Sign Here: How Parental Waivers Exceed the Bounds of Parents' Fundamental Rights

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I. INTRODUCTION

The purpose of exculpatory contracts has always been to mitigate businesses’ and institutions’ economic risk. The purpose of parental due process rights is to promote child well-being by limiting state intrusion into family life. Since exculpation entered the domain of parental rights in the twentieth century, the result has been a proliferation of waivers by which a parent signs away their child’s right to sue a recreational activity provider for negligence if the child is injured while participating. Activity providers favor parental waivers because they protect their bottom line. And even though many courts see through this and invalidate parental waivers to protect children, there are still many other courts that have not prioritized child welfare over commercial interests or that lack binding authority on the issue. This Note argues that courts that use parental rights to justify upholding parental waivers misapply the parental-rights doctrine, effectively coopting a doctrine aimed at promoting child welfare to protect businesses and activity providers instead.

3 After the Supreme Court issued its first parental-rights cases in the 1920s, it still took decades for courts to start addressing the validity of parental waivers. See Alfred C. Yen & Matthew Gregas, Liability Waivers and Participation Rates in Youth Sports: An Empirical Investigation, 10 ARIZ. ST. SPORTS & ENT. L.J. 1, 5–6 (2020). Now they are commonly litigated throughout the United States. See cases cited infra notes 158, 160.
4 See, e.g., Woodman ex rel. Woodman v. Kera LLC, 785 N.W.2d 1, 11 (Mich. 2010) (“Defendant openly concedes that the principal impetus for seeking enforcement of parental preinjury waivers is the protection that waivers afford its business in the face of the increasingly litigious nature of society.”).
5 See infra note 158 and accompanying text.
6 States have used parental authority as a pretext to enforce other values on numerous occasions. See infra notes 106–07 and accompanying text; Caroline Mala Corbin, The Pledge of Allegiance and Compelled Speech Revisited: Requiring Parental Consent, 97 IND. L.J. 967, 970 (2022) (examining Texas and Florida laws requiring children to recite the pledge of allegiance unless they obtain parental permission to decline participation) (“The state’s invocation [of parental rights] is instead a pretext for its own viewpoint-based, unconstitutional compulsion.”); Katharine B. Silbaugh, The Legal Design for Parenting Concussion Risk, 53 U.C. DAVIS L. REV. 197, 201 (2019) (examining Lystedt legislation aimed at preventing concussed youth sports players from returning to play) (“Judging from its structure and operation, Lystedt legislation does not appear to elevate parental authority out of respect for parents’ efficacy, but instead because parents are the essential tool in the transfer of risk away from organizations and to children.”).
The Minnesota Supreme Court has yet to consider the enforceability of parental waivers as a matter of public policy, but it came close in 2022 with its decision in *Justice v. Marvel, LLC*.7 There, Carter Justice sought to invalidate a liability waiver his mother signed on his behalf when he was seven years old so he could participate in a birthday party at an inflatable amusement play area owned by Marvel, LLC.8 While playing on the company’s inflatables, Justice suffered multiple injuries, including a traumatic brain injury, and sought to recover from Marvel when he turned eighteen.9 The majority avoided addressing the issue of enforceability of parental waivers, instead finding Marvel’s waiver unenforceable based on its construction. But the dissent and the lower courts10 would have held the waiver enforceable based in part on their reading of the United States Supreme Court’s parental-rights cases.11

This Note advocates for a parental waiver analysis in which courts assess whether waivers, as an exercise of parental authority, actually support child well-being. The Note uses the *Justice* case as a foil to this proposed analysis and to examine how courts apply parental authority. In Part II, this Note provides a brief history of exculpatory contracts in the United States and how states have handled their validity.12 Part III outlines the evolution of Minnesota’s approach to analyzing exculpatory clauses, walks through the *Justice* case, and asserts that the dissenting opinion in the *Justice* decision was a missed opportunity to extend its reasoning in favor of invalidating indemnification clauses to also invalidate parental waivers as a matter of public policy, as other states have.13 Part IV summarizes the origins and evolution of parental due process rights in the United States with an eye toward helping lawyers and judges apply the parental-rights doctrine with accuracy.14 Specifically, Section

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7 *Justice v. Marvel, LLC*, 979 N.W.2d 894 (Minn. 2022).
8 *Id.* at 896.
9 *Id.* at 897.
12 *infra* Part II.
13 *infra* Part III.
14 *infra* Part IV.
IV.A explains how parents’ fundamental due process rights stem from an understanding of children as property.\textsuperscript{15} Section IV.B delves deeper into the U.S. Supreme Court’s parental-rights cases and summarizes the prevalent themes.\textsuperscript{16} Section IV.C considers the level of scrutiny the U.S. Supreme Court applies in parental-rights cases.\textsuperscript{17} Then, Part V looks broadly at state court decisions on parental waivers and examines the merits of the most common reasons state courts cite for and against enforcing parental waivers as a matter of public policy.\textsuperscript{18} Finally, Part VI proposes that courts engage in a child-well-being inquiry rather than apply parental authority as an absolute or categorical rule that controls cases involving parental decision-making. Part VI then demonstrates what that inquiry should look like by borrowing principles from the U.S. Supreme Court’s parental-rights jurisprudence.\textsuperscript{19}

II. EXCULPATORY CONTRACTS IN AMERICAN JURISPRUDENCE

Businesses in the United States have successfully reduced their tort liability to consumers and employees through contracts since as early as the nineteenth century.\textsuperscript{20} Since then, tort law and contract law have vied for dominance.\textsuperscript{21} By the middle of the twentieth century, the doctrine of strict products liability, the aftereffects of the New Deal era, and workers’ compensation systems ushered in what appeared to be lasting diminution of contract exculpation in the name of “public values over private interests.”\textsuperscript{22} However, since the 1980s, state courts have enforced waivers at increasing rates despite the oft cited “waiver-law gospel” that courts disfavor waivers.\textsuperscript{23}

Today, the wide variety of principles courts apply to test the validity of waivers is a product of these historic oscillations between tort and contract dominance as well as the competing values bound up in contract and tort, namely market efficiency versus compensation for tort victims.\textsuperscript{24} Courts usually employ a strict-construction test, a public

\textsuperscript{15} \textit{Infra} Section IV.A.
\textsuperscript{16} \textit{Infra} Section IV.B.
\textsuperscript{17} \textit{Infra} Section IV.C.
\textsuperscript{18} \textit{Infra} Part V.
\textsuperscript{19} \textit{Infra} Part VI.
\textsuperscript{20} Martins et al., \textit{supra} note 1, at 1269–74.
\textsuperscript{21} \textit{Id.} at 1266–67.
\textsuperscript{22} \textit{Id.} at 1275–78.
\textsuperscript{23} See \textit{id.} at 1282, 1285.
\textsuperscript{24} See \textit{id.} at 1291–92.
policy test, or some combination of the two to evaluate exculpatory clauses.\textsuperscript{25} Under strict construction, an exculpatory clause must make clear the parties’ intent to waive one party’s liability for negligence to the extent that an ordinary person would “know what he is contracting away.”\textsuperscript{26} In \textit{Tunkl v. Regents of the University of California}, the California Supreme Court established a six-factor public-policy test that became a model for other jurisdictions in determining whether a waiver should be invalidated based on its potential to harm public interest.\textsuperscript{27}

Though strict construction and public policy dominate waiver analysis, there has always been significant variation among states in their adoption and application of either rule.\textsuperscript{28} For example, the Minnesota Supreme Court announced what some courts viewed as a “watered down” version of the \textit{Tunkl} factors in its 1982 decision \textit{Schlobohm v. Spa Petite, Inc.}\textsuperscript{29} The Minnesota test contains only two factors: (1) whether there was a disparity of bargaining power between contracting parties, and (2) whether the service offered was a public or essential service.\textsuperscript{30} Other states have flat out rejected \textit{Tunkl} in favor of strict construction as a means of ensuring the market efficiency that waivers enable.\textsuperscript{31}

Two points come into focus from states’ varying approaches. First, it is clearly not lost on courts that the purpose of waivers has always been to favor commercial endeavors over tort compensation. Second, those favoring commercialism and contract over tort or vice versa select their waiver rules accordingly.\textsuperscript{32} However, as the rest of this Note demonstrates, courts that favor commercialism over

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\textsuperscript{25} \textit{Id.} at 1282–90.

