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Sacrificing Our Children at the Altar of Modern K-12 Public Education

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RENA M. LINDEVALDSEN

Sacrificing Our Children at the Altar of Modern K-12 Public Education

ABSTRACT

Should publicly-funded K-12 education continue to exist? At first blush, it might seem a radical question to even ask. But when public schools are failing in their essential purposes, we need to explore whether to cease funding them. From their inception, public schools had at least two essential purposes: to train students in those values essential to participating in society and, as the saying goes, teaching reading, writing, and arithmetic.

This Article will highlight the ways in which public schools are failing to achieve these two basic goals. First, public schools are failing academically. Scores on standardized tests continue to decline as students increasingly graduate unable to read at grade level. The 2023 National Assessment of Educational Progress results reveal the steepest declines in reading and math scores since the tests began fifty-five years ago. In Chicago, zero students at fifty-five public schools passed standard math or reading tests. In the face of these shocking statistics, many call simultaneously for increased funding for public schools and limits or bans on school choice even though the charter schools, private schools, and home schools generally are producing students who are academically more successful than their public school counterparts.

Second, public schools fail to train students in the values essential to participating in society. The Bible is clear that the fear of the Lord is the beginning of knowledge and wisdom and that the knowledge of God leads to understanding. Thus, schools that fail to educate based on those values pursue, as *Proverbs* 1:7 indicates, a foolish path. Unfortunately, the Establishment Clause jurisprudence over the past eighty years increasingly prompted schools to remove biblical values from classroom instruction.

These curriculum choices, in turn, have directly undermined parental authority to direct the education of their children.

In early American law, public educators were treated as agents of the parents, exercising only the authority delegated to the teachers. Parents, who have the God-given right and obligation to raise and educate their children, could delegate some responsibility over education to schools. But when a conflict arose between what the schools desired to teach and what the parents believed was proper, the parental right prevailed. Today, some courts operate on the exact opposite premise: parental authority ceases once parents decide to send their children to public schools. Once students are in the classroom, the schools decide what values to instill, even in the presence of parental objection.

The Article concludes by asserting that there is no legitimate basis for continued public funding of K-12 education given the poor academic outcomes at public schools and the overt hostility of public schools to biblical values and the parents who seek to instill those values.

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Professor of Law, Liberty University School of Law. J.D., *magna cum laude*, Brooklyn Law School. The author wishes to thank her research assistant Kara Davis for her invaluable research and the Liberty University Law Review for holding a symposium on the significant issues surrounding publicly-funded education and school choice.

ARTICLE

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Rena M. Lindevaldsen[†]

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I. INTRODUCTION

“Don’t throw good money after bad.” It is a saying all of us have heard at one point in our life and perhaps even contemplated with respect to a financial decision we had made that proved unprofitable. With respect to funding public K-12 education, federal, state, and local government decisionmakers act as though they had never heard the saying. Public K-12 educational outcomes aren’t just “bad,” they are abysmal—with many students failing to achieve competency levels in reading, mathematics, history, and other basic subjects. These facts alone should be enough to rethink the educational system in the United States. When you couple the poor academic outcomes with the ways in which public schools have usurped parental authority to educate their children, unconstitutionally used federal taxpayer monies to fund public K-12, and demonstrated an overt hostility to biblical values, there is no legitimate basis for continued public funding of K-12 education.

In reality, the debate in the United States over funding for public education, school choice, charter schools, and homeschooling is an ideological struggle for the hearts and minds of children. Everyone seems to agree that a key purpose of K-12 education is to train students in values essential to participating in society.¹ What those essential values are, however, is a point of contention. The Bible makes plain what values God desires for us to learn. Scripture states that the “fear of the Lord is the beginning of knowledge”² and “the beginning of wisdom.”³ And, it is the knowledge of God that leads to “understanding.”⁴ Daniel 2:21 echoes these sentiments when he writes that “[God] gives wisdom to the wise and knowledge to the discerning.”⁵ Because “[a]ll Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness,”⁶ the Bible places a responsibility on parents to bring up their children “in the

¹ See discussion *infra* Section II.C, III.A–B.

² *Proverbs* 1:7 (New Int’l).

³ *Proverbs* 9:10 (New Int’l).

⁴ *Id.*

⁵ *Daniel* 2:21 (New Int’l).

⁶ *2 Timothy* 3:16 (New Int’l).

training and instruction of the Lord.”⁷ Deuteronomy 6:6–7 commands parents to “[i]mpress” the commandments on their children—to “[t]alk about them when you sit at home and when you walk along the road, when you lie down and when you get up.”⁸

The Bible also is very clear that there is no middle-ground thinking—we either follow biblical truth or reject it. Only those who believe “in the name of God’s one and only Son” will have eternal life in heaven.⁹ Author Charles Colson described it this way:

In every action we take, we are doing one of two things: we are either helping to create a hell on earth or helping to bring down a foretaste of heaven. We are either contributing to the broken condition of the world or participating with God in transforming the world to reflect his righteousness. We are either advancing the rule of Satan or establishing the reign of God.¹⁰

Paul instructs us that we are to “demolish arguments and every pretension that sets itself up against the knowledge of God” and to “take captive every thought to make it obedient to Christ.”¹¹ Author Greg Bahnsen explains that we must choose to either adopt a mind of Christ or to reject biblical thinking.

“No man *is able* to serve two lords” (Matt. 6:24). It should come as no surprise that, in a world where all things have been created by Christ (Col. 1:16) and are carried along by the word of His power (Heb. 1:3) and where all knowledge is therefore deposited in Him who is The Truth (Col. 2:3;

⁷ *Ephesians* 6:4 (New Int’l).

⁸ *Deuteronomy* 6:6–7 (New Int’l).

⁹ *John* 3:17–18 (New Int’l).

¹⁰ CHARLES COLSON & NANCY PEARCEY, *HOW NOW SHALL WE LIVE?* 13 (1999).

¹¹ *2 Corinthians* 10:5 (New Int’l).

John 14:6) and who must be Lord over all thinking (2 Cor. 10:5), *neutrality is nothing short of immorality*.¹²

Thus, a person who rejects God's word not only lacks biblical knowledge and wisdom but is pursuing the path of the fool.¹³

Public K-12 education not only rejects biblical truth as the basis of all knowledge and wisdom, but current Establishment Clause jurisprudence has prompted and empowered schools to adopt curriculum that instills values that are overtly hostile to Scripture.¹⁴ In other words, the current interpretation and application of the Establishment Clause has caused schools to prohibit teaching the only source of knowledge and wisdom and, instead, schools seek to instill ideas and values in our children that are "against the knowledge of God."¹⁵ Although the Supreme Court appears to have finally abandoned the *Lemon* test, which mandated that governments have a secular purpose for anything that appears to support religion,¹⁶ the longstanding notion that there must be a "wall of separation" between church and state¹⁷ fuels the hostility to biblically based instruction in public K-12 education.¹⁷ What the courts refuse to acknowledge is the reality that

¹² GREG L. BAHNSEN, ALWAYS READY: DIRECTIONS FOR DEFENDING THE FAITH 9 (Robert R. Booth ed., Covenant Media Found. 8th ed. 2007) (1996).

¹³ See *Proverbs* 1:7 (New Int'l) ("but fools despise wisdom and instruction"); *Romans* 1:21 (New Int'l) ("For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened.").

¹⁴ See, e.g., *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 529 (1st Cir. 1995); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005).

¹⁵ 2 *Corinthians* 10:5 (New Int'l).

¹⁶ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (citing *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (plurality opinion)) ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.").

¹⁷ See Lawrence Hurley & Andrew Chung, *Supreme Court Takes Aim at Separation of Church and State*, REUTERS (June 29, 2022 12:38 AM), <https://www.reuters.com/legal/government/us-supreme-court-takes-aim-separation-church-state-2022-06-28/> (discussing recent Supreme Court decisions that the authors believe have eroded the wall of separation between church and state); Judd W. Patton, *The Wall of Separation Between Church and State*, FOUND. FOR ECON. EDUC. (Nov. 1, 1995), <https://fee.org/articles/the-wall-of-separation-between-church-and-state/> (describing the Supreme Court's "wall of separation" language

all instruction is based on a set of values; it's just a question of which values.¹⁸

An educational system that fails to educate based on truth should not be publicly funded. To support that conclusion, this Article first will provide a brief overview of the current state of affairs of K-12 education in the United States. It will focus on the poor educational outcomes and the ways in which schools are overtly hostile to biblical values. Second, this Article will provide a brief description of the evolution of public education in the United States, highlighting the fact that parents (not government) have the biblical responsibility to educate their children. As a result, any authority schools have to educate children is delegated authority and cannot be inconsistent with the values of the parents. Finally, the Article concludes with an explanation of why there is no middle ground for compromise between the biblical values that should be taught in schools and the values predominantly taught in schools today.¹⁹

II. THE CURRENT STATE OF AFFAIRS OF K-12 IN THE UNITED STATES

The educational outcomes of students graduating from American public schools have continued to decline. Recent statistics demonstrate that public school students are falling further and further behind in even the most basic subjects, raising the question of why we continue to fund a system that fails at its most basic mission.²⁰ In addition to the poor education outcomes, the aging school facilities pose significant obstacles to learning, including lack

from *Everson v. Board of Education* as having set off “a cultural war of mammoth proportions”).

¹⁸ Professor Jeff Tuomala explains in his article the Supreme Court's false dichotomy between the sacred and secular in its Establishment Clause jurisprudence. See Jeffrey C. Tuomala, *Is Tax-funded Education Constitutional?*, 18 LIBERTY U. L. REV. 1009, 1064–1101 (2024).

¹⁹ This Article leaves for additional discussion by other symposium authors the questions of whether a publicly-funded educational system is biblical or constitutional.

²⁰ See Larry Sand, *Our Failing Schools are a National Crisis*, CITY J. (July 14, 2023), <https://www.city-journal.org/article/our-failing-schools-are-a-national-crisis>.

of air conditioning, lack of adequate heating, and leaky roofs.²¹ Given these outcomes and conditions, many school-choice advocates point to alternatives to public schools as the way to educate our children. The alternatives include private schools, charter schools (public and private), and homeschooling. Despite the success of these alternative forms of education, some call for elimination of any privatization—asking that we continue to throw good money after bad.

