon & Robert G. Schwartz, *Foreword: Looking Back, Looking Ahead: The Evolution of Children’s Rights*, 68 TEMP. L. REV. 1557, 1562 (1995).

16. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

17. *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

adulthood.<sup>18</sup>

The situation in *Frazier* elicits two separate concerns: (1) whether the state of Florida, having implemented a policy of Pledge of Allegiance recitation in schools, may constitutionally offer a right of refusal only to the parent; and, if so, (2) whether the state should choose such a policy. This note will focus primarily on the first question, as a legal matter. The merits of education by rote memorization and recitation as compared to discussion are certainly worthy of analysis, both by states and by parents. In the case of *Frazier*, however, the choice has already been made in favor of recitation, which shifts the question to the validity of the choice to give only the parent the right to opt out of that recitation. The goal of this note is to create not uniform agreement with that choice, but rather respect for the legal right of Florida to have made it. Additionally, while the situation implicates questions of free speech, this note will focus not on the rights of children against the State, but rather on the relationship between the rights of children and of their parents, as well as what role the State has between them.

This note will analyze various precedents regarding both freedom of speech and parents' fundamental right to direct the upbringing of their children. Ultimately, those precedents can, and should, be read to support the parental right in *Frazier*. The analysis consists of four parts. The first two parts consist of legal analysis, with Part I presenting a summary of Supreme Court precedent regarding both children's and parents' rights and Part II applying that precedent to *Frazier*. The next two parts will look beyond the legal framework of the question at hand, with Part III showing historical precedent for choosing to support parental rights and Part IV presenting modern philosophical support for parental rights.

## I. SUPREME COURT PRECEDENT

At first glance, it would seem that only one precedent would be necessary to decide *Frazier* in favor of the student: *Barnette*, in which the Supreme Court held that the State could not constitutionally compel recitation of the Pledge of Allegiance in schools.<sup>19</sup> But, if there were any doubt that the student, as an individual, had the right to free speech in the context of a school, *Tinker v. Des Moines Independent Community School District*<sup>20</sup> would again seem to settle the question firmly in favor of the student in *Frazier*. However, *Bethel School District No. 403 v. Fraser*<sup>21</sup> and *Vernonia*

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18. *Pierce*, 268 U.S. at 535.

19. *See Barnette*, 319 U.S. at 642.

20. 393 U.S. 503 (students have free speech rights in school).

21. 478 U.S. 675 (1986) (allowing local school board to determine limits on vulgarity in class-

*School District 47J v. Acton*<sup>22</sup> show that minor students' constitutional rights do not extend as far as those of adults and are limited to what is appropriate for children in the school context.<sup>23</sup>

Additionally, because the conflict in *Frazier* is between the student and his parent, the Supreme Court's precedent regarding parental rights is equally pertinent to the discussion. Cases such as *Meyer v. Nebraska*<sup>24</sup> and *Pierce v. Society of Sisters*<sup>25</sup> established parents' fundamental right to "direct the upbringing and education" of their children.<sup>26</sup> Furthermore, *Prince v. Massachusetts* dealt with the extent of that right, and the ability of the State to intervene under the theory of *parens patriae*,<sup>27</sup> while *Wisconsin v. Yoder* illustrated some of the limitations on the State's *parens patriae* power.<sup>28</sup> Finally, *Elk Grove Unified School District v. Newdow* demonstrated a shift from earlier cases in that divorced parents disagreed with each other, and only one disagreed with the State.<sup>29</sup> Notably, the Court ruled in favor of the custodial parent's view, with which the child agreed, and the case still offered no rule for situations in which child is pitted against parent.<sup>30</sup>

### A. Freedom of Speech for Students

#### 1. *Barnette*: Compelled speech violates the First Amendment

*Barnette* is the seminal case regarding forced Pledge of Allegiance recitation<sup>31</sup> and thus the one on which *Frazier* relied heavily to support his case.<sup>32</sup> *Barnette* was decided just three years after the Supreme Court declared, in *Minersville School District v. Gobitis*, that a compulsory Pledge was perfectly legitimate.<sup>33</sup> In both cases, the dispute arose in the context of religious freedom, with Jehovah's Witnesses refusing to recite the Pledge

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room and school assemblies). To avoid potential confusion between *Fraser* and *Frazier*, *Bethel School District No. 403 v. Fraser* will be abbreviated as *Bethel* throughout this note.

22. 515 U.S. 646 (1995).

23. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995) (citing *Tinker*, 393 U.S. at 506).

24. 262 U.S. 390 (1923).

25. 268 U.S. 510 (1925).

26. *Id.* at 534.

27. 321 U.S. 158, 166 (1944).

28. 406 U.S. 205, 220 (1972).

29. 542 U.S. 1 (2004).

30. *Id.* at 9, 17-18.

31. 319 U.S. 624, 626 (1943).

32. See generally Answer Brief of Appellee, *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008) (No. 06-14462-FF).

33. 310 U.S. 586, 599 (1940).

for religious reasons.<sup>34</sup> Only in the Supreme Court's opinion did the focus shift to the issue of free speech.<sup>35</sup>

After *Gobitis*, West Virginia enacted legislation requiring instruction in history, civics, and the Constitution for purposes of "teaching, fostering and perpetuating the ideals, principles and spirit of Americanism . . ."<sup>36</sup> To further that goal, the Board of Education required that a salute to the flag become "a regular part of the program of activities in the public schools."<sup>37</sup> The punishment for "insubordinate" refusal was expulsion.<sup>38</sup> Parents, too, shared in the punishment by extension, as they were subject to fines and imprisonment for their children's truancy.<sup>39</sup>

Members of the Jehovah's Witnesses faith, however, regarded the flag as a "graven image" forbidden by the Second Commandment.<sup>40</sup> As such, saluting and pledging allegiance to it went against their religious faith, and they refused to allow their children to participate.<sup>41</sup> In an effort to compromise, the Witnesses offered a substitute pledge in line with their faith.<sup>42</sup> They were not the only group to protest.<sup>43</sup> The Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs all objected to the required physical salute, claiming it was too much like that of the Nazis—an important concern in the midst of World War II.<sup>44</sup> While the Board made some modifications to the physical salute in response to those objections, it made no concession for the Jehovah's Witnesses.<sup>45</sup>

Religion formed the original framework for the dispute, but the Supreme Court's decision was unconcerned with the religious beliefs of the challengers.<sup>46</sup> Rather, the obligation to salute the flag and recite the Pledge required "affirmation of a belief and an attitude of mind."<sup>47</sup> When compulsory, this affirmation infringed on the freedom of speech of those who dis-

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34. *Barnette*, 319 U.S. 624, 629; *Gobitis*, 310 U.S. 586, 591-92.

35. Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES 433, 448 (Michael C. Dorf ed., 2004).

36. *Barnette*, 319 U.S. at 625.

37. *Id.* at 626.

38. *Id.* at 629.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 628 n.4.