\textsuperscript{26} 57A AM. JUR. 2D Negligence § 46 (2024).

\textsuperscript{27} \textit{Tunkl v. Regents of Univ. of Cal.}, 383 P.2d 441, 444–46 (Cal. 1963). The six factors are whether: (1) the business is of a type suitable for public regulation, (2) the party seeking exculpation provides an essential public service, (3) the business is open to the general public in its provision of that service, (4) the party invoking exculpation has a bargaining advantage because of the essential nature of the service, (5) the contract is one of adhesion, and (6) the person or property of the purchaser is put under the control of the provider as a result of the service rendered. \textit{Id.}

\textsuperscript{28} Martins et al., \textit{supra} note 1, at 1283, 1289.

\textsuperscript{29} \textit{Id.} at 1289–90; see \textit{Schlobohm v. Spa Petite, Inc.}, 326 N.W.2d 920, 923 (Minn. 1982).

\textsuperscript{30} \textit{Schlobohm}, 326 N.W.2d at 923.

\textsuperscript{31} Martins et al., \textit{supra} note 1, at 1291–92.

\textsuperscript{32} See \textit{id.} at 1290 (“[C]ourts’ overarching attitudes about the relative importance of contract and tort drove the types of legal tests that waivers faced in a particular state.”).
compensation for children in the context of parental waivers cannot do so under the guise of parental authority without misapplying the parental-rights doctrine.

III. THE MINNESOTA APPROACH

A. The Evolution of Minnesota’s Waiver Analysis

In *Solidification, Inc. v. Minter*, the Minnesota Supreme Court first recognized that exculpatory clauses, like indemnity clauses, should be strictly construed against the benefited party. The court had occasion to actually apply this new approach in *Solidification* by holding an exculpatory clause unenforceable against a warehouse owner because the clause did not specifically release a contractor from liability for its own negligence.

The following year, in *Schlobohm v. Spa Petite, Inc.*, the court considered for the first time whether an exculpatory clause in a contract for recreational services was contrary to public policy. Though the court again recognized that exculpatory clauses are strictly construed against the benefited party, it did not apply strict construction because the clause was unambiguous, it specifically mentioned exonerating the business for its own negligence, and the plaintiff’s suit was for negligence. Instead, the court cemented its “two-prong” public policy test established in *Schlobohm* and used it to uphold the waiver at issue—finding that there was no disparity in bargaining power between the parties and that spas are neither essential nor suitable for public regulation. Consequently, Minnesota’s exculpatory clause jurisprudence established that strict construction applied to exculpatory clauses, but it had yet to formulate a

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33 Justice v. Marvel, LLC, 979 N.W.2d 894, 899 (Minn. 2022); see also *Solidification, Inc. v. Minter*, 305 N.W.2d 871, 873 (Minn. 1981) (holding the same rule of strict construction applies to indemnity and exculpatory clauses). An indemnity clause is a type of contractual provision where one party (the indemnitor) agrees to assume responsibility for any damages the other party (the indemnitee) may incur. 41 AM. JUR. 2D *Indemnity* § 7 (2024).
34 *Solidification*, 305 N.W.2d at 873.
35 *Schlobohm*, 326 N.W.2d at 922.
36 *Id.* at 923.
37 See *id*. The court also noted Minnesota’s categorical rules for finding an exculpatory clause unenforceable. *Id.* (“If the clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced.”).
38 *Id.* at 923–26.
clear standard for judging the validity of such a clause under strict construction.\textsuperscript{39}

Nearly twenty-five years after \textit{Schlobohm}, the court cast some doubt on whether exculpatory clauses and indemnity clauses should be subject to the same standard of review.\textsuperscript{40} In a footnote in \textit{Yang v. Voyagaire Houseboats, Inc.}, the court suggested that indemnity clauses should be subject to a higher standard of scrutiny than exculpatory clauses because they not only relieve negligent parties from liability but can also shift liability to innocent parties.\textsuperscript{41} Nevertheless, the court also found occasion in \textit{Yang} to articulate a preliminary rule for applying strict construction to indemnity clauses, explaining that indemnity clauses "are not construed in favor of indemnification unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it.”\textsuperscript{42}

The rule first introduced in \textit{Yang} became foundational to the rule for strict construction of indemnity clauses, as formulated and applied in \textit{Dewitt v. London Road Rental Center, Inc.}\textsuperscript{43} There, the court held that the validity of an indemnity provision hinges on whether the provision includes "specific language that expressly shows, in clear and unequivocal language, that the parties intended the clause to obligate the indemnitor to indemnify the indemnitee for the indemnitee’s own negligence.”\textsuperscript{44} Alluding to the rule’s

\textsuperscript{39} See Justice v. Marvel, LLC, 979 N.W.2d 894, 899 (Minn. 2022) (stating that as of 2022, the Minnesota Supreme Court had not yet applied strict construction when an exculpatory clause purported to release all claims of liability without specific reference to negligence).

\textsuperscript{40} See Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783, 792 n.6 (Minn. 2005) (holding exculpatory and indemnity clauses in a houseboat rental agreement unenforceable on public policy grounds because the houseboat owner provided a public service and could be considered an innkeeper).

\textsuperscript{41} Id. The court’s assertion was responsive to the facts of \textit{Yang}, where a single innocent individual would have been held liable for the injuries of nine other individuals had the court found the indemnity clause enforceable. \textit{See id.} at 788.

\textsuperscript{42} \textit{See id.} at 791 (quoting Nat’l Hydro Sys. v. M.A. Mortenson Co., 529 N.W.2d 690, 694 (Minn. 1995)). Despite articulating a rule for applying strict construction, the focus of the court’s holding in \textit{Yang} was that an exculpatory clause and an indemnity clause were unenforceable on public policy grounds. \textit{Id.} at 793.

\textsuperscript{43} \textit{See Dewitt v. London Rd. Rental Ctr., Inc.}, 910 N.W.2d 412, 417–18 (Minn. 2018) (holding an indemnity clause unenforceable against a restaurant where the restaurant’s agreement with a rental company for folding tables did not specifically state that liability would shift to the restaurant for the rental company’s own negligence).

\textsuperscript{44} \textit{Id.} at 417 (citing Johnson v. McGough Constr. Co., 294 N.W.2d 286, 288 (Minn. 1980); Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc., 281 N.W.2d 838, 842 (Minn. 1979)).
purpose, the court stated that an “indemnity clause must fairly apprise[ ] the indemnitor . . . of . . . its obligation to indemnify the indemnitee . . . for the indemnitee’s . . . own negligence.”

In sum, over the course of nearly forty years, the Minnesota Supreme Court articulated a set of rules for applying strict construction to exculpatory clauses but never had occasion to give them effect. In 2022, the court found its opportunity in *Justice v. Marvel, LLC*.47

**B. The Justice Decision**

**1. Facts and Procedural Posture**

In 2007, Michelle Sutton signed a waiver of liability on behalf of her seven-year-old son, Carter Justice, so he could participate in a birthday party at Pump It Up Parties, an inflatable amusement play area owned by Marvel, LLC. By signing the waiver, Sutton agreed to “release and hold harmless MARVEL, LLC” from “any and all claims” arising out of Justice’s use of the business’s play area or inflatable equipment. The waiver also included a disclaimer warning against the risks associated with the play area and a statement that signing the waiver meant participants “knowingly and freely assume[d] all such risks.”

During the party, Justice fell from an inflatable, hitting his head on an unpadded concrete floor covered only in carpet. Justice suffered severe injuries, including a traumatic brain injury. When he turned eighteen, Justice

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45 See id. (quoting Yang, 701 N.W.2d at 791 n.5). The court also explained that its articulation of the rule was correct based on the rule applied in Yang, despite having also stated in Yang that the court would uphold an indemnity clause if its language “could have ‘no other meaning ascribed to it.’” Id. at 417–18 (quoting Yang, 701 N.W.2d at 791 n.5).
46 See Solidification, Inc. v. Minter, 305 N.W.2d 871, 873 (Minn. 1981) (holding strict construction applies to indemnification clauses and exculpatory clauses); Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn. 1982) (affirming the same standard of strict construction applies to indemnification and exculpatory clauses); Yang, 701 N.W.2d at 791 n.5 (stating indemnity clauses must be “clear and unequivocal”); Dewitt, 910 N.W.2d at 417 (holding indemnity clauses must use “specific language” showing the parties’ intention to indemnify the indemnitee for its or their own negligence in “clear and unequivocal terms”).
47 Justice v. Marvel, LLC, 979 N.W.2d 894, 899 (Minn. 2022).
48 Id. at 896.
49 Id.
50 Id. at 896–97.
51 Id. at 897.
52 Id.
sued Marvel, claiming Marvel was negligent for failing to pad the floor near the inflatables, causing him to suffer permanent injuries. Marvel moved for summary judgment, arguing that the waiver of liability barred Justice’s negligence claim.