A. *The Poor Educational Outcomes in Public K-12 Schools*

American public schools continue to decline academically. The 2023 National Assessment of Educational Progress (NAEP) results for thirteen-year-old students in reading and math “showed the steepest declines for 13-year-olds since the tests began” in 1969.²² Compared to scores from 2019–2020, “the average scores . . . declined 4 points in reading and 9 points in mathematics.”²³ “Compared to a decade ago, the average scores declined 7 points in reading and 14 points in mathematics.”²⁴ The 2023 reading and math scores declined at all five selected percentiles.²⁵ Female students showed a greater decrease than male students in mathematics, widening the score gap as compared to 2020.²⁶ The students also reported that much higher percentages (28% in 2012 as compared to 42% in 2023) were taking regular mathematics courses rather than algebra or other advanced courses.²⁷

²¹ See generally Mark Lieberman, *Half of Schools have Urgent Cooling and Heating Concerns, Survey Shows*, EDUC. WEEK (July 13, 2021), <https://www.edweek.org/leadership/half-of-schools-have-urgent-cooling-and-heating-concerns-survey-shows/2021/07> (discussing the deteriorating condition of many school facilities).

²² *Id.*; *About NAEP*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/nationsreportcard/about/> (last visited Feb. 1, 2024) (testing began in 1969).

²³ *NAEP Long-Term Trend Assessment Results: Reading and Mathematics*, THE NATION’S REP. CARD (last visited Feb. 1, 2024), <https://www.nationsreportcard.gov/highlights/ltr/2023/>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

The commissioner of the National Center for Educational Statistics stated that “[t]he mathematics decline for 13-year-olds was the single largest decline we have observed in the past half a century.”²⁸ Only “13% of eighth-graders met proficiency standards” in the subject of U.S. history.²⁹ In response to the 2023 NAEP, one commentator characterized the K-12 education system in the United States as “a disaster.”³⁰ State and local testing results reveal similarly disturbing results.

“About 50% of New York City children fail standard reading tests.”³¹ Reading scores in Boston public schools fell “to levels last seen in 1992.”³² “In Washington, D.C., only 21% of black high school students who took an advanced placement course passed.”³³ In Baltimore, “zero students passed their state math exams” among thirteen state schools.³⁴ Reports in Baltimore also revealed that “not one student among the 2,000-strong student body was reaching the required math standard in 10 high schools, eight elementary schools, three Middle/High schools and two Elementary/Middle schools.”³⁵ Those numbers echoed results six years earlier where another report found that thirteen schools in Baltimore had

²⁸ Sand, *supra* note 20.

²⁹ *Id.*

³⁰ James Rogan, *Stop Funding Failed Public Schools*, WASH. EXAM’R (May 13, 2023, 6:00 AM), <https://www.washingtonexaminer.com/opinion/beltway-confidential/2768987/stop-funding-failed-public-schools/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Will Potter, *Fury as Zero Children at 13 Baltimore State Schools Pass Math Exam—as Parent Groups Call on Leaders to Step Down*, DAILY MAIL (Sept. 22, 2023, 4:27 PM), <https://www.dailymail.co.uk/news/article-12550623/This-educational-homicide-Fury-ZERO-children-13-Baltimore-state-schools-pass-math-exam-parent-groups-call-leaders-step-down.html>.

³⁵ Harriet Alexander, *Where Are Things Going Wrong? Damning Report Finds There Are 23 Public Schools in Baltimore Where None of the Children Understand Basic Math—as Parents Blame Dem-led City’s ‘Fraud and Corruption’*, Daily Mail (Feb. 14, 2023, 7:08 PM), <https://www.dailymail.co.uk/news/article-11747209/Report-finds-23-public-schools-Baltimore-NONE-children-understand-basic-math.html>.

zero students test proficiently in math.³⁶ And in Chicago, “zero students at 55 public schools passed standard math or reading tests.”³⁷ The statistics show that students at Chicago’s lowest-performing schools drop out of high school at twelve times the rate of others—with 36% dropping out.³⁸ High school drop-out rates correlate to lower income earning potential, with census data showing that those without a high school diploma or GED earn 41% less than those with a diploma or GED.³⁹ Not surprisingly, the declining high school performance has translated into lower college admission test scores. In 2023, the average ACT score was at a 30-year low.⁴⁰

The continued decline in performance has led one commentator to say that much of the \$60 billion a year spent by the *federal* government on public K-12 education is “wasted.”⁴¹ Federal funding constitutes a small percentage of total funding for public K-12 education. Thus, a 2023 report reflects that local, state, and federal governments combined paid \$810 billion a year toward a failing public school system, with federal funds constituting 10.5% of that amount.⁴²

B. *The Poor Facilities in Public K-12 Schools*

Despite all the funds, not only are students failing to meet minimum competencies, but many students meet in school buildings that are in disrepair. A 2022 news article reported that the American Society of Civil

³⁶ Potter, *supra* note 34.

³⁷ Rogan, *supra* note 30.

³⁸ *Trapped in Chicago’s Worst Schools: Education Outcomes in Chicago’s Lowest-Performing Public Schools*, ILL. POL’Y, <https://www.illinoispolicy.org/reports/trapped-in-chicagos-worst-schools-education-outcomes-in-chicagos-lowest-performing-public-schools/> (last visited Mar. 6, 2024).

³⁹ *Id.*

⁴⁰ Zachary Schermele, *Scathing New Report Says American Schools Are ‘Failing the COVID Generation’*, USA TODAY (Sept. 13, 2023, 6:06 AM), <https://www.usatoday.com/story/news/education/2023/09/13/us-schools-failing-covid-generation-report-says/70835897007/>.

⁴¹ Rogan, *supra* note 30.

⁴² Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (Sept. 8, 2023), <https://educationdata.org/public-education-spending-statistics>.

Engineers rated “America’s 100,000 public school buildings [at an average score] of D+.”⁴³ The article described schools without air conditioning that have to cancel classes because temperatures in classrooms reach eighty-five degrees and above.⁴⁴ In Baltimore, fourteen schools lack air conditioning, and more than thirty schools in Denver Public Schools have sent students home early or closed for days at a time because of the heat.⁴⁵ Conversely, the article mentioned other schools that canceled classes because heating systems could not keep classroom temperatures at a safe level.⁴⁶ “Baltimore teachers have reported classroom[] [temperatures as low] as 40 degrees.”⁴⁷ One school in Massachusetts regularly has leaking water in classrooms, leaving ceiling tiles brown and rusty looking.⁴⁸ One school in California reported a cockroach infestation so bad that some feared eating lunch.⁴⁹

C. *Proposed Alternatives to Public K-12 Schools*

Ignoring the maxim, “don’t throw good money after bad,” many respond to the poor educational outcomes and facilities by asking for more funding. But some reports have revealed that funding is not the problem. According to data from the National Center for Educational Statistics, adjusting for inflation, the per pupil spending between 1971 and 2020 rose 140%.⁵⁰ In fact, when spending per state is compared, states with more per pupil spending do not necessarily outperform lower-spending states. For example, Texas spent 25% less than California per pupil and scored about the same on the 2022 NAEP.⁵¹

⁴³ Christina Zdanowicz & Holly Yan, *US Public Schools Get a D+ for Poor Conditions, and Experts Say Problems Are Getting Worse. Here’s What Kids Are Facing*, CNN (Sept. 18, 2022, 4:12 AM), <https://www.cnn.com/2022/09/18/us/school-conditions-2022/index.html>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Zdanowicz & Yan, *supra* note 43.

⁵⁰ Sand, *supra* note 21.

⁵¹ *Id.*

With the public K-12 educational system failing, some parents have sued states. A lawsuit in Michigan alleges that hundreds of students in the Highland Park school district are “functionally illiterate.”⁵² A California suit that resulted in a settlement providing additional funding for schools asserted that the state denied students the civil right to literacy guaranteed under the state constitution; the suit was based on data showing that in some schools less than 10% of students could read at grade level.⁵³ An article discussing the suit referred to one fifth grade student who wrote his book report on Dr. Seuss’ *Cat in the Hat*—“a book meant for kindergarteners”—and a second grade student that could not get past a pre-school reading level.⁵⁴ Parents of students in Baltimore City public schools sued after learning that 75% of high schoolers in one area of Baltimore were reading at an elementary grade level and 41% of all Baltimore Public High School students had a grade point average below 1.0.⁵⁵ Rather than pour more money into public schools, many scholars point to school choice as the solution.

Looking only at performance outcomes, the data does reflect that charter schools tend to outperform the public school system.⁵⁶ As illustrated by a report from Stanford University each year, on average, the students in urban charter schools receive forty more learning days in math and twenty-

⁵² E.g., Grace Chen, *Failure to Read Now Grounds for Lawsuit? ACLU Says Yes*, PUB. SCH. REV. (June 30, 2023), <https://www.publicschoolreview.com/blog/failure-to-read-now-grounds-for-lawsuit-aclu-says-yes>.

⁵³ Karen D’Souza, *The Right to Read: It Took a Lawsuit Against California*, EDSOURCE (Sept. 29, 2022), <https://edsources.org/2022/the-right-to-read-it-took-a-lawsuit-against-california/678069>.

⁵⁴ *Id.*

⁵⁵ Phil Shiver, *Baltimore Parents Sue City After Student Graduates High School Not Being Able to Read; Shocking Number of Students Have Failing GPAs*, BLAZE MEDIA (Apr. 1, 2022), <https://www.theblaze.com/news/baltimore-parents-sue-city-over-education-failures>.

⁵⁶ See Jacob Fischler & Cole Claybourn, *Understanding Charter Schools vs. Public Schools*, U.S. NEWS (Nov. 14, 2023, 10:20 AM), <https://www.usnews.com/education/k12/articles/understanding-charter-schools-vs-public-schools> (explaining what a charter school is and generally stating that they are narrowing the achievement gap as compared to public schools).

eight more learning days in reading than students in public schools.⁵⁷ “After Denver [expanded] school choice [options] in 2009, graduation rates and” academic performance improved.⁵⁸ Between 2009 and 2019, “Colorado charter schools grew by more than 85%.”⁵⁹ During the 2020–2021 academic school year, across the nation, 1.4 million students left public K-12 schools, with 17% choosing charter schools.⁶⁰

A 2020 book by Thomas Sowell compared the outcomes of students attending public high schools in the South Bronx and those attending charter schools in the South Bronx.⁶¹ The research revealed that only 2% of the nearly 2,000 public school students in the South Bronx graduated ready for college.⁶² The NYC Charter Center reported that “more than 25,000 families applied for just over 9,000 available seats in Bronx charter schools.”⁶³ Sowell based the performance comparisons in his book on data drawn from “the 2018 New York State Education Department tests in Math and English Language Arts, which [is] administered to all students in grades three through eight,” whether they are in public district schools or public charter schools.⁶⁴ He also ensured that he compared students who shared “the same grade, racial, ethnic, and socioeconomic characteristics.”⁶⁵ He also only compared students who were “co-located,” which means that the public and charter schools actually share the same building.⁶⁶ Using those

⁵⁷ Hanna Skandera, *America’s Education System is Failing—but a Growing School Choice Movement Believes It Has the Solution*, FORTUNE (June 23, 2023, 6:38 AM), <https://fortune.com/2023/06/23/americas-education-system-is-failing-but-a-growing-school-choice-movement-believes-it-has-the-solution/>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See THOMAS SOWELL, *CHARTER SCHOOLS AND THEIR ENEMIES* (2020).