43. *Id.* at 627-28.

44. *See id.*

45. *Id.* at 628.

46. *Id.* at 634.

47. *Id.* at 633.

agreed, regardless of whether the speaker bore directly conflicting religious views or simply did not wish to affirm the belief as stated.<sup>48</sup> The Court reaffirmed that freedom of speech is “susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect,” and that national unity, while permissible through persuasion and example, was not an interest which the State could lawfully promote through compulsion.<sup>49</sup>

## 2. *Tinker*, *Bethel*, and *Acton*: Students’ Constitutional Rights in School

*Barnette* dealt with the fundamental right of free speech in the specific context of the Pledge of Allegiance in school. Other cases show the extent to which students possess fundamental rights in that same school setting. When a fundamental, individual right conflicts with the school’s duty to provide education, the student’s fundamental right is often more restricted than that of an adult. In *Tinker*<sup>50</sup> and *Bethel*,<sup>51</sup> the Court articulated some boundaries of that scope regarding free speech. In *Vernonia School District 47J v. Acton*, the issue was not free speech, but the Court again addressed the scope of a student’s rights.<sup>52</sup>

The events leading to *Tinker* began in 1965, when a group of both adults and children wanted to protest the Vietnam War visibly.<sup>53</sup> They decided to fast and wear black armbands through the holiday season.<sup>54</sup> Three of the children, high-schoolers John Tinker and Christopher Eckhardt, and John’s junior-high sister, Mary Beth, decided to join their parents in this protest.<sup>55</sup> The form of the protest resembled those in which they had all participated before.<sup>56</sup> In response to the plan, their school principals created a new policy to suspend any student who refused to remove the armband.<sup>57</sup>

The district court ruled the policy acceptable because it was based on “fear of a disturbance from the wearing of the armbands,” and therefore corresponded to other rules within the school’s authority.<sup>58</sup> The Supreme Court, however, distinguished the regulation of the armbands from legiti-

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48. *Id.* at 634-35.

49. *Id.* at 639-40, 642.

50. 393 U.S. 503 (1969).

51. 478 U.S. 675 (1986).

52. 515 U.S. 646 (1995).

53. *Tinker*, 393 U.S. at 504.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 508.

mate restrictions on skirt length, hair style, and cosmetics,<sup>59</sup> classifying the armbands as political expression rather than mere fashion.<sup>60</sup> Further, as political speech, the armbands did not involve “aggressive, disruptive action” or a legitimate fear of such things.<sup>61</sup> As a result, the school had no superior interest to allow infringement on the “direct, primary First Amendment rights.”<sup>62</sup>

*Bethel*, by contrast, presents a situation in which the school does have the right to limit the speech of its students.<sup>63</sup> Matthew Fraser made a speech at a school assembly, attended by high school students as young as fourteen.<sup>64</sup> He nominated a fellow student for student office in “elaborate, graphic, and explicit sexual” terms.<sup>65</sup> In accordance with a school policy regarding obscene language, he was suspended for three days.<sup>66</sup> Fraser sued for violation of his free speech rights.<sup>67</sup>

The Court of Appeals for the Ninth Circuit decided in his favor, holding his speech “indistinguishable from the . . . armband[s] in *Tinker* . . .”<sup>68</sup> The Supreme Court reversed, however, because of the “marked distinction” between the non-disruptive political protest of the armbands and the sexual content of Fraser’s speech.<sup>69</sup> Through this difference, the Court created a separate category of student speech from the original *Tinker* standard, which offered protection for all student speech so long as it did not “intrude[] upon the work of the schools or the rights of other students.”<sup>70</sup>

In its opinion, the Court declared that the purpose of the American school system was the “inculcation of fundamental values necessary to the maintenance of a democratic political system.”<sup>71</sup> It recognized that the constitutional “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.”<sup>72</sup> The Court recognized the “inculcation of these values” to be a

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59. *Id.* at 507-08 (citing *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697 (5th Cir. 1968); *Pugsley v. Sellmeyer*, 250 S.W. 538 (Ark. 1923)).

60. *Tinker*, 393 U.S. at 508.

61. *Id.*

62. *Id.*

63. 478 U.S. 675 (1986).

64. *Id.* at 677.

65. *Id.* at 677-78.

66. *Id.* at 678.

67. *Id.* at 679.

68. *Id.*

69. *Id.* at 680.

70. *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

71. *Id.* at 681 (citing *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

72. *Id.*

vital component of education, with teachers and older students modeling “the shared values of a civilized social order” through their conduct both in and out of class.<sup>73</sup> In that regard, the Court held that the proper determination of appropriate manner of speech—both for the classroom setting and for the broader school assembly—rests with the local school board.<sup>74</sup>

*Acton*, while not dealing with free speech, still addressed the extent of students’ constitutional rights within the context of public schools.<sup>75</sup> An Oregon school district noticed an increased level of both drug usage and disciplinary problems among its student body, especially among athletes.<sup>76</sup> After receiving unanimous approval at a parent input night, the school board approved a drug-testing program to combat the trend.<sup>77</sup> Part of the program required all student athletes and their parents to sign a form consenting to uniform drug testing at the start of the year and weekly drawings throughout the season to select random students for re-testing.<sup>78</sup> Seventh-grader James Acton and his parents refused to sign the form, which barred him from participating in sports.<sup>79</sup> He then sued the school district, claiming that the program violated the Fourth Amendment.<sup>80</sup>

The Fourth Amendment protects individuals against unreasonable searches and seizures by the government, which includes urine tests as a “search” and school officials as representatives of the government.<sup>81</sup> Normally, a search is reasonable if the promotion of legitimate governmental interests outweighs the intrusion on the individual’s Fourth Amendment privacy interests.<sup>82</sup> In any law enforcement context, proof of that balance typically requires a warrant.<sup>83</sup> The Court held here, however, that the school context has special needs which take precedence over the need for a warrant; namely, “the substantial need of teachers and administrators for freedom to maintain order in the schools.”<sup>84</sup>

The Court justified its decision by looking both at the rights of children vis-à-vis their parents, and at the role of the school officials standing *in loco parentis*.<sup>85</sup> First, with regard to children and parents, the Court said,

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73. *Id.* at 683.

74. *Id.*

75. 515 U.S. 646 (1995).

76. *Id.* at 648-49.

77. *Id.* at 649-50.

78. *Id.* at 650.

79. *Id.* at 651.

80. *Id.*

81. *Id.* at 652.

82. *Id.* at 652-53.

83. *Id.* at 653.

84. *Id.* (citing *New Jersey v. T. L. O.*, 469 U.S. 325, 341 (1985)).

85. *Id.* at 654.