The district court granted Marvel’s motion for summary judgment, reasoning in part that parents have a fundamental right to make decisions regarding the care, custody, and control of their children. The Minnesota Court of Appeals affirmed, also citing parents’ fundamental right to make decisions regarding their children as reflected in the U.S. Supreme Court’s parental-rights jurisprudence.

2. The Minnesota Supreme Court’s Decision

Justice appealed the court of appeals’ decision, arguing the waiver was unenforceable. The Minnesota Supreme Court reversed on the basis that the waiver of liability signed by Sutton was not enforceable against a claim for Marvel’s own negligence under the standard of strict construction. First, the court considered the appropriate standard of construction for exculpatory clauses. Second, as a matter of first impression, the court considered how strict construction applies when an exculpatory clause like Marvel’s purports to broadly release a party from all liability without clear reference to its own negligence.

The court began by tracing its application of strict construction from Solidification to Dewitt. It held that both indemnity clauses and exculpatory clauses are subject to strict construction. The court acknowledged the assertion in Yang that indemnity clauses are subject to a higher standard of review than exculpatory clauses because they shift liability to innocent parties. But the court reasoned that exculpatory

53 Id. Justice was able to sue over a decade after his injury because the statute of limitations on his claim was tolled until he turned eighteen. Minn. Stat. § 541.15(a)(1) (2022) (effective 1993).
54 Justice, 979 N.W.2d at 897.
57 Justice, 979 N.W.2d at 898.
58 Id. at 902–03.
59 Id. at 898.
60 Id. at 899.
61 Id. at 899–900.
62 Id. at 900.
63 Id.
clauses also shift liability to innocent parties—victims of negligence.64 The court additionally noted that exculpatory clauses also completely bar a victim’s recovery whereas indemnity clauses may not.65 Therefore, the court did not veer from its holding: only exculpatory clauses that specifically and unequivocally state parties’ intent to release a party from liability for its own negligence are enforceable.66

Under that standard, the court held that the waiver of liability signed by Sutton was not enforceable against Justice’s negligence claim because its provision waiving liability for “any and all claims” did not specifically state that it released Marvel for liability for its own negligence.67

3. Justice Anderson’s Dissenting Opinion

Writing for the dissent, Justice Anderson argued the majority’s application of strict construction was inappropriate because exculpatory clauses and indemnity clauses are materially different.68 With an exculpatory clause, the victim alone assumes their own risk,69 but indemnity clauses risk “ballooning liability for the injuries of other parties” to an extent unanticipated by the indemnitor.70 Therefore, the dissent would have declined to apply strict construction and held the waiver enforceable based on its clear and unambiguous language.71

The dissent went further and, analyzing the waiver on public policy grounds, found the waiver passed the appropriate level of construction.72 Then, failing to find that the waiver violated public policy, the dissent continued on and considered whether the waiver was unenforceable because it was signed by a parent on behalf of a minor.73 Echoing the

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64 Id.
65 Id.
66 Id. at 901 (adopting and citing the rule in Dewitt v. London Rd. Rental Ctr., Inc., 910 N.W.2d 412, 417 (Minn. 2018)).
67 Id. at 902.
68 Id. at 905 (Anderson, J., dissenting).
69 Id. It seems likely that other courts would vehemently disagree with the notion that exculpatory clauses universally involve victims who personally assume their own risk. See, e.g., BJ’s Wholesale Club, Inc. v. Rosen, 80 A.3d 345, 363–64 (Md. 2013) (Adkins, J., dissenting) (explaining that one issue with parental waivers is that the parent, not the child, unwittingly assumes the risk of injury on behalf of the child).
70 Justice, 979 N.W.2d at 905 (Anderson, J., dissenting).
71 Id. at 907.
72 Id. at 906.
73 Id. at 906–07.
court of appeals’ discussion of parents’ fundamental rights, the dissent would have also found the waiver enforceable based on the public interest in parental authority and freedom of contract.\textsuperscript{74} The dissent appears to advocate for a policy of deference to parental authority based on an assumption that child well-being follows naturally from parental authority.\textsuperscript{75}

Had the \textit{Justice} majority adopted the dissent’s view, it would have confronted the enforceability of parental waivers as a matter of first impression.\textsuperscript{76} Obviously, the majority never approached that issue because it found Marvel’s waiver unenforceable based on its construction. Nevertheless, the dissent provides a glimpse into what Minnesota’s stance on parental waivers could look like in the future when a parental waiver \textit{does} pass strict construction. It appears the time is nigh for the Minnesota Supreme Court to consider whether to go the way of existing dicta and enforce parental waivers as a matter of public policy.

4. \textit{The Majority’s Missed Opportunity to Leverage \textit{Yang} and the Dissent}

While this Note does not dispute that the Minnesota Supreme Court majority applied strict construction appropriately in \textit{Justice}, it does assert that the court could have squared its reasoning for applying strict construction with \textit{Yang}’s and the dissent’s indemnity clause analyses. As a result, the Minnesota Supreme Court missed an opportunity to engage in a critical discussion about the consequences of parental waivers that could have been useful when the court inevitably addresses the enforceability of parental waivers in the future.

In \textit{Yang}, the court opened the door to substantive discussion about the unanticipated consequences of

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{See id.} at 907 (“And a child’s parents are in the best situation to decide if participating in an activity is worth the risk of signing a liability waiver. . . . [T]here is a presumption that fit parents act in the best interests of their children.” (quoting Troxel v. Granville, 530 U.S. 57, 68 (2000)).

\textsuperscript{76} \textit{See Justice v. Marvel, LLC, 965 N.W.2d 335, 341 (Minn. Ct. App. 2021), rev’d and remanded, 979 N.W.2d 894 (Minn. 2022).} Even though a Minnesota statute now exists to void parental waivers for children who visit commercial inflatable play areas, Minnesota Statutes section 184B.20 (enacted in 2010), this is still an issue the court will eventually need to decide outside of that narrow circumstance.
indemnity clauses.\textsuperscript{77} The dissent in \textit{Justice} picked up on this, highlighting how \textit{Yang} illustrated the risk of shifting or “ballooning liability” because in \textit{Yang} an indemnity clause could have made one innocent party to a contract liable for the damages of nine other parties.\textsuperscript{78} Instead of responding to \textit{Yang} and the \textit{Justice} dissent by explaining how ballooning liability also applies to justify strict construction, the majority in \textit{Justice} discredited \textit{Yang} and focused its reasoning on the fact that exculpatory clauses bar recovery for injured parties whereas indemnity clauses do not.\textsuperscript{79} While true, the majority missed the point. The core of the dissent’s argument was that the type of liability shifting inherent in indemnity clauses is just riskier.\textsuperscript{80} It can result in one person unwittingly agreeing to shoulder the liability of many.\textsuperscript{81}

Enter the missed opportunity. The concept of “ballooning liability” could just as well have been plucked from the decisions of numerous parental waiver cases discussing the consequences of parental waivers.\textsuperscript{82} Many states that discuss the parental waiver issue in terms of child rights and child welfare rest their decisions on the very real possibility that when parents sign such waivers, they may not be able to pay for their children’s injuries themselves.\textsuperscript{83} When this happens, it can place enormous pressure on the child, the family unit, the State, and ultimately the taxpayers.\textsuperscript{84} The sheer number of parties implicated by a parental waiver who are not expressly contemplated by the waiver itself signals that exculpatory clauses are likely to expand beyond what the parties intended. So, while the majority did not need to address the parental waiver issue to reach its holding, it could have easily leveraged \textit{Yang}’s ballooning-liability test to show there was ample justification to apply strict construction to Marvel’s waiver. Doing so could have provided the necessary analysis to help the court begin to weigh all the public

\textsuperscript{77} See \textit{Yang v. Voyagaire Houseboats, Inc.}, 701 N.W.2d 783, 792 n.6 (Minn. 2005) (“Indemnification clauses are subject to greater scrutiny because they release negligent parties from liability, but also may shift liability to innocent parties.”).