⁶² Ian Rowe, *The Unwelcome Success of Charter Schools*, AM. ENTER. INST. (Oct. 5, 2020), <https://www.aei.org/articles/the-unwelcome-success-of-charter-schools/>.

⁶³ *Id.*

⁶⁴ *Id.* A public charter school is created by a private group that obtains government approval and funding to operate.

⁶⁵ *Id.*

⁶⁶ *Id.*

sample limitations, he gathered a sample size of 23,000 students.⁶⁷ Sowell's conclusions are well-documented, including an appendix to the book that contains more than 100 pages of charts detailing the comparisons between the public and charter schools.⁶⁸

The research revealed that “[w]hile not every charter public school outperformed its co-located district public school in every grade, the difference was decisive in an overwhelming number of cases.”⁶⁹ For example, “a majority of students in the [Knowledge is Power Program] charter network passed the 2018 math exams in [twelve] of their [fourteen] grade levels”; in contrast, a majority of the students in district public schools “passed the math exam in just one of their twenty grade levels.”⁷⁰ A comprehensive, longitudinal study by a Harvard professor showed similar data. Professor Paul Peterson described the differences between the student cohorts in charter schools as compared to public schools as constituting “nearly an additional half-year’s worth of learning.”⁷¹ Professor Peterson’s study found the biggest gains “for African Americans and for students of low socioeconomic status attending charter schools.”⁷²

Private Catholic Schools also generally produce better outcomes than public schools. The only private school scores published by the NAEP reports are those of Catholic schools. Looking only at history scores, 28% of Catholic school eighth graders were proficient as compared to 14% in public schools.⁷³ Interestingly, the average tuition for private Catholic

⁶⁷ *Id.*

⁶⁸ Rowe, *supra* note 62; see SOWELL, *supra* note 61.

⁶⁹ Rowe, *supra* note 62.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ National Center for Education Statistics, *The Nation’s Report Card U.S. History 2001*, U.S. DEP’T OF EDUC. OFF. OF EDUC. RSCH. & IMPROVEMENT 1, 43, 145 (2002), <https://nces.ed.gov/nationsreportcard/pdf/main2001/2002483.pdf>.

schools is \$8,000 per student as compared to the \$15,000 or more per pupil in public schools.⁷⁴

Given the ideological battleground that today's public schools represent, not surprisingly, the response of some to the growth and success of charter schools is that they need to be stopped. NYC Mayor Bill DeBlasio stated in his opening statement at the 2019 annual forum for the National Education Association that "I hate the privatizers and I want to stop them."⁷⁵ He is not alone. "[T]eacher unions and many Democratic elected officials have consistently blocked legislation" that would allow more public charter schools in New York City.⁷⁶

Still, others believe the right solution is to ban all school choice (charter, private, or homeschooling)—forcing all students into public education.⁷⁷ Emory University Professors Martha Fineman and George Shepherd take the radical position that homeschooling should be prohibited.⁷⁸ Although

⁷⁴ Patrick Wolf & Neal McCluskey, *COVID-19 Leaving Most Private Schools in Financial Despair*, CATO INST. (July 16, 2020), <https://www.cato.org/commentary/covid-19-leaving-most-private-schools-financial-despair>.

⁷⁵ Rowe, *supra* note 62.

⁷⁶ *Id.*; see also *New Federal Funding Bill Out of Step With What Parents Want for Charter Schools*, NAT'L ALL. FOR PUB. CHARTER SCHS. (July 12, 2022), <https://publiccharters.org/news/new-federal-funding-bill-out-of-step-with-what-parents-want-for-charter-schools/> (discussing Congress's proposal to reduce funding for charter schools).

⁷⁷ See Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children's Interests*, 46 U. BAL'T. L. REV. 57, 100 (2016) (focusing on prohibiting homeschooling, but the authors generally refer to any "privatized educational system" as undermining the values training that should take place in public schools); *id.* at 103 ("Homeschooling and other forms of choice create harmful incentives that can ruin public schools."); *id.* at 106 ("[B]oth the rights of children and economic analysis support mandatory public education."); see also Sacha M. Coupet, *Valuing All Identities Beyond the Schoolhouse Gate: The Case for Inclusivity as a Civic Virtue in K-12*, 27 MICH. J. GENDER & L. 1, 22 (2020) ("[Although] there is an attraction to a system that prioritizes parental authority by letting parents educate their own children as they see fit . . . [and] foster[s] the value of pluralism . . . these attractions are only superficial, and perhaps, more problematically, deeply threatening to the common good, in a society where many parents might teach racism, for example, in the absence of political pressure to do otherwise.").

⁷⁸ Fineman & Shepherd, *supra* note 77, at 57.

the primary target of their article is homeschooling, they are less than subtle about their position that all forms of privatized education (charter, private, or homeschooling) harm students. In their overtly ideologically-driven opposition to homeschooling, the authors do not hide their disdain for the right of parents (rather than government) to direct a child's education.⁷⁹ The authors describe the legal basis for homeschooling as “[a]n excessive focus on the interests of parents in controlling the influences on their children,” which the authors believe diverts attention away from what the government-controlled schools believe is best for the children.⁸⁰ The article rests on the premise that children are vulnerable and it is the government, not parents, who know what is best for the children.⁸¹ They conclude that “[t]he child's interest in a diverse education aligns with the interest of the state[],”⁸² not the parents who would choose homeschooling or other forms of school choice. The authors' vulnerability theory requires the *government* to give children the proper educational foundation to accrue “resources and resilience” in life.⁸³ As a result,

[H]omeschooling should be understood to be a failure of the state to be fully responsive to the need of vulnerable subject in childhood for a strong educational foundation. This failure presents the possibility of harm to both the child and society. Homeschooling is an inadequate mechanism to ensure access to an effective education that will provide opportunities for future citizens; in this way, it may directly harm individual children.⁸⁴

Homeschooling is harmful, according to Fineman and Shepherd, because it is “radically separatist and individualistic,” it can be “antisocial,” and, for

⁷⁹ *Id.* at 59.

⁸⁰ *Id.*

⁸¹ *Id.* at 60–61 (“[V]ulnerability theory ultimately is a theory of state responsibility.”); *id.* at 62 (stating that the vulnerability analysis asks, on the issue of education, “whether the state should continue to privilege parents’ interests over those of the child and society”).

⁸² *Id.* at 106.

⁸³ *Id.* at 62–63.

⁸⁴ Fineman & Shepherd, *supra* note 77, at 63.

many, it undermines the values of “toleration and expanded notions of equality.”⁸⁵ The authors assert that

the state abdicates its responsibilities on multiple fronts when it tolerates homeschooling. The state fails when it does not effectively educate children about sexual, gender, and other forms of diversity or when it inadequately addresses bullying, harassment, and discrimination. It fails on an even more fundamental level, however, when it concedes an unregulated educational space in which children can be isolated, shielded from diversity, and, perhaps, conditioned to carry bias and discrimination into their future dealings as adult members of society.⁸⁶

The authors correctly point out that “children must have a foundation of literacy and grasp of knowledge necessary to become productive” members of society; however, they omit any meaningful discussion of the abysmal failure of the public education system to provide that basic education and their article reveals the ideological differences that exist concerning what knowledge is necessary to become a productive member of society.⁸⁷ Rather, the authors mention in passing the existing failure of public schools but then, ignoring the substantial data concerning the success of privatized forms of education, assert the solution is not to allow school choice but to put additional funding and focus into public schools.⁸⁸

Fineman and Shepherd maintain that there must be “widespread participation in a shared core curriculum.”⁸⁹ If we ignore the “transmission of civic virtue and tolerance” or permit those values to be provided in an “idiosyncratic matter, resulting in a twisted distortion of civic ideals . . . it can foster or reinforce irreconcilable political and ideological factions

⁸⁵ *Id.* at 64.

⁸⁶ *Id.* at 70.

⁸⁷ *Id.* at 75–76.

⁸⁸ *See id.* at 77–78.

⁸⁹ *Id.* at 82.

within a society.”⁹⁰ Professors Fineman and Shepherd’s response to the problem of ideological factions (which necessarily cause disagreement and friction in society) is the exact response James Madison cautioned against in *Federalist No. 10* because it tends to destroy liberty.

James Madison responded to the concern raised by a political system that fosters “a factious spirit” that causes division along rival parties and instability.⁹¹ He said there are only two ways to cure the inevitable existence of factions: one is to remove its causes and the other to control its effects.⁹² There are, in turn, two ways to remove the causes of factions: one is to “destroy the liberty [that] is essential to its existence” and the other is to give every citizen “the same opinions, the same passions, and the same interests.”⁹³ The “liberty” Madison referred to as essential to existence of our nation encompassed freedoms of belief, thought, and expression.⁹⁴ He described the attempt to destroy that liberty as “worse than the disease [of factions].”⁹⁵ “Liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air”⁹⁶ And, as to the second remedy—giving everyone the same opinions, passions, and interests—Madison explained that as long as man continues to be fallible, there will be diversity of opinions, passions, and interests.⁹⁷ In other words, it is impossible to expect everyone to be of one mind and desires.⁹⁸

As Fineman and Shepherd continue on their path to eradicate factions, they make the primary factual assertion that homeschooling is harmful to children and society. Despite all the data to indicate otherwise, these

⁹⁰ Fineman & Shepherd, *supra* note 77, at 82.

⁹¹ THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 1961).

⁹² *Id.*

⁹³ *Id.* at 72–73.

⁹⁴ *See id.*

⁹⁵ *Id.* at 73.

⁹⁶ *Id.*

⁹⁷ THE FEDERALIST NO. 10, *supra* note 91 at 73.

⁹⁸ *See id.*

authors allege that “[f]or a substantial number of children, homeschooling means no schooling at all.”⁹⁹ The authors cite no data for their assertion that a substantial number of the 3 to 5 million homeschoolers are not being schooled at all,¹⁰⁰ instead they generally refer readers to a discussion-forum website called unschooling.com.¹⁰¹ The authors make the broad generalization that for the unschooled children, many find themselves just “sitting in front of daytime television.”¹⁰² Realizing that there are homeschoolers who actually educate their children, the authors then take aim at the substance of the education, labeling the instruction factually wrong and stemming from the assertion that “the Bible is literally true.”¹⁰³ This is where the ideological division reveals itself most clearly: “This insistence that Biblical statements are literal truth leads to instruction that can be sharply out of touch with the rest of the modern world,” including such statements as “[e]volution is false,” “Noah’s ark was real,” and that “[p]eople’s lifespans are shorter than they were 5000 years ago.”¹⁰⁴

⁹⁹ Fineman & Shepherd, *supra* note 77, at 84.