“[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination.”<sup>86</sup> Even with the most basic of freedoms, the “liberty” right to physically come and go, minors “are subject . . . to the control of their parents or guardians.”<sup>87</sup>

The school then shares in that control through the doctrine of *in loco parentis*.<sup>88</sup> The parent delegates part of his parental authority to place the school *in loco parentis*, and then the school “has such a portion of the power of the parent committed to his charge, [namely] that of restraint and correction.”<sup>89</sup> Here the Court relied on *Bethel* to support the proposition that *in loco parentis* confers the power and duty to “inculcate the habits and manners of civility.”<sup>90</sup> However, the school does not share the lack of constitutional limitations on parental power, in part because compulsory education laws remove the parent’s choice to grant authority voluntarily.<sup>91</sup> Nonetheless, while the Court cited *Tinker*’s proposition that children do not shed their constitutional rights at the schoolhouse gate, they remain distinct from ones outside the school context, with “the nature of those rights [being] what is appropriate for children in school.”<sup>92</sup>

### B. Parental Right to Direct Upbringing

#### 1. *Meyer* and *Pierce*: Official Recognition of the parental right

*Meyer v. Nebraska*<sup>93</sup> and *Pierce v. Society of Sisters*<sup>94</sup> set the foundation for the notion of parental rights in modern Supreme Court precedent. *Meyer*, decided in 1923, recognized educational choices as a “liberty” protected by the Fourteenth Amendment,<sup>95</sup> while *Pierce* affirmed the right to be free from excessive interference without a legitimate state purpose.<sup>96</sup>

In *Meyer*, Nebraska’s legislature had banned any classes in any language other than English with the goal of promoting the common language of English among all its citizens, which included large numbers of immigrants.<sup>97</sup> The purpose behind the legislation was to “promote civic devel-

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 655 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 441 (1769)).

90. *Id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

91. *Id.* at 655.

92. *Id.* at 655-56 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

93. 262 U.S. 390 (1923).

94. 268 U.S. 510 (1925).

95. *Meyer*, 262 U.S. at 399-400.

96. *Pierce*, 268 U.S. at 535.

97. *Meyer*, 262 U.S. at 400-01.

opment” by ensuring that young people learned English and American ideals, and the Court recognized that the State may do a great deal “in order to improve the quality of its citizens.”<sup>98</sup> However, the State’s actions in pursuit of that goal may not infringe on the basic fundamental rights those citizens possess.<sup>99</sup> As a result, the Court overturned Nebraska’s policy because it interfered both with the ability of the children to learn, and with the power of the parents to control their children’s education.<sup>100</sup> While the Court protected both the children and parents, it explicitly articulated only the parental right to rear children as a fundamental liberty right protected under the Fourteenth Amendment.<sup>101</sup>

Two years later, the Court followed *Meyer* with *Pierce v. Society of Sisters*, where it again prevented the State from excessively interfering with parental educational choices.<sup>102</sup> It articulated the right of parents as the right “to direct the upbringing and education of children under their control.”<sup>103</sup> In *Pierce*, Oregon had adopted a statute requiring all children of specified ages, with certain restrictions for handicapped children and other exceptions, to attend public schools.<sup>104</sup> The practical effect of the statute was to shut down private schools by forcing patrons to “choose” the public school.<sup>105</sup> The Society of Sisters, which ran private schools, brought suit to protect its business from that effect.<sup>106</sup> The extended effect, however, and the one with stronger constitutional implications, was that the statute removed education choices from the hands of the parents.<sup>107</sup> According to the Court, the Constitution guarantees the parents’ right to that choice, and legislation may not abridge it unless the abridgement is justified by a legitimate state purpose.<sup>108</sup> While creating high-quality future citizens through education could be a legitimate and laudable state goal, as established in *Meyer*,<sup>109</sup> it did not extend to allow the State to force all education to come from state-run schools.<sup>110</sup>

## 2. *Prince, Yoder, and Newdow*: Further Development Regarding Parental

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98. *Id.* at 401.

99. *Id.*

100. *Id.* at 400-03.

101. *Id.* at 399.

102. *Pierce*, 268 U.S. at 534-35 (1925).

103. *Id.*

104. *Id.* at 530-31.

105. *Id.* at 531-32.

106. *Id.*

107. *Id.* at 534-35.

108. *Id.* at 535.

109. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

110. *Pierce*, 268 U.S. at 535.

### Rights

*Prince v. Massachusetts*, decided shortly after *Barnette*, delineated some of the outer boundaries past which the parental right could not extend.<sup>111</sup> Rather than the educational setting, *Prince* dealt with a mother's religious choice regarding her child, having the child preach and sell Jehovah's Witnesses magazines on a public intersection.<sup>112</sup> However, in addition to being a religious choice, this also violated state child labor laws by essentially employing her child as a salesperson in a public place.<sup>113</sup>

The Court again recognized the cardinal role of parents in the "custody, care, and nurture of the child."<sup>114</sup> It also acknowledged parents' right to raise their children according to the doctrine of a specific religion, as parents have the primary obligation to prepare children for adulthood in ways that "the state can neither supply nor hinder."<sup>115</sup> However, while religious choices were a valid exercise of parental authority, the effect of those choices showed a limitation on that authority.<sup>116</sup> Specifically, the state could act as *parens patriae* to guard "the general interest in youth's well being," through regulation of child labor, school attendance requirements, and other similar restrictions.<sup>117</sup> When the state acted in the public interest, even the parental right could not supersede child labor laws.<sup>118</sup>

*Parens patriae* literally means "parent of [the] country" and is the power of the "state in its capacity as provider of protection to those unable to care for themselves."<sup>119</sup> Much more expansive than the doctrine of *in loco parentis*, under which one acts in the place of a parent or guardian when the parent has specifically handed over the responsibility of care,<sup>120</sup> *parens patriae* nonetheless requires the State to show that its action is "necessary for or conducive to the child's protection against some clear and present danger" in order to impinge upon the superior right of the parent.<sup>121</sup> In the case of *Prince*, the "crippling effects of child employment" proved to

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111. 321 U.S. 158 (1944).

112. *Id.* at 161-63.

113. *Id.* at 159.

114. *Id.* at 166.

115. *Id.* at 165-66.

116. *Id.* at 166.

117. *Id.*

118. *Id.*

119. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). The doctrine of *parens patriae* and how it compares to *in loco parentis* ("in the place of a parent" / Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent) is discussed by Tara Dahl in *Surveys in America's Classrooms: How Much Do Parents Really Know?*, 37 J.L. & EDUC. 143 (2008).

120. BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

121. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

be a sufficiently clear and present danger to justify the State's action under *parens patriae*.<sup>122</sup>

By contrast, in *Wisconsin v. Yoder*,<sup>123</sup> even the State's repeatedly recognized interest in universal education was balanced against the traditional interest of parents with respect to the religious upbringing of their children.<sup>124</sup> At the time of the case, Wisconsin law required school attendance until the student reached the age of sixteen.<sup>125</sup> Amish families testified at trial that the values taught in high school, both public and private, went against the values of both the Amish religion and the Amish way of life.<sup>126</sup> According to their beliefs, the values that further public education would impose on their children bore the risk of endangering their salvation.<sup>127</sup> They argued that adolescence was a crucially formative period and that modern high schools were not equipped to pass on the values specific to the Amish community.<sup>128</sup> Further, forcing Amish teenagers to be separated from those values during that period prevented them from preparing to accept the role that came with adult baptism.<sup>129</sup>

In contrast, the State argued that its role as *parens patriae* both allowed and required it to offer secondary education to all its citizens, regardless of the parents' wishes.<sup>130</sup> The State claimed that if a child chose to leave the Amish community, the lack of secondary education would leave him ill-prepared to face adulthood in modern society.<sup>131</sup>

The Court was not persuaded by the State's argument, instead stating that government regulation of such protected liberties must be directed against harm to "the physical or mental health of the child or to the public safety, peace, order, or welfare."<sup>132</sup> Specific factual evidence supported the distinct lack of such harm.<sup>133</sup> First, Amish communities experienced very little attrition.<sup>134</sup> Second, even if a member wished to leave, the Amish training included enough "vocational" education to prepare for adulthood in modern society.<sup>135</sup>

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122. *Id.* at 168.

123. 406 U.S. 205 (1972).

124. *Id.* at 214.

125. *Id.* at 207.

126. *Id.* at 209.

127. *Id.*

128. *Id.* at 211-12.

129. *Id.* at 211.

130. *Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972).

131. *Id.* at 224.

132. *Id.* at 230.

133. *Id.* at 224.

134. *Id.*

135. *Id.*

*Elk Grove Unified School District v. Newdow* is a recent case involving both parental rights and a Pledge of Allegiance statute.<sup>136</sup> It is also the first in this line of cases to show a conflict between the wishes of the child and those of the parent.<sup>137</sup> In *Newdow*, the Court focused on whether a non-custodial father had the proper standing to sue regarding his child's education.<sup>138</sup> The father, an atheist, took issue with his daughter reciting the Pledge in school, expressing religious objection to the inclusion of the phrase "under God."<sup>139</sup> Neither the daughter nor the mother had any objection to the recitation of the Pledge as it stood.<sup>140</sup> The Court acknowledged that the interests of the challenging parent and the child were not parallel, and were "indeed,[] potentially in conflict."<sup>141</sup>

However, the Court did not have to rule on whose right would prevail between parent and child in conflict, because the mother and daughter were in agreement with each other.<sup>142</sup> As part of the couple's divorce proceedings, the mother had received court-endorsed authority regarding child-rearing decisions where she and the father were in disagreement.<sup>143</sup> Therefore, the Court ruled that the father did not even have standing to sue regarding his daughter's education.<sup>144</sup> This does not mean that the father's rights were trumped by those of the child, but that the parental right to overrule the child's wishes was among the rights of which he had been deprived by the original custody order.<sup>145</sup> The Court's need to focus on the father's standing also implicitly supports the power of this parental right, because the Court gave no credence to, nor so much as mentioned the possibility of, a child's right to free speech within the school having the power to trump the wishes of her parent.<sup>146</sup>

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136. 542 U.S. 1 (2004).

137. *Id.*

138. *Id.* at 14-15.

139. *Id.* at 5.

140. *Id.* at 9.

141. *Id.* at 15.

142. *Id.* at 9.

143. *Id.* at 14.

144. *Id.* at 17.

145. *Id.*

146. *Id.* at 15.

## II. APPLYING SUPREME COURT PRECEDENT TO *FRAZIER V. WINN*

The common thread among all the precedential cases listed, *supra*, barring in part *Newdow*, was that the students and the parents were in agreement, or at least not in vocal disagreement, regarding the choices made. The precedent for the student's individual, fundamental rights within the school context is generally in favor of the student over the State, as shown in *Tinker*. Importantly, though, the extent of a student's constitutional rights can be smaller than that of an adult's, as evidenced by *Bethel* and *Acton*. Similarly, parents prevail against the State in general educational choices, as in *Meyer*, *Pierce*, and *Yoder*, but they do not trump the State when they act against the general public interest, as in *Prince*. However, this same precedent has offered very little on the question of whether the outcome would be the same were the parents to disagree with the student.

This note does not dispute that when the family is united in support of those choices, the State must typically bow to the shared fundamental rights of the family, and therefore also to the rights of the individual within. It is the application of this precedent to a family in conflict with itself, however, that *Frazier* requires.<sup>147</sup> This section will show how the precedent can be read to support the proposition that when the child and parent are in conflict, and the State's only course of action is to support one's rights at the cost of the other's, the State should stand with the parents. None of the cases require the school to place the choice of whether the student shall recite the Pledge of Allegiance solely with the parents. But neither do any of them forbid it, should the State choose that statutory scheme.

### A. *The Frazier Statute in Light of Students' Rights in School*

On its face, *Barnette* seems the most analogous in fact pattern to *Frazier*, and thus appears to have the clearest application of precedent. Both involve a school requiring students to recite the Pledge of Allegiance, both have a student refusing, and both offer punishments for the student. However, there the similarities end. The requirement in *Barnette* offered no exceptions,<sup>148</sup> while the statute in *Frazier* not only has an opt-out provision, but also requires that all students be notified of it.<sup>149</sup> The students in *Barnette* bore the initial punishment for refusing to recite the Pledge, but their parents bore the ultimate responsibility for the children's actions,

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147. *Frazier*, 535 F.3d at 1279.

148. *Barnette*, 319 U.S. at 629.

149. *Frazier*, 535 F.3d at 1281.

including criminal penalties.<sup>150</sup> Under the *Frazier* facts, any student who refused to say the Pledge either did it legitimately, with his parents' permission, or against the wishes of his parents, thus bringing any penalty upon himself alone.<sup>151</sup>

The greatest difference between *Barnette* and *Frazier*, however, is the number of actors involved. *Barnette* involved only two: the State and the families.<sup>152</sup> *Frazier*, by contrast, expands to three: the State, the parents, and the students.<sup>153</sup> The Court in *Barnette* stated that the "freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual."<sup>154</sup> Indeed, the case stood out from typical cases requiring State intervention, because there was no determination necessary of "where the rights of one end and those of another begin."<sup>155</sup>

*Frazier* stands in marked contrast to *Barnette* because Cameron Frazier rested his entire case on the fact that the Florida statute infringed upon his rights and his alone.<sup>156</sup> The statute in question satisfies the required standard set forth in *Barnette* by offering a means of refusal.<sup>157</sup> Frazier's contention—that the means of refusal are not sufficient—presents a significant deviation from the *Barnette* fact pattern by introducing a third party. This changes the necessary analysis to one where "determination of where the rights of one end and those of another begin" is vital to the conclusion. After all, if the student and his parents were of one accord, no conflict would remain. The speech would neither be compelled nor forbidden, but rather independently chosen or not chosen, thus removing the issue of free speech infringement altogether.