\textsuperscript{78} \textit{Justice}, 979 N.W.2d at 905 (Anderson, J., dissenting).

\textsuperscript{79} \textit{Id.} at 900–01 (majority opinion).

\textsuperscript{80} \textit{Id.} at 905 (Anderson, J., dissenting) (“And further, although it does not arise in this dispute, the risk of shifting liabilities from indemnification reaches far more broadly.”).

\textsuperscript{81} \textit{Id.} (“Put another way, an exculpatory clause is not a trap for the unwary in the same manner as an indemnity agreement.”).

\textsuperscript{82} See infra Section V.B.

\textsuperscript{83} See infra Section V.B.

\textsuperscript{84} See infra Section V.B.
interests that parental waivers implicate—because there are many more besides parental authority.\textsuperscript{85}

Despite the missed opportunity, the Minnesota Supreme Court cannot turn back the clock on the \textit{Justice} decision to tweak its analysis, nor does it need to. The court’s discussion of ballooning liability shows its willingness to wrestle with the same issues leading other states to invalidate parental waivers as a matter of public policy.\textsuperscript{86} The question is whether the court will be willing to peel back the layers of the parental-rights doctrine to critically assess its applicability in the context of parental waivers. The remainder of this Note outlines the origins of the parental-rights doctrine, the U.S. Supreme Court’s application of the doctrine, and state courts’ reasons for and against enforcing parental waivers to show that courts misapply parental authority when they use it to justify enforcing parental waivers. Instead, Minnesota and other states should look at the risks posed to children, families, and states when determining whether to hold parental waivers unenforceable.

\section*{IV. PARENTAL AUTHORITY IN AMERICAN JURISPRUDENCE}

\subsection*{A. A Fundamental Right Originating from a View of Children as Property}

The U.S. Supreme Court first recognized parents’ fundamental right to direct the upbringing of their children in the 1923 case \textit{Meyer v. Nebraska}.\textsuperscript{87} There, the Court held that a Nebraska law prohibiting teachers from teaching in languages other than English violated parents’ constitutional right to control their children’s education under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{88} Not long

\begin{itemize}
  \item \textsuperscript{85} See BJ’s Wholesale Club, Inc. v. Rosen, 80 A.3d 345, 364–65 (Md. 2013) (Adkins, J., dissenting) (stating multiple times that, in holding parental waivers enforceable, the majority failed to consider the full breadth of policy considerations beyond parental authority that should factor into a decision about parental waivers); see also infra Section V.B. The \textit{Justice} dissent cites to Maryland’s \textit{BJ’s Wholesale} to propose that courts enforcing parental waivers are not unique. \textit{Justice}, 979 N.W.2d at 906–07 (Anderson, J., dissenting). However, thorough review of states’ parental waiver cases reveals that Maryland is unique; it is one of the only states, if not the only state, whose highest court has held for-profit and non-profit waivers enforceable based on parental authority.
  \item \textsuperscript{86} See infra note 163 and accompanying text; see also infra Section V.B.
  \item \textsuperscript{88} Meyer, 262 U.S. at 400–01.
\end{itemize}
after *Meyer*, in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the Court held that an Oregon law requiring parents to send their children to public school was unconstitutional based on the same grounds as *Meyer*. In order to properly apply parental authority to any legal issue, lawyers and judges must first understand the basis for the Court’s reasoning in *Meyer* and the other early parental-rights cases. The belief that parents, specifically fathers, had a fundamental right to control their children as they would their property provided the backdrop for the Court’s decisions in this era.

Parents, scholars, and judges in the era of *Meyer* and *Pierce* were not the first to treat children as property. Indeed, the concept traces its origin to ancient Greek and Judeo-Christian traditions. The trend toward expansive parental rights in the United States following *Meyer* and *Pierce* also finds its origin in the English common law doctrine of coverture. Under the doctrine of coverture, the state vested all decision-making authority within the family in the husband or father. The law considered children born of a marriage “covered” by the male head of household. It was against this backdrop that Justice McReynolds authored the *Meyer* decision in 1923. However, by the early twentieth century, the children’s rights movement and the movement against child labor had propelled the notion of children’s rights, as distinct from parental rights, into public discourse. Consequently, when Justice McReynolds issued the *Meyer* opinion championing parental rights, his conservative contemporaries saw it as a defense of the coverture model of family, that is, “the individual’s right to control his own.”

Even as American society has become less patriarchal, the judiciary continues to reinforce the idea that children are

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90 Woodhouse, *supra* note 87, at 1042 (“Property and ownership were indeed a powerful subtext of parental rights rhetoric in the era of *Pierce* and *Meyer*.”).
91 Id. at 1042–43.
92 Id. at 1043.
94 Dailey & Rosenbury, *supra* note 93, at 85–86.
95 Id. at 88.
96 Woodhouse, *supra* note 87, at 1051.
97 Id. at 1090.
akin to property in the eyes of the law. The Justice dissent and preceding district court and court of appeals opinions themselves recite the oft-cited principle from Troxel v. Granville, the leading modern U.S. Supreme Court decision on parental authority, that parents have a fundamental right to the “care, custody, and control of their children.” Today, numerous scholars writing about the intersection of parental authority and child welfare reject absolute and unquestioning deference to parental authority based on broad notions of parental “control” because of the child-as-property legacy from which it derives. As Professors Anne Dailey and Laura Rosenbury have reasoned, this legacy has led to the complete privatization of family life, in turn absolving the state of

98 Id. at 1047–49 (citing numerous judicial opinions issued between the 1840s and 1980s framing parental authority and custody disputes in terms such as “possession,” “recovery,” “title,” and “assign[ment]).


102 Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (emphasis added) (“In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”). The “control” language dates to Meyer and Pierce. See Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (“Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . . .”); Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925) (“[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.”).

103 See Woodhouse, supra note 87, at 1113–17 (arguing that a property theory of parental authority continues to harm children by extolling genetic parentage, removing children from the care of extended family or guardians, and denying the child an identity and voice independent from the parent to the point of oppression); Dailey & Rosenbury, supra note 93, at 85 (arguing, in part, that expansive parental rights deriving from the legacy of coverture perpetuate systemic racism and classism by privatizing caregiving, in turn absolving the state of responsibility for child well-being and blaming parents’ morals and economics for any shortcomings); Samantha Godwin, Against Parental Rights, 47 COLUM. HUM. RTS. L. REV. 1, 36–39 (2015) (arguing against the notion that parents “control” their children because it is “incompatible with a belief in the equality of persons as possessors of morally equal interests, worth, and standing”); James G. Dwyer, Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights, 82 CAL. L. REV. 1371, 1426 (1994) (“Today, however, the law recognizes that children are not chattel, but persons, who themselves hold rights under our Constitution. Thus, parental rights of control may be no more just than was the centuries-old institution of slavery or the longstanding legal sanction of marital rape.”).
responsibility for the well-being of children, pitting parents against the state, and preventing states and communities from meaningfully partnering with parents to support children.\footnote{Dailey & Rosenbury, \textit{supra} note 93, at 107–08.}

Taken together, the origin and effects of parental rights in the United States undermine the widely accepted rationale that expansive parental authority supports child well-being.\footnote{See id. at 96; Dwyer, \textit{supra} note 103, at 1426–34.}

B. “Parents’ Substantive Due Process Rights End Where Harm to Children Begins”\footnote{Corbin, \textit{supra} note 6, at 993 (explaining that in cases as early as \textit{Prince}, the Supreme Court has made clear that parental authority is not absolute).}

An analysis of the Supreme Court’s parental authority cases since \textit{Meyer} and \textit{Pierce} reveals that decisions to permit or prohibit states from intervening in parenting decisions often hinge on an assessment of what is in the best interests of the child.\footnote{Whether judges want to or should be the arbiters of the child’s “best interests” is a different story. See Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, \textit{Psychological Parenthood}, 106 MINN. L. REV. 2363, 2365 (2022).}