¹⁰⁰ *But see* Kerry McDonald, *New Census Data Show Homeschooling Tripled During the Pandemic—and One Key Group is Driving the Surge*, FOUND. FOR ECON. EDUC. (Mar. 30, 2021), <https://fee.org/articles/us-census-homeschooling-triples-diversifies-during-pandemic-response/>.

¹⁰¹ Fineman & Shepherd, *supra* note 77, at 84 & n.127.

¹⁰² Fineman & Shepherd, *supra* note 77, at 84. The authors cite an article where one set of parents locked their child in a room for two years with no human contact. *Id.* at 85. Of course, the authors seem to overlook the fact that those examples of child abuse and neglect unfortunately happen all too often and certainly are not isolated to homeschooling families.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 85–86. For a website that links the reader to a variety of sources factually supporting creation as compared to evolution, see *Evidence Against Evolution*, ANSWERS IN GENESIS, <https://answersingenesis.org/evidence-against-evolution/> (last visited Feb. 2, 2024). Stating that it is false to each that lifespans are shorter today than previously is a direct attack on the truthfulness of the Bible. In Genesis 5, for example it states that Adam lived 930 years, Seth lived 912 years, Enosh lived 905 years, Lamech lived 777 years, and Methusela lived 969 years. *Genesis* 5:3–31. We also know that after Noah was 500 years old, he then became the father of Shem, Ham, and Japheth. *Id.* 5:32. The authors statement that it is false to say Noah’s ark is real also takes direct aim at the inerrancy of Scripture. In Genesis 6, God tells Noah the exact specifications on how to build the ark. *Id.* 6:14–16. In Genesis 7, we learn that God flooded the entire earth and only those in the ark survived. *Id.* 7:17–23. And in Genesis

Given the authors' position that "some parents homeschool their children in order to indoctrinate them with *extreme* views while isolating them from *moderate*, competing views," the authors posit the question of how society should respond.¹⁰⁵ The fact that the authors believe that what is being taught in public schools and how they characterize biblical truth as simply a "moderate, competing view" demonstrates the ideological conflict for which there really is no middle ground for compromise.¹⁰⁶ To malign the beliefs of homeschoolers, the authors assert that they might teach white supremacy, the need for armed resistance to a government that plans to enslave free people, or that women should be sequestered and treated as property.¹⁰⁷ Then, out of an alleged concern for the constitutional rights of homeschoolers, the authors assert that government should ban homeschooling rather than attempt to impose additional regulations because governmental oversight of what is taught or said to children by parents would raise First Amendment concerns and be "too intrusive."¹⁰⁸ It seems that prohibiting parents from exercising the parental right and duty to direct their child's education is an extreme form of intrusiveness.

Fineman and Shepherd, however, circumvent the parental rights concern by asserting that any parental right to make educational decisions is secondary to the state's responsibility to educate children.¹⁰⁹ The authors switch the terminology of "parental rights" to "parental responsibility," and then state that parents abdicate their responsibility when they cause harm to children through homeschooling.¹¹⁰ Emblematic of the faulty reasoning and

8, we read that after 150 days, God caused the waters to recede, the ark came to rest on the mountains of Ararat, and God directed Noah to leave the ark. *Id.* 8:1-5, 15-16.

¹⁰⁵ Fineman & Shepherd, *supra* note 77, at 86-87 (emphasis added).

¹⁰⁶ *Id.* at 86.

¹⁰⁷ *Id.* at 87.

¹⁰⁸ *Id.* at 98-99.

¹⁰⁹ *See id.* at 57, 92, 96.

¹¹⁰ *Id.* at 91-92, 95-96. The National Education Association does not officially support a ban of homeschooling, but asserts in Resolution B-85 that homeschooling "cannot provide the student with a comprehensive education experience." NAT'L EDUC. ASS'N, 2022-2023 NEA RESOLUTIONS 39, https://www.nea.org/sites/default/files/2022-08/nea-resolutions_2022-2023.pdf. As a result, when homeschooling does occur, parents must meet all state curricular

research supporting their article, the authors make the case that the impact on parents to instill their desired values is minimal. The authors offer a math equation to demonstrate the large number of hours parents would still have to influence their children outside the hours the children would be required to attend public schools.¹¹¹

The math equation, however, demonstrates the declining math skills noted earlier in this Article.¹¹² The authors conclude that parents would have at least seventy waking hours during the school week, exclusive of vacations and weekends, to interact with their children.¹¹³ The footnote to this math equation states that it assumes children will sleep nine hours per night.¹¹⁴

Let's take a closer look at the math problem. The authors assumed students attended public school for thirty-five hours per week (seven hours per day Monday through Friday).¹¹⁵ If we subtract thirty-five hours from 120 hours during the school week (twenty-four hours times five days), it leaves eighty-five hours. We then reduce the number of waking hours during the school week by forty-five hours (representing the nine hours of sleep per night), leaving forty waking hours during the week (eighty-five minus forty-five), not the seventy waking hours asserted by the authors.¹¹⁶ In addition, it is unclear if the thirty-five hours for school hours accounts for time traveling to and from school on a bus or other after-school activities, which would further reduce the forty waking hours during the school week that parents have to influence their children. It also does not account for the fact that parents might have work schedules that impact the time spent with their children. In any event, forty waking hours is a far cry

requirements and should be limited to children of the immediate family, with all expenses borne by the family, instruction only by people who are licensed by the appropriate educational licensing agency, and curriculum approved by the state. *Id.*

¹¹¹ Fineman & Shepherd, *supra* note 77, at 97–98.

¹¹² *See supra* Section II.A.

¹¹³ Fineman & Shepherd, *supra* note 77, at 97–98.

¹¹⁴ *Id.* at 97 n.198.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 97.

from the seventy waking hours the authors asserted.¹¹⁷ Even more importantly, it is the parents, not the government, that should decide how the students spend all of their school week.

Another author, Professor Sacha Coupet from Loyola University, does not go as far as to assert that homeschooling and other forms of school choice should be banned, but she does take a similarly disturbing position that places state interests above parental rights with respect to educational decisions.¹¹⁸ Professor Coupet, like Professors Fineman and Shepherd, bases her article on the premise that schools are intended to be a “powerful arena for molding visions of what constitutes the good life to which we should aspire as an American society and the values that undergird our modern liberal democracy.”¹¹⁹ After first asserting schools have the responsibility for citizenship development of students, the author acknowledges parents also play some role. The article explores whose vision for citizenship development should prevail when schools and parents conflict. The author’s conclusion is that the core civil virtues taught in schools are “tolerance, inclusion, and equality,” and that those virtues should “compel schools to adopt affirming models of care for transgender and gender-expansive students, including adoption of gender-complex and LGBT-inclusive curricula.”¹²⁰ She refers to schools as “the almost sacred space in which we entrust the State with the inculcation of critical civic virtues.”¹²¹

So, how exactly does the author resolve disputes that necessarily arise when parents object to the values being taught in the schools? First, she characterizes the state’s role as “citizen formation” and the parents’ role as “child rearing.”¹²² From there, she asserts that there are instances where the

¹¹⁷ It seems the authors’ math equation would be correct if they stated in the text that parents would have approximately seventy waking hours each week, *including* vacations and weekends, rather than “plus vacations and weekends.” Fineman & Shepherd, *supra* note 77, at 97. But that is not what the text states. It is ironic for that mistake to exist in an article attacking homeschools for doing such a poor job at educating and training their children.

¹¹⁸ See Coupet, *supra* note 77.

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.* at 8.

¹²¹ *Id.* at 9.

¹²² *Id.* at 18.

parents' child-rearing decisions are actually thwarting the state's citizen-formation responsibility.¹²³ When parents exercise their child-rearing responsibility in ways that are "deeply threatening to the common good," the state cannot "abdicate exclusive educational authority to parents."¹²⁴ Where the common good is threatened, the state's interests trump parental authority.¹²⁵ "[T]he state's interests in controlling the school curriculum must be prioritized over the interests of parents, particularly those parents seeking to 'protect' their children from exposure to gender diversity."¹²⁶ Not only should the state interests trump, but parents should not be allowed to opt their children out of any curriculum provided by the state.¹²⁷

What is most ironic about Professor Coupet's article is its insistence throughout the article that students must be exposed to different ways of life,¹²⁸ must learn to engage in respectful discourse,¹²⁹ must be open-minded and tolerant,¹³⁰ and must model civility.¹³¹ The author offers no such respect, tolerance, civility, and even-handed exposure to people with biblical values. Rather, those views are relegated to discussion in the "privacy of the home."¹³² She is fine with that "balance" because in a "multicultural, pluralistic society" like ours, we are all free in our personal lives to believe as we wish and to pray to the god of our choice in our "personal lives," but must be willing to "channel' our conduct" as the price to pay to live in civilized life.¹³³ As with the Fineman and Shepherd article, Professor Coupet reveals that at its core, the battle over school choice is

¹²³ *Id.*

¹²⁴ Coupet, *supra* note 77, at 22.

¹²⁵ *Id.* at 23.

¹²⁶ *Id.* at 52.

¹²⁷ *Id.* at 23, 54.

¹²⁸ *Id.* at 57.

¹²⁹ *Id.* at 9.

¹³⁰ Coupet, *supra* note 77, at 12, 14.

¹³¹ *Id.* at 12.

¹³² *See id.* at 25.

¹³³ *Id.* at 74 (quoting *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 91–92 (N.M. 2013)).

about which values are acceptable to government. Perhaps that is why so many new families are choosing to homeschool.

An October 2023 Washington Post article took an in-depth look at the explosive growth of homeschooling across the nation.¹³⁴ Relying on data the Post collected for thousands of school districts across the country, the article explores the fact that homeschooling, by a wide margin, is the “fastest-growing form of education” that once was “confined to the ideological fringe.”¹³⁵ Washington, D.C., for example, saw a 108% increase in homeschooled students.¹³⁶ In those states where the Post could compare statistics for homeschooling, public school, and private school enrollment, homeschooled students increased 51% over the past six school years, as compared to a 7% increase for private school enrollment.¹³⁷ Interestingly, the surge in homeschooling families “crosses every measurable line of politics, geography, and demographics.”¹³⁸ According to the Post’s data, there was no correlation between the increase in homeschooling and school district quality, meaning that even students eligible to attend affluent or academically successful districts have more frequently chosen homeschooling.¹³⁹ The Post article cites a Harvard Law School professor who says that we should be concerned about whether all these new homeschooled children are learning anything.¹⁴⁰ Such concerns ring hollow, however, when you consider the abysmal performance outcomes in the nation’s public schools.