Additionally, while the assumption of parental preference for recitation makes a situation of compelled speech more likely, the Court read the statute to also implicate the reverse: if a parent sent in a written request for the child to be excused from the Pledge, the school must forbid the child to say it.<sup>158</sup> This lengthens the distance from *Barnette* in that it shifts the question from solely a compelled speech issue to one of speech in general. That issue then becomes one of how much control the parents should have over the speech of their child—in general, in the school, and in using the State as a tool for that control.

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150. *Barnette*, 319 U.S. at 629.

151. *Frazier*, 535 F.3d at 1283.

152. *Barnette*, 319 U.S. at 630.

153. *Frazier*, 535 F.3d at 1284-85.

154. *Barnette*, 319 U.S. at 630.

155. *Id.*

156. *Frazier*, 535 F.3d at 1281.

157. *Id.* at 1283.

158. *Id.* at 1285.

Even without that final step to the paradigm of an active parental right subordinating the child's rights, the ideology regarding children's individual rights allows the interpretation of the *Frazier* statute as satisfying the demands of *Barnette*. As the Court re-emphasized in 1995, a minor's rights of self-determination, of which speech is surely one, remain at the control of his parents.<sup>159</sup> With that framework in place, the choice by the school board to place the right of refusal solely in the hands of the parents is not an illegitimate one. Though the school board in *Acton* chose to require consent from both the student and the parents, nothing in the Court's decision indicates that the program would have failed had the consent only been required of the parents.<sup>160</sup> Indeed, the Court relied on *Bethel* and *Tinker* to reiterate that *in loco parentis* confers the power to "inculcate habits and manners of civility," and further emphasized that students' constitutional rights within an educational context are limited to a nature appropriate to the situation.<sup>161</sup> This reasoning would seem to indicate that a choice to give the ultimate decision-making power to the parents would not be held unconstitutional.

#### B. The Frazier Statute in Light of Parental Rights

Viewing the *Frazier* statute in light of a student's rights alone admittedly allows more room for interpretation regarding the outcome. A student's constitutional rights within school are more limited, as is appropriate for a minor in the context of an institution of learning, but that does not necessarily prevent him from exercising self-determination regarding an affirmation of belief such as the Pledge of Allegiance. The question, however, is not one of his rights alone. The additional parental factor here, as one that protects and encourages both the parental right and the parental duty of directing the upbringing of their children, shifts the balance further in favor of affirming the *Frazier* decision.

The question is not whether the State must, but rather whether the State may implement a statutory scheme such as the one in *Frazier*. The precedent set by *Meyer* and *Pierce* prevents the State from excessively interfering in the educational choices of a parent without a legitimate State purpose.<sup>162</sup> Similarly, while the State needs a legitimate purpose to infringe upon a student's constitutional rights in the educational setting,<sup>163</sup> the court

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159. *Acton*, 515 U.S. at 654.

160. *Id.* at 650.

161. *Id.* at 655-56 (quoting *Bethel*, 478 U.S. at 684).

162. *Pierce*, 268 U.S. at 535 (1925).

163. *Acton*, 515 U.S. at 653; *Bethel*, 478 U.S. at 680.

has recognized certain educational standards as sufficient purposes.<sup>164</sup> Since the parental right is predicated on the parents' role in the upbringing, including education, of their children,<sup>165</sup> it too could be viewed as falling into this educational need to limit the student's personal constitutional rights.

This is not to say that the parental right requires the State, any more than the student cases listed above, to enact the type of statute that Florida chose in *Frazier*. However, in light of the parental right and the legitimate State purpose in supporting that right, the State should remain free to choose such a course.

After *Meyer* and *Pierce*, *Prince* clarified that the parental right was not absolute.<sup>166</sup> Even so, while the State may act in opposition to the parent under the notion of *parens patriae*, that action must still only be to protect the child "against some clear and present danger."<sup>167</sup> Despite *Prince*'s violation of child labor laws in that circumstance, parents' choices regarding education, instilling loyalty to one's country, or inculcating the habits of civility rarely reach into the realm of posing a clear and present danger to their children.

Indeed, the Court in *Yoder*, in dealing with a compulsory education law of the type deemed justifiable under *parens patriae* in *Prince*, found that even legitimate exercise of *parens patriae* could be limited by the parental right.<sup>168</sup> As with the majority of the cases seen here, the Court considered the desires of the parents and children together.<sup>169</sup> Though the state was acting under *parens patriae* in favor of children and its own interests in quality future citizens, it argued its right to enforce compulsory attendance on Amish parents the same as on other parents, as the punishment for disobedience was borne by the parents, not the children.<sup>170</sup> The Court therefore viewed the matter entirely in the context of the parental rights.<sup>171</sup>

While it refused to consider the situation in which the child and parent were in conflict over the exercise of religious and educational rights, as it was not at issue there, the Court did explicitly state that "such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recog-

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164. *Acton*, 515 U.S. at 653; *Bethel*, 478 U.S. at 680 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

165. *Pierce*, 268 U.S. at 535.

166. *Prince*, 321 U.S. at 158.

167. *Id.* at 167.

168. *Yoder*, 406 U.S. at 231.

169. *Id.*

170. *Id.* at 230-31.

171. *Id.*

nized in this Court's past decisions."<sup>172</sup> Further, the tone of the entire opinion respected the parental concern of maintaining the Amish way of life through raising children in accordance with Amish values.<sup>173</sup> Taken in combination with the tone, this statement offered 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.<sup>174</sup> Rather, the parents' duties toward the child "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."<sup>175</sup> The Court offered limits on such inculcation only if the parent's decisions "jeopardize[d] the health or safety of the child, or [had] a potential for significant social burdens."<sup>176</sup>

More recently, the Court in *Newdow* came closest to the issue of parent and child in conflict, though still without taking a clear stance on that issue.<sup>177</sup> While the father's interest and that of his child were in conflict, the Court's decision did not rest on that fact.<sup>178</sup> Rather, the father's freedom to direct his child's upbringing was limited there because he had been deprived of that right through a court's custody order.<sup>179</sup> The need for the Court to decide the father's standing at all implicitly supports the power of parents' rights, because if the child's right had the power to trump that of her father, his custodial standing would have been of no import.<sup>180</sup>

Further, though the father in *Newdow* was limited in his control of the State regarding his daughter, the Court acknowledged that a "next friend" could "reach outside the private parent-child sphere" to control a third party—that is, the State.<sup>181</sup> While a next friend would be limited to a parent with custodial rights, the associated full extent of parental rights further lends credence to the argument in *Frazier* that the State was legitimately acting at the behest of parents.

These cases lend support to the court's decision in *Frazier* to favor the parental right to compel speech in directing the upbringing of one's children. The line of cases limiting the State's ability to infringe on a student's constitutional rights all placed such limits in situations where the student and parents were in a unified stance, and equally established the State's

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172. *Id.* at 231.

173. *Id.*

174. *Id.*

175. *Id.* at 233.