1. \textit{A Child-Welfare Limit on Parental Authority}

The Court first recognized a child-welfare limit on parental authority in \textit{Prince v. Massachusetts}.\footnote{Corbin, \textit{supra} note 6, at 993.} In \textit{Prince}, the Court upheld the conviction of a legal guardian who had violated Massachusetts child labor law by permitting a nine-year-old to sell religious tracts, which is a required practice in the Jehovah’s Witness faith.\footnote{\textit{Prince v. Massachusetts}, 321 U.S. 158 (1944).} In upholding the constitutionality of Massachusetts’s child labor laws against alleged infringement on parental due process rights, the Court reasoned that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.”\footnote{Id. at 167.}

Later, in \textit{Wisconsin v. Yoder}, the Court reaffirmed its child-welfare limit on parental authority, albeit with an outcome favoring parent over state.\footnote{\textit{Wisconsin v. Yoder}, 406 U.S. 205, 234 (1972).} There, the Court held in favor of Amish parents who had been convicted of violating Wisconsin’s compulsory education law for declining to send...
their children to formal high school until age sixteen.112 The Court reasoned that, unlike in Prince, the Amish parents’ actions did not “impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.”113

2. Child Welfare in the Health and Abortion Cases

The decades after Yoder brought a string of cases dealing with a minor’s right to seek an abortion without parental consent.114 These cases differed from the preceding parental authority cases because they dealt not with state regulation interfering with parental authority but with state regulation coopting parental authority as justification for limiting minors’ access to abortion.115 In Planned Parenthood of Central Missouri v. Danforth, the Court held that a provision of a Missouri statute requiring parents’ written consent to a minor’s abortion was unconstitutional because Missouri had no legitimate interest in imposing such a condition.116 Writing for a plurality, Justice Blackmun reasoned that where the interests of child and parent conflict, parental veto power is unlikely to strengthen the family or enhance parental authority.117 Additionally, he concluded that a parent’s interest in the termination of their child’s

112 Id.
113 Id. at 233–34.
115 See Bellotti, 443 U.S. at 638–39 (“Under the Constitution, the State can ‘properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.’” (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968))). In Hodgson, Justice Marshall clarified the distinction between parental rights and state control, writing, “[P]arents’ right to direct their children’s upbringing is a right against state interference with family matters. . . . It is a strange constitutional alchemy that would transform a limitation on state power into a justification for governmental intrusion into family interactions.” 497 U.S. at 471 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part).
116 Danforth, 428 U.S. at 75 (plurality opinion).
117 Id.
pregnancy did not outweigh the child’s own right to privacy.\textsuperscript{118} Disagreeing with Justice Blackmun’s view of Missouri’s interest in a parental-consent requirement, Justice Stevens brought the discussion back to child welfare, explaining that “[a] state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare[.].”\textsuperscript{119}

In \textit{Bellotti v. Baird}, the Court considered the constitutionality of a provision of a Massachusetts statute requiring a minor to seek the consent of both parents for an abortion.\textsuperscript{120} If parents withheld consent, a minor could seek authorization by judicial order.\textsuperscript{121} The Court held the Massachusetts provision unduly burdensome on a minor’s right to an abortion because it predicated the option for a judicial order on parental notice.\textsuperscript{122} The Court also took issue with the provision because it permitted a judge to withhold authorization regardless of finding the minor competent to make the decision independently.\textsuperscript{123} Interestingly, the Court mandated judicial authorization, even without a showing of competency, so long as the minor could persuade a judge that an abortion would be in their best interests.\textsuperscript{124}

Two themes emerge from the fractured plurality opinions, concurrences, and dissents in \textit{Danforth} and \textit{Bellotti}—one familiar and one absent from the Court’s reasoning in \textit{Meyer}, \textit{Pierce}, \textit{Prince}, and \textit{Yoder}. First, the Court remained consistent in framing parental authority as coextensive with minors’ well-being.\textsuperscript{125} Second, the Court became more insistent in its recognition of minors’ rights as independent from the rights of their parents.\textsuperscript{126}

\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.} at 104 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{120} \textit{Bellotti}, 443 U.S. at 625.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 647 (plurality opinion).
\textsuperscript{123} \textit{Id.} at 650 (plurality opinion).
\textsuperscript{124} \textit{Id.} at 647–48 (plurality opinion).
\textsuperscript{125} See \textit{Planned Parenthood of Cent. Mo. v. Danforth}, 428 U.S. 52, 75 (1976) (plurality opinion) (questioning whether parental veto would strengthen the family, presumably for the minor’s benefit); \textit{Id.} at 105 (Stevens, J., concurring in part and dissenting in part); \textit{Bellotti}, 443 U.S. at 647–48 (plurality opinion).
\textsuperscript{126} See \textit{Danforth}, 428 U.S. at 75 (plurality opinion); \textit{Bellotti}, 443 U.S. at 640 (plurality opinion) (framing the legal issue as whether Massachusetts’s law unduly burdened the minor’s right to seek an abortion). In \textit{Danforth}, Justice
limits demonstrate is that parental authority as a fundamental due process right is far from absolute.

In 1979, the Court departed from what appeared to be its increasing consideration of children’s rights in healthcare decisions when it issued Parham v. J.R. In this case, the Court seemed to favor parental authority in deciding to uphold the constitutionality of Georgia laws that allowed parents to involuntarily commit their children to mental health hospitals. Alluding again to child wellbeing, the Court reasoned there was no evidence that the parents of the children who initiated the suit had acted in bad faith, and the laws did not permit parents to act with absolute discretion against the interests of the child. Nevertheless, the Court found it necessary to qualify its holding, requiring a neutral third-party review of parents’ decisions to commit their children as a means of protecting children’s constitutional rights.

The Court also distinguished Parham from Danforth. The child-appellees in Parham argued that Danforth demonstrated “how little deference to parents is appropriate when the child is exercising a constitutional right.” The Court distinguished the cases on the basis that Danforth “involved an absolute parental veto,” whereas the laws at issue in Parham required hospital superintendents to approve parents’ decisions to commit their children.

Thus, Parham reaffirmed the Prince Court’s interest in limiting parental authority to the extent it could harm children while also revealing that states could cure just about

Blackmun was steadfast in reinforcing minors’ independent rights: “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.” 428 U.S. at 74 (plurality opinion). However, Justice Powell seems to have considered abortion a unique case in which the Court would give such deference to minors’ rights. Bellotti, 443 U.S. at 642 (plurality opinion) (“In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.”).

128 See id. at 616–17.
129 Id. at 603–04.
130 Id. at 606–07.
131 Id. at 603–04.
132 Id. at 604.
133 Id.
any constitutional defect short of absolute parental veto power with minimal safeguards for the child.134

3. Child Welfare in the Custody and Visitation Cases

Even in custody and visitation cases involving fit, biological parents—where one might expect parental rights to be the strongest—the Supreme Court has made clear that the bounds of parental due process rights are not limitless.135 In Quilloin v. Walcott, the Court upheld a Georgia trial court’s denial of a biological father’s legitimation petition, through which he planned to veto his son’s adoption, despite a lack of any evidence showing he was unfit to parent.136 The Court reasoned that the State need not base its denial on anything more than a finding that legitimization was not in the best interests of the child.137 With this holding, the Court recognized that parents are not automatically entitled to parental rights under the Constitution solely because of biological parentage.138 Instead, contrary to the Justice dissent’s formulation, parental rights derive from and exist in relation to the child’s well-being.139

Despite the Court’s recognition since Prince that children’s best interests temper parental rights, the Court