Painting a very different picture than the Loyola professors who said that homeschooling should be banned because a significant number of homeschoolers are actually unschooled, the Post article explored all of the

¹³⁴ Peter Jamison et al., *Home Schooling’s Rise from Fringe to Fastest-Growing Form of Education*, THE WASH. POST (Oct. 31, 2023, 7:00 AM), <https://www.washingtonpost.com/education/interactive/2023/homeschooling-growth-data-by-district/>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Jamison et al., *supra* note 134.

schooling options available to those in the large homeschooling community in Hillsborough County, Florida.¹⁴¹ There, “homeschoolers inhabit a scholastic and extracurricular ecosystem that is in many ways indistinguishable from that of a public or private school.”¹⁴² The students play competitive sports, put on full-scale musical productions, host prom dances, and have graduation ceremonies.¹⁴³

The Post article also found a significant increase in homeschooling in New York City. “In [twenty-four] of the City’s thirty-three school districts, homeschooled children increased by at least 200% over six years.”¹⁴⁴ Some districts in Brooklyn and Bronx showed a 300% increase.¹⁴⁵ Afua Brown, who pulled her daughter out of public elementary school because she was bullied in kindergarten, “became a leader in the New York City Home Educators Alliance.”¹⁴⁶ In Pulaski County, Kentucky, there is one homeschooled student for every ten students enrolled in public schools.¹⁴⁷ The Post also highlighted several school districts that are academically high-performing and still experiencing explosive growth in the homeschooling community.¹⁴⁸ The Post article concluded by asking what is causing parents to leave public schools for homeschooling. It says parents have concerns over school shootings, bullying, quality of the school environment, and ideological clashes over subjects like sexual identity.¹⁴⁹

Data from the National Home Education Research Institute supports the Post article’s findings that homeschooling continues to grow but refutes the concern raised by public school advocates that homeschooling harms children. In 2021–2022, there were approximately 3.1 million homeschool students in grades K–12, which is roughly 6% of school-age children in the

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Jamison et al., *supra* note 134.

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

United States.¹⁵⁰ Homeschooling families are demographically diverse, drawing families from various political, religious, socioeconomic, education, and racial groups.¹⁵¹ There are also a diversity of reasons parents choose to homeschool including the ability to: customize the educational experience for each child; accomplish more academically than in other schools; enhance family dynamics; provide a safer learning environment; protect students from bullying and racism; and impart a desired set of values.

The academic success of homeschooling highlights the fact that the effort to eliminate or reduce homeschooling is an ideological dispute rather than one of academic quality. In general, homeschooled students also academically outperform those in public schools on standardized achievement tests.¹⁵² Those statistics are particularly significant for Black students, with a 2015 study finding that Black homeschooled students scored 23 to 42 percentile points higher than those in public schools.¹⁵³ Seventy-eight percent of peer-reviewed studies show that homeschool students perform statistically significantly better than those in other schools.¹⁵⁴ Homeschool students perform better on those standardized tests regardless of the parents' education or income level and generally score above average on the SAT and ACT tests.¹⁵⁵ They also graduate college at higher rates.¹⁵⁶

¹⁵⁰ Brian D. Ray, *Research Facts on Homeschooling*, NAT'L HOME EDUC. RSCH. INST. (Dec. 11, 2023), <https://www.nheri.org/research-facts-on-homeschooling/>. The report concludes by pointing out that the research demonstrates correlation but do not, to date, establish causation. *See id.*

¹⁵¹ *Id.*

¹⁵² One article found that homeschoolers performed 15–30% better on standardized tests. Helen Vlasova, *Homeschooling Statistics: Breakdown by the 2023 Numbers*, ADMISSIONSLY (Mar. 27, 2023), <https://admissionsly.com/homeschooling-statistics/>.

¹⁵³ Ray, *supra* note 150.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See* Vlasova, *supra* note 152 (referring to a study by Professor Cogan at the University of St. Thomas, which found that homeschooled students graduated college at a rate 10% higher than students in public school).

The research also demonstrates that homeschool students perform significantly better in social, emotional, and psychological development than those in other schools.¹⁵⁷ Contrary to the popular concern about socialization for homeschool students, the research shows that homeschool students are regularly engaged in social and educational activities outside the home, including field trips, scouting, 4-H, political drives, church ministry, sports, and community volunteer work.¹⁵⁸ Initial research results reveal that adults who were homeschooled tend to be more politically tolerant of diverse views than those who were educated in public schools.¹⁵⁹

The data also contradicts the concerns some have that homeschooling fails to produce adults who become productive members of society. Nearly seventy percent of peer-reviewed studies analyzing whether homeschooled students become successful adults reflect that they perform at statistically significantly higher rates than those who attended public or private schools.¹⁶⁰ The homeschooled adults participate more frequently in local community service, attend more public meetings, and “succeed at college at an equal or higher rate than the general population.”¹⁶¹ The success of parent-directed education, particularly an education that is rooted in biblical truth and values, has historically been the norm in the United States.

III. THE EVOLUTION OF PUBLIC EDUCATION AND PARENTAL RIGHTS IN EDUCATION

In the formative years of this Nation, we understood that an educated citizenry was vital to the nation’s success, and that a vital component of that education was proper morals training. We also understood that “proper” morals training meant training based on biblical values, and that parents (not government) had the duty to direct the education and upbringing of their children.

¹⁵⁷ Ray, *supra* note 150.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

A. *The Historical Understanding of Education and Parental Rights*

For example, Gouverneur Morris, a signer of the Constitution, stated that “[r]eligion is the only solid basis of good morals; therefore, education should teach the precepts of religion, and the duties of man towards God.”¹⁶² Benjamin Rush, a signer of the Declaration of Independence, similarly stated that “the only foundation for a useful education in a republic is to be laid in Religion. Without this there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments.”¹⁶³

The New England Primer, written in the seventeenth century and one of the most popular children’s textbooks during the eighteenth and nineteenth centuries, taught children the alphabet with explicit references to Bible characters and events.¹⁶⁴ To learn the letter “A,” children recited “[i]n Adam’s Fall, We sinned all.”¹⁶⁵ For the letter “P,” they recited “Peter denies His Lord, and cries.”¹⁶⁶ Noah Webster explained,

In my view, the Christian religion is the most important and one of the first things in which all children, under a free government, ought to be instructed . . . No truth is more evident to my mind than that the Christian religion

¹⁶² Gregg Frazer, *Gouverneur Morris and Theistic Rationalism in the Founding Era*, in *FAITH & THE FOUNDERS OF THE AM. REPUBLIC* 203, 220 (Mark David Hall & Daniel L. Dreisbach eds., 2014) (quoting Gouverneur Morris).

¹⁶³ Benjamin Rush, *Of the Mode of Education Proper in a Republic*, in *THE SELECTED WRITINGS OF BENJAMIN RUSH* 110, 111 (Dagobert D. Runes ed., 2018).

¹⁶⁴ *The New England Primer*, N.Y. PUB. LIBR., <https://www.nypl.org/events/exhibitions/galleries/childhood/item/4109> (last visited Feb. 2, 2024) (describing *The New England Primer*); *THE NEW-ENGLAND PRIMER, IMPROVED* (Boston, Manning & Loring 1803), https://collections.libraries.indiana.edu/lilly/exhibitions_legacy/NewEnglandPrimerWeb/text.html (links to the actual text of *The New England Primer*).

¹⁶⁵ *THE NEW-ENGLAND PRIMER, IMPROVED*, *supra* note 164, at 8.

¹⁶⁶ *Id.* at 10.

must be the basis of any government intended to secure the rights and privileges of a free people.¹⁶⁷

One of the first public education laws in America, passed by Massachusetts, directly links the purpose of education with religion. “The Old Deluder Satan Act” declared that children needed a good education so that they could read their Bibles.¹⁶⁸ Supreme Court Justice Joseph Story also commented on the important role of religion in public schools, stating in an 1844 decision:

¹⁶⁷ Rosalie J. Slater, *Preface to the First Edition of NOAH WEBSTER, AM. DICTIONARY OF THE ENG. LANGUAGE*, at 12 (Found. for Am. Christian Educ., 1997) (1828).

¹⁶⁸ The full text of the statute provided:

It being one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures, as in former times by keeping them in an unknown tongue, so in these latter times by persuading from the use of tongues, that so that at least the true sense and meaning of the original might be clouded and corrupted with false glosses of saint-seeming deceivers; and to the end that learning may not be buried in the grave of our forefathers, in church and commonwealth, the Lord assisting our endeavors.

It is therefore ordered that every township in this jurisdiction, after the Lord hath increased them to fifty households shall forthwith appoint one within their town to teach all such children as shall resort to him to write and read, whose wages shall be paid either by the parents or masters of such children, or by the inhabitants in general, by way of supply, as the major part of those that order the prudentials of the town shall appoint; provided those that send their children be not oppressed by paying much more than they can have them taught for in other towns.

And it is further ordered, that when any town shall increase to the number of one hundred families or householders, they shall set up a grammar school, the master thereof being able to instruct youth so far as they may be fitted for the university, provided that if any town neglect the performance hereof above one year that every such town shall pay 5 pounds to the next school till they shall perform this order.

The Old Deluder Satan Act (1647), *reprinted in The Old Deluder Satan Act (1647)*, THE ELIZABETH MURRAY PROJECT, <https://web.csulb.edu/colleges/cla/projects/EM/smdeluder.html> (last visited Feb. 2, 2024).

Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a [D]ivine revelation in the [school]—its general precepts expounded . . . and its glorious principles of morality inculcated? . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?¹⁶⁹

President George Washington reminded the nation in his 1796 Farewell Address that there are two indispensable supports to the political prosperity of a republic: religion and morality.¹⁷⁰ He also made clear that a particular type of morality was essential to the nation's continued success—morality based on Judeo-Christian principles.¹⁷¹

The United States Supreme Court has long recognized that from the very beginning of our nation education also was viewed as an essential means to properly prepare citizens for participation in our political system. The Court has explained that:

The 'American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.' We have recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government,' and as the primary vehicle for transmitting 'the values on which our society

¹⁶⁹ *Vidal v. Mayor of Philadelphia*, 43 U.S. 127, 200 (1844).

¹⁷⁰ George Washington, President of the U.S., Farewell Address (Sept. 19, 1796). The Northwest Ordinance, signed by President Washington in 1789, stated: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Territory Ordinance of 1787, 1 Stat. 51.