176. *Id.* at 233-34.

177. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 15 (2004).

178. *Id.* at 15-16.

179. *Id.* at 17.

180. *Id.* at 1.

181. *Id.* at 17.

ability to infringe in furtherance of a legitimate State interest. The parental-right line establishes a fundamental right worthy of State protection. It also establishes the inference that when parents and minor children are in conflict over parenting choices, the State should support the parent's childrearing choices absent a "clear and present danger" to the child. In other words, absent a clear harm to a child, that child possesses self-determination rights with respect to the State only to the extent the parent wishes.

The fact that the parental choice in *Frazier* involved recitation of the Pledge does not meet the threshold of clear and present danger. While modern educators debate the validity of rote recitation in learning, there is still evidence to support the idea that it can be highly effective.<sup>182</sup> Moreover, recitation of a belief without true adherence to it can also lead to familiarity, self-analysis, and an ultimate shift to that true adherence.<sup>183</sup> As such, it is both a legitimate educational and parental choice, as well as far from a danger.

The power given to the school through *in loco parentis*, while not giving the school complete immunity to constitutional concerns, does give the school the ability to make choices in furtherance of education that would be forbidden if implemented against adults. Thus, while national unity is not an interest which the State may lawfully protect through compulsion,<sup>184</sup> parental educational choices could fall into a category enabling compelled speech.

Again, the question in *Frazier* is whether it is permissible, at the request of the citizenry and through the democratic process, to create a statute which sets certain educational standards while simultaneously offering an out for dissenters. The State could implement a scheme that allows either student or parent to make the choice, and some states have.<sup>185</sup> Similarly, instead of presuming that silent parents wished their children to recite the Pledge, the State could implement a scheme requiring an affirmative statement, to recite or to refrain, from each student's parents. However, while those schemes are certainly acceptable, neither is required of the State, and their availability does not serve to undermine the scheme chosen by Florida in *Frazier*. In fact, the prevalence of other state and federal statutes, both in

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182. See, e.g., Carol Muske-Dukes, *A Lost Eloquence* 27 *Am. Educ.* 42, 42-3 (2003) (discussing advantages of rote memorization of poetry).

183. Blasi & Shiffrin, *supra* note 35, at 461.

184. *Barnette*, 319 U.S. at 639-40.

185. See, e.g., Idaho Code § 33-1602(5) (2008) ("No pupil shall be compelled, against the pupil's objections or those of the pupil's parent or guardian, to recite the pledge of allegiance or to sing the national anthem."); Burns Ind. Code Ann. § 20-20-5-0.5 (2008) ("A student is exempt from participation in the Pledge of Allegiance . . . if: (1) the student chooses not to participate; or (2) the student's parents choose to have the student not participate.");

the realm of the Pledge of Allegiance and in other aspects of public education, that give sole choice to parents ultimately supports the choice in *Frazier* as legitimate on the part of both parents and the State.<sup>186</sup> Further, while some of the available alternatives would serve to remove the specific conflict between the rights of children and those of their parents, they could also potentially undermine the right of the parent on its own by essentially placing the parent and child at equal status level. When states place the choice solely in the hands of the parents, they are in a sense affirming, at an official, legal level, the parents' right to make that decision regarding their own children.

### *C. Impact of the Minor's Age in the Frazier Situation*

The court in *Frazier* only decided the facial constitutionality of the Florida statute, and it even stressed that it "decide[d] and hint[ed] at nothing about the Pledge Statute's constitutionality as applied to a specific student or a specific division of students."<sup>187</sup> The court's emphasis on the fact that it decided only the facial constitutionality, and not the as-applied constitutionality, offers the possibility that the court viewed age as a pertinent factor for who should have the right to decide the student's speech. The implication of that emphasis could be that the court would have held differently if the statute were evaluated solely in terms of its application to *Frazier*, a high-school junior, or even to a "division" of students in that upper age range. The inevitable shift in a child's mental and judgment capabilities through adolescence could support a different standard for the comparison of rights when dealing with teenagers as opposed to younger children, but that view creates unnecessary complications and difficulties.

Resources for decision-making, both internal and external, increase tremendously as children grow older.<sup>188</sup> As children become teenagers and approach adulthood, their physical, mental, emotional, and legal status more closely resembles that of an adult.<sup>189</sup> However, that similarity is not enough to simply grant them full rights of adulthood. Our society has placed the age of "adulthood" at eighteen years. While that threshold could potentially be challenged as arbitrary, or no longer accurate with regards to modern adolescent development, it nonetheless remains in place. Some

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186. See, e.g., Tex. Educ. Code § 25.0820(c) (2007) (excusing student from Pledge upon written request from parent); Cal Ed Code § 49091.10 (2007) (giving parent the right to view all curricula and instruction); ORS § 336.035 (2007) (giving parent right to request child be excused from any class within certain supplemental courses).

187. *Frazier*, 535 F.3d at 1286.

188. Harry Brighouse, *How Should Children be Heard?*, 45 ARIZ. L. REV. 691, 702 (2003).

189. *Id.*

teens possess the mental and emotional judgment of adulthood before the age of eighteen; on the other hand, some adults of thirty-odd years have not yet reached that full maturity. Additionally, as the Court recognized in *Yoder*, adolescence is a period during which children are formed into adults and the parental role in refining the values they have passed on throughout their children's initial years remains crucial.<sup>190</sup>

While there are always exceptions to the general rule, the government has an obligation to set the age of majority at an age where it is "reasonable to expect most people to approximate the relevant competences."<sup>191</sup> Some individuals will always fall outside those assumptions, but the State does not have the capability, in terms of either efficiency or judgment, to deal with each individual on a case-by-case basis.<sup>192</sup> Consequently, a generally applicable rule regarding ascension to adulthood and the rights thereof is both logical and just. Further, even if the State had the resources to make such individual determinations, doing so would undermine overall parental authority as children would constantly challenge it, instead of restricting such challenges to the extraordinary circumstances in which a child seeks emancipation.

### III. HISTORICAL PRECEDENT FOR PARENTAL RIGHTS

In addition to the precedent of the Supreme Court, historical precedent shows that children's rights to self-determination are nearly always subordinate to the control of their parents.<sup>193</sup> While the Founders of the United States never enumerated "parental" or "children's" rights, it was not because they saw no value in them, but simply because they were operating within a different paradigm of articulation.<sup>194</sup> The Founders considered "Americans' 'domestic habits' as necessary 'preconditions for maintaining the constitutional Republic.'"<sup>195</sup> Within those domestic habits were "traditions of protecting and preparing children for citizenship, and of parental authority and family integrity."<sup>196</sup> The Founders did not enumerate those traditions as rights; they were instead considered "cornerstones of liberty."<sup>197</sup>

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190. *Yoder*, 406 U.S. at 211-12.

191. Brighthouse, *supra* note 188, at 704.

192. *Id.* at 703.