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134 See id.
135 See Quilloin v. Walcott, 434 U.S. 246 (1978) (holding denial of a biological father’s legitimation petition did not violate his substantive due process rights where he had never petitioned for legitimation during the eleven-year period between his child’s birth and the child’s stepfather filing an adoption petition); Lehr v. Robertson, 463 U.S. 248 (1983) (holding that failure to notify a biological father of the adoption proceedings of a child with whom he had not established a relationship did not deny him procedural due process); Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that a California statutory presumption that a child born to a married woman living with her husband was the husband’s child did not violate the substantive due process rights of the child’s biological father who was not the husband).
136 Quilloin, 434 U.S. at 254–56.
137 Id. at 255. The Court seems to suggest that either a judicial determination of best interests alone would not suffice if a court was acting to break up an existing family unit or that the best-interests analysis would be different if the adopting stepfather had not already been serving as the child’s primary father figure. Id.
138 Cf. Quinter & Markowitz, supra note 93, at 1932–33 (discussing Lehr v. Robertson, a case factually similar to Quilloin v. Walcott) (“The Court there recognizes that parental rights are not sui generis; they are earned. . . . By this logic, parental rights exist only to promote a child’s welfare. Where they no longer serve that purpose, they should not prevail.”).
139 Compare id. with Justice v. Marvel, LLC, 979 N.W.2d 894, 907 (Minn. 2022) (Anderson, J., dissenting) (framing parents’ fundamental rights as absolute and without reference to child well-being).
made clear in *Troxel v. Granville* that courts can go awry in applying the best-interests standard. In *Troxel*, the Court considered the constitutionality of a Washington statute under which Jenifer and Gary Troxel sought court-ordered visitation rights to their grandchildren against the wishes of the children’s mother, Tommie Granville. The statute permitted anyone to petition the court for child visitation rights at any time and allowed state courts to order visitation upon determining that “visitation may serve the best interest of the child.” The Court held that the statute violated Granville’s fundamental rights in part because it did not require state courts to give any weight to a parent’s decision that visitation would not serve the child’s best interests. The Court reasoned that under the statute a judge could usurp the parent’s authority based on “mere disagreement” alone without any “special factors that might justify the State’s interference with Granville’s fundamental right to make decisions concerning the rearing of her two daughters.” Thus, while child well-being limits parental rights, those rights do not yield to just any finding that exercising them is not in the best interests of the child.

The results of the Supreme Court’s parental-rights cases from *Meyer* to *Troxel* do not produce any bright-line rules about the scope of parental authority. One can imagine *Troxel* might have been decided differently, even under

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141 *Id.* at 61 (citing WASH. REV. CODE ANN. § 26.10.160(3) (West 2018) (repealed 2020)).
142 *Id.* at 67.
143 *Id.* at 68. The “special factors” that the Court suggested were lacking to justify interference with Granville’s rights included a showing that (1) Granville was an unfit parent, (2) the children would be harmed by withholding visitation, or (3) Granville unreasonably denied visitation altogether. See *id.* at 68–71.
144 At a minimum, the Court requires more than a “simple disagreement” to justify interference with parental rights. See *id.* at 72. Though *Troxel* is frequently touted as the seminal parental-rights case, this Note urges readers to consider the weakness of the legal basis of the Washington Superior Court’s initial visitation decree when using *Troxel* to support parental-rights arguments. The Superior Court’s reasoning behind ordering one week of visitation in the summer, as quoted in the *Troxel* decision, exemplifies the Washington Superior Court’s scant, subjective reasoning: “I look back on some personal experiences . . . We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out.” *Id.* at 72 (quoting the Washington Superior Court’s oral ruling). Thus, *Troxel’s* facts mask what the plurality articulated as a fairly low bar (i.e., more than a “simple disagreement”) to justify interference with parental rights.
slightly different circumstances.145 Yet, despite the truism that “[p]arental authority is strong but situational,”146 there are takeaways from the cases to guide practitioners in applying parental authority jurisprudence. First, parental rights break down when applied in extreme situations where harm to the child is objectively plausible.147 Second, while the bar for exercising parental rights is seemingly low, so too is the bar for usurping those rights in the name of a child’s well-being.148

C. The Standard of Review Suggests Parents’ Fundamental Right to Care, Custody, and Control Is Not So Fundamental

Compounding the confusion regarding the nature and extent of parents’ constitutionally protected rights is the U.S. Supreme Court’s failure to apply strict scrutiny, or even a consistent level of scrutiny, to state interference with parental rights.149 Justice Thomas criticized the Troxel plurality for failing to apply strict scrutiny, the standard of review often applicable to fundamental rights, to Washington’s visitation statute.150 However, the plurality’s treatment of state interference in Troxel is far from unique.151 Professor Vivian Hamilton explains that “[a]lthough 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

145 The plurality suggests that it could have been swayed to uphold the application of Washington’s visitation statute if Granville had refused visitation altogether or if the Superior Court had considered Granville’s position and still found an objective reason to grant visitation. Id. at 71–73.
146 Silbaugh, supra note 6, at 234.
148 See supra note 144 and accompanying text; see also Vivian E. Hamilton, Immature Citizens and the State, 2010 BYU L. REV. 1055, 1093 (2010) (“The implications of the Supreme Court’s parental rights jurisprudence for state actors formulating policies affecting the immature are clear: ‘The state may do much, go very far, indeed’ to advance its ends before being considered to have infringed parents’ rights.”).
151 See Hamilton, supra note 148, at 1086.
parent-child relationship itself.” 152 Even when federal courts have applied strict scrutiny in parental-rights cases, they have regularly upheld laws that allegedly infringe on parents’ constitutional rights.153

The Court’s flexibility in dealing with parents’ fundamental rights positions those rights as anything but a panacea for lawyers and judges analyzing issues involving parents and children.154 This is as it should be. After all, as various commentators have noted, it would be difficult to apply something as rigid as strict scrutiny to cases involving “the complex and intersecting private and communal interests which are often at stake in the family.”155 Over the years, the U.S. Supreme Court seems to have recognized that the solution to these complexities is not categorical deference to parental authority but rather case-by-case consideration using child well-being as a guidepost.156 Judges and lawyers analyzing parent-child issues should follow the Supreme Court’s lead.

V. PARENTAL LIABILITY WAIVERS IN AMERICAN JURISPRUDENCE

State courts’ decisions on the validity of parental-liability waivers exemplify the collision of a century’s worth of parental due process decisions with the upward trend in waiver enforcement since the 1980s.157 This Part provides an

152 Id.
153 Fatal in Theory, supra note 150, at 864 (noting such laws survived strict scrutiny twenty-five percent of the time in a sample of federal court decisions between 1990 and 2003).
154 See Hamilton, supra note 148, at 1084 (“[T]he scope of parents’ actual authority is weaker than the Supreme Court’s rhetoric of strong parental rights suggests.”).
155 David D. Meyer, The Paradox of Family Privacy, 53 Vand. L. Rev. 527, 594–95 (2000) (suggesting the Supreme Court adopt intermediate-scrutiny review for parental authority cases). Several other scholars have suggested different review frameworks for parental authority cases. See Ryznar, supra note 149, at 146–49 (advocating for a sliding-scale or bundle-of-rights approach to reviewing parental-rights cases) (“[U]nbundling the parental right into its elements would allow a more nuanced approach to the selection of a level of scrutiny based on the exact parental issue at stake. For example, the protection of a parent’s right to custody might be more compelling than the protection of a parent’s decision to shield the child from contraceptives offered by the school nurse’s office.”); see also Dailey & Rosenbury, supra note 93, at 111–12 (advocating for strict scrutiny applied to government action that threatens to separate parents and children but intermediate scrutiny for other government actions that otherwise burden parental rights).
156 See supra Section IV.B.
157 See supra notes 12–16 and accompanying text. Parental-rights cases have
overview of the reasons state courts cite for whether to enforce parental waivers and reviews evidence that supports or undermines their various positions. For states like Minnesota that lack binding authority on parental waivers or those states reconsidering their public policy, understanding the substance behind popular arguments for and against parental waivers is crucial to setting and changing policy on the issue.