¹⁷¹ See Washington, *supra* note 170. Daniel Webster also explained that "it is not to be doubted, that to the free and universal reading of the Bible, in that age, men were much indebted for right views of civil liberty. The Bible is a book of faith, and a book of doctrine, and a book of morals, and a book of religion, of especial revelation from God; but it is also a book which teaches man his own individual responsibility, his own dignity, and his equality with his fellow-man." DANIEL WEBSTER, *The Completion of the Bunker Hill Monument*, in THE WORKS OF DANIEL WEBSTER 79, 102 (Bos., Little, Brown, and Co. 1881).

rests.’ [As] . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.’ And these historic ‘perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.’ In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.¹⁷²

Even today, there is little dispute over the proposition that for a republican form of government to survive, proper values must be taught to the next generation. The battle is over who decides what values are “proper values,” because whoever wins that battle shapes the future generation. Nelson Mandela once stated that “[e]ducation is the most powerful weapon we can use to change the world.”¹⁷³ A statement attributed to Adolf Hitler is apropos: “He alone, who owns the youth, gains the future.”¹⁷⁴ This battle

¹⁷² Plyler v. Doe, 457 U.S. 202, 221 (1982) (alteration in original) (citations omitted).

¹⁷³ Nelson Mandela, Address at Launch of Mindset Network, Johannesburg: Lighting Your Way to a Better Future (July 16, 2003), (transcript available at http://www.mandela.gov.za/mandela_speeches/2003/030716_mindset.htm). In January 2022, the Michigan Democratic Party posted a message on its Facebook page saying that the purpose of public education is to “teach [students] what society needs them to know.” S. Ernie Walton, In Loco Parentis, *The First Amendment, and Parental Rights—Can They Coexist in Public Schools?*, 55 TEX. TECH. L. REV. 461, 463 (2023) (quoting Michigan Democratic Party, FACEBOOK (June 15, 2022, 11:35 AM)).

¹⁷⁴ 3 Times This Quote by Adolph Hitler Was Used Publicly in Recent History, INDIANAPOLIS STAR (June 23, 2023, 7:52 AM), <https://www.indystar.com/story/news/politics/2023/06/22/adolf-hitler-quote-youth-moms-for-liberty-hamilton-county-indiana/70346453007/>. In an article discussing the ways organizations used the K-12 educational system to change attitudes toward homosexuality, the author cited then-prominent LGBT activist Patricia Nell Warren as stating “[w]hoever captures the kids owns the future.” Paul E. Rondeau, *Selling Homosexuality to America*, 14 REGENT UNIV. L. REV. 443, 470 (2001) (quoting Patrice Nell Warren, *Future Shock*, ADVOCATE, Oct. 3, 1995, at 80).

over the hearts and minds of our children places K-12 education as a “sort of ground zero” in the quest for inculcation of values.¹⁷⁵

The United States Supreme Court has long recognized the parents’ right to direct the education and upbringing of their children.¹⁷⁶ A parent’s fundamental right has been described as “perhaps the oldest of the fundamental liberty interests.”¹⁷⁷ The Supreme Court has explained that because “[t]he child is not the mere creature of the [s]tate,”¹⁷⁸ “[i]t is cardinal . . . that the custody, care and nurture of the child reside[s] first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹⁷⁹

In *Meyer v. Nebraska*, the state made it unlawful to teach a foreign language to a child before she passed the eighth grade. When a teacher was prosecuted for teaching German in violation of the statute, he challenged the constitutionality of the law.¹⁸⁰ In striking down the statute, the Supreme Court explained that

[w]hile this Court has not attempted to define with exactness the liberty thus guaranteed [under the Fourteenth Amendment] . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at

¹⁷⁵ Coupet, *supra* note 77, at 42 (referring specifically to the values taught by public schools on the issue of transgender equality).

¹⁷⁶ This Author previously laid out the Supreme Court’s historical treatment of the parents’ right to direct the education and upbringing in an article entitled *Holding Schools Accountable for Their Sex-Ed Curricula*, 5 LIBERTY UNIV. L. REV. 463 (2011).

¹⁷⁷ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

¹⁷⁸ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

¹⁷⁹ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce*, 268 U.S. at 510).

¹⁸⁰ See *Meyer v. Nebraska*, 262 U.S. 390, 396–97 (1923).

common law as essential to the orderly pursuit of happiness by free men.¹⁸¹

Thus, even though a teacher challenged the law, the Court decided the case by relying on the parents' right to direct their child's education.

Two years later, the Supreme Court again analyzed the scope of the parental right when it overturned an Oregon statute that prohibited parents from enrolling their children in private school.¹⁸² The Supreme Court reaffirmed in *Pierce* that the fit parent's liberty interest in the child was superior to the state's interest in the welfare of the child. The Court explained that the statute requiring public school attendance

unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the [s]tate; [and] those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹⁸³

Nearly two decades later, the Court revisited the parental liberty interest in *Prince v. Massachusetts*.¹⁸⁴ In *Prince*, a woman was prosecuted for taking her niece, over whom she had guardianship, along with her to sell religious literature.¹⁸⁵ The Court affirmed the prosecution, explaining that the state, as *parens patriae*, may, under certain circumstances, restrict the parents' right.¹⁸⁶ The state interest, however, is limited. "The religious training and

¹⁸¹ *Id.* at 399 (citations omitted).

¹⁸² *See Pierce*, 268 U.S. at 510.

¹⁸³ *Id.* at 534–35.

¹⁸⁴ *See Prince*, 321 U.S. at 158.

¹⁸⁵ *Id.* at 159–60, 162.

¹⁸⁶ *Id.* at 166. Black's Law Dictionary explains that *parens patriae* literally means "parent of the country," and traditionally refers to the "role of the state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child." This state authority to protect children from harm is relied on by those who seek to prohibit homeschooling, asserting that homeschooling harms children. Cami Fraser, *Protecting*

indoctrination of children may be accomplished in many ways. . . . These and all others except the public proclaiming of religion on the streets . . . remain unaffected by the decision.”¹⁸⁷

In 1972, the Court again acknowledged the fundamental liberty interest of parents in directing the upbringing of their children albeit in the context of a free exercise claim. In *Wisconsin v. Yoder*, the Court upheld the right of Amish parents to educate their children at home after the eighth grade notwithstanding a state law requiring education in a state-approved school.¹⁸⁸ The Court found that the state’s interest in providing universal education was secondary to the parents’ rights to educating their children according to their Amish faith.¹⁸⁹ The Court explained that:

Providing public schools ranks at the very apex of the function of a State. Yet[,] . . . a State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children. . . .¹⁹⁰

The parents’ “duty to prepare [a] child for ‘additional obligations’ . . . include[s] the inculcation of moral standards, religious beliefs, and elements of good citizenship.”¹⁹¹ For the Amish, they believed children beyond the eighth grade should be educated at home in the Amish way of life.¹⁹²

Native Americans: The Tribe as Parens Patriae, 5 MICH. J. RACE & L. 665, 666 n.1 (2000) (quoting *Parens Patriae*, BLACK’S LAW DICTIONARY (6th ed. 1990)); see also *Parens Patriae*, BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁸⁷ *Prince*, 321 U.S. at 171. The court cited safety concerns with young children selling religious literature door to door. *Id.* at 169–70.

¹⁸⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 230–31, 234 (1972).

¹⁸⁹ See *id.* at 205.

¹⁹⁰ *Id.* at 213–14.

¹⁹¹ *Id.* at 233.

¹⁹² *Id.* at 205.

The importance placed upon the relationship between the child and fit, legal parents, also has been emphasized by the higher standard of proof required before the state can substantially interfere with the parents' constitutional rights.¹⁹³ “[T]he interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’”¹⁹⁴ “Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.”¹⁹⁵ The “State’s interest in caring for” the child of natural or adoptive parents is *de minimis* if the parents are fit parents.¹⁹⁶

The legal recognition of this parental right is consistent with the biblical jurisdiction of the family over childrearing. As Creator, God gives children to parents, not government.¹⁹⁷ Parents, therefore, are responsible and accountable to God, not government, for how they train their children. The Fifth Commandment directs children to honor their father and mother—

¹⁹³ See *Santosky v. Kramer*, 455 U.S. 745, 766–67 (1982) (explaining that a “clear and convincing evidence” standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing); *Garcia v. Rubio*, 670 N.W.2d 475, 483 (Neb. Ct. App. 2003) (quoting *Stuhr v. Stuhr*, 481 N.W.2d 212, 217 (Neb. 1992)) (“[A] court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child.”).

¹⁹⁴ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)) (dealing with rights of an unwed father).

¹⁹⁵ *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citations omitted) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).

¹⁹⁶ *Stanley*, 405 U.S. at 657–58.

¹⁹⁷ Cf. *Genesis* 33:5 (New Int’l) (“They are the children God has graciously given your servant.”); *Genesis* 48:9 (New Int’l) (“They are the sons God has given me here”); *Psalms* 127:3 (New Int’l) (“Children are a heritage from the Lord, offspring a reward from him.”).

not government.¹⁹⁸ When parents have chosen to send their children to public education, the question has become whether the schools stand *in loco parentis*, and therefore are limited to the agency authority granted to them by the parents, or whether the schools are agents of the state with authority to contradict the wishes of the parents.

B. *Parental Rights Should Trump Government's Interest in Educating Children*

William Blackstone limited the authority of schools to only that delegated to them by parents. He referred to the parent-child relationship as the “most universal relation in nature,” from which springs three primary parental duties toward their children: to provide for their “maintenance, their protection, and their education.”¹⁹⁹ The parental duty has by “far the greatest importance of any.”²⁰⁰ Blackstone acknowledged that parents could delegate to a tutor and schoolmaster some of the parental duty to educate, at which point the tutor or schoolmaster stood *in loco parentis*—having only “such a portion of the power of the parent committed to his charge.”²⁰¹ Nowhere does Blackstone maintain that the school supplants the authority of parents to educate children. These views are also reflected in the common law of the United States. James Wilson, a signer of the Declaration of Independence and the Constitution and one of the original U.S. Supreme Court Justices, stated that “It is the duty of parents to . . . educate [their children] according to the suggestions of a judicious and zealous regard for their usefulness, their respectability, and happiness.”²⁰² Parents could

¹⁹⁸ *Exodus* 20:12. Admittedly, *Romans* 13 instructs us to submit ourselves to civil government. But *Romans* 13 does not give a broad grant of jurisdiction to civil government over areas that God has delegated to another. In this case, God has delegated childrearing responsibilities to parents, and *Romans* 13 does not expand the jurisdiction of civil government. *Romans* 13:1–7.

¹⁹⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES *446.

²⁰⁰ *Id.* at *450.

²⁰¹ *Id.* at *453.