193. *Acton*, 515 U.S. at 654.

194. Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 *Loy. U. Chi. L.J.* 321, 338 (1995-96).

195. *Id.*

196. *Id.*

197. *Id.*

Even before the foundation of the United States, beyond American Jurisprudence, the philosophical foundations of the Constitution support the idea of a fundamental right in parenting.<sup>198</sup> One proponent of such was John Locke, who saw two private domains: property and family.<sup>199</sup> He viewed family as completely autonomous, except in the case of a legal controversy between a husband and wife (as in divorce).<sup>200</sup> As a result, “the family was almost hermetically autonomous from government” in the matters of procreation and the rearing of children.<sup>201</sup> Locke also advocated the need for a separation of control—for the family to control the intellectual and ethical development of children, in order that the children grow up to be mature citizens.<sup>202</sup> In his estimation, such mature citizens needed to be capable of re-establishing government when it dissolved and resisting government when it became arbitrary or opposed the fundamental values of life, liberty, and estate.<sup>203</sup>

This paradigm would actually tend to work against the establishment of State-run education in the first place, because a child educated by the State is more likely to learn only the point of view of that State; therefore, the resulting adult would be less capable of resisting an arbitrary government, or even, in fact, recognizing one. With that in mind, for public education to be truly effective in creating mature citizens, it must involve not just the State, but the family and the community as well. However, while Locke speaks of resisting and replacing bad governments, active support would be equally necessary to sustain a non-arbitrary government that protects the values of life, liberty, and estate. For that reason, an interest in instilling patriotism is valid for both the family and the State. The balance must remain, however, with ultimate control on the side of the parents; otherwise the discernment necessary to determine whether one’s government is worth resisting or worth reinforcing will disappear.

Though the statute in *Frazier* could be viewed as the government’s attempt to coerce patriotism through the Pledge, the court illustrates that this compulsion was actually at the request of the parents whose votes led to the statute in question.<sup>204</sup> As such, although the government cannot force such

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198. See Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195 (1998-1999).

199. *Id.* at 1205.

200. *Id.*

201. *Id.*

202. *Id.* at 1206.

203. *Id.*

204. *Frazier*, 535 F.3d at 1285 n.6 (stating that while the statute starts with the presumption that parents do not object to their children reciting the Pledge, the elected Florida legislature probably knows more about what the parents in its state would prefer; as such, parents show express intent

affirming speech without consent of the governed,<sup>205</sup> it can and should act at the command of the governed. The fact that the wishes of the governed coincide with the desires of the State, in this instance to have civil activities such as the Pledge of Allegiance be a consistent part of its children's education, does not undermine the original source of the desire.

It is also important to remember that the ideals supported in *Frazier* are broader than just those associated with the Pledge. The general willingness of the State to involve parents in the educational system, and to support the parents in such an endeavor, further establishes to the children that the government serves at the will of the people. It thus fosters exactly the type of civil education that Locke encouraged, which gives citizens the foundation to ensure that the government protects the rights and liberties of the governed.

In addition to its place in philosophy, the modern concept of a parental right typically falls under the Due Process Clause of the Fourteenth Amendment.<sup>206</sup> The historical framework that brought this Amendment into being is vital to a clear understanding of how to apply the rights it implicates. Both the anti-slavery traditions leading up to it and the Fourteenth Amendment itself recognized that rights of liberty and citizenship require self-determination, which in turn requires rights to social influence of one's family, and a community free from the State's control.<sup>207</sup> Slavery included not only the fact that humans were literal property, but also the fact that, as property, they had no opportunity for self-determination for themselves or for their children as against other citizens, nor did they have any control as against the State.<sup>208</sup>

Courts have not expressly relied on this historical foundation for the Fourteenth Amendment in dealing with Fourteenth Amendment cases, much less in the specific realm of parental rights.<sup>209</sup> However, the grant of rights previously denied to the newly-freed slaves, including the right to choose and maintain familial bonds, offers a clear indication of the liberties that the Fourteenth Amendment was designed to protect for former slaves and free alike.<sup>210</sup> With that basis, the application of this right when parents and children are in conflict only serves as State support for the authority of

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through written objection or implicit request through their silence).

205. See *Barnette*, 319 U.S. at 624.

206. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1349 (1993-1994).

207. *Id.*

208. *Id.*

209. *Id.* at 1361.

210. *Id.*

parents, which in turn stabilizes the family bonds.

#### IV. MODERN PHILOSOPHICAL SUPPORT FOR PARENTAL RIGHTS

Historical precedent, however, only goes so far. Perhaps the theories of John Locke, developed prior to the inception of our entire country, or even the underpinnings of the Fourteenth Amendment put in place over a century ago, would seem no longer applicable against the modern understanding of child development. There is still modern support, however, for the validity of these. Professor Harry Brighthouse maintains that even today parents' rights must remain superior to those of children in order for parents to be effective in creating the next generation.<sup>211</sup> He develops this view by separating children's overall rights into two separate categories: welfare and agency.<sup>212</sup> Welfare rights relate to one's well-being, including sustenance, shelter, education, and healthcare.<sup>213</sup> In contrast, agency rights are those of self-determination, such as the rights to vote, marry, associate freely with others, or follow a specific religion.<sup>214</sup> In other words, the rights which permit one to "act on one's own judgments,"<sup>215</sup> According to this framework, the right to free speech is clearly an agency right: it has nothing to do with basic food, shelter, or other physical needs that constitute the "welfare" of the child.

The importance of this distinction would have been minor in a time when children were, if not quite the old adage of "seen and not heard," at least "seen, and perhaps heard, but not listened to."<sup>216</sup> However, with the modern trend of both parents and courts listening to children's expressed desires, the amount of credence given to the child's view rests greatly on which type of interest serves as a basis to support the child's desire.<sup>217</sup> Child "liberationists" would deem the child's voice the sole and final authority over all decisions regarding the child.<sup>218</sup> However, if given life, this view would severely undermine the parental right to direct the upbringing and education of his child, both within the home and outside it.

In contrast, Brighthouse proposes that while children's voices should be listened to, in all cases where the children speak, the credence given should

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211. Brighthouse, *supra* note 188, at 695 (2003).

212. *Id.* at 696.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 691.