As of this writing, most states will not enforce a parent’s waiver of liability signed on behalf of their child.\footnote{As of this writing, most states will not enforce a parent’s waiver of liability signed on behalf of their child. While the numbers of enforcing and non-enforcing states have both been trending up over the last several decades, a majority of states that have decided the issue either do not enforce any parental liability waivers or only enforce them when they are employed by non-profit entities. The main influenced the way parental-waiver cases are argued by lawyers and decided by judges. See, e.g., Miller ex rel. E.M. v. House of Boom Ky., LLC, 575 S.W.3d 656, 661 (Ky. 2019) ("House of Boom argues that the parens patriae doctrine 'is difficult to defend in a post-Troxel world.'").}

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public policy reasons courts cite for enforcing parental waivers include (1) incentivizing the availability of youth sports and recreation;\textsuperscript{161} and (2) upholding parents’ fundamental right to the care, custody, and control of their children.\textsuperscript{162} Reasons courts cite against enforcement include (1) protecting children’s welfare, and with that, ensuring the tortfeasor bears the financial burden of injury instead of the child, family, or state;\textsuperscript{163} (2) protecting children’s right to control their own legal affairs and property;\textsuperscript{164} and (3) businesses’ superior ability to mitigate liability and the need to incentivize them to do so.\textsuperscript{165} The following sections present and examine the merits of the youth-recreation and child-welfare arguments, as those tend to implicate parental authority, child rights, and business interests by association.\textsuperscript{166}

A. The Youth-Recreation Argument for Parental Waivers

State court decisions on parental waivers sometimes turn on whether the defendant is a for-profit business or a non-profit or volunteer-led entity.\textsuperscript{167} Some decisions finding parental waivers enforceable cite the need to encourage schools and non-profit entities to offer low-cost youth activities, which they hope will also encourage participation in

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{161}]
\item See Hohe, 274 Cal. Rptr. 647; Zivich, 696 N.E.2d 201; Sharon, 769 N.E.2d 738.
\item See Zivich, 696 N.E.2d 201; Sharon, 769 N.E.2d 738; BJ’s Wholesale, 80 A.3d 345.
\item See Childress, 777 S.W.2d 1; Scott, 834 P.2d 6; Meyer, 634 N.E.2d 411; Cooper v. Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002) (superseded by COLO. REV. STAT. ANN. § 13-22-107 (West 2023)); Hojnowski, 901 A.2d 381; Kirton, 997 So. 2d 349; Galloway, 790 N.W.2d 252; Woodman, 785 N.W.2d 1; Miller, 575 S.W.3d 656.
\item See Childress, 777 S.W.2d 1; Scott, 834 P.2d 6; Meyer, 634 N.E.2d 411; Cooper, 48 P.3d 1229 (superseded by COLO. REV. STAT. ANN. § 13-22-107); Hojnowski, 901 A.2d 381; Kirton, 997 So. 2d 349; J.T. ex rel. Thode, 754 F. Supp. 2d 1323; Galloway, 790 N.W.2d 252; Woodman, 785 N.W.2d 1; Miller, 575 S.W.3d 656.
\item See Hojnowski, 901 A.2d 381; Kirton, 997 So. 2d 349; Woodman, 785 N.W.2d 1; Miller, 575 S.W.3d 656.
\item See, e.g., Hojnowski, 901 A.2d at 387–88 (discussing how protecting children’s pre- and post-injury rights to sue ensures they have access to needed care after injury).
\item Yen & Gregas, supra note 3, at 11–13.
\end{enumerate}
\end{footnotesize}
youth sports. In *Sharon v. City of Newton*, the Massachusetts Supreme Judicial Court upheld a waiver signed by a father on behalf of his sixteen-year-old daughter who was injured while participating in cheerleading sponsored by a public high school. The court reasoned that “[t]o hold that releases of the type in question here are unenforceable would expose public schools, who offer many of the extracurricular sports opportunities available to children, to financial costs and risks that will inevitably lead to the reduction of those programs.”

Similarly, decisions that find parental waivers unenforceable sometimes distinguish between for-profit and non-profit entities and leave open the door to enforcement in the non-profit context. For example, the Kentucky Supreme Court invalidated a waiver signed by a mother on behalf of her eleven-year-old child who was injured while playing at a commercial trampoline park. There, the court explained that the public policy considerations that apply in the non-profit setting do not apply in the commercial setting because a business can “purchase insurance and spread the cost between its customers. It also has the ability to train its employees and inspect the business for unsafe conditions. A child has no similar ability to protect himself from the negligence of others within the confines of a commercial establishment.”

Courts and scholars alike challenge the proposition that holding non-profit entities liable for children’s injuries diminishes access to recreational activities. The Iowa Supreme Court conveyed such skepticism in its leading parental waiver decision *Galloway v. State*, stating, “We find no reason to believe opportunities for recreational, cultural, and educational activities for youths have been significantly compromised in the many jurisdictions following the majority rule.” Moreover, now that some states have been invalidating parental waivers for decades, they have effectively debunked the proposition themselves. For instance, in deciding a parental waiver case in 2017, the

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168 See *id.* at 7–8.
170 *Id.* at 747.
173 *Id.* at 662–63.
174 Galloway v. State, 790 N.W.2d 252, 259 (Iowa 2010).
Tennessee Court of Appeals wrote: “Given the twenty-five years under which Tennessee has been applying the rule adopted in Childress, however, we need not speculate as to the dire consequences that may result to children’s recreational opportunities. Indeed, Tennessee law is replete with instances of children participating in, and becoming injured by, recreational activities.”

In 2020, Professor Alfred Yen and Biostatistician Matthew Gregas published an empirical study confirming this skepticism. Their study compared all fifty states’ laws on parental waivers to high school sports participation rates between 1988 and 2014. They found no statistically significant association between enforcing youth sports releases and high school sports participation rates. Those results suggest that courts citing public policy reasons to enforce parental waivers should look elsewhere.

B. The Child-Welfare Argument Against Parental Waivers

Unlike courts enforcing waivers based on concerns about youth recreation and parental authority, courts invaliding parental waivers based on child welfare find support in the parental-rights doctrine and empirical evidence about the effects of under-compensated childhood injuries.

First, non-enforcing courts recognize the child-welfare limit on parental authority. The Kentucky Supreme Court explained:

Although this Court recognizes a parent’s fundamental liberty interest in the rearing of one’s child, this right is not absolute, and the Commonwealth may step in as parens patriae to protect the best interests of the child. . . . [W]e do not recognize a parent’s fundamental liberty interest to quash their child’s potential tort claim.

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177 Yen & Gregas, supra note 3, at 2–4.
178 Id. at 3.
179 Id. at 3–4.
180 See cases cited supra notes 163–64.
Additionally, courts point to fundamental differences between invalidating parental waivers and the infringements that the parental-rights doctrine aims to prevent. While most parental-rights cases involve state intervention in parental decision-making, invalidating parental waivers does not amount to the state deciding for a parent whether or not to allow their child to participate in recreational activities. Moreover, like the state statutes the Supreme Court considered in *Danforth* and *Bellotti* that effectively coopted parental authority as a reason to interfere in family matters, using parental authority to justify waivers would coopt a doctrine meant to promote child welfare for a very different purpose—to protect the interests of businesses and activity providers. After all, arguing that parental waivers support child well-being is a stretch because they always pose the risk that an injured child could be left without recourse for their severe or permanent injuries.

Not only do non-enforcing courts’ concerns square with the parental-rights doctrine, but they also square with the realities and risks that parental waivers pose to children, families, and society. Several courts cite the risk of ballooning liability inherent in parental waivers as a reason for non-enforcement. The Iowa Supreme Court explained it well:

"By signing a preinjury waiver, a parent purports to agree in advance to bear the financial burden of providing for her child in the event the child is injured by a tortfeasor’s negligence. Sometimes parents are not willing or able to perform such commitments after an injury occurs. If parents fail to provide for the needs of their injured children, and the preinjury waiver"

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182 See, e.g., Hojnowski v. Vans Skate Park, 901 A.2d 381, 390 (N.J. 2006) ("[N]othing in our analysis interferes with the constitutionally protected right of a parent ‘to permit or deny a child’s participation in any or all of the recreational activities that may be available.’").

183 See supra note 107 and accompanying text.

184 See, e.g., Kirton v. Fields, 997 So. 2d 349, 357 (Fla. 2008) ("[W]hen a parent decides to execute a pre-injury release on behalf of a minor child, the parent is not protecting the welfare of the child, but is instead protecting the interests of the activity provider.").

185 See, e.g., Woodman ex rel. Woodman v. Kera LLC, 785 N.W.2d 1, 13 (Mich. 2010) ("While society might generally benefit from allowance of parental waivers for minor children, it could reasonably be asked: Is any preinjury waiver that is later asserted against a particular minor ever in the best interests of the injured child?").