²⁰² Walton, *supra* note 173, at 469 (quoting James Wilson, *Of the Natural Rights of Individuals* (1790), reprinted in 2 COLLECTED WORKS OF JAMES WILSON 1076 (Kermit L. Hall & Mark D. Hall eds., 2007)).

delegate their responsibility to someone else, who acted in the place of the parent.²⁰³

In early American law, “there was no inconsistency between [the doctrine of] *in loco parentis* and public education.”²⁰⁴ American law recognized that parents had the exclusive right to direct their child’s education and that part of the right included the ability to delegate responsibility to another, who stood *in loco parentis*.²⁰⁵ That early case law demonstrates that when parents had delegated responsibility to public schools for education, the schools could exercise the authority that parents had over the child with respect to discipline. Thus, the North Carolina Supreme Court reversed the assault and battery conviction of a teacher who had inflicted corporal punishment on a student.²⁰⁶ The court held that like parents, the teachers “must be ‘armed with the power to administer moderate correction, when [they] shall believe it to be just and necessary.’”²⁰⁷

However, when parental desires clashed with those of the school with respect to educational decisions, the courts sided with the parents. That result makes sense given that parents are delegating some of their responsibility and would not consent to schools acting inconsistently with the parents’ expectations. This principle is exemplified in a case decided in 1874 by the Wisconsin Supreme Court. In that case, a father sent his twelve-year-old son to public school, instructing him to study orthography, reading, writing, and arithmetic.²⁰⁸ After the teacher told the student that he would be required to study geography, the father expressly told the son and the teacher that the son would not be allowed to study geography.²⁰⁹

²⁰³ *Id.*

²⁰⁴ *Id.* at 472.

²⁰⁵ *Id.* at 472; *see also* *Morse v. Frederick*, 551 U.S. 393, 413 (2007) (Thomas, J., concurring) (citing BLACKSTONE, *supra* note 199, at *441).

²⁰⁶ *Walton*, *supra* note 173, at 472.

²⁰⁷ *Id.* at 473 (alteration in original) (quoting *State v. Pendergrass*, 19 N.C. 365, 365–66 (1837)).

²⁰⁸ *Morrow v. Wood*, 35 Wis. 59, 62 (1874).

²⁰⁹ *Id.*

Nevertheless, the teacher directed the student to study geography; when the student refused, the teacher disciplined the student.²¹⁰ The father sued the teacher for assault and battery.²¹¹ The teacher counterclaimed for malicious prosecution.²¹² The case turned on the question of whether the teacher stood *in loco parentis*:²¹³ if she did, she had authority to discipline the student for refusing to study geography; if she did not stand *in loco parentis*, then she could not discipline the student.

The court held that the teacher had no such authority to discipline the student for refusing to study geography because the parent did not want the student to study geography. The “law gives the parent the exclusive right to govern and control the conduct of his minor children,” and children are expected to honor and obey their parents.²¹⁴ Noting that the father’s request was reasonable and did not interfere with any school rules and regulations, the court found the teacher liable.²¹⁵ The teacher’s scope of authority was only that delegated by the father. Notably, the court did *not* conclude that once the father sent his child to school he lost authority over his child or that his authority was secondary to that of the school.²¹⁶ Other cases, including more recent court decisions, limited a parent’s authority to object to curriculum once the parent sent the child to public school or to the extent the parent objected to a *mandatory* subject.²¹⁷ Both of these limitations raise issues.

The notion that parents cannot object to curriculum once they choose to send their student to public schools acts more like a waiver than *in loco parentis*. Delegating authority, consistent with the common law

²¹⁰ *Id.* at 62–63.

²¹¹ *Id.* at 63.

²¹² *Id.*

²¹³ See *Morrow v. Wood*, 35 Wis. 59, 63 (1874).

²¹⁴ *Id.* at 64.

²¹⁵ *Id.* at 64–65.

²¹⁶ *Id.* at 65–66.

²¹⁷ See generally Walton, *supra* note 173, at 476 & n.133 (citing several cases where schools lacked authority to discipline students who refused to study subjects parents instructed the students not to study and other cases where courts held parents did not have such authority).

understanding of *in loco parentis*, should not result in a waiver of parental rights. Similarly, the inability of parents to object to any curriculum that is considered a mandatory subject sets up the clash that exists today in the law. Everything the school teaches seems to fall into the mandatory curriculum category and, thus, parents have no basis for objecting. Even the existence of compulsory education laws, which dictate to parents rules for education, “undermine the central premise underlying *in loco parentis*.”²¹⁸ To the extent government dictates anything to parents concerning education it disregards the fundamental truth that children belong to parents (as entrusted to them by God) and not to government.

Unfortunately, language from a 1986 United States Supreme Court opinion swung the door wide open for schools to inculcate those values that the *school district* determines appropriate. In *Bethel School District No. 403 v. Fraser*, a school district suspended a high school student for a sexually graphic metaphor he used in a nominating speech he made at a school assembly.²¹⁹ While the speech was inappropriate and schools must have authority to discipline improper student conduct, the Supreme Court’s broad grant of authority to schools to instill values it decides appropriate is troubling. “*The inculcation of these values is truly the ‘work of the schools.’ . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . .*”²²⁰

In another case, the Connecticut Supreme Court explained that

a sound education “is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” “We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government . . . and

²¹⁸ *Id.* at 490.

²¹⁹ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 675 (1986).

²²⁰ *Id.* at 683 (emphasis added) (citations omitted).

as the primary vehicle for transmitting the values on which our society rests. . . . In sum, education has a fundamental role in maintaining the fabric of our society.”²²¹

This fundamental role that courts have given to schools to transmit appropriate cultural values is what is causing the conflicts we see to today in schools and society. In *Brown v. Hot, Sexy and Safer Productions, Inc.*, the school required high school students to attend an AIDS awareness assembly during which the presenters used sexually explicit language and performed sexually explicit skits with several students selected from the audience.²²² In the complaint, the students alleged that during the assembly, presenters also advocated and approved oral sex, masturbation, homosexual sexual activity, and premarital sex.²²³ In rejecting the parents’ claim that the instruction violated their parental rights, the court explained that a parent’s right involves “choosing a specific educational program—whether it be religious instruction at a private school,” but parents do not have a “right to dictate the curriculum at the public school to which they have chosen to send their children.”²²⁴

Relying on *Brown*, the Ninth Circuit held that the parents’ rights were not violated because parents have no rights concerning what their children are taught in school.²²⁵

[O]nce parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished. The constitution does not vest parents with the

²²¹ Sheff v. O’Neill, 678 A.2d 1267, 1289–90 (Conn. 1996) (first quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); and then quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)); see also *Parents United for Better Schs., Inc. v. Sch. Dist. of Phila. Bd. of Educ.*, 148 F.3d 260, 271 (3d Cir. 1998) (stating schools have “broad discretionary powers” to teach whatever values *they* deem appropriate).

²²² *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 529 (1st Cir. 1995).

²²³ *Id.*

²²⁴ *Id.* at 533 (citing ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 18.28 n.25 (2d ed. 1992)).

²²⁵ *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005).

authority to interfere with the public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise. . . .”While parents may have a fundamental right to decide *whether* to send their children to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school . . . these issues of public education are generally ‘committed to the control of state and local authorities.’”²²⁶

Given the common law recognition of the biblical responsibility of parents, not government, to direct a child's education and upbringing, parents should be able to decide how their children will be educated, including how and when they will be exposed to sensitive topics like abortion, sex education, sexual orientation, and gender identity. That parental right, however, evaporates in the face of the broad discretion afforded schools to educate children in government-approved values.

C. *Current Clashes in our Public Schools*

The public education system is rife with disagreements and clashes over what are the core values students should learn, how best to keep students safe from physical and emotional harms, and what should be taught to students. The complaints are widespread and diverse. For example, schools across the country face complaints by some parents that books in school libraries are too sexually explicit and face complaints from other parents if those books are removed from the shelves.²²⁷ Schools continue to stifle

²²⁶ *Id.* (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005)).

²²⁷ See, e.g., Nicole Asbury, *Families Sue Montgomery County Schools Over LGBTQ-Inclusive Books*, WASH. POST (May 26, 2023 10:39 AM), <https://www.washingtonpost.com/education/2023/05/25/lgbtq-montgomery-books-lawsuit-opt-out/> (discussing when parents

conservative or religious speech on campuses. One school in Colorado objected to a student's "Don't Tread on Me" patch that was on his book bag.²²⁸ After the parents raised free speech concerns, the school agreed to let the student wear the patch on the book bag as long as no one complained about it, making the student's speech rights contingent upon approval of those around him.²²⁹ Disputes continue to arise over after-school use of school facilities by religious groups,²³⁰ the presence of anything religious in the curriculum, or religious speech by students and teachers.²³¹

sued over inclusion of LGBTQ books for young children and school's failure to provide an opt out); Max Eden & Jay P. Greene, *Parents Objecting to Pornographic Material in School Libraries Aren't "Book Banners,"* HERITAGE FOUND. (Oct. 6, 2023), <https://www.heritage.org/education/commentary/parents-objecting-pornographic-material-school-libraries-arent-book-banners> ("The true significance of so-called book bans is not some resurgent racist or fascist impulse exhibited by a faction of American parents. It's the profound moral disconnect between the 90% of Americans who believe that sexually obscene material does not belong in school libraries and an education establishment broadly convinced that it's good, necessary and 'inclusive' to show children explicit images of sexual acts."); Lexi Lonas, *School May Have Violated Students' Rights with Book Removals: Education Department*, THE HILL (May 22, 2023, 1:44 PM), <https://thehill.com/homenews/education/4015532-school-may-have-violated-students-rights-with-book-removals-education-department/> (discussing that after Forsyth County schools removed a handful of books, the Department of Education began an investigation, asserting that the removals may have violated students' rights).

²²⁸ Carrie Robison & Aaron Terr, *Colorado Public School to Allow Student to Display Gadsden Flag Patch—as Long as Nobody Complains*, FIRE (Sept. 1, 2023), <https://www.thefire.org/news/colorado-public-school-allow-student-display-gadsden-flag-patch-long-nobody-complains>.

²²⁹ *Id.*

²³⁰ Amy Russo, *PPSD Loses By Default Lawsuit From Evangelical Group Over Good News Clubs in Schools*, PROVIDENCE J. (Apr. 12, 2023, 5:52 PM), <https://www.providencejournal.com/story/news/education/2023/04/12/providence-public-schools-loses-suit-from-evangelical-group-by-default/70108384007/> (concerning a school that refused to permit Good News Club to use school facilities after school hours, but lost lawsuit after it failed to even respond to the complaint by the Good News Club).