217. *Id.*

218. *Id.* at 692.

not be authoritative, but rather consultative.<sup>219</sup> This is true even in situations where an adult's voice would be authoritative without question, such as with regard to a fundamental right.<sup>220</sup> The final authoritative voice for the child, by contrast, rests with the adult who is "morally charged with protecting the interests of [the child]."<sup>221</sup> However, rather than the authority that an adult has over self—"unconditional license to do what [one] wants with respect to [oneself]"—the authority the adult has over the child is within the context of strict rules.<sup>222</sup> Just as a teacher's authority must be used in furtherance of education, and a judge's in furtherance of the law, the authority of an adult charged with protecting the interests of the child must, in fact, be used to discern and protect those interests.<sup>223</sup>

This responsibility in the hands of the adult comes from the inherent differences between children and adults that require that children have a guardian in the first place. Namely, children are dependent on others for their well-being, they are vulnerable to others' decisions, and they are by their very nature only temporarily in this state.<sup>224</sup> This temporary status markedly separates children from other classes which have fought for equal rights—such as slaves and women—because children have a natural avenue to exit this status, and in fact cannot avoid exiting to full adulthood and its accompanying rights.<sup>225</sup> Similarly, children are separate from those other classes because their youthful nature means they lack the rational and emotional judgment to make decisions in their own best interests—again a state from which they have a natural exit over time.<sup>226</sup>

The adult in charge must protect both the child's present and future interests. With regard to welfare, the adult's protection has present impact in giving the child a happy childhood, which also serves to protect the child's future interest in a flourishing adulthood.<sup>227</sup> Additionally, while the child cannot usually enforce his right to welfare (shelter, education, the care of a loving adult), he still has the right and the State has an interest in enforcing it,<sup>228</sup> which it can do under the concept of *parens patriae*. The adult truly looking out for the child's interest will support that right, but if he should

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219. *Id.* at 693.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 698-699.

225. *Id.* at 703.

226. *Id.* at 698-699.

227. *Id.* at 700.

228. *Id.* at 701.

fail, the State has an interest in holding him accountable.<sup>229</sup>

Agency rights, in contrast, ultimately encompass the judgment of how to act.<sup>230</sup> In this case, granting unfettered agency rights to children, exactly as we grant them to adults, in fact endangers “both their current welfare and their prospective agency interests.”<sup>231</sup> While adults have the emotional and mental capacity to analyze various possibilities and their logical consequences, methods to deal with the consequences, and the ability to seek out advice when necessary, children are simply incapable of such judgment by virtue of their state of childhood.<sup>232</sup>

The emphasis on a child’s voice as consultative is, on the one hand, a limitation of it, which is justifiable because the child is often not as well-informed, nor emotionally capable of processing all the factors.<sup>233</sup> On the other hand, the consultative aspect empowers the child, in that the adult should listen to the child as part of the process of determining the child’s best interest.

Put in the context of *Frazier*, parents have an obligation to prepare their child for adulthood and part of that obligation is “inculcating” him with moral values. As such, the adult can view more aspects of the situation over a longer time period than can the child, which makes the adult more likely to act in the child’s best interest. However, if the child expresses an opinion one way or the other regarding recitation of the Pledge, the adult who pays attention to both the opinion and the justification behind it can incorporate it into the decision of whether the child recites it or not. In this case, age will play a role as well; a five-year-old protesting is much more likely to be simply rebelling than a teenager articulating his philosophical problems with saying the Pledge. In the latter case, if a parent simply forces a child to act as the parent wishes, without explanation, it would not be acting in the child’s best interest because it would imply to the child that his opinion carries no weight whatsoever. On the other hand, if the parent actively listens and reciprocates the communication by explaining why he prefers that the child continue to recite the Pledge, he has shown respect for the child’s view. Through that action, he empowers the child to continue thinking and making independent judgments, even if the child is still restricted at the moment by the parent’s final decision.

Outside the interaction between parent and child, of course, remains the ever-present actor of the State. If the child’s voice is merely consulta-

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229. *Id.*

230. *Id.*

231. *Id.* at 701-02.

232. *Id.* at 702.

233. *Id.* at 708-10.

tive, and the adult has final authority, when can the State intervene to trump the authority of the parent? Professor Emily Buss argues in an article on parental rights after *Troxel v. Granville* that the children themselves are best served when the power of the State to intervene is limited to “circumstances where parental incompetence is most serious and demonstrable.”<sup>234</sup> Absent such circumstances, parents are generally in the best position to make good judgments on their children’s behalf,<sup>235</sup> both through knowing their children and listening to their children’s voices, and through maintaining consistency in the children’s upbringing. Furthermore, she argues that parents who are given “near absolute control” will actually perform better.<sup>236</sup> This comes both from the fact that giving parents freedom will increase their enjoyment of, and thus dedication to, the mission of child-rearing, and that intrusions—even those designed to help—often serve to undermine parental effectiveness.<sup>237</sup>

These practical reasons support extensive parental control, which in turn implies that the scrutiny required to limit the child’s fundamental rights is necessary to support the parental control. This in turn affirms that the parental right is a fundamental one. But aside from the positive benefits of parental enjoyment of, dedication to, and effectiveness at the task of parenting, the right of the parent should be categorized as fundamental. Regardless of the merits of the choice made, we as a society and a government aggressively protect individuals’ rights, believing that the individual’s choice is better simply as a result of it being the individual’s.<sup>238</sup> The child’s dependency on the parent for both welfare and agency interests support the idea that the child is, to an extent, an extension of the parent. Contrary to minimizing the child’s identity solely for the benefit of the parent’s, this idea that the child “belongs” to the parent has positive psychological value to the child in giving him a firm sense of belonging and familial identity, one which cannot be undermined by State action.<sup>239</sup> The emphasis on children’s rights alone, outside this familial framework, “speak[s] only of autonomy rather than need, especially the central need for relationships with adults who are themselves enabled to create settings where children can thrive.”<sup>240</sup> Support for these relationships, as a result of supporting parental autonomy, can only serve to fulfill both children’s needs and their

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234. Emily Buss, *Adrift in the Middle: Parental Rights after Troxel v. Granville*, 2000 SUP. CT. REV. 279, 287 (2000).

235. *Id.*

236. *Id.*

237. *Id.* at 290-91.

238. *Id.* at 291-92.

239. *Id.* at 292-93.

240. Wardle, *supra* note 194, at 325.

rights.

To serve the best interests of the child, the parent should listen to him and let him act as a consultant. But as a matter of law, the parent remains the final authority, even if, or perhaps especially if, the parent and child are in disagreement as to the best course of action regarding the child's upbringing. Only then can the parent remain effective in parenting, and at the same time can the child remain confident in his identity within the family.

#### CONCLUSION

Florida did not violate the Constitution when it enacted the Pledge of Allegiance statute at issue in *Frazier*, but rather met the requirements of *Barnette* by allowing a means of refusal. In limiting that avenue of refusal to the parents, and not the students, the State did not infringe upon the students' free speech rights, but chose to support the parents' right to direct the upbringing of their children. Parents, obligated to prepare children for adulthood, have the right to choose the specifics of how to do so without interference from the State, except in the cases where those parents present a clear danger to either the children or the general public interest. Desiring their children to recite the Pledge of Allegiance falls into neither of these categories. Further, the State's involvement in the process remains constitutional, despite the fact that it would have been unconstitutional for the State alone to require students to recite the Pledge. Instead, the State's action is at the behest of the parents and, in light of the relationship between parents and their children regarding self-determination choices, serves to give active recognition to the important role that parents fulfill in raising the next generation of citizens.