186 See cases cited supra note 163.
in favor of the tortfeasor is enforced, financial demands may be made on the public fisc to cover the cost of care.\textsuperscript{187}

As it turns out, studies on traumatic brain injuries (TBIs), like the one Carter Justice suffered, support this concern, and federal and state governments have considered TBIs a major public health issue for years.\textsuperscript{188} Sports and recreational activities are a leading cause of childhood TBIs.\textsuperscript{189} Healthcare costs associated with TBIs impose a significant financial burden on families and states every year.\textsuperscript{190} Childhood TBIs are also associated with a higher likelihood of incarceration in adolescence and adulthood, worse employment outcomes, substance abuse, and reduced life expectancy.\textsuperscript{191} Socioeconomics and insurance coverage directly impact long-term TBI outcomes.\textsuperscript{192} Therefore, any financial impediment to treating childhood TBIs, like removing a child’s ability to recover funds at law for ongoing care, imposes not just an obligation to pay for healthcare costs, but also long-term social and financial burdens on the child, the family, and the state.

In sum, courts giving weight to child welfare in their waiver analyses appear to have found the most doctrinally and practically sound approach. Unlike youth-recreation and parental-rights arguments, which operate on assumptions about waivers and child welfare that are not supported by sufficient data, data on the impacts of under-resourced treatment of childhood injuries show that waivers are anything but good for children and families.

VI. DISCUSSION

A century of parental-rights jurisprudence indicates that parental authority is neither absolute nor categorical, so to apply it as such is to misapply the parental-rights

\textsuperscript{187} Galloway v. State, 790 N.W.2d 252, 257 (Iowa 2010).
\textsuperscript{189} Id. at 19.
\textsuperscript{190} See id. at 21.
\textsuperscript{191} Id. at 21, 29–31.
\textsuperscript{192} Id. at 33–34, 39.
If there is any guidepost to glean from the Supreme Court’s parental-rights cases, it is that parental rights are a means to an end—and that end is child well-being. Cases like Carter Justice’s, where children are at risk of losing their chance to obtain some recourse for life-altering injuries, show just how far from that end courts stray when they enforce liability waivers in the name of parental rights. A more appropriate approach to parental waivers, and one that is supported by the parental-rights doctrine itself, asks whether the waiver supports child well-being. If the answer to the child-well-being inquiry is no, then courts should hold parental waivers unenforceable.

Admittedly, considering whether something supports a child’s well-being is easier said than done, but the Supreme Court offers some guidance that is particularly useful in the context of parental waivers. Two principles from the Supreme Court’s parental-rights cases should guide courts in evaluating parental waivers as an exercise of parental authority.

First, while parents have broad authority over their children, that authority stops short of an absolute parental veto against the interests of the child. Any law that gives parents a right to release their child’s claims for negligence reads like an absolute parental veto of the child’s interests. A parent does not know whether their child will come out of the activity unharmed or left with an irreversible injury, yet waivers allow them to unilaterally sign the child’s future health and well-being away. And, unlike the institutionalization of children considered in Parham, parental waivers do not involve any third-party safeguards to protect the child or help the parent make the decision. Even under the principle that parents can act on behalf of their children up to the point of absolute parental veto, parental waivers pose too great a risk to children’s interests.

Second, parental rights break down where harm to the child is objectively plausible, but a court should not usurp

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193 See supra Sections IV.B–C.
194 See supra Section IV.B.
195 See supra Section IV.B.
197 Id. (holding a Georgia law constitutional in part because hospital superintendents also had to approve parents’ decisions to involuntarily commit their children to mental health hospitals).
198 Child labor and preventing necessary medical treatment are two examples of
parental authority based on a mere disagreement about what is or is not in a child’s best interests.199 As the Tennessee Court of Appeals stated, the law is replete with instances of children becoming injured through recreational activities,200 erasing any doubt that harm to children is plausible when parents exchange their children’s legal rights for the chance to participate in such activities. Further, it cannot be said that the risks inherent in waivers amount to a matter of mere disagreement about child well-being when the consequences of not being able to recover funds for injury can be so severe and far-reaching, affecting not just the child but also their family and community at large.201 Whether participating in these activities is good for children is a matter of opinion; whether exchanging legal rights for the opportunity to participate harms children’s interests is not just a matter of opinion. Parental waivers do harm children’s interests. The question upon signing one is simply how much they harm those interests.202

Parental waivers do not hold up as a valid exercise of parental authority under either principle—the rule against absolute parental veto or the framing of the issue as objective harm vs. mere disagreement. The second principle highlights a key difference between a parent’s authority to choose activities and a parent’s authority to release their child’s claims. As non-enforcing state courts have noted, removing parents’ right to release their child’s claims is not tantamount to usurping their decision-making authority regarding what activities their children should participate in.203 If anything, invalidating waivers should give parents more autonomy and confidence in deciding what activities they want their children to take part in because they will have when the Supreme Court seemed to think harm was plausible enough to overcome parental authority. See Prince v. Massachusetts, 321 U.S. 158 (1944); Bellotti v. Baird, 443 U.S. 622 (1979). Other child-protective laws also supplant parental authority where risk to the child is high and parents may not be an adequate safeguard (e.g., state car seat laws). Silbaugh, supra note 6, at 241 (“For the parent of the screaming baby who wants to pick the child up, or install the car seat facing forward so that the child can see the parent, we think a legal mandate that runs contrary to parental impulse is necessary to protect the child, and so we override the parent’s authority to make risk assessments.”).

200 See cases cited supra notes 158, 160.
201 See supra Section V.B.
202 States have expressed this as a range of harms spanning from depriving the child of legal rights to stripping resources needed for post-injury care. See cases cited supra notes 163–64.
203 See supra note 182 and accompanying text.
some recourse if things go wrong. Somewhere along the line, it seems some courts started equating non-enforcement with a lack of parental authority. However, the availability of numerous recreational options for parents and children in non-enforcing states demonstrates that parental authority is not a product of waiver. Moreover, it is not a stretch to assume that the authority most parents are interested in preserving is the ability to guide their children, not to affirmatively diminish their children’s rights or well-being.

VII. CONCLUSION

This Note examined the two leading reasons state courts hold parental waivers enforceable and argued that both are without merit. First, state courts misapply the parental-rights doctrine when they use it as a means to justify a parent’s decision that is an obvious detriment to the child. Second, the courts overstate the consequences of non-enforcement for organizations providing recreational activities for children. Given the conclusions that this Note draws, the question remains—what is left to love about parental waivers? Apparently, there is something to love. State high courts like Minnesota’s are still grappling with these issues. They are far from alone, as many states enforce at least some parental waivers or are undecided on enforceability.

Rather than parental authority and recreational opportunities being motivating factors, attempts to hang on to parental waivers likely boil down to valuing freedom of contract, businesses’ bottom lines, and privatized family life over protections for children. The use of parental authority

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204 See, e.g., Justice v. Marvel, LLC, 979 N.W.2d 894, 907 (Anderson, J., dissenting) (equating non-enforcement with state interference); see also cases cited supra note 162.
205 See, e.g., Blackwell v. Sky High Sports Nashville Operations, LLC, 523 S.W.3d 624, 655 (Tenn. Ct. App. 2017) (explaining even a non-enforcing state like Tennessee is still replete with children participating and becoming injured in recreational activities); see also Yen & Gregas, supra note 3, at 3 (finding no statistically significant relationship between waiver enforcement and high school sports participation rates).
206 See supra Part V.
207 See supra Sections IV.B, V.B.
208 See supra Section V.A.
209 See Justice, 979 N.W.2d at 906–07 (Anderson, J., dissenting).
210 See cases cited supra notes 158, 160 and accompanying text.
211 See, e.g., Justice, 979 N.W.2d at 907 (Anderson, J., dissenting) (“And we generally recognize that enforcing clear contractual terms furthers the public interest by preserving freedom of contract.”); see also supra Part II, Section IV.A.
to mask those values likely softens the blow of what these waivers really entail for children. It would not be the first state attempt to use parental authority as a pretext for other values.212

In light of what this Note has highlighted about the parental-rights doctrine, courts should set aside arguments in favor of waivers that use parental authority to skirt past the risks they pose to children and families. If freedom of contract or commercialism is the operative value, courts should explicitly address why it serves the public interest more than ensuring protections for injured children. Anything less masks the public health issues that coincide with waivers and likely precludes what could become productive, state-led solutions to a recurring problem for parents and businesses alike.

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212 See supra note 6 and accompanying text.