²³¹ Chris Pandolfo, *More Than 300 Public Schools Nationwide Will Learn From the Bible This Year*, FOX NEWS (Sept. 1, 2023, 2:01 PM), <https://www.foxnews.com/faith-values/more-than-300-public-schools-nationwide-learn-bible-this-year>. LifeWise operates release time programs at 325 elementary schools in twelve states. *Id.*

There are also ongoing legal disputes related to sexual orientation and gender identity.²³² There are clashes over use of restrooms and locker rooms by those whose gender identity is different than their biological sex.²³³ Curriculum disputes are prevalent, focusing on what, how much, and how early students should be exposed to gender identity curriculum.²³⁴ Students and teachers face discipline if they refuse to call students by their preferred pronoun when that pronoun is inconsistent with the student's biological sex.²³⁵ And, because of the values clash over transgendered issues, schools

²³² The notion that under the threat of civil fines or other punishment people must disregard biological reality and treat people according to their preferred gender is a direct attack on what God has created. Scripture establishes that God creates us male or female. See *Genesis* 1:2; *Id.* 5:21–28; *Matthew* 19:4. God also ordained a union between a man and a woman—not between two people of the same sex. See *Genesis* 2:24; *Matthew* 19:5–6. And Scripture tells us homosexual conduct is sinful conduct. See *Leviticus* 18:22; *Id.* 20:13; *Romans* 1:18–32.

²³³ *Adams v. Sch. Bd. of St. John's Cnty.*, 318 F. Supp. 3d 1293, 1314–15 (M.D. Fla. 2018), *aff'd*, 968 F.3d 1286 (11th Cir. 2020) (holding that a transgendered student's interest in using the restroom consistent with the student's gender identity outweighed the school's interests in privacy for students); Erin Snodgrass, *Transgender Student Wins \$300,000 Discrimination Lawsuit After He Was Barred From Using the Boy's Locker Room*, BUS. INSIDER (Mar. 24, 2021, 9:08 PM), <https://www.businessinsider.com/trans-student-wins-lawsuit-after-being-barred-from-boys-locker-room> (discussing school district forced to pay biologically female student \$300,000 for refusing to allow her to use boys' locker room even after school remodeled the locker room to provide an enhanced privacy space for the student).

²³⁴ Tad Walch, *Parents Object to Maryland School District Refusing to Let Kids Opt Out of Storybook Time*, DESERET NEWS (Aug. 30, 2023, 11:38 AM), <https://www.deseret.com/2023/8/30/23818934/parents-rights-becket-culture-maryland-school-district-refusing-opt-out-storybook> (stating Muslim, Christian, and Jewish parents sue dover school's refusal to permit them to opt their children out of ideological instruction on family life and sexuality, including gender identity).

²³⁵ Rebekah Riess & Alaa Elassar, *Teacher Gets \$95,000 to Settle Lawsuit Over Refusal to Use Student's Preferred Name*, CNN (Sept. 1, 2022, 4:45 PM), <https://www.cnn.com/2022/09/01/us/kansas-teacher-suspend-settle/index.html>; Hannah Grossman, *California School Suspends 2 Children for Misgendering Classmate*, N.Y. POST (July 7, 2023, 3:31 PM), <https://nypost.com/2023/07/07/california-school-suspends-2-children-for-misgendering-classmate/> (stating the high school suspended two students for using the wrong pronouns and required them to attend restorative justice training); Emily Matesic, *Middle Schoolers Accused of Sexual Harassment for Not Using Preferred Pronouns*,

use nondiscrimination policies to punish students for speech the schools deem intolerant or unacceptable.²³⁶ One recent article discussed a policy the Fairfax County school district in Virginia was exploring. That policy, the “Orwellian ‘bias incident reporting system,’” encouraged students to anonymously report alleged bias, harassment, or discrimination²³⁷—terms broad enough to encompass a student’s failure to use another student’s preferred pronoun. After being reported, the student can be required to attend a “culturally responsive intervention.”²³⁸

As K-12 schools consider these anti-bias policies, it seems likely the results will be similar to what colleges have encountered. In April 2023, “Riley Gaines, a former collegiate swimmer . . . was held for ransom and assaulted when she spoke at San Francisco State University.”²³⁹ She spoke about her experience as a Division 1 swimmer who had to share a locker room with a biological male who identified as a female.²⁴⁰ Riley’s message was that women’s sports should remain open only to biological women.²⁴¹ Protestors, however, claimed that her presence on campus was so traumatic that they deserved compensation.²⁴² Sadly, the college’s Vice President for Student Affairs and Enrollment Management commended the students for their protest, stating that the transgendered students were the

Parents Say, 11 NEWS (May 15, 2022, 11:40 PM), <https://www.kktv.com/2022/05/16/middle-schoolers-accused-sexual-harassment-not-using-preferred-pronouns-parents-say/>.

²³⁶ Stephanie Lundquist-Arora, *Fairfax County Schools Moves to End K-12 Free Speech With ‘Bias Incident’ Tattling System*, THE FEDERALIST (May 24, 2023), <https://thefederalist.com/2023/05/24/fairfax-county-schools-moves-to-end-k-12-free-speech-with-bias-incident-tattling-system/> (“The district’s school board members are currently considering an Orwellian ‘bias incident reporting system’ in changes to the code of conduct. With the new system, students, parents, and staff members would anonymously report ‘any incident of inappropriate conduct, including, and without limitation, discrimination, harassment, retaliation, bullying, other violations of civil rights.’”).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Lundquist-Arora, *supra* note 236.

victims of Riley’s speech.²⁴³ The very notion of “hate speech” policies leaves unfettered discretion to school leaders to determine what constitutes hate.

Curriculum clashes also occur over history and civics lessons with parents objecting to revisionist history or anti-bias curriculum that itself is infused with bias.²⁴⁴ The debate over Critical Race Theory prompted Florida to pass a law that prohibited CRT from being taught in schools.²⁴⁵ Some schools also assert the right to refuse to disclose to parents when their children use a gender identification or pronoun at school that does not align with the student’s biological sex.²⁴⁶ “At least 168 districts governing

²⁴³ *Id.*

²⁴⁴ Compare Eesha Pendharkar, *School District’s Anti-CRT Resolution Prompts Lawsuit from Teachers and Students*, EDUC.WEEK (Aug. 30, 2023), <https://www.edweek.org/leadership/school-districts-anti-crt-resolution-prompts-lawsuit-from-teachers-and-students/2023/08> (banning critical race theory stifles free speech), with Steve West, *Virginia Parents Take Critical Race Theory to Court*, WORLD (Jan. 4, 2022), <https://wng.org/roundups/virginia-parents-take-critical-race-theory-to-court-1641324117> (explaining that the critical race theory curriculum fosters racial discrimination in schools). Any curriculum that is rooted in the idea that people should be treated differently based on their skin color is in direct conflict with Scripture. All are uniquely created in God’s image. *Genesis* 1:26–27.

²⁴⁵ Matt Papaycik & Forrest Saunders, *Florida’s Governor Signs Controversial Bill Banning Critical Race Theory in Schools*, WPTV (Apr. 22, 2022, 5:29 PM), <https://www.wptv.com/news/education/floridas-governor-to-sign-critical-race-theory-education-bill-into-law>. The first executive order issued by newly-elected Virginia Governor Glenn Youngkin prohibited CRT instruction in public K-12 schools. Evan Watson, *Youngkin: Ban Critical Race Theory and ‘Inherently Divisive Concepts’ in Public Education*, 13NEWSNOW (Jan. 17, 2022, 6:01 PM), <https://www.13newsnow.com/article/news/education/glenn-youngkin-critical-race-theory-ban-executive-order/291-30a4d6e7-3fcf-4938-8d7f-7f82e5b24d44>.

²⁴⁶ Amy Taxin, *California Judge Halts District Policy Requiring Parents Be Told if Kids Change Pronouns*, ASSOCIATED PRESS (Sept. 6, 2023, 9:42 PM), <https://apnews.com/article/chino-valley-parental-notification-transgender-students-california-cb4deaab3d29f26bc3705ee3815a5705> (discussing a California trial court that ruled in favor of the state “after [the] California Attorney General Rob Bonta sued the Chino Valley Unified School District for adopting a policy requiring schools to tell parents when their children change their pronouns or use a bathroom of a gender other than the one listed on their official paperwork”); Eesha Pendharkar, *Parents are Suing Schools Over Pronoun Policies. Here’s What You Need to Know*, EDUC. WEEK (May 12, 2023), <https://www.edweek.org/leadership/parents-are-suing-schools-over-pronoun-policies-heres->

5,904 schools nationwide have [policies in place] that prevent faculty and staff from disclosing to parents a student's gender status without [the] student's permission"²⁴⁷

IV. CONCLUSION

K-12 education has become ground zero for the battle over the hearts and minds of our children. Education, by design, seeks to instill a set of values that those delivering the instruction believe best prepares students for their future. What we see happening in our schools today is nothing less than a struggle between good and evil.²⁴⁸

Scripture clearly reveals that "[t]he fear of the Lord is the beginning of [all] wisdom" and knowledge.²⁴⁹ Yet, many of our nation's schools reject the inerrancy of God's word, instead training children in ways that directly contradict Scripture. Much of today's K-12 education seems to reflect what the book of Isaiah describes as a time where there are "those who call evil good and good evil, who put darkness for light and light for darkness"²⁵⁰ When society promotes that which is ungodly, Paul tells us in Romans that "[t]he wrath of God is being revealed from heaven against all the godlessness and wickedness of people"²⁵¹ An educational system that promotes ungodly beliefs and that interferes with the responsibility of parents to raise their children in the fear and admonition of the Lord deserves the wrath of God and should not receive any public funding.²⁵²

what-you-need-to-know/2023/05 (discussing parents suing over policies that do not require schools to inform parents when their child uses a pronoun inconsistent with biological sex).

²⁴⁷ Josh Christenson, *Nearly 6,000 US Public Schools Hide Child's Gender Status From Parents*, N.Y. POST (Mar. 8, 2023, 6:25 PM), <https://nypost.com/2023/03/08/us-public-schools-conceal-childs-gender-status-from-parents/>.

²⁴⁸ *Ephesians* 6:12 (New Int'l) ("For our struggle is not against flesh and blood, but against the rulers, against the authorities, against the powers of this dark world and against the spiritual forces of evil in the heavenly realms.").

²⁴⁹ *Proverbs* 9:10 (New Int'l).

²⁵⁰ *Isaiah* 5:20 (New Int'l).

²⁵¹ *Romans* 1:18–19 (New Int'l).

²⁵² See *Ephesians* 6:4.

Public K-12 education has failed to achieve basic academic outcomes, and it has failed to train students in the only basis for wisdom and knowledge. Second Corinthians 10:5 commands us to “demolish arguments and every pretension that sets itself up against the knowledge of God”²⁵³ Thus, now is the time to end publicly-funded K-12 education.

²⁵³ 2 *Corinthians* 10:5 (New Int’